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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK D'ANGELO, JR.,

Defendant and Appellant.

D058400

(Super. Ct. No. SCN247867)

APPEAL from a judgment of the Superior Court of San Diego County, Harry M. Elias, Judge. Vacated and remanded.

BACKGROUND

On June 27, 2008, Frank D'Angelo, Jr.,¹ entered a residence in Escondido. He ransacked the house and took jewelry, collectable coins and silverware valued at over \$8,000. While he was inside the residence, the owner of the house returned, and heard a

¹ The court record contains a variety of names for defendant. We use the name listed on the information filed August 5, 2008.

noise coming from the master bedroom. The owner left the house and called the police. After dropping a bag in the rear yard, D'Angelo jumped over a fence and ran into a nearby park. The police formed a perimeter around the last place D'Angelo was seen and with the assistance of a canine unit located and arrested him.

By a second amended information filed on April 30, 2010, the San Diego County District Attorney's Office charged D'Angelo with first degree burglary (count 1, Pen. Code,² § 459) and grand theft of personal property (count 2, § 460). As to count 1, it was further alleged that the burglary was of an inhabited part of a building (§ 460), and further alleged a person was present in the residence during the commission of the burglary in violation of section 667.5, subdivision (c)(21). It was also alleged D'Angelo had seven probation denial priors (§ 1203, subd. (e)), three prison term priors (§§ 667.5, subd. (b), 668), one serious felony prior (§§ 667, subd.(a)(1), 668, 1192.7, subd. (c)) and eight strike priors (§§ 667, subds. (b)-(i), 668, 1170.12).

On the same day the second information was filed, D'Angelo entered a negotiated plea to first degree burglary. He admitted as true the additional allegation that the burglary was of an inhabited portion of a building. In addition, he admitted as true two prison term priors, admitted as true the serious felony prior and also admitted as true one strike prior. As part of the plea agreement, D'Angelo gave up his right to appeal (1) denial of his section 1538.5 motion, (2) issues related to strike priors under sections (b)

² Unless otherwise stated all statutory references are to the Penal Code.

through (i) and 1170.12, and (3) any sentence stipulated in the agreement. The sentence agreement included additional time imposed for priors in San Diego, case No. ECR10180, and a 1983 case from Michigan, case No. 83-951-FH. In case No. ECR10180, D'Angelo was convicted of five serious felonies, and in addition a prior from a 1991 case, No. CRN16266, was found true. The prior conviction in case No. CRN16266 was for first degree burglary.

On October 19, 2010, the trial court sentenced D'Angelo to 19 years in state prison as stipulated in the plea agreement. He submitted a notice of appeal and requested a certificate of probable cause, which the trial court granted.

The sole issue raised by D'Angelo's appeal is whether he is entitled to withdraw his plea of guilty. We believe D'Angelo's request must be granted.

A. The Trial Proceedings

On April 30, 2010, D'Angelo entered a plea of guilty. On June 2, 2010, the trial court held a hearing based upon a letter it received from D'Angelo. Although his plea agreement specified he was waiving his right to appeal any suppression motion, strike priors and stipulated sentence, D'Angelo argued that he "may seek to appeal" issues in addition to the three listed on the change of plea form. He argued for example that his due process rights were violated during the discovery process and in addition that the prosecutor presented evidence that was not credible. The court stated: "Those things you can still pursue. You can pursue those. There's only three things you can't, and they're very specific on there. You maintain other appellate rights." Following a discussion of

the benefits of the plea bargain, including the fact that the People had dropped all but one strike prior, the court continued the hearing.

On September 17, 2010, a further hearing was held during which D'Angelo, who was present with counsel, requested he be allowed to withdraw his guilty plea so that he could exercise his right to appeal. In response, the People argued D'Angelo gave up his right to appeal in exchange for the plea agreement. After considering the positions of the parties, the trial judge stated he would grant D'Angelo's request to withdraw his plea because the plea had been conditional on the court having told D'Angelo that he could appeal certain issues. The court stated: "In that case I'll grant his request to withdraw his plea. I thought it was conditional on my telling him he could appeal these issues and not lose them. It's the People's legal position that in effect then what I told him is incorrect and he has waived his appellate rights. I'm not going to put him in that position."

Following the court's statement, the prosecutor indicated she wished to review the change of plea form and confer with her supervisor. The trial court stated that pending that review it would itemize a certificate of probable cause for D'Angelo. The matter was continued until October 8, 2010.

On October 8, 2010, the People reported to the court that they would not oppose D'Angelo's appeal of the section 1538.5 ruling or "other motion ruling" in the case. When asked if that was agreeable to D'Angelo, he said "No." The trial judge then granted D'Angelo's request to withdraw his plea and indicated he was going to recuse himself

from any further proceedings. The court rejected defense counsel's request to momentarily trail the matter, and the following exchange took place:

"THE COURT: I want to make sure. Mr. D'Angelo, your paper to me said you wanted to withdraw your plea?

"[D'Angelo]: Yes.

"THE COURT: That's the motion?

"[D'Angelo]: Right.

"THE COURT: I'm granting that motion.

"[D'Angelo]: Okay.

"THE COURT: I'll give you and Mr. Burland a chance to talk for a few minutes, but I want to make sure everybody understands the game plan. Once I grant the motion—and I'll delay it till Mr. Burland has a chance to actual fully talk. It's my intent to give it to him. I send it back to five. You won't see me again. I'm recusing myself. So you're going to another courtroom.

"And I want to make sure you understand the offer is going to be withdrawn. There's only one sentence left if you're convicted.

"[D'Angelo]: Your honor, the only thing I want to say, she [the prosecutor] stated right now that she has no objection to appealing any 1538 or any other motion that's been filed. [¶] There was never a motion filed or an objection on the issue that I want to appeal.

"THE COURT: Well, sir, I'd sign a stipulation of probable cause as to any issue you wanted, and if that's not satisfactory—

"[D'Angelo]: That's fine, then. That's fine, then.

"THE COURT: You just itemize what you want on the stipulation for PC, and I'll sign it."

The trial court further stated on the record: "I'll indicate on the record now that I will formally sign a stipulation for probable cause so that Mr. D'Angelo can appeal any and all issues he deems appropriate. [¶] . . . [¶]

"So once you list them, I'll print out the PC."

A few days later, D'Angelo's counsel submitted a certificate of probable cause which listed a number of issues, including that the prosecution made untimely discovery of a witness's statement, a motion to exclude evidence for insufficient proof of chain of custody, whether a prior conviction in case No. CRN16266 was improperly used to enhance his sentence, whether his suppression motion was improperly denied, and whether there was prosecutorial misconduct during presentation of witness testimony. On October 15, 2010, the trial court granted and signed D'Angelo's certificate of probable cause.

Against this procedural backdrop, D'Angelo argues this court must allow him to withdraw his plea of guilty. We agree.

B. Analysis

A guilty plea concedes that the prosecution possesses legally admissible evidence sufficient to prove defendant's guilt beyond a reasonable doubt, therefore a guilty plea waives the right to raise questions regarding the evidence, including its sufficiency and admissibility. (*People v. Thurman* (2007) 157 Cal.App.4th 36, 43; *People v. Moore* (2003) 105 Cal.App.4th 94, 99-100; *People v. Mink* (1985) 173 Cal.App.3d 766, 769-770; see also *In re Chavez* (2003) 30 Cal. 4th 643, 651; *People v. Panizzon* (1996) 13 Cal.4th 68, 75.) Courts have no authority to waive these requirements. (*People v. Thurman, supra*, 157 Cal.App.4th at p. 42.)

Moreover, an issue which is not cognizable on appeal following a guilty plea cannot be made cognizable by an agreement of the parties or issuance of a certificate of probable cause. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1178; see *People v. Miller* (2006) 145 Cal.App.4th 206, 212; *People v. Thurman, supra*, 157 Cal.App.4th at p. 43; *People v. Massey* (1976) 59 Cal.App.3d 777; see also *United States v. Benson* (1978) 579 F.2d 508.)

In addition to the legal limits placed on appeals following a guilty plea, the plea agreement in this case clearly spelled out that D'Angelo was waiving his rights to appeal any section 1538.5 motion, issues relating to the strike priors and any sentence stipulated. Although the People agreed to alter that agreement by permitting D'Angelo to appeal any

section 1538.5 motion or any other motions, they did not agree to alter his waiver as to the use of the priors or the sentence imposed.

Expressing the view that a certificate of probable cause "overrides everything," the trial court allowed D'Angelo to file a certificate of probable cause on any and all issues he wished irrespective of the agreement he entered and irrespective of requirements of section 1237.5. It resulted in D'Angelo appealing the sufficiency of the evidence and a challenge to use of a burglary conviction in case No. CRN16266, a prior conviction in case No. ECR10180, the prior alleged in this case.

Although a powerful tool for assuring a defendant's appeal rights, overwhelming authority establishes a certificate of probable cause does not make cognizable on appeal issues that have been waived by a guilty plea; nor may a certificate of probable cause expand the grounds on which an appeal may be taken following a guilty plea. (See *People v. Jones* (1995) 10 Cal. 4th 1102, 1109, overruled on an unrelated issue in *In re Chavez, supra*, 30 Cal.4th at p. 656; *People v. Turner* (1985) 171 Cal.App.3d 116, 126.) In allowing D'Angelo to appeal any issue he wanted, including ostensibly issues related to establishing the elements of the offense, the trial judge erred.

DISPOSITION

The judgment is vacated and the matter is remanded to the trial court.

D'Angelo may file a new motion to withdraw his guilty plea. Any new motion shall be filed within 60 days of the issuance of the remittitur. If D'Angelo requests additional time to file a motion to withdraw his plea, the court may grant the request for good cause, at its discretion.

If D'Angelo wishes to be represented by an attorney to assist him in assessing his options and making a decision as to whether to file a new motion to withdraw his guilty plea and/or in preparing a new motion to withdraw his guilty plea, the trial court shall appoint new counsel to represent D'Angelo.

If D'Angelo indicates that he does not wish to file a motion to withdraw his guilty plea, or does not file a motion to withdraw his guilty plea or seek additional time to file

a motion to withdraw his guilty plea within 60 days of the issuance of the remittitur, the trial court shall reinstate the original judgment.

BENKE, Acting P. J.

WE CONCUR:

McDONALD, J.

AARON, J.