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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

THAI HER,

Defendant and Appellant.

C081143

(Super. Ct. No. 14F7070)

Following the denial of his motion to suppress evidence, defendant Thai Her pleaded no contest to sale or transportation of marijuana. (Health & Saf. Code, § 11360, subd. (a).)¹ Pursuant to the parties' plea agreement, the trial court suspended imposition of sentence and placed defendant on a three-year term of informal probation with 60 days in county jail as one of the conditions.

¹ Undesignated statutory references are to the Health and Safety Code.

On appeal, defendant contends the magistrate erred in denying his motion to suppress. However, because we conclude defendant is procedurally barred from seeking appellate review of this ruling, we cannot reach the merits of the suppression motion.

Recognizing that trial counsel neglected to preserve the ruling on the suppression motion for appeal, defendant also raises an ineffective assistance of counsel claim. We cannot review this claim either because it is outside the scope of reviewable issues on appeal from a conviction following a plea of no contest without a certificate of probable cause. Thus, we will dismiss the appeal without prejudice to any rights defendant may have by way of a petition for writ of habeas corpus. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Around 11:00 p.m. on October 9, 2014, a state game warden stopped defendant for speeding near the town of Oak Run in Shasta County. The warden asked for defendant's license, registration, and proof of insurance. After dispatch indicated that "everything was clear," the warden returned defendant's documents and told him he was "good to go." However, before defendant left, the warden asked him if he had methamphetamine, heroin, cocaine, marijuana, or a large amount of United States currency. He said no to each, except when the warden asked him about marijuana. According to the warden, defendant had a slight hesitation and looked toward his vehicle when he was asked about whether he possessed any marijuana. The warden then asked defendant for consent to search his vehicle but defendant declined to give consent. Defendant, however, consented to having a canine sniff around the outside of his vehicle.

While the warden and defendant were waiting for the canine to arrive, defendant indicated that he would "like to get going." The warden then asked defendant to wait a few minutes for the canine to arrive. Approximately seven minutes later, the canine arrived. After the canine alerted on the vehicle, the warden searched it and found eight 1-pound bags of marijuana in the trunk.

On November 20, 2014, defendant was charged by felony complaint with possession of marijuana for sale (§ 11359; count 1) and sale or transportation of marijuana (§ 11360, subd. (a); count 2). After the preliminary examination was commenced and continued, defendant filed a motion to suppress on the grounds that the warrantless detention and arrest were unlawful. Following the denial of his motion and the magistrate deeming the complaint an information, defendant pleaded no contest to count 2 in exchange for the dismissal of count 1 and an agreed-upon sentence of three years' probation with 60 days in county jail. The trial court sentenced defendant consistent with the parties' agreement.

Defendant filed a timely notice of appeal. However, he did not obtain a certificate of probable cause.

DISCUSSION

A. Motion to Suppress

Defendant contends the magistrate erred in denying his motion to suppress. We decline to reach the merits of this contention because it is forfeited.

A defendant must seek review of a magistrate's ruling on a motion to suppress "in the superior court to preserve the point for review on appeal, for it would be wholly inappropriate to reverse a superior court's judgment for error it did not commit and that was never called to its attention" either by a motion to suppress evidence or a Penal Code section 995 motion. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896 (*Lilienthal*), fn. omitted.) The unification of the municipal and superior courts did not abrogate this requirement. (*People v. Richardson* (2007) 156 Cal.App.4th 574, 582, 589 (*Richardson*)). Here, it is undisputed that defendant failed to renew his motion to suppress before a superior court judge.

Relying on *People v. Williams* (1998) 17 Cal.4th 148 (*Williams*), defendant argues that this court has discretion to reach the merits of an issue not adequately preserved for review. Defendant's reliance on *Williams* is misplaced.

In *Williams*, the court was faced with deciding the Court of Appeal’s authority to review a trial court’s decision to dismiss a prior strike conviction “ ‘in furtherance of justice.’ ” (*Williams, supra*, 17 Cal.4th at p. 161.) Thus, in *Williams* the appellate court was reviewing a decision made by a superior court judge acting in that capacity. (*Id.* at p. 153.) That is not the case here because defendant did not renew his suppression motion before a superior court judge. Under *Lilienthal*, we cannot review a magistrate’s ruling on a motion to suppress; we can only review a superior court’s ruling on such a motion. (*Lilienthal, supra*, 22 Cal.3d at p. 896.) While we “generally” may not be precluded from reviewing an issue that has not been properly preserved for review, *Lilienthal* created an exception to this general rule.

B. Ineffective Assistance of Counsel

Defendant contends his trial counsel rendered ineffective assistance of counsel by failing to renew his motion to suppress before a superior court judge. We cannot review this argument because it is beyond the limited issues that are reviewable on appeal from a conviction following a no contest plea without a certificate of probable cause.

“Under [Penal Code] section 1237.5, an appeal from a conviction predicated on a [no contest] plea requires a certificate of probable cause. ‘Notwithstanding the broad language of [Penal Code] section 1237.5, it is settled that two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a certificate: (1) search and seizure issues for which an appeal is provided under [Penal Code] section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.’ [Citation.]” (*Richardson, supra*, 156 Cal.App.4th at p. 596.)

Thus, absent a certificate of probable cause, we can address the ineffective assistance of counsel claim only if it pertains to “ ‘proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.’ [Citation.]” (*Richardson, supra*, 156 Cal.App.4th at p. 596.) Here, if

