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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON SAMUEL ANTONE,

Defendant and Appellant.

A142420

(Solano County
Super. Ct. No. FCR296905)

Jason Samuel Antone (appellant) appeals from a judgment entered after he pleaded no contest to carrying a loaded unregistered firearm (Pen. Code, § 25850, subd. (a))¹ and the trial court placed him on three years of probation. He contends his plea was induced by “an illusory bargain” and that he must therefore be allowed to “withdraw his plea if he wishes.” We agree, and shall remand the case to the trial court to give appellant an opportunity to withdraw his plea.

FACTUAL AND PROCEDURAL BACKGROUND

On November 6, 2012, a felony complaint was filed charging appellant with carrying a loaded unregistered firearm (§ 25850, subd. (a), count 1). The complaint also charged three co-defendants with various firearm and narcotics offenses. On November 27, 2012, appellant moved to suppress evidence under section 1538.5. A magistrate heard the motion at the preliminary hearing and, after requesting additional briefing, denied the motion.

¹All further statutory references are to the Penal Code.

On March 19, 2013, an amended information was filed charging appellant with carrying a loaded unregistered gun (§ 25850, subd. (a), count 1) and carrying a concealed firearm (§ 25400, subd. (a)(2), count 5). The amended information included other charges—counts 2, 3, 4, 6, 7, and 8—against the three co-defendants. Appellant unsuccessfully moved for severance, and to dismiss the information for failure of the police to preserve evidence under *California v. Trombetta* (1984) 467 U.S. 479 and *Arizona v. Youngblood* (1988) 488 U.S. 51.

On May 21, 2014, appellant waived his constitutional rights and pleaded no contest to count 1. Among other things, the plea agreement called for a grant of probation and a maximum of 90 days in county jail. It also preserved the motion to suppress for appellate review.

At the hearing at which appellant entered his plea, the parties indicated they had reached a resolution and defense counsel stated it was his “intention to fashion a disposition wherein [appellant] preserves his right to appeal the denial of the 1538 and the denial of the *Youngblood* motion.” The trial court stated, “I can understand the 1538 being preserved because that is traditional and written into the California Rules of Court and there is statutory authorization for it, but the *Youngblood Trombetta* motion is typically something you will give up because it is not preserved by statute.” The court said it should be made clear in the plea agreement “what you are preserving, what you are not.” Defense counsel responded, “So we will agree with that.” Before appellant entered his plea, the court stated, “You are still preserving your 1538 rights.” The court reiterated, “You are preserving your right to appeal the 1538. That was something expressly addressed in the plea form.” “And, of course, you still maintain any rights to appeal to anything I do subsequent to these pleas as well.” The written plea agreement stated, “I give up my right of appeal[] except 1538.5 denial.” The minute order stated, “1538 is preserved for appeal.”

On July 8, 2014, the trial court suspended imposition of judgment, placed appellant on probation for three years, and imposed various fines and fees. The

underlying facts that led to the filing of the complaint and information are not at issue in this case.

DISCUSSION

Appellant contends his plea was induced by “an illusory bargain” and that he must therefore be allowed to “withdraw his plea if he wishes.” Specifically, he asserts he was “induced to [enter the plea] pursuant to an agreement that his motion to suppress would be reviewable on appeal.” We agree that appellant should be given an opportunity to withdraw his plea.

It is well established that a defendant who wishes to seek appellate review of the denial of a motion to suppress must raise the issue before *a superior court judge* acting in that capacity. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896 [a defendant who failed to renew his suppression motion in the superior court after the municipal court denied it was precluded from seeking appellate review of the issue].) This rule continues to apply despite the unification of municipal and superior courts. (*People v. Garrido* (2005) 127 Cal.App.4th 359, 364 [“The unification of the municipal and superior courts has not abrogated the need for a renewal of a motion to suppress evidence following certification of a case to the superior court”].) Because the appellate court may review only “the actions of the trial judge,” a defendant who wishes to preserve his right to appeal the denial of a suppression motion must renew the motion in the superior court after the matter is heard at the preliminary hearing. (*People v. Hart* (1999) 74 Cal.App.4th 479, 485–486.) The parties “cannot by their [plea] agreement confer upon [the appellate] court the jurisdiction to hear an issue which is not appealable.” (*People v. Burns* (1993) 20 Cal.App.4th 1266, 1274 (*Burns*).)

In *Burns*, the defendant filed a motion to suppress evidence in the municipal court, and the motion was denied. (*Burns, supra*, 20 Cal.App.4th at p. 1270.) Thereafter, he entered into a plea agreement which, among other things, provided that “ ‘[i]t will be certified for appeal with regard to the denial of [the] motion to suppress.’ ” (*Ibid.*) When the defendant challenged the denial of his suppression motion on appeal, the Court of Appeal held that it lacked jurisdiction to hear the matter because the defendant had not

renewed the motion in the superior court. (*Id.* at p. 1274.) The Court of Appeal then held: “Accordingly, since appellant cannot be given the benefit of his plea bargain, which entailed the ability to raise on appeal the search and seizure claim, he must be permitted to withdraw his guilty plea.” (*Ibid.*)

Similarly, here, the record shows that appellant entered his no contest plea in reliance on an agreement that he could seek appellate review of the denial of his motion to suppress. As noted, the trial court stated twice before accepting appellant’s plea that appellant was “preserving [his] right to appeal the 1538.” The plea agreement form also indicated that appellant was not giving up his right to appellate review of the issue, and the minute order stated, “1538 is preserved for appeal.” Further, as in *Burns*, we lack jurisdiction to review the denial of the suppression motion because appellant did not renew the motion in the superior court. (*People v. Lilienthal, supra*, 22 Cal.3d at p. 896.) Thus, appellant “cannot be given the benefit of his plea bargain,” and “he must be permitted to withdraw his guilty plea.” (*Burns, supra*, 20 Cal.App.4th at p. 1274.)

The Attorney General (respondent) acknowledges the holding in *Burns* but argues that reversal is not appropriate in this case because appellate review of the suppression motion was not a “material” term of the plea agreement. Citing *People v. Martin* (2010) 51 Cal.4th 75, 80, for the proposition that a plea is invalidated only where a *material* term is breached, respondent asserts that appellant’s “failure to renew the motion and failure to obtain a certificate of probable cause argue against materiality.” Respondent cites no relevant authority to support this position and fails to explain how the failure to renew the motion or the failure to obtain a certificate of probable cause are relevant to whether or not a specific term of the plea agreement is material. In fact, the record in this case demonstrates that the promise of appellate review of the suppression motion was a material inducement for appellant’s no contest plea. With the right of appeal lost, appellant has been deprived of a significant condition of the plea agreement. As in *Burns*, we conclude that the appropriate remedy is to give appellant the opportunity to withdraw his no contest plea, if he so chooses. We see no reason to depart from the holding in *Burns*.

Finally, respondent asserts, without much legal argument,² that the appeal “is barred” because appellant did not obtain a certificate of probable cause. The Court of Appeal in *Burns* did not consider whether it could entertain a challenge to the validity of the plea absent a certificate of probable cause. In fact, the *Burns* opinion is silent as to whether or not the defendant in that case had obtained a certificate of probable cause. (*Burns, supra*, 20 Cal.App.4th at p. 1274.) In our view, *Burns*’s rationale for allowing a defendant to withdraw his plea does not depend on whether the defendant has obtained a certificate of probable cause because he is not challenging the validity of the plea.

When an appellant seeks to invalidate his or her guilty plea by appeal, the person must ordinarily first obtain a certificate of probable cause from the trial court. (§ 1237.5; *People v. Shelton* (2006) 37 Cal.4th 759, 766.) However, in a case where the appellant seeks to enforce a plea agreement or to challenge the court’s failure to comply with the terms of the agreement, a certificate of probable cause is not required. (*People v. Johnson* (2009) 47 Cal.4th 668, 679, fn. 5 [“if a defendant claims on appeal that the sentence imposed *violated* a plea agreement, no certificate of probable cause is required even though the result of a successful appeal could be the withdrawal of the defendant’s plea]; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1220 [the defendant who sought specific performance of a term of her plea agreement was not required to obtain a certificate of probable cause].) We conclude that a certificate of probable cause was not required to permit this appeal because appellant is not challenging the validity of his plea, but rather, is seeking enforcement of a term of the plea agreement.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with instructions to vacate the no contest plea if appellant makes an appropriate motion within 30 days after the remittitur is issued. In that event, the trial court shall reinstate the

²The entire argument consists of three sentences: “Appellant seeks to have this court review the validity of his plea, claiming he did not receive the benefit of his bargain. A challenge to the validity of a plea requires a certificate of probable cause. [Citations.] Since appellant did not obtain a certificate of probable cause, his appeal is barred.”

original charges contained in the information, if the prosecution so moves, and proceed to trial or make other appropriate dispositions. If no such motion to vacate the no contest plea is filed by appellant, the trial court is directed to reinstate the original judgment.

McGuinness, P.J.

We concur:

Siggins, J.

Jenkins, J.