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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(El Dorado)

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR ZAVALA BRINGAS,

Defendant and Appellant.

C068112

(Super. Ct. Nos.
S08CRF0075 &
S11CRM0071)

Defendant Edgar Zavala Bringas entered into a plea agreement pursuant to which he received five years of formal probation and a prison term of 10 years four months, stayed. After finding defendant in violation of probation, the trial court lifted the stay. Defendant now purports to appeal from his sentence, contending that the court abused its discretion by enforcing the plea agreement and, as a result, lifting the stay on the sentence previously pronounced.

Because defendant failed to obtain a certificate of probable cause, we shall dismiss the appeal. (Pen. Code,¹ § 1237.5.)

FACTUAL AND PROCEDURAL BACKGROUND

On October 1, 2008, defendant was charged by information with first degree burglary (count 1; § 459), criminal threats (count 2; § 422), corporal injury to his child's parent with a prior conviction (count 3; § 273.5, subd. (e)(1)), assault with a deadly weapon or by means of force likely to produce great bodily injury (count 4; § 245, subd. (a)(1), assault by means of force likely to produce great bodily injury (count 5; § 245, subd. (a)(1)), dissuading a witness by force or threat (count 6; § 136.1, subd. (c)(1)), and cruelty to a child by inflicting injury (count 7; § 273a, subd. (b)). Counts 1, 2, 4, and 5 were alleged to be serious felonies. (§ 1192.7, subd. (c).) As to count 2, it was alleged that defendant personally used a deadly and dangerous weapon, a knife. (§ 12202, subd. (b).) It was also alleged that defendant served a prior prison term and did not thereafter remain free of custody for five years. (§ 667.5, subd. (b).)

According to the evidence presented at defendant's preliminary hearing, defendant ambushed Jessica A. as she was unlocking the door to her residence in the company of her children, aged 14 months and two years old. He pushed her

¹ Further undesignated statutory references are to the Penal Code.

inside and locked the door behind him. After pulling a cordless phone away from her, he put his arm around her throat and threatened to kill her if anyone was there. As he choked her, he also threatened to kill her if she called the police, and to kill her and her family if she told anyone else about the incident. He said that if he could not have her, no one else would. Believing defendant's threats, she struggled and tried to escape. During the struggle, defendant inflicted bruises on her legs, punched her in the head, and menaced her with a knife. She feared for her life during the incident. She had been placed in a safe house to avoid defendant before, but he had been able to find it.

Defendant entered into a written plea agreement. The agreement specified that defendant would plead guilty to counts 1, 3, 4, and 6, admit that counts 1, 4, and 6 were strikes, admit the prior conviction for violation of section 273.5, subdivision (a), and the prior prison term, in return for a sentence consisting of five years formal probation and a stayed prison term of 10 years four months. The agreement also stated: "Defendant understands any violation of probation, including technical violation[,] results in the stay [being] lifted [and] 10 y[ea]rs state prison imposed." Defendant initialed every provision of the agreement. His counsel wrote on the plea form: "I do not concur with the plea [and] have advised [d]efendant it is not in his best interests."

At the sentencing hearing, the trial court stated that it had reviewed the plea agreement, including defense counsel's

advice that it was against defendant's best interests, and asked defendant whether he intended to disregard counsel's advice and enter the plea. Defendant said he did. The court asked whether defendant understood that any violation of probation, even a "technical" violation, would result in the lifting of the stay of the prison term; defendant said he understood. The court then went through all the terms of the agreement, and defendant said he understood them all. The court asked defendant whether he was under the influence of any substance that might affect his ability to understand the agreement, and whether anyone had made any threats or promises outside the agreement to induce him to enter into the agreement; he answered all of those questions in the negative.

Defense counsel stated that he had tried to explain the danger of pleading to three strikes and that defendant said he understood, but wanted to be released immediately to spend time with his father, who was dying of cancer: "From an emotional perspective he believes he has no choice but to take the plea." Defendant concurred in that account.

Defendant thereupon entered his plea and received the stipulated sentence.

On February 1, 2011, the People filed a petition to revoke defendant's probation, alleging that he had violated Vehicle Code section 23152, subdivisions (a) and (b). The trial court summarily revoked defendant's probation.

On February 3, 2011, the People filed a criminal complaint alleging the Vehicle Code violations.

On February 24, 2011, the People moved to reduce the charge of violating Vehicle Code section 23152, subdivision (a), to a charge of violating Vehicle Code sections 23103(a) and 23103.5 ("Alcohol Reckless Driving") better known as a wet reckless, and to lift the stay on defendant's 10-year four-month prison term. On the same date, defendant pled no contest to the reduced charge and admitted the violation of probation.

On April 29, 2011, at the contested sentencing hearing, the trial court sentenced defendant to time served on the Vehicle Code violation. As to the lifting of the stay, the court heard evidence and argument.

The People argued that defendant was not entitled to contest the lifting of the stay on his prison term because it was "a zero tolerance violation." Defense counsel agreed the terms included "zero tolerance," but argued that the trial court should "protect . . . defendant from himself" by refusing to lift the stay.

The court found that defendant had freely entered into the plea agreement with full understanding of what it entailed. The sentence was not fundamentally unfair in light of defendant's culpability in the underlying case, his overall record, and his agreement to accept the risk that the stay on his lengthy sentence would be lifted if he violated probation.² Therefore,

² The court also noted the discrepancy in defendant's past and present accounts as to which relative was dying of cancer such that defendant had needed to be released from custody immediately.

the court lifted the stay on the sentence of 10 years, four months in prison.

Defendant filed notice of appeal from the sentencing. The trial court denied defendant's request for a certificate of probable cause.

DISCUSSION

Defendant contends that the trial court abused its discretion by lifting the stay on the prison sentence because the plea agreement proposed by defendant and accepted by the trial court was procedurally and substantively unconscionable.³

The People reply that defendant's appeal must be dismissed as procedurally barred because he seeks to attack the validity of his plea without having obtained a certificate of probable cause. They also contend that his argument lacks merit.⁴ Agreeing with the People's first point, we need not address the second. We shall dismiss the appeal.

³ Defendant asserts in his opening brief that his appeal is authorized under section 1237, subdivision (a), but does not acknowledge let alone address his failure to obtain a certificate of probable cause. He did not file a reply brief.

⁴ The People further assert that defendant waived his appellate rights as part of the plea bargain. However, the record shows only that the parties entered into an agreement waiving defendant's right to appeal to matters occurring *up until the time the waiver was taken*. Because the stay on the lengthy prison sentence had not yet been lifted at the time the waiver was taken, this waiver did not extend to its lifting.

Under section 1237.5, subdivision (b), a defendant may not appeal from a judgment of conviction following a guilty plea unless he has obtained a certificate of probable cause for the appeal from the trial court. If defendant's appeal is "*in substance* a challenge to the validity of the plea," a certificate of probable cause is required. (*People v. Panizzon* (1996) 13 Cal.4th 68, 76.)

Here, the gist of defendant's argument is that the trial court could not legally sentence him in accordance with his plea agreement, because the *agreement itself* was unconscionable and unenforceable. This is clearly a challenge to the validity of the plea. Such a challenge is not reviewable in the absence of a certificate of probable cause, and an appeal raising such a challenge without a certificate of probable cause must be dismissed. (*People v. Panizzon, supra*, 13 Cal.4th at pp. 89-90.)

It is of no moment that defendant noticed his appeal as pertaining only to his sentence, and the trial court's enforcement of the plea an abuse of discretion rather than an illegal act. By asserting that the plea agreement was unconscionable, defendant argues in substance that it could not lawfully be enforced. (See *Patterson v. ITT Consumer Financial Corp.* (1993) 14 Cal.App.4th 1659, 1663 ["Unconscionability is ultimately a question of law."].)

DISPOSITION

The appeal is dismissed.

DUARTE, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.