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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

ANTHONY JOHN GARCIA,

Petitioner,

v.

THE SUPERIOR COURT OF CONTRA
COSTA COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

A142817

(Contra Costa County
Super. Ct. No. 51406065)

Petitioner Anthony John Garcia filed this petition for writ of mandate after the superior court denied his request for a certificate of probable cause on the ground he waived his appellate rights at the change-of-plea hearing. We will issue a peremptory writ in the first instance directing respondent court to vacate its order denying petitioner's application for a certificate of probable cause. All parties were informed the court was considering issuing a peremptory writ in the first instance, the matter has been fully briefed, and issuance of an alternative writ would add nothing to the exposition of the issues. (See *Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1240–1241.)

However, the remedy we provide is limited. The superior court is not required to grant petitioner's application for a certificate of probable cause, but need only consider his application on the merits or on procedural grounds other than appellate waiver, the ground on which the court denied the certificate request.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

In March 2014, the People filed an information accusing Garcia of driving under the influence (count 1) and driving with a 0.08 percent or higher blood-alcohol content (count 2). The offenses were alleged as felonies due to Garcia's prior drunk driving convictions and prison terms. On April 30, 2014, the court held a change-of-plea hearing. Garcia's counsel stated Garcia was willing to enter a plea of no contest on count 1, and also admit a prior conviction from 2010, for a sentence of two years four months with a total of 133 days of credit. Garcia stated he was entering the plea freely and voluntarily and acknowledged he had been advised of his constitutional rights, and the court so found. A "Felony Advisement of Rights, Waiver and Plea Form" was initialed throughout by Garcia and signed by Garcia, his defense counsel and the court. The court accepted the plea, the prosecutor moved to dismiss the remaining count, and the court granted the motion to dismiss. The court imposed the prison term contemplated by the plea agreement, informed Garcia his parole term would be three years and imposed a restitution fine.

Thereafter the following colloquy ensued:

"The Court: Okay. I think that covers everything. Good luck, sir. Okay?"

"[Garcia]: Thank you.

"[Prosecutor]: Mr. Garcia, you have the right to appeal from this conviction and sentence. Do you understand you have the right to appeal?"

"[Garcia]: Yes.

"[Prosecutor]: Do you agree to give that right up in this case?"

"[Garcia]: Yes.

"[Prosecutor]: Counsel, do you join in the waiver?"

"[Defense Counsel]: Yes."

On June 23, 2014, Garcia filed a notice of appeal along with a request for certificate of probable cause listing several different grounds allegedly "going to the legality" of the plea. On June 25, 2014, the court denied the request; a handwritten note under the judge's signature line states, "Defendant waived appellate rights on 4/30/14."

DISCUSSION

Garcia contends the waiver of appellate rights relied on by the trial court in denying his probable cause certificate request is erroneous for two reasons:

(1) enforcement of the appellate waiver violates Penal Code section 1192.5¹ because it was not in the waiver form signed and initialed by defendant, not acknowledged by the court, and was made in response to questions posed by the prosecutor after the court had taken his plea and imposed sentence; (2) the record does not permit a finding the appellate waiver was made knowingly, intelligently and voluntarily.

The Attorney General (AG) does not defend the propriety of the appellate waiver in her opposition brief, stating she declines to “address the validity of petitioner’s appellate waiver or his contention that the lower court failed to consider his request [for a certificate of probable cause] on the merits.” Rather, the AG contends the trial court did not abuse its discretion by denying petitioner’s request for a certificate of probable cause because none of the claims asserted by petitioner are cognizable on appeal from a guilty-plea conviction.

We conclude the appellate waiver extracted by the prosecutor cannot be enforced because it was not made part of the plea agreement and is not included in the signed “Felony Advisement of Rights, Waiver and Plea Form.” Therefore we cannot say Garcia knowingly and voluntarily waived all his appellate rights, including those provided under section 1237.5.² (*People v. Vargas* (1993) 13 Cal.App.4th 1653, 1659 [“a defendant may

¹ Penal Code section 1192.5 provides in relevant part: “Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea.” Also, all further statutory references are to the Penal Code.

² Section 1237.5 provides: “No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has

expressly waive his statutory right to appeal *as part of a plea agreement*, provided it is knowing, intelligent and voluntary”], italics added.)

Moreover, section 1237.5 clearly specifies the trial court must determine whether a certificate of probable cause should issue in a particular case. Accordingly, we decline the AG’s invitation to make that determination in the first instance. Rather, where the trial court rules on an improper basis, as happened here, the proper course is to remand the matter for redetermination. (See *Werschkull v. United California Bank* (1978) 85 Cal.App.3d 981, 1009 [remand for redetermination of attorney fees required where trial court failed to establish proper basis for initial determination]; *People v. Glover* (1974) 40 Cal.App.3d 1006, 1013 [“Where the record indicates that the trial court applied the wrong standards in determining the issue, . . . the appellate court will remand for a proper determination.”].)

In sum, we conclude the trial court erred in denying petitioner’s application for certificate of probable cause on the ground he had waived his appellate rights. However, as in *Drake v. Superior Court* (2009) 175 Cal.App.4th 1462, “[w]e will not attempt to determine whether the application may be procedurally barred for some other reason, much less whether the trial court must issue a certificate of probable cause on the merits. We therefore issue a peremptory writ limited to directing the trial court to vacate its [waiver]-based order and to consider petitioner’s application for a certificate of probable cause on the merits or other procedural grounds.” (*Id.* at p. 1467.)

DISPOSITION

Let a peremptory writ of mandate issue directing respondent court to vacate its order denying petitioner’s application for a certificate of probable cause and to conduct further proceedings in accordance with the views expressed in this opinion. In the interests of justice, this opinion is made final immediately on filing with regard to this court. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

executed and filed a certificate of probable cause for such appeal with the clerk of the court.”

Banke, J.

We concur:

Humes, P. J.

Dondero, J.