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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS EARL BELLUOMINI,

Defendant and Appellant.

F063046

(Super. Ct. Nos. F10904673, F10905868,
F11901128)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Houry Sanderson, Judge.

J. Edward Jones, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Poochigian, J., and Franson, J.

It was alleged in three separate cases—Fresno County Superior Court case Nos. F10904673, F10905868 and F11901128—that appellant, Thomas Earl Belluomini, committed 93 felonies and two misdemeanors, that he committed all offenses charged in the latter two cases while released on bail (Pen. Code, § 12022.1),¹ and that he had served a single prison term for two prior felony convictions (§ 667.5, subd. (b)).

Pursuant to a plea agreement, one of the terms of which was that appellant would receive a prison sentence of no more than 16 years, appellant pled no contest to 12 felony counts, as follows: in case No. F10904673, single counts of identity theft (§ 530.5, subd. (a)), grand theft (§ 487, subd. (a)), identity theft with 10 or more victims (§ 530.5, subd. (c)(3)) and unlawful taking or driving of a motor vehicle (Veh. Code, § 10851, subd. (a)); in case No. F10905868, single counts of identity theft (§ 530.5, subd. (a)) and identity theft with 10 or more victims (§ 530.5, subd. (c)(3)); and in case No. F11901128, two counts of identity theft (§ 530.5, subd. (a)), two counts of perjury (§ 118, subd. (a)), a single count of identity theft with 10 or more victims (§ 530.5, subd. (c)(3)) and a single count of transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a)). In addition, appellant admitted the two on-bail enhancement allegations in case Nos. F10905868 and F11901128 and the prior prison term enhancement allegation. Also pursuant to the plea agreement, the prosecution moved to dismiss the remaining charges and enhancement allegations and the court granted the motion. The court imposed a prison term of 16 years.

Appellant did not request, and the court did not issue, a certificate of probable cause (§ 1237.5).

On appeal, appellant contends the trial court erred in failing to conduct an inquiry into the factual basis for appellant's plea. Alternatively, appellant argues that if this

¹ Except as otherwise indicated, all statutory references are to the Penal Code.

contention is not cognizable on appeal because appellant failed to obtain a certificate of probable cause, counsel's failure to request a certificate of probable cause at the time he assisted appellant in filing a notice of appeal deprived appellant of his constitutional right to the effective assistance of counsel. We dismiss the appeal based on appellant's failure to obtain a certificate of probable cause and reject his claim of ineffective assistance of counsel.

PROCEDURAL BACKGROUND

Shortly after appellant entered his pleas and admissions to the enhancement allegation, the court stated: "At this time the Court will accept all of the pleas entered by [appellant]. Find that he has done so freely and voluntarily. That he has intelligently, knowingly, expressly and understandingly waived his constitutional rights in each case. Further find factual basis to support the plea in each case in each count, and find him guilty [of the instant offenses]." At no point did the court inquire into the factual basis for appellant's pleas.

DISCUSSION

Certificate of Probable Cause

The right to appeal following a guilty or no contest plea is controlled by section 1237.5.² On its face, section 1237.5 precludes an appeal unless the defendant files a written statement "showing reasonable constitutional, jurisdictional, or other grounds

² Section 1237.5 provides as follows: "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."

going to the legality of the proceedings” and the trial court issues a certificate of probable cause.

““Despite this broad language, [the California Supreme Court has] held that two types of issues may be raised on appeal following a guilty or nolo plea without the need for a certificate: issues relating to the validity of a search and seizure, for which an appeal is provided under [Penal Code] section 1538.5, subdivision (m), and issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.”” (*People v. Shelton* (2006) 37 Cal.4th 759, 766, first bracketed insertion added.)

Two basic principles follow from the forgoing: (1) “issues going to the validity of a plea require compliance with section 1237.5” (*People v. Panizzon* (1996) 13 Cal.4th 68, 76 (*Panizzon*)) and (2) a postplea question not challenging the validity of a plea of guilty or no contest is a noncertificate issue that may be raised on appeal after a guilty or no contest plea without a certificate of probable cause (*People v. Kaanehe* (1977) 19 Cal.3d 1, 8).

In determining whether section 1237.5 applies, “““the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.””” (*People v. Buttram* (2003) 30 Cal.4th 773, 781-782.) “[T]he critical inquiry is whether a challenge ... is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5.” (*Panizzon, supra*, 13 Cal.4th at p. 76.)

As indicated above, appellant argues on appeal that the court, in violation of section 1192.5, failed to conduct an inquiry of any kind into the factual basis for his pleas.³ In an effort to avoid the requirement of a certificate of probable cause, he argues

³ “Section 1192.5 provides that for a conditional plea of guilty or no contest, the trial court is required to ‘cause an inquiry to be made of the defendant to satisfy itself that

that this claim does not challenge the validity of his pleas because he is not seeking withdrawal of his pleas, but rather a remand for the purpose of allowing the court to conduct the required factual basis inquiry. This claim is without merit.

In *People v. Johnson* (2009) 47 Cal.4th 668 (*Johnson*), the defendant appealed following the trial court's denial of his motion to withdraw his no contest plea. On appeal, he argued that a certificate of probable cause was not required because he was not directly challenging the trial court's ruling on his motion to withdraw his plea. Instead, he argued, he was seeking a remand for a new hearing on the motion. The Supreme Court rejected this distinction: "Whether the appeal seeks a ruling by the appellate court that the guilty plea was invalid, or merely seeks an order for further proceedings aimed at obtaining a ruling by the trial court that the plea was invalid, the primary purpose of section 1237.5 is met by requiring a certificate of probable cause for an appeal whose purpose is, ultimately, to invalidate a plea of guilty or no contest." (*Id.* at p. 682.)

Appellant's argument on appeal is not limited to a claim that the matter should be remanded so that the trial court can comply with the requirements of section 1192.5. Appellant also argues that if on remand no factual basis is established, he should be allowed to withdraw his pleas. Like the defendant in *Johnson*, appellant seeks a further proceeding, the primary purpose of which is to obtain a finding by the trial court that his plea was invalid. (See *People v. Voit* (2011) 200 Cal.App.4th 1353, 1368 ["an adequate inquiry into the factual basis for the plea addresses ... issues such as the voluntariness of the plea and a knowing decision to plead guilty"].) Thus, his argument is, "*in substance*" (*Panizzon, supra*, 13 Cal.4th at p. 76), a challenge to the validity of his pleas.

the plea is freely and voluntarily made, and that there is a factual basis for the plea." (*People v. Holmes* (2004) 32 Cal.4th 432, 438 (*Holmes*); accord, *People v. Hoffard* (1995) 10 Cal.4th 1170, 1180-1182.)

Appellant's failure to obtain a certificate of probable cause precludes him from pursuing this challenge on appeal.

In arguing to the contrary, appellant relies on *People v. Hernandez* (2008) 166 Cal.App.4th 641 (*Hernandez*). In that case, the defendant was convicted of violating section 288a, subdivision (b)(2) and ordered to register as a sex offender pursuant to section 290, subdivision (a)(1)(A). Six years later, relying on a then-recent Supreme Court decision, he moved to vacate the mandatory registration requirement on constitutional grounds. The trial court denied the motion and the defendant appealed. On appeal, the People argued that the defendant's contention was not cognizable on appeal without a certificate of probable cause because that contention was "in substance a challenge to the validity of his plea" (*Hernandez*, at p. 646.) The appellate court rejected this argument, holding that the defendant's postplea motion was "not a substantive attack on the validity of the plea," reasoning, in the part of the opinion on which appellant relies, as follows: "Here, appellant appeals the denial of his postplea motion to terminate his mandatory sex offender registration requirement on the ground that it violates equal protection. He does not seek to retract his no contest plea or otherwise challenge its validity. He does not argue that the plea bargaining process was invalid or that he entered his plea as the result of any misrepresentation by the court. *If appellant prevails, his conviction based on his plea bargain will remain valid and unaffected.*" (*Id.* at p. 647, italics added.) Appellant likens his claim to that of the defendant in *Hernandez* because, he asserts, if on remand the court conducts an adequate inquiry and establishes a factual basis for appellant's pleas, the pleas would be left "undisturbed."

Hernandez, however, is inapposite. The defendant's objective in that case was to obtain an order vacating the sex offender registration requirement. Regardless of whether he was successful in achieving that objective, his plea would remain intact and there

would be no further proceedings that could have any effect on the plea. Here, by contrast and as demonstrated above, the immediate relief appellant seeks—remand to allow the court to conduct a factual basis inquiry—is merely the prelude to potential further proceedings in which, if the court were to fail to establish a factual basis for appellant’s pleas, appellant could move to withdraw his pleas.

Thus, appellant has appealed on certificate grounds. However, he has not obtained a certificate of probable cause. Under these circumstances we may not proceed to the merits of the appeal but must instead order its dismissal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1096.)

Ineffective Assistance of Counsel

Appellant argues that if, as we have concluded, the absence of a certificate of probable cause renders his appellate claims noncognizable on appeal, his trial counsel was constitutionally ineffective for not requesting a certificate of probable cause when he assisted appellant in filing the notice of appeal. There is no merit to this contention.

“The burden of proving ineffective assistance of counsel is on the defendant.” (*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) To meet this burden, “a defendant must show both that his counsel’s performance was deficient when measured against the standard of a reasonably competent attorney and that counsel’s deficient performance resulted in prejudice to defendant” (*People v. Lewis* (2001) 25 Cal.4th 610, 674 (*Lewis*)). Since the failure of either prong of an ineffective assistance of counsel claim is fatal to establishing the claim, we need not address both prongs if we conclude appellant cannot prevail on one of them. (*People v. Cox* (1991) 53 Cal.3d 618, 656, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

“We presume ‘counsel’s conduct falls within the wide range of reasonable professional assistance’ [citations], and accord great deference to counsel’s tactical decisions. [Citation.] Because it is inappropriate for a reviewing court to speculate about

the tactical bases for counsel's conduct at trial [citation], when the reasons for counsel's actions are not readily apparent in the record, we will not assume constitutionally inadequate representation and reverse a conviction unless the appellate record discloses "no conceivable tactical purpose" for counsel's act or omission." (*Lewis, supra*, 25 Cal.4th at pp. 674-675.) Thus, a claim of ineffective assistance of counsel must be rejected if "the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] ... unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation ...'" (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266.) "[T]his court is, of course, limited to the record on appeal and may not speculate about matters outside that record." (*People v. Moreno* (1987) 188 Cal.App.3d 1179, 1185.)

"The factual basis required by section 1192.5 does not require more than establishing a prima facie factual basis for the charges." (*Holmes, supra*, 32 Cal.4th at p. 441, fn. omitted.)

The record here admits of the possibility that there existed facts, of which counsel was aware, that constituted a prima facie factual basis for the charges. If that was the case, counsel reasonably could have concluded it would have been pointless to pursue an appellate challenge to the court's failure to conduct the required factual basis inquiry because success on appeal would have done no more than lead to a proceeding at which the factual basis easily could have been established. It is settled that "counsel is not required to make futile motions or to indulge in idle acts to appear competent." (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091.)

In addition, appellant's plea agreement contained the following provision: "If [appellant] ever *attempts to vacate his plea*, dismiss the underlying charges, or reduce or set aside his sentence on any of the counts to which he is pleading guilty, the People shall have the right to: (1) prosecute [appellant] on any of the counts to which he pleaded 'no

contest’; (2) reinstate any counts that may be dismissed pursuant to this plea agreement; and (3) file any new charges that would otherwise be barred by this plea agreement.” (Italics added.) Counsel reasonably could have decided not to seek a certificate of probable cause to pursue a challenge to the court’s failure to conduct a factual basis inquiry because if he did so, and if he was subsequently successful in establishing that the factual basis requirement could not be satisfied, appellant’s remedy would have been to withdraw his pleas. Pursuing that remedy would, in turn, subject appellant to the reinstatement of dismissed charges and/or the filing of new charges, thereby exposing appellant to a more severe punishment than that provided in the plea agreement. Indeed, because the record does not reveal what discussions, if any, took place between appellant and counsel, it is possible that appellant may have instructed counsel not to request a certificate of probable cause for this very reason.

For these reasons, on this record it cannot be said that counsel had no conceivable tactical purpose for not requesting a certificate of probable cause. Therefore, appellant’s claim of ineffective assistance of counsel fails.⁴

DISPOSITION

The appeal is dismissed.

⁴ Appellant also argues that if this court were to conclude that the absence of an objection in the trial court to the court’s failure to conduct the factual basis inquiry waived any claim of error based on that failure, counsel was ineffective for failing to object. Because we conclude the appeal must be dismissed due to the absence of a certificate of probable cause, we do not reach this waiver issue. Therefore, we also do not reach the question of ineffective assistance of counsel based on any such waiver. In addition, we do not reach the merits of either appellant’s argument that the court erred in failing to conduct a factual basis inquiry or respondent’s response to those arguments.