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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTHONY MITCHELL,

Defendant and Appellant.

2d Crim. No. B236534
(Super. Ct. Nos. 2011005919, 2009046010,
2006011818)
(Ventura County)

Michael Anthony Mitchell purports to appeal the judgment entered after he pled guilty to transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)), possession of a deadly weapon (Pen. Code,¹ former § 12020, subd. (a), now § 21810), and possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)). Appellant admitted two prior drug convictions (Health & Saf. Code, § 11370.2), and also admitted violating his probation in two prior cases. The trial court sentenced him to five years in state prison. Appellant contends the court erred in failing to hold a *Marsden*² hearing after appellant asked the court to appoint a new attorney to assist him in filing a motion to withdraw his plea based on ineffective assistance of counsel.

¹ All further undesignated statutory references are to the Penal Code.

² (*People v. Marsden* (1970) 2 Cal.3d 118.)

Because this claim essentially attacks the validity of appellant's guilty plea and he did not obtain a certificate of probable cause pursuant to section 1237.5, we dismiss the appeal.

BACKGROUND

The facts underlying appellant's convictions are not relevant to the issue raised on appeal, so we need not discuss them. After appellant pled guilty but prior to the sentencing hearing, he wrote a letter to the court requesting a *Marsden* hearing on the ground of ineffective assistance of counsel. Appellant complained that his appointed counsel "[had not] done anything to help [him]" at the preliminary hearing and had failed to ask "a lot of questions I ask[ed] him to ask the officers." He further claimed that counsel had (1) lied to him and his witness; (2) intimidated and threatened a potential witness; (3) failed to apprise the court of evidence that was relevant to his defense; (4) refused to call an expert witness; and (5) failed to send an investigator to interview his witness.

When the matter was called for sentencing, the court indicated that conflict counsel had been appointed for the limited purpose of addressing appellant's "interest[] in pursuing a withdrawal of his plea." Conflict counsel indicated he had spoken to appellant and reviewed his letter to the court and the plea form. In addition to the concerns stated in his letter, appellant had orally "expressed some other concerns about why he believed he was basically forced to plead guilty because one of his witnesses wasn't available." Based on all of the information, conflict counsel concluded there was no legal basis for appellant to seek to withdraw his plea on the ground of ineffective assistance of counsel.

When the court stated its intent to proceed to sentencing, appellant stated, "I would like a continuation to get private counsel." The court responded, "I appreciate your concerns. I am sympathetic to your position. That does not appear to be legally appropriate to me now based on what I have read and heard in this case. It is my intention at this point to proceed on to sentencing." The court asked appellant if he wanted to add anything else to the record, and appellant replied: "Yes. I am objecting to the sentencing at this time. I would like to seek private counseling. My lawyer told my witness previously that if she came to court and testified, she would probably go to jail

which I believe is intimidation of a witness. And I think that's a serious charge. I knew somebody who went to jail 32 to life for intimidation of a witness. So I would like to know why I cannot withdraw my plea based on those grounds."

The court told appellant that his concerns had been noted and proceeded to sentence him. Appellant filed at timely notice of appeal stating that the appeal "seeks review of all orders entered except for those directly related to entry of a guilty plea, and does not address the validity of the plea." Appellant did not seek or obtain a certificate of probable cause.

DISCUSSION

Appellant's sole contention on appeal is that the court erred in failing to conduct a *Marsden*³ hearing after he expressed his interest in moving to withdraw his guilty plea on the ground of ineffective assistance of counsel. Because this claim ultimately seeks a ruling that appellant's plea was invalid, it is not cognizable in the absence of a certificate of probable cause. No certificate was obtained here, so the appeal must be dismissed.

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, . . . 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 executed and filed a certificate of probable cause for such appeal with the clerk of the court." The purpose of the certificate of probable cause requirement is to prevent frivolous appeals challenging convictions following guilty and nolo contendere pleas. (*People v. Johnson* (2009) 47 Cal.4th 668, 676 (*Johnson*); *People v. Brown* (2010) 181 Cal.App.4th 356, 359.)

³ In *Marsden*, the court held that when a criminal defendant seeks new appointed counsel based on a claim of ineffective assistance of counsel, the court must inquire into the reasons for the defendant's dissatisfaction with counsel.

"A defendant who has pleaded guilty . . . to a charge in the superior court, and who seeks to take an appeal from a judgment of conviction entered thereon, may not obtain review of so-called 'certificate' issues, that is, questions going to the legality of the proceedings, including the validity of his plea" unless he has complied with section 1237.5 and California Rules of Court, rule 8.304(b)(1).⁴ (*People v. Mendez* (1999) 19 Cal.4th 1084, 1088.) We are compelled to enforce the certificate of probable cause requirement in a "strict manner" to promote the goal of judicial economy. (*Id.* at p. 1098.) Where a certificate of probable cause is required but has not been obtained, we "may not proceed to the merits of the appeal, but must order dismissal thereof[.]" (*Id.* at p. 1096.)

"A defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea, even though such a motion involves a proceeding that occurs after the guilty plea. [Citation.]" (*Johnson, supra*, 47 Cal.4th at p. 679, italics omitted.) Even when the appeal is based on "trial counsel's alleged refusal to assist defendant in moving to withdraw his plea," this "does not warrant creation of a new exception to the certificate requirement." (*Id.* at p. 683.) "In determining whether an appeal is cognizable without a certificate of probable cause, "the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made." [Citation.] [Citation.] If the challenge is in substance an attack on

⁴ Rule 8.304(b) provides: "(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court with the notice of appeal required by (a)—the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. [¶] (2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate. [¶] (3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal 'Inoperative,' notify the defendant, and send a copy of the marked notice of appeal to the district appellate project. [¶] (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: [¶] (A) The denial of a motion to suppress evidence under Penal Code section 1538.5; or [¶] (B) Grounds that arose after entry of the plea and do not affect the plea's validity. [¶] (5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1)."

the validity of the plea, defendant must obtain a certificate of probable cause. [Citation.]" (*People v. Emery* (2006) 140 Cal.App.4th 560, 564–565.) Where a defendant whose motion to withdraw a plea was denied "seeks remand for the opportunity to bring a motion to withdraw his plea[, and t]he further proceedings he seeks are ultimately aimed at obtaining a ruling by the trial court that his plea was invalid[, a] certificate of probable cause is required in order to pursue th[e] appeal." (*People v. Brown, supra*, 181 Cal.App.4th at p. 361.)

Although appellant frames his claim as merely challenging the court's failure to hold a *Marsden* hearing, this claim ultimately seeks the withdrawal of appellant's guilty plea and is thus an attack on the validity of that plea. The only purpose of a *Marsden* hearing would be to determine whether substitute counsel should be appointed to assist appellant in filing a motion to withdraw his plea on the ground of ineffective assistance. Moreover, the only purpose for appointing counsel in this context would be to obtain a ruling that appellant is entitled to withdraw his plea. Construing section 1237.5 strictly, as we must (*People v. Mendez, supra*, 19 Cal.4th at p. 1098), it is clear that appellant's claim attacks the validity of his plea and thus cannot be raised without a certificate of probable cause.

The appeal is dismissed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

David Hirsch, Judge
Superior Court County of Ventura

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