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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

BRIAN WAYNE REINBACH

Defendant and Appellant.

D060319

(Super. Ct. No. SCD232629)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

I.

INTRODUCTION

Brian Wayne Reinbach was charged in an amended complaint with transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) (count 1); possession of methamphetamine for sale (Health & Saf. Code, § 11378) (count 2); possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1))<sup>1</sup> (count 6); and possession of a stun

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<sup>1</sup> Further statutory references are to the Penal Code unless otherwise specified.

gun (§ 12651, subd. (a) (count 7). The complaint alleged as to count 1 that the transportation of methamphetamine was not for personal use, within the meaning of section 1210, subdivision (a). As to count 2, the complaint alleged that appellant had suffered a prior conviction under section 1203.07, subdivision (a)(11), and that he was personally armed with a firearm, specifically, a shotgun, under section 12022, subdivision (c). As to counts 1 and 2, the complaint alleged that appellant had incurred three prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (c). Finally, the complaint alleged that appellant had suffered a prison prior under section 667.5, subdivision (b).

Reinbach pled guilty to count 2 and admitted having suffered two prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (c). The trial court sentenced Reinbach to an agreed upon term of six years in prison—the upper term of three years on count two, and a consecutive three-year term on one of the prior conviction allegations, and ordered him to pay various fines and fees. The court struck the remaining prior conviction allegation. The court granted Reinbach's request for a certificate of probable cause.

On appeal, Reinbach contends that his plea agreement provided that he would be permitted to appeal the denial of his motion to suppress, and that because he is precluded from appealing that denial due to his failure to raise the suppression motion in the superior court, he must be allowed to withdraw his guilty plea. We affirm.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND<sup>2</sup>

On February 18, 2011, members of the San Diego Police Department Narcotics Division obtained a search warrant for the residence of Reinbach and his girlfriend, Rebecca Israel. The warrant authorized officers to search Reinbach and Israel's persons and vehicles, as well as their residence. Prior to searching the residence, officers saw Reinbach driving away from the residence and conducted a traffic stop. Police found marijuana and \$627 in cash on Reinbach's person, and also discovered two baggies that contained 111.55 grams of methamphetamine on the driver's side floor board of his vehicle. In the search of the residence, officers found dominion and control documents in the names of both Reinbach and Israel, a digital scale, a stun gun, .88 grams of methamphetamine, and other items, including a loaded shotgun.

Reinbach filed motions to unseal the search warrant, to quash and traverse the warrant, and to suppress all evidence seized at the time of his arrest. The motions were heard at the time of the preliminary hearing. The court denied the motions and proceeded to conduct the preliminary hearing. After the hearing, the court bound over the defendants to the superior court.

On June 15, the date on which the readiness conference was to take place, Reinbach's attorney stated that Reinbach intended to enter a guilty plea. The court then stated that there had been a brief off-the-record discussion between the court and both

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<sup>2</sup> In light of Reinbach's plea of guilty, there was no trial in this case. The statement of facts is taken from the probation report and the clerk's transcript.

counsel, and that it was the court's understanding that Reinbach would plead guilty to count 2 and admit two section 11370.2 allegations. The court further stated that the parties had agreed to a stipulated six-year sentence, and that the prosecutor would dismiss the remaining charges. The court then asked Reinbach's attorney whether there was anything that he would like to place on the record. Reinbach's attorney responded,

"Yes, your honor. The court wasn't privy to this one, but I did have a negotiated agreement with the district attorney that [Reinbach] would not waive his right to appeal a denial of the 1538.5 motion that was heard in the Superior Court, and so we did not check that box. And so I may be seeking at some point, if [Reinbach] decides to go forward, a certificate of probable cause for purposes of appealing that ruling."

In fact, Reinbach's section 1538.5 motion was heard by a superior court judge sitting as magistrate at the time of the preliminary hearing, and was never renewed, or raised in any manner, in the superior court.

After a brief discussion concerning the fact that there was no agreement that Reinbach would be released on bond pending appeal and that the court intended to recommend as part of Reinbach's sentence that he be allowed to participate in the Department of Corrections fire fighting camp, Reinbach's attorney stated, "With that, that is all that I recall with regard to this plea." The court then turned to the prosecutor, whose only comment was, "That is correct, your honor."

On the change of plea form, after the statement, "I have not been induced to enter this plea by any promise or representation of any kind, except:" is handwritten, "Stipulated six years state prison. Dismiss balance." After that notation, the following is handwritten, but crossed out: "Retain right to appeal denial of 1538.5 motion." There is

no discussion on the record concerning these statements, and in particular, why the latter statement is crossed out.

At the sentencing hearing, in discussing the issue of release pending appeal, the court stated, "I understood that there were issues associated with the motions and I believe the 1538.5 or the issues associated with it, but I believe there was no agreement as relates to the issue that you presented about release pending appeal on bond." The court also stated, "I can appreciate that there appears to be merit in—at least arguable merit, in the appeal." At the conclusion of the sentencing hearing, Reinbach's attorney indicated that he would be submitting a notice of appeal with a statement of probable cause.

Reinbach filed a timely notice of appeal and the court granted his request for a certificate of probable cause.

### III.

#### DISCUSSION

- A. *Because Reinbach failed to renew his motion to suppress in the superior court, he may not appeal the denial of the motion*

Section 1538.5, subdivision (m) provides in relevant part,

"A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty. Review on appeal may be obtained by the defendant provided that at some stage of the proceedings prior to conviction he or she has moved for the return of the property or the suppression of the evidence."

In *People v. Lilienthal* (1978) 22 Cal.3d 891, 896, the California Supreme Court held that section 1538.5, subdivision (m) "should be interpreted to require that the matter be raised in the superior court to preserve the point for review on appeal," reasoning that, "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." The *Lilienthal* court stated, however, that the defendant need not raise the matter in the superior court by a motion to suppress, and that raising the issue in the superior court via a section 995 motion was sufficient to preserve the Fourth Amendment issue. (*Lilienthal, supra*, at pp. 896-897.)

At the time *Lilienthal* was decided, a motion to suppress filed at or before the preliminary hearing would be heard by a municipal court judge sitting as magistrate. In 1998, the superior courts and municipal courts were unified. However, "[t]he unification of the municipal and superior courts has not abrogated the need for a renewal of a motion to suppress evidence following certification of a case to the superior court. [Citations.]" (*People v. Garrido* (2005) 127 Cal.App.4th 359, 364 (*Garrido*)). The *Garrido* court explained, "*Lilienthal* continues to apply postunification because the California Constitution, [former] article VI, section 23, subdivision (c), which created the unified court system, specifically provides for superior court review of preliminary hearing suppression motions." (*Garrido, supra*, at p. 364.) The rationale for the continued application of the *Lilienthal* rule is "based on the distinct roles assigned to the magistrate and the superior court." (*Ibid.*)

Because Reinbach failed to renew his motion to suppress in the superior court prior to entering his guilty plea, he may not appeal the denial of that motion.

B. *Reinbach is not entitled to withdraw his guilty plea because he has not established on this record that his plea was conditioned on his right to appeal*

Reinbach acknowledges that the record does not indicate that he renewed his motion to suppress at any time in the superior court, and thus, that under "controlling law," he failed to preserve the issue for appeal. Reinbach contends, however, that his plea agreement "specifically provided that in exchange for his plea and the agreed upon six-year sentence, he also would retain the right to appeal the magistrate's denial of his motion to suppress evidence, traverse the warrant and quash the warrant," and that because he cannot obtain the benefit of his plea bargain, the matter must be remanded to the trial court to permit Reinbach to withdraw his guilty plea.

The People counter that "[t]he record reflects that the plea agreement *did not* include as a negotiated term the right to appeal the denial of the motion to suppress." (Italics added.)

Reinbach relies on *People v. Burns* (1993) 20 Cal.App.4th 1266 (*Burns*) to support his contention that the judgment must be reversed and he must be permitted to withdraw his guilty plea. In *Burns*, the appellant moved to quash and traverse a search warrant in the municipal court, pursuant to section 1538.5. After the court denied the motion, Burns proceeded to plead guilty to one of four counts in the information. During the plea colloquy, "it was . . . acknowledged . . . that '[t]here will be a four year lid by way of sentencing,' that appellant will be on bail pending appeal, and '[i]t will be certified for appeal with regard to the denial of [the] motion to suppress.'" (*Burns, supra*, at p. 1270.)

On appeal, the reviewing court asserted that a defendant must raise the illegality of a search in the superior court in order to preserve the issue for appeal, and observed that Burns had failed to do so. Noting that before Burns entered his guilty plea, the prosecutor had indicated that there was an agreement between the parties that Burns would be permitted to appeal the denial of his suppression motion, the court stated that the parties "cannot by their agreement confer upon this court the jurisdiction to hear an issue which is not appealable." (*Burns, supra*, 20 Cal.App.4th at p. 1274.) However, the *Burns* court concluded that "since appellant cannot be given the benefit of his plea bargain, which entailed the ability to raise on appeal the search and seizure claim, he must be permitted to withdraw his guilty plea." (*Ibid.*) The court reversed the judgment and remanded the matter to the superior court, directing that the court vacate the guilty plea if Burns made an appropriate motion within 30 days of the issuing of the remittitur, or, if no such motion were made, reinstate the judgment. (*Ibid.*) (See also *People v. Lee* (1980) 100 Cal.App.3d 715, 718 [defendant must be permitted to withdraw guilty plea where negotiated plea bargain included "illusory" right to appeal].)

Reinbach maintains that the record in this case clearly establishes that his plea agreement, like the plea agreement in *Burns*, included a promise that he would be able to seek appellate review of the court's denial of his suppression motion, and that this case is therefore controlled by *Burns*.

Respondent maintains that unlike *Burns*, "the record does not reflect that a negotiated term of [Reinbach's] plea bargain was an agreement by the parties that appellant could appeal the denial of the motion to suppress," and thus, that Reinbach "is

not entitled to withdraw his guilty plea." Respondent contends that this case is more similar to *People v. Castro* (1974) 42 Cal.App.3d 960 (*Castro*) and *Garrido, supra*, 127 Cal.App.4th 359. In *Castro*, the words, " 'Defendant reserves the right to appeal the court's denial of any pretrial motion,' " were handwritten on the defendant's change of plea form. However, "[a]t the insistence of the prosecutor, these words were blocked out of the form and initialed by the defendant before the document was filed with the court." (*Castro, supra*, at p. 964.) At the time of the defendant's guilty plea, Castro's counsel stated that Castro would not waive his right to appeal and that "the District Attorney is satisfied with that." (*Ibid.*) Castro appealed, contending that his plea bargain preserved his right to appeal an order of the trial court denying his motion to disclose the identity of an informant.

The *Castro* court noted that an order denying a motion to disclose the identity of an informant is not subject to review on appeal after a defendant has pled guilty. (*Castro, supra*, 42 Cal.App.3d at p. 963.) Notwithstanding the general rule barring appellate review of the denial of such a motion after a guilty plea, the defendant contended that the terms of his plea agreement permitted appellate review of the court's denial of his motion to disclose the identity of an informant. (*Id.* at pp. 963-964.) In rejecting this contention, the *Castro* court noted that appellant's counsel's reference during the plea colloquy to the district attorney's being "satisfied" with Castro not waiving his right to appeal pertained

to an entirely different motion, i.e., a motion to suppress evidence.<sup>3</sup> The *Castro* court reasoned that appellant's counsel's statement "cannot be interpreted as enlarging defendant's right to appeal or be expanded into an agreement that he reserved the right to raise issues which are not reviewable on appeal," noting that "[s]uch an understanding was not expressed by defendant or his attorney, accepted by the prosecutor, or approved by the court." (*Id.* at p. 964.)

In *Garrido*, after concluding that the defendant could not appeal the denial of a motion to suppress pursuant to section 1538.5 because she had failed to renew her motion to suppress in the superior court, this court considered whether the defendant's plea agreement provided her with a right to appeal the denial of the motion to suppress pursuant to *Burns, supra*, 20 Cal.App.4th 1266. In rejecting this argument, the *Garrido* court noted that "[t]he only information in the record relating to an appeal is that Garrido did cross out the portion of the change of plea form relating to her waiver of the right to appeal and that, at the change of plea hearing, [the deputy district attorney] did ask for a waiver of her right to appeal." (*Garrido, supra*, 127 Cal.App.4th at p. 367.) After observing that defense counsel's refusal to waive her client's right to appeal was not related to the suppression motion, the *Garrido* court commented that "there is no reason

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<sup>3</sup> Unlike a motion to disclose the identity of an informant, the denial of a motion to suppress evidence raised in the superior court is reviewable on appeal, even when the defendant has pled guilty, unless waived by the defendant. (§ 1538.5, subd. (m).) Thus, notwithstanding its refusal to review the denial of the defendant's motion to disclose the identity of an informant, the *Castro* court reviewed the trial court's denial of the defendant's motion to suppress evidence on the merits pursuant to section 1538.5, subdivision (m). (*Castro, supra*, 42 Cal.App.3d at p. 965.)

to believe that Garrido's right to appeal the ruling on the suppression motion was contemplated by the plea agreement nor is there any way of knowing what Garrido understood." (*Ibid.*) This court concluded that Garrido had not been denied the benefit of her plea agreement, reasoning, "Rather than guaranteeing Garrido an additional right to appeal, it appears the district attorney's office acquiesced to Garrido's retaining her ordinary rights to appeal." (*Ibid.*)

Contrary to Reinbach's contention, unlike *Burns*, it is not clear from the record in this case that Reinbach's plea agreement included a promise that Reinbach would be permitted to appeal the court's denial of his suppression motion. In *Burns*, the prosecutor acknowledged that there was an agreement that the matter would " 'be certified for appeal with regard to the denial of [the] motion to suppress.' " (*Burns, supra*, 20 Cal.App.4th at p. 1274.) In the present case, defense counsel stated at the time of the plea that a negotiated agreement was that Reinbach "*would not waive* his right to appeal a denial of the 1538.5 motion that was heard in the superior court" (italics added), which was *not* an affirmative agreement that Reinbach could appeal the denial of the motion to suppress. The fact that the words "retain right to appeal denial of 1538.5 motion" are crossed out on the change of plea form weighs against Reinbach's argument. Reinbach fails to address this fact in his briefing on appeal.

We acknowledge that in *Castro* and *Garrido*, the records more clearly established that the plea agreements did not contain a term that provided the defendants with the right to appeal. Nevertheless, because the record on appeal does not establish that the right to appeal the denial of Reinbach's motion to suppress was a term of his negotiated plea

agreement, he has not established that he has been deprived of the benefit of his plea bargain. He is therefore not entitled to a remand of the matter to the trial court to permit him to withdraw his guilty plea.<sup>4</sup>

IV.

DISPOSITION

The judgment is affirmed.

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AARON, J.

WE CONCUR:

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NARES, Acting P. J.

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IRION, J.

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<sup>4</sup> We conclude in this appeal only that Reinbach has failed to establish that his right to appeal the motion to suppress was a term of his plea agreement. The record in this case suggests that Reinbach may have understood that he would be permitted to appeal the denial of his suppression motion based on defense counsel's statement that he had entered into a "negotiated agreement" with the district attorney that Reinbach would not waive his right to appeal *the denial of his motion to suppress*, and the court's comments, both during the plea colloquy and at the sentencing hearing, which indicate that the court understood and anticipated that Reinbach would be appealing the ruling on his motion to suppress. However, on this record, Reinbach has not established that he was in fact induced to plead guilty by an "illusory" promise that he would be able to appeal the denial of his motion to suppress. We express no view as to whether Reinbach's possible misunderstanding concerning the appealability of the denial of his motion to suppress might provide a ground for voiding the plea agreement. If Reinbach wishes to pursue this matter further, the appropriate vehicle may be a petition for habeas corpus.