

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM LEON SAVAGE,

Defendant and Appellant.

A133708

(Solano County  
Super. Ct. No. FCR287145)

Defendant William Leon Savage appeals a judgment entered upon his plea of no contest to felony unlawful taking or driving of a vehicle with a prior conviction of theft or unauthorized use of a vehicle. (Pen. Code,<sup>1</sup> § 666.5 & Veh. Code, § 10851.) He contends the trial court should have sentenced him to serve his term of imprisonment in county jail rather than in state prison. We conclude defendant was required to obtain a certificate of probable cause, and accordingly dismiss the appeal.

**I. BACKGROUND**

Defendant was charged in count one with unlawful taking or driving of a vehicle with a prior conviction of theft or unauthorized use of a vehicle (Pen. Code, § 666.5 & Veh. Code, § 10851); in count two with giving false information to a police officer (Veh. Code, § 31); in count three with unlicensed driving (Veh. Code, § 12500, subd. (a)); and in count four with possession of a device used for smoking a controlled substance (Health

---

<sup>1</sup> All undesignated statutory references are to the Penal Code.

& Saf. Code, § 11364). In connection with count one, the complaint alleged defendant had previously served five prison terms (§ 667.5), one of them for robbery (§ 211).<sup>2</sup>

Pursuant to a negotiated disposition, on September 12, 2011, defendant pled no contest to count one, and the section 667.5 prior prison term allegations were stricken. The waiver of rights form signed by defendant specified that the maximum punishment the court could impose based upon the plea was “4 yrs State Prison.” On October 26, 2011, the trial court sentenced him to the upper term of four years in state prison.

## II. DISCUSSION

Defendant contends the trial court erred in not sentencing him to serve his term of imprisonment in county jail rather than in state prison pursuant to revisions to section 1170, subdivision (h) that became operative after he entered his plea but before he was sentenced. As recently explained in *People v. Cruz* (2012) 207 Cal.App.4th 664, 668, “[o]n April 4, 2011, the Governor approved the ‘2011 Realignment Legislation addressing public safety’ (Stats. 2011, ch. 15, § 1) [the Realignment Act] which, together with subsequent related legislation, significantly changed the sentencing and supervision of persons convicted of felony offenses. The sentencing changes made by the [Realignment] Act apply, by its express terms, ‘prospectively to any person sentenced on or after October 1, 2011.’ (Pen. Code, § 1170, subd. (h)(6).)” (Fns. omitted.)

Defendant pled no contest to a violation of section 666.5. Until October 1, 2011, the punishment under that statute was “imprisonment in the state prison for two, three, or four years . . . .” (Former § 666.5, subd. (a).) After the sentencing changes under the Realignment Act became operative, the punishment was “imprisonment pursuant to subdivision (h) of Section 1170 for two, three, or four years . . . .” (§ 666.5, subd. (a).) Under section 1170, subdivision (h)(2), “[e]xcept as provided in paragraph (3), a felony punishable pursuant to this subdivision shall be punishable by imprisonment in a county jail for the term described in the underlying offense.” Subdivision (h)(3) provides in pertinent part that where a defendant has suffered a prior or current conviction for, among

---

<sup>2</sup> The facts underlying these charges are not germane to the issues on appeal, and we will not recite them here.

other things, a violent felony described in section 667.5, subdivision (c), “an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.”<sup>3</sup> Robbery is among the violent felonies listed in section 667.5, subdivision (c). (§ 667.5, subd. (c)(9).) The result is that a defendant sentenced after October 1, 2011, for a violation of section 666.5 would ordinarily serve the term of imprisonment in county jail; but among the exceptions to that rule, a defendant who had suffered a conviction of a violent felony such as robbery would be sentenced to state prison instead.

Defendant argues that because he was sentenced after October 1, 2011, he should have been sentenced to county jail under the Realignment Act. Relying on the premise that a prison sentence subjects an inmate to greater punishment than the same term in county jail, he contends that because the robbery prior was not pled and proved—and

---

<sup>3</sup> The version of section 1170, subdivision (h)(3) in effect when defendant was sentenced provided: “Notwithstanding paragraphs (1) and (2), where the defendant (A) has a prior or current felony conviction for a serious felony described in subdivision (c) of Section 1192.7 or a prior or current conviction for a violent felony described in subdivision (c) of Section 667.5, (B) has a prior felony conviction in another jurisdiction for an offense that has all of the elements of a serious felony described in subdivision (c) of Section 1192.7 or a violent felony described in subdivision (c) of Section 667.5, (C) is required to register as a sex offender pursuant to Chapter 5.5 (commencing with Section 290) of Title 9 of Part 1, or (D) is convicted of a crime and as part of the sentence an enhancement pursuant to Section 186.11 is imposed, an executed sentence for a felony punishable pursuant to this subdivision shall be served in state prison.”

indeed, was stricken—the trial court could not properly rely on it to impose a prison term.<sup>4</sup>

The Attorney General urges us not to reach the merits of defendant’s argument because defendant failed to obtain a certificate of probable cause. “Penal Code section 1237.5 provides that a defendant may not appeal ‘from a judgment of conviction upon a plea of guilty or nolo contendere’ unless the defendant has applied to the trial court for, and the trial court has executed and filed, ‘a certificate of probable cause for such appeal.’ [Citation.] ‘Despite this broad language, [our Supreme Court has] held that two types of issues may be raised in an appeal following a guilty or nolo plea without the need for a certificate: issues relating to the validity of a search and seizure . . . and issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.’ [Citation.]” (*People v. Shelton* (2006) 37 Cal.4th 759, 766 (*Shelton*)). In deciding whether an appeal relates to issues subsequent to the plea, we ask whether the defendant’s challenge is one that arose after the plea and does not affect the plea’s validity. (*Ibid.*; see also Cal. Rules of Court, rule 8.304(b).)

Our Supreme Court explained in *Shelton* that “ ‘[a] challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself’ and thus requires a certificate of probable cause. [Citation.]”

---

<sup>4</sup> In rejecting defendant’s arguments at the sentencing hearing, the trial court noted that the parties had negotiated a disposition of four years, expressed its view that it did not have “jurisdiction to force our Sheriff to house somebody who is specifically excluded by law from being housed at the county jail,” and found that being housed in state prison did not increase defendant’s punishment in any way. In *Cruz*, the Fifth Appellate District recently expressed reservations about whether serving a sentence in county jail instead of state prison amounts to lesser punishment where the sentences are the same length, but went on to acknowledge that defendants who have served their sentences under section 1170, subdivision (h) would be free of the period of parole or postrelease community supervision mandated after a state prison sentence. The court did not, however, resolve the question of whether a prison sentence amounted to greater punishment. (*Cruz, supra*, 207 Cal.App.4th at p. 672, fn. 8, citing §§ 3000, subd. (a)(1) & 3451, subd. (a).)

(*Shelton, supra*, 37 Cal.4th at p. 766, citing *People v. Panizzon* (1996) 13 Cal.4th 68, 79 (*Panizzon*)). In *Panizzon*, the defendant contended the sentence he had negotiated violated the constitutional prohibitions against cruel and unusual punishment because it was disproportionate to the sentences imposed on his codefendants. (*Panizzon, supra*, 13 Cal.4th at p. 74.) Our high court concluded he could not raise this issue without obtaining a certificate of probable cause, reasoning, “[w]hile a trial court’s error in making certain decisions after a plea may give rise to challenges that do not require compliance with section 1237.5, all the trial court did here was to sentence defendant in accordance with the previously entered plea. . . . [T]hat the events supposedly giving rise to defendant’s disproportionality claim occurred [after the plea] is of no consequence. Rather, ‘the crucial issue is *what* the defendant is challenging.’ [Citation.] Here, by contesting the constitutionality of the very sentence he negotiated as part of the plea bargain, defendant is, in substance, attacking the validity of the plea. For that reason . . . we hold that the certificate requirement of section 1237.5 applies.” (*Panizzon, supra*, 13 Cal.4th at p. 78.)

The principles appellate courts apply when determining whether post-plea challenges to a sentence require a certificate of probable cause have been distilled as follows: “(1) a challenge to the court’s authority to impose an agreed upon maximum sentence is a challenge to the validity of the plea requiring a certificate of probable cause, but (2) a challenge to the trial court’s exercise of individualized sentencing discretion within an agreed maximum sentence does not require a certificate of probable cause because it does not challenge the trial court’s authority to impose the upper term, i.e., it does not attack the validity of the plea agreement but instead attacks the court’s exercise of discretion permitted by the agreement.” (*People v. Rushing* (2008) 168 Cal.App.4th 354, 359-360 (*Rushing*); see also *People v. Cuevas* (2008) 44 Cal.4th 374, 384 [certificate of probable cause required because defendant’s contention that section 654 required duplicative counts to be stayed amounted to attack on court’s *authority* to impose consecutive terms, not challenge to exercise of sentencing discretion]; *People v. French* (2008) 43 Cal.4th 36, 45-46 [no certificate of probable cause required where

“defendant’s claim, if successful, would not deprive the People of the benefit of the plea agreement, because they would still have the opportunity to convince the trial court that the full 18-year term should be imposed”].)

Applying these principles, we conclude defendant’s challenge is to the validity of his plea and accordingly he was obliged to obtain a certificate of probable cause. Defendant’s substantive argument is not that the trial court *abused its discretion* in sentencing him to prison rather than county jail, but the trial court was *required* to sentence him to county jail.<sup>5</sup> In essence, this is a challenge to the trial court’s authority to sentence him to prison. And the record shows that as part of the agreement, defendant agreed to be sentenced to prison.<sup>6</sup> Defendant argues the record is ambiguous on this point, noting that at the hearing in which he pled no contest, there was no mention of *where* he would serve his sentence; instead, the trial court asked “And the [c]ourt that he just pled to, is that a four year top?” and the prosecutor replied, “It is. That is the indicated sentence.” However, the court also noted at the hearing that it had the waiver of rights form and asked defendant if he had gone over the form with his lawyer. Defendant replied in the affirmative. Paragraph seven of that form specified that the maximum punishment based upon the plea was “4 yrs State Prison.” Defendant initialed that paragraph. On this record, it is clear that a prison sentence was part of the plea agreement.

---

<sup>5</sup> In his reply brief, in response to the Attorney General’s certificate of probable cause argument, defendant suggests he is challenging the trial court’s exercise of its sentencing discretion. Nowhere in his opening or reply brief, however, does he contend the trial court in fact had discretion to sentence him to state prison; rather, his contention is that such a sentence was error in the absence of a pled and proved allegation of a qualifying prior felony. Indeed, elsewhere in his reply brief, defendant argues that “since the pleading and proof requirement was not met, the trial court had no discretion to impose the state prison sentence.”

<sup>6</sup> We interpret the agreement to give effect to the parties’ mutual intent, and consider the totality of the circumstances. (*Shelton, supra*, 37 Cal.4th at pp. 767-769.) “[T]he *defendant’s* reasonable beliefs control” our interpretation. (*V.C. v. Superior Court* (2009) 173 Cal.App.4th 1455, 1467, fn. 12, disapproved on another point in *In re Greg F.* (2012) 55 Cal.4th 393, 415.)

Accordingly, defendant's challenge to the court's authority to impose the agreed-upon sentence is a challenge to the terms of the plea agreement, and is not cognizable on appeal absent a certificate of probable cause. (See *Rushing, supra*, 168 Cal.App.4th at pp. 359-360.) We shall therefore dismiss the appeal. (See *People v. Stubbs* (1998) 61 Cal.App.4th 243, 245.)

### III. DISPOSITION

The appeal is dismissed.

---

RIVERA, J.

We concur:

---

REARDON, ACTING P. J.

---

SEPULVEDA, J.\*

\* Retired Associate Justice of the Court of Appeal, First Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.