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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Tehama)

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJANDRO MAXIMINO SANCHEZ,

Defendant and Appellant.

C067843

(Super. Ct. No.
NCR78349)

Defendant Alejandro Maximino Sanchez pleaded guilty to possession of methamphetamine while armed with a loaded firearm. He also admitted a prior strike conviction and a prior prison term. The trial court sentenced him to nine years in prison.

On appeal, defendant contends (1) the trial court abused its discretion in denying a further continuance of the sentencing hearing, thereby preventing defense counsel from determining the validity of the prior strike conviction defendant previously admitted; (2) defense counsel rendered

ineffective assistance in failing to investigate the validity of the prior strike conviction before advising defendant to admit it; and (3) insufficient evidence supports the trial court's adjustment of custody credits to zero.

A month after filing his opening brief, defendant asked this court for leave to file an untimely request in the superior court for a certificate of probable cause. The People opposed the request and sought dismissal of defendant's contentions that the trial court abused its discretion in denying a further continuance, and that trial counsel was ineffective. This court denied defendant's request for leave and deferred ruling on the People's motion to dismiss.

We now deny the People's motion to dismiss. We conclude, however, that defendant's contentions that the trial court abused its discretion in denying a further continuance, and that trial counsel was ineffective, are both noncognizable on appeal because defendant did not obtain a certificate of probable cause. We further conclude that sufficient evidence supports the trial court's adjustment of custody credits to zero.

We will affirm the judgment and order correction of errors in the abstract of judgment.

BACKGROUND

The parties stipulated to certain facts as the factual basis for the plea. Sheriff's deputies searched defendant's home on January 7, 2010, and discovered a .308 caliber pistol, .22 caliber rifle, compatible ammunition, glass smoking pipes, and 0.76 grams of methamphetamine. Defendant was previously

convicted in 1998 of assault with a semiautomatic firearm (Pen. Code, § 245, subd. (b)), and in 2008 he was convicted and sentenced to prison for possession for sale of a controlled substance (Health and Saf. Code, § 11378).

Defendant pleaded guilty to possession of methamphetamine while armed with a loaded firearm. (Health & Saf. Code, § 11370.1, subd. (a).) He admitted the prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and the prior prison term (Pen. Code, § 667.5, subd. (b)). Consistent with the plea agreement, the trial court sentenced defendant to nine years in prison, dismissed the remaining charges, and also dismissed a separate case (No. NCR79667).

DISCUSSION

I

Defendant contends the trial court abused its discretion in denying a further continuance of the sentencing hearing.

Sentencing had already been delayed several months when defense counsel requested a further continuance so that he could obtain the transcript from the plea proceeding. Defense counsel wanted to confirm whether the prior strike conviction that defendant previously admitted was in fact a prior strike. The trial court granted a two-week continuance of the sentencing hearing so defense counsel could obtain the transcript. At the next hearing, however, although defense counsel did not request a further continuance, he did inform the trial court that he had not yet obtained the transcript. The trial court asked, "how can it be that going on four months later now we still don't

have materials you need for sentencing?" Defense counsel explained that he only recently realized what he needed. The trial court replied, "this has been continued so long, I don't know if I can remember it. But, we're talking about a strike prior that was admitted by the defendant." The trial court proceeded with sentencing.

In responding to defendant's contention on appeal that the trial court abused its discretion in denying a further continuance, the Attorney General argues the contention is noncognizable because defendant did not obtain a certificate of probable cause to challenge his admission of the prior strike conviction. We agree with the Attorney General that the contention is noncognizable.

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

Defendant entered a plea for a stipulated nine-year sentence, consisting of the upper term of four years, doubled for the prior strike, plus one year for the prior prison term.

Defendant's admission that the prior felony conviction constituted a strike for purposes of doubling the underlying term was an integral part of his plea agreement.

Defense counsel sought a further continuance in an effort to determine the validity of defendant's admission of the prior strike and thus to determine whether he could challenge the validity of defendant's plea. Such a challenge requires a certificate of probable cause. Defendant's failure to obtain a certificate of probable cause renders the contention noncognizable on appeal. (*People v. Johnson* (2009) 47 Cal.4th 668, 678-679; *People v. Emery* (2006) 140 Cal.App.4th 560, 562, 564-565.)

II

Defendant next contends that defense counsel rendered ineffective assistance in failing to investigate the validity of the prior strike before advising defendant to admit it. The Attorney General argues this contention is also noncognizable. We agree with the Attorney General.

Defendant is required to obtain a certificate of probable cause in order to argue on appeal that his admission was invalid due to ineffective assistance of counsel. (*People v. Richardson* (2007) 156 Cal.App.4th 574, 595-596; *People v. Stubbs* (1998) 61 Cal.App.4th 243, 244-245; *People v. Cotton* (1991) 230 Cal.App.3d 1072, 1079; *People v. Guzman* (1991) 226 Cal.App.3d 1060, 1065.) Defendant's failure to obtain a certificate of probable cause renders his contention noncognizable on appeal. (*People v. Panizzon* (1996) 13 Cal.4th 68, 89, fn. 15.)

III

Defendant also contends that insufficient evidence supports the trial court's adjustment of custody credit to zero. We disagree.

The probation officer reported the following: "The defendant said he is on parole, and his violation was for the present matter as well as not reporting an address change. He was offered a year return to prison with half-time credit, but he exercised a[n] optional waiver to see what the court does. His parole agent in Sacramento did not return this writer's calls to confirm this. However, based upon defendant's statement his parole was violated for reasons beyond the present offense and he is therefore not eligible for confinement credit."

Three months later, the probation officer reported that he had made three additional calls to follow up but again no one returned his calls. The probation officer stood by his recommendation that defendant was ineligible for confinement credit based on defendant's statement.

At sentencing, defendant did not offer any evidence to refute his statement to the probation officer. Defense counsel expressed his understanding that if defendant received a prison sentence in this case his parole violations would be dismissed, and defense counsel asked the trial court to award defendant 369 days of credit "since we are kind of unprepared with what parole is doing." The trial court adjusted the credits to zero based on the information from the probation officer, commenting that

"there will be a letter coming back to me to correct that if there is a correction in how the parole election went down or in what happened, but right now I'll go with the Probation Department."

"[A] prisoner is not entitled to credit for presentence confinement unless he shows that the conduct which led to his conviction was the sole reason for his loss of liberty during the presentence period." (*People v. Bruner* (1995) 9 Cal.4th 1178, 1191.) Nonetheless, defendant complains that insufficient evidence supports the trial court's determination because probation failed to confer with parole whether there was more than one basis for a parole violation and "[t]here was no evidence in the record of the petition to revoke parole nor the result of the parole violation proceedings."

However, the trial court properly relied on defendant's admission that he had been confined based not only on his conduct in the present matter but also based on his failure to report a change of address to his parole officer. (See Evid. Code, §§ 1220, 1280.) Defendant did not offer any contrary evidence. The trial court's finding is supported by sufficient evidence. (*People v. Bruner, supra*, 9 Cal.4th at pp. 1191, 1195.)

IV

The abstract of judgment incorrectly identifies the underlying offense as a violation of "PC" section 11370.1, subdivision (a). But defendant was convicted of a violation of Health and Safety Code section 11370.1, subdivision (a). We

also note the abstract of judgment does not reflect that defendant was convicted by a plea agreement. We will order the trial court to correct the abstract of judgment.

DISPOSITION

The judgment is affirmed. The trial court is directed to prepare a corrected abstract of judgment to reflect that defendant was convicted of a violation of Health and Safety Code section 11370.1, subdivision (a) and that he was convicted by a plea agreement. The trial court is further directed to forward a certified copy of the corrected abstract of judgment to the California Department of Corrections and Rehabilitation.

_____ MAURO _____, J.

We concur:

_____ HULL _____, Acting P. J.

_____ BUTZ _____, J.