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

THE PEOPLE,

Plaintiff and Respondent,

v.

HAROLD SCOTT BALL,

Defendant and Appellant.

F063105

(Fresno Super. Ct. No. F10906058)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Bird, Commissioner; Ralph Nuñez, Judge. (Retired Judge of the Fresno Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)¹

Richard Power, under appointment by the Court of Appeal, for Defendant and Appellant.

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

¹ Commissioner Bird presided over the April 21 and June 17, 2011, hearings; Judge Nuñez presided over the June 10, 2011, hearing.

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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INTRODUCTION

Appellant/defendant Harold Scott Ball and three associates were charged with multiple felony offenses and gang enhancements based on their assault on a man who allegedly owed them money from a drug deal. Defendant entered into a negotiated disposition and pleaded no contest to count I, felony assault by means likely to produce great bodily injury (Pen. Code,² § 245, subd. (a)), with an enhancement for the personal infliction of great bodily injury (§ 12022.7, subd. (a)); and count VII, misdemeanor street terrorism (§ 186.22, subd. (a)(1)). He was sentenced to the stipulated term of seven years.

Defendant filed a notice of appeal and obtained a certificate of probable cause, and contends his constitutional right to a speedy trial was violated. The People assert that he waived any alleged speedy trial issues by entering into the negotiated disposition. We agree with the People and will dismiss the appeal.

FACTS

On the afternoon of November 29, 2010, police officers responded to a residence in Clovis where they encountered Mark Avenessian. Avenessian reported that he had been assaulted.

Avenessian stated that earlier that afternoon, an acquaintance known as “Bask” called him and asked him to go to Bask’s house to work on his computer. Avenessian agreed and drove to Bask’s house near Barstow and Minnewawa in Clovis. When he arrived, however, he was confronted by Bask and three other white males. He knew one

² All further statutory citations are to the Penal Code unless otherwise indicated.

of the men as “Jacker.” Avenessian said he knew Bask from past contacts, and he had heard about Jacker.

Avenessian stated that Jacker accused him of being “a cop, a cop caller, a snitch.” Bask and the other two men began to assault and beat Avenessian. Jacker did not participate, but he watched as the other three men attacked Avenessian. The three men kicked Avenessian in the thigh and punched him in the face. Bask picked up a heavy wax candle in a glass container and hit him in the back of the head. Avenessian tried to stay on his feet, but the three men repeatedly hit Avenessian in the face, punched and kicked him. During the assault, one of the men took Avenessian’s wallet, and his car keys fell to the floor.

Avenessian testified that as he was being beaten, the four men repeatedly yelled: “We’re Fresnecks. You shouldn’t mess with Fresnecks.” After they finished screaming, Bask hit Avenessian in the head.

Jacker was still standing there, and he said “we don’t like cop callers around here.” Jacker raised his shirt and revealed a black revolver in his waistband.

Avenessian stated that the men told him to get into his own car. Avenessian was scared, but he got into his car and hoped for a chance to jump out and escape. Avenessian sat in the front passenger seat. One of the men got into the driver’s seat, drove away from Bask’s house, and headed to a gas station near Bullard and Villa. Bask and another man followed in a black Mustang. Jacker remained at Bask’s house.

Avenessian said the man drove him to a gas station near Bullard and Villa. The driver of Avenessian’s car got out, walked to the black Mustang, and got into that car. The black Mustang then left the area, and Avenessian was left in his own car.

As a result of the assault, Avenessian told the officers that he was in severe, almost unbearable pain. His face and lips were extremely swollen, and he was bleeding from his nose and mouth. The back of his head was extremely swollen to the size of a

softball. He was transported to the hospital, where he was treated for a broken jaw and cheekbone.

Identification of the four suspects

Based on a series of photographic lineups, Avenessian identified Marvin Boyd as “Jacker,” and Justin Upchurch as “Bask.”

A confidential informant advised the investigating officer that Robert Flores and defendant Harold Scott Ball could have been the other two men involved in the assault. Avenessian reviewed a photographic lineup with defendant’s picture and identified defendant as one of the men who assaulted him. Avenessian said he was 100 percent certain of his identification.

Avenessian looked at a separate photographic lineup with Flores’s picture and identified Flores as the fourth man involved in the assault.

Flores was arrested and said he was a former member of the “Fresneck” gang. Flores admitted he was present when a man named “Mark” was assaulted. Flores said that defendant, Upchurch, and Marvin “Jacker” Boyd were also there. Defendant was driving a black Mustang. Flores believed the assault occurred because “Mark” owed money to Upchurch from a drug deal. Flores said that defendant punched the victim several times. Flores also said that Upchurch was yelling that he was a “Fresneck.” Boyd lifted up his shirt and displayed a gun to the victim. Upchurch took the victim’s wallet, and they drove him to the gas station and left him there.

The felony complaint

On February 9, 2011, a complaint was filed in the Superior Court of Fresno County charging defendant Harold Scott Ball, and codefendants Upchurch and Boyd, with count I, assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)); count II, battery with serious bodily injury (§ 243, subd. (d)); count III, second degree robbery (§ 211); count IV, dissuading a witness by force or threat (§ 136.1, subd. (c)(1)); count V, kidnapping (§ 207, subd. (a)); and count VI, street terrorism (§ 186.22, subd.

(a)). Upchurch was separately charged with count VII, possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)).

As to counts I through V, it was further alleged the offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)).

On February 9, 2011, defendant was arraigned. He pleaded not guilty, denied the special allegations, and entered a general time waiver.

On February 16, 2011, defendant, who was out of custody, failed to appear, and the court issued a bench warrant. On February 18, 2011, defendant appeared after being taken into custody. He declined to waive time.

The preliminary hearing

On March 4, 2011, the court conducted a preliminary hearing only for defendant's case. The prosecution's gang expert testified that the "Fresneck" gang was likely a subset of the "Peckerwood" white supremacist criminal street gang in Fresno County. The "Fresneck" gang also associated with members of the Highly Insane Criminals and Skinheads. The gang expert testified the primary activities of the Peckerwood gang included auto thefts, home invasion robberies, and weapons offenses, and testified about predicate offenses committed by members of the Peckerwood gang.

The gang expert testified that defendant, Boyd, Upchurch, and Flores had previously admitted to being members of the Peckerwood gang, based on their prior contacts with law enforcement officers and when they were booked into jail.

The expert further testified that defendant was an active member of the Peckerwoods and was known as "Maniac." He had a large tattoo which said "Fresno Peckerwood" across his back, plus tattoos of swastikas and "white supremacy markings."

After hearing the evidence, the court dismissed count III, robbery, for insufficient evidence, and held defendant to answer on the other charges and special allegations.

The informations

On March 11, 2011, an information was filed only against defendant (No. F10906058), charging him with count I, assault by means likely to produce great bodily injury, with an enhancement for the personal infliction of great bodily injury (§ 12022.7, subd. (a)); count II, dissuading a witness by force or threat; count III, kidnapping; and count IV, street terrorism. The gang enhancement was alleged as to counts I, II, and III.

On March 18, 2011, defendant was arraigned on the information and pleaded not guilty. The trial confirmation was set for April 21, 2011.

On April 12, 2011, a separate information was filed against codefendants Upchurch and Boyd (with the same case No. F10906058), charging them with count I, assault by means likely to produce great bodily injury, with an enhancement for personal infliction of great bodily injury; count II, battery with serious bodily injury; count III, second degree robbery; count IV, dissuading a witness by force or threat; count V, kidnapping; count VI, street terrorism. The codefendants were separately charged with drug and firearm offenses. The gang enhancement was alleged as to counts I through IV.

Initial continuances

On April 21, 2011, codefendants Upchurch and Boyd requested a continuance so they could obtain discovery, conduct further investigation, and determine whether to retain a gang expert, particularly since the gang allegations raised the possibility of a life term.

Defendant's attorney objected to any continuance, stated that he would not waive time, and that his case "timed-out" on May 17, 2011. Defendant further argued that he was charged in a separate information, that his case was thus separate from Upchurch and Boyd, and he should not be subject to their continuance motion.

The prosecutor replied that defendant, Upchurch, and Boyd were charged under the same case number and should be tried together. Defendant's preliminary hearing had

been held separately because he initially failed to appear, and his preliminary hearing was delayed.

Defendant replied that there was no evidence of good cause to continue his separately-filed case. Defendant argued that a continuance beyond the 60-day time period would violate his speedy trial rights, “and it would be something we would explore taking a writ on.” Defendant complained that the prosecution was trying to “short circuit [his] speedy trial rights.”

Commissioner Bird found good cause and granted the motion to continue the case as to all three parties over defendant’s objection. The trial confirmation was continued to June 2, 2011, with the trial set for June 13, 2011.

On June 2, 2011, the court granted a defense motion for discovery and continued the trial confirmation hearing to June 8, 2011. The trial was still set for June 13, 2011.

On June 8, 2011, the court continued the trial confirmation to June 10, 2011, with the trial date remaining on June 13, 2011.

First amended joint information

On June 10, 2011, a first amended information was filed which jointly charged defendant and his codefendants with count I, assault by means likely to produce great bodily injury, with an enhancement for personal infliction of great bodily injury; count II, second degree robbery; count III, dissuading a witness by force or threat; count IV, kidnapping; and count VII, street terrorism. The gang enhancement was alleged as to counts I through IV. It was further alleged that defendant had one prior strike conviction.

Codefendants, Upchurch and Boyd, were separately charged with drug and firearm offenses and prior conviction allegations.

Additional continuances

Also on June 10, 2011, after the amended information was filed, defendant, Upchurch, and Boyd pleaded not guilty and denied the special allegations. Upchurch moved for a continuance so he could file a motion for funds to hire a gang expert since

the gang allegations potentially carried a life term. Upchurch also noted that the parties were still in plea negotiations.

Defendant objected and argued that he had been separately charged and held to answer. Defendant complained his rights had already been violated because his case had “timed out” on May 16, 2011, “[s]o we want to preserve that issue for appeal. We’re not participating in the trial setting dates.”

Defendant also noted that the prosecutor had offered a “package” plea for defendant, Upchurch, and Boyd, and defendant had considered that offer. However, defendant just learned that the prosecutor alleged a prior strike conviction. The prosecutor replied that he was trying to obtain the relevant documents to determine if defendant’s prior conviction was a strike, because “[t]hat would obviously affect negotiations.” The prosecutor stated that Upchurch had good cause to continue, and asserted that all three cases should be kept together if the court found good cause.

Upchurch and Boyd stated they were ready to accept the plea offer. However, the prosecutor stated that all plea offers had been revoked but negotiations would continue.

Judge Nuñez found good cause to grant Upchurch’s motion to continue, and continued the trial as to all three parties. The trial confirmation was set for June 17, 2011.

On June 17, 2011, Boyd and Upchurch requested another continuance. Upchurch’s proposed expert would not be available for another six to eight weeks. In addition, Upchurch and Boyd explained there was an outstanding offer from the prosecution, and they believed the cases would settle within one week. Upchurch and Boyd waived time. Defendant objected to any continuance.

Commissioner Bird found good cause to continue the matter over defendant’s objections, based on the unavailability of Upchurch’s gang expert. The trial confirmation was set for June 24, 2011.

The plea proceedings

On June 24, 2011, Commissioner Bird conducted a plea hearing for defendant, Upchurch, and Boyd. First, the court granted the prosecution's motion to reduce count VII, street terrorism, to a misdemeanor.

Thereafter, codefendant Upchurch pleaded no contest to count I, felony assault by means likely to produce great bodily injury (§ 245, subd. (a)(1)), with the personal infliction of great bodily injury enhancement (§ 12022.7, subd. (a)); and count VII, misdemeanor street terrorism (§ 186.22, subd. (a)), with a stipulated term of seven years.

Next, codefendant Boyd similarly pleaded no contest to the same two offenses, and also to the offense of possession of a firearm by a felon (§ 12021, subd. (a)(1)), for a stipulated term of seven years.

The court then turned to defendant's case. Defendant's attorney stated:

“[Defendant] is going to enter the admissions to the same things that the co-defendants have. He's going to ... plead no contest to Count One, [section] 245(a)(1), admit the [section] 12022.7 enhancement. He's going to plead no contest to Count Seven as amended by the People to a [section] 186.22 (a), and he's going to admit the narrow factual issue that in 1988, in Madera Superior Court, a jury convicted him of a [section] 245(a)(1). *He's going to reserve the legal issue as to whether or not that is sufficient to evidence a strike, and Your Honor has agreed to hear and make a determination in a court trial.* My client is willing to stipulate to an eleven-year sentence if the court finds it to be a strike beyond a reasonable doubt, and he'll stipulate to a seven-year sentence if it's found not to be a strike.” (Italics added.)

The court asked the prosecutor if he agreed with the stated terms. The prosecutor said yes. The court asked defendant if he understood the terms of the plea agreement, and defendant said yes.

The court reviewed defendant's change-of-plea form. The form stated that defendant would plead no contest to felony count I, misdemeanor count VII, and admit the personal infliction enhancement. He would admit the fact of his prior conviction, but he would not admit that it was a strike. The stipulated sentence was seven years if the

prior conviction was not a strike and 11 years if it was a strike. Defendant further stipulated to the preliminary hearing transcript for the factual basis. There were no other stated terms on the plea form.

The court asked defendant if he had reviewed the plea agreement with his attorney and understood the terms, and defendant said yes.

“THE COURT: ... Other than what’s been stated in open court on the record about your case and set forth on the plea form, has anyone made any other promises to you or threatened you in any way to get you to enter your plea?”

“THE DEFENDANT: No.”

Defendant then pleaded no contest to count I, felony assault by means likely to produce great bodily injury, and count VII, misdemeanor street terrorism. Defendant admitted the great bodily injury enhancement as to count I. Defendant also admitted that he suffered one prior conviction for felony assault with a deadly weapon or by force likely to produce gross bodily injury.

Defendant declined to admit the prior conviction was a strike and waived a jury trial to determine the truth of the strike allegation. The court dismissed the remaining charges and allegations and granted defendant’s motion for a bench trial as to whether the prior conviction was a strike. The court and defendant stipulated that his aggregate term would be seven years if the court found his prior conviction was not a strike, or it would be 11 years if the court found the prior conviction was a strike.³

Bench trial and sentencing

On July 25, 2011, defendant filed a trial brief as to whether his prior conviction was a strike. Defendant’s brief stated that when he entered his plea, he “explicitly

³ Robert Flores later pleaded no contest to assault by means likely to produce great bodily injury, and admitted the gang enhancement, for a two-year prison term.

reserved the issue of whether the [prior] conviction amounts of a strike.” Defendant did not raise or address any other issues.

On August 8, 2011, Commissioner Bird conducted a bench trial and found defendant’s prior conviction for assault did not constitute a strike.

Thereafter, the court sentenced defendant pursuant to the negotiated disposition to the stipulated term of seven years: the upper term of four years for count I, with a consecutive term of three years for the great bodily injury enhancement, plus a concurrent term of 224 days in county jail for count VII.⁴

Notice of appeal/certificate of probable cause

On August 11, 2011, defendant filed a notice of appeal, which stated: “Defendant’s speedy trial rights were denied when the court repeatedly continued this case over his objection at the request of attorneys for other individuals.” On the same day, defendant requested a certificate of probable cause.

On August 18, 2011, the court granted defendant’s request for a certificate of probable cause.

DISCUSSION

I. Defendant waived appellate review of his speedy trial contentions based on his no contest plea.

Defendant contends the superior court’s repeated decisions to grant his codefendants’ pretrial motions for continuances, over his objections, violated his federal and state constitutional rights to a speedy trial, and his statutory right to a speedy trial. The People respond that defendant waived appellate review of these contentions when he entered into the negotiated disposition and pleaded no contest. We agree with the People.

“A criminal defendant’s guilty plea not only constitutes an admission of every element of the offense charged, waives trial, and concedes the prosecution possesses

⁴ On the same day, the court sentenced codefendants Upchurch and Boyd to the stipulated term of seven years.

admissible evidence sufficient to prove guilt beyond a reasonable doubt, it also waives any irregularity in the proceedings which would not preclude a conviction. [Citation.]” (*Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 792.) A no contest plea is the legal equivalent of a guilty plea, and defendant in this case was so advised. (§ 1016, subd. 3; *People v. Wallace* (2004) 33 Cal.4th 738, 749; *People v. Warburton* (1970) 7 Cal.App.3d 815, 820-821.)

“The Sixth Amendment to the federal Constitution, as applied to the states through the due process clause of the Fourteenth Amendment [citation], guarantees a criminal defendant the ‘right to a speedy and public trial.’ Similarly, article I, section 15 of the California Constitution guarantees an accused the ‘right to a speedy public trial.’ The California Legislature has ‘re-expressed and amplified’ these fundamental guarantees by various statutory enactments, including Penal Code section 1382. [Citation.]” (*People v. Harrison* (2005) 35 Cal.4th 208, 225.)

“ ‘[A] defendant’s failure to timely object to the delay and thereafter move for dismissal of the charges is normally deemed a waiver of his right to a speedy trial.’ ” (*People v. Harrison, supra*, 35 Cal.4th at pp. 225-226.) While defense counsel objected to the continuances motions made by the codefendants, and complained that defendant’s speedy trial rights were being violated, defendant never moved for a dismissal of the charges based on the alleged violation of his speedy trial rights.

More importantly, however, “the cases are virtually uniform in holding that a claim of speedy trial violation – whether statutory or constitutional – does not survive a guilty plea. [Citations.]” (*People v. Hernandez* (1992) 6 Cal.App.4th 1355, 1357 (*Hernandez*); see also *Ricki J. v. Superior Court, supra*, 128 Cal.App.4th at p. 792; *People v. Sanders* (2012) 203 Cal.App.4th 839, 847; *People v. Egbert* (1997) 59 Cal.App.4th 503, 506, 512-513 (*Egbert*); *People v. Lee* (1980) 100 Cal.App.3d 715, 717.)

“The essence of a defendant’s speedy trial ... claim in the usual case is that the passage of time has frustrated his ability to establish his innocence. The resolution of a

speedy trial or due process issue necessitates a careful assessment of the particular facts of a case in order that the question of prejudice may be determined. [¶] Where the defendant pleads guilty, there are no facts to be assessed. And since a plea of guilty admits every element of the offense charged, there is no innocence to be established.” (*People v. Hayton* (1979) 95 Cal.App.3d 413, 419, fn. omitted.) “[T]he weighing process required to establish a constitutional speedy trial violation necessitates consideration of prejudice to the accused in the particular context of the case. By pleading guilty, a defendant concedes the absence of prejudice, having admitted ‘ “all matters essential to the conviction.” ’ [Citations.] Viewed in this way, a guilty plea in both felony and misdemeanor prosecutions forecloses any further inquiry into whether there has been a deprivation of a defendant’s speedy trial right.” (*Egbert, supra*, 59 Cal.App.4th at p. 511, fn. omitted.)

The same analysis applies regardless of whether the defendant has pleaded guilty or no contest to a felony or misdemeanor offense. (*People v. Aguilar* (1998) 61 Cal.App.4th 615, 622 (*Aguilar*); *Hernandez, supra*, 6 Cal.App.4th at pp. 1358-1360; *Egbert, supra*, 59 Cal.App.4th at pp. 506, 512-514; cf. *Avila v. Municipal Court* (1983) 148 Cal.App.3d 807.)⁵ “The appealability of a claimed speedy trial violation, whether constitutional or statutory, does not depend on whether the charges are misdemeanors or felonies. Instead, principles of waiver applicable to guilty pleas in general control. Rather than create rules that are subject to the vagaries of the dismissal statutes and varying interpretations of constitutional principles, rules we believe would ultimately

⁵ *Avila v. Municipal Court, supra*, 148 Cal.App.3d 807, held that a defendant could enter a plea to a misdemeanor and still preserve appellate review of an alleged statutory speedy trial violation. (*Id.* at p. 812.) We agree with the numerous cases which have criticized and undermined the reasoning in *Avila*. (*Egbert, supra*, 59 Cal.App.4th at pp.513-515; *Hernandez, supra*, 8 Cal.App.4th at pp. 1358-1359; *Aguilar, supra*, 61 Cal.App.4th at pp. 621-622; see also *Serna v. Superior Court* (1985) 40 Cal.3d 239, 246, fn. 2.)

prove unworkable, we believe the better policy is a uniform rule stating a claimed speedy trial violation, statutory or constitutional, does not survive a guilty plea to either a misdemeanor or a felony.” (*Egbert, supra*, 59 Cal.App.4th at p. 515.)

In the instant case, defendant entered into a negotiated disposition and pleaded no contest to a felony and misdemeanor offense, admitted the personal infliction enhancement, and his prior conviction for assault. Defendant stipulated that he would be sentenced to 11 years if the court found his prior conviction was a strike, or he would receive seven years if the court found it was not a strike. After a bench trial, the court found the prior conviction was not a strike and sentenced defendant to the stipulated term of seven years. Having entered into a negotiated disposition, defendant waived appellate review of any alleged constitutional or statutory speedy trial violation.

II. Defendant may not withdraw his plea

In the alternative, defendant asserts that if this court finds that his no contest pleas amounted to a waiver of appellate review of his speedy trial contentions, then the matter should be remanded to permit him to withdraw his pleas and admissions. Defendant asserts that he entered into the negotiated disposition with the understanding that he would be able to seek appellate review of his speedy trial arguments. Defendant argues that since the superior court could not authorize appellate review of his speedy trial claim, his pleas and admissions are void, and he should be permitted to go to trial.

A similar argument was addressed in *People v. Lee* (1980) 100 Cal.App.3d 715 (*Lee*). In that case, however, the defendant pleaded guilty pursuant to a plea agreement which expressly provided that he could raise his constitutional speedy trial claim on appeal. (*Id.* at p. 718, fn. 1.) *Lee* held the defendant’s speedy trial claim was not reviewable on appeal because he had pleaded guilty. (*Id.* at p. 717.) However, *Lee* remanded the matter to allow the defendant to withdraw his plea based on the trial court’s improper attempt to preserve his speedy trial contentions as part of the plea agreement: “Since we have concluded that defendant’s claim is not reviewable on appeal, it was

improper for the trial court to approve the negotiated plea bargain purporting to provide the otherwise illusory right of appeal. [Citation.] The resulting failure to properly advise the defendant of the consequences of his conditional plea rendered the plea bargain itself procedurally defective. [Citation.] Accordingly, the judgment of conviction must be reversed and remanded with instructions to permit the defendant a reasonable opportunity to withdraw his plea of guilty if he so elects, and to undertake such further proceedings as may be necessary.” (*Id.* at pp. 718-719.)

Hernandez, supra, 6 Cal.App.4th 1355 addressed a different situation, where the superior court denied the defendant’s motion to dismiss on speedy trial grounds. The defendant pleaded guilty pursuant to a plea bargain. The defendant filed a notice of appeal and sought review of the court’s denial of his motion to dismiss. *Hernandez* held the defendant’s speedy trial issues did not survive his guilty plea. (*Id.* at p. 1357.) The defendant alternatively sought to withdraw his plea and argued that “ ‘[a] reading of the plea bargain in the instant case and of the certificate of probable cause issued by the trial judge, clearly shows that the issues set forth in appellant’s opening brief were preserved, and further, that part of the plea agreement was that the defendant remain released on his own recognizance pending the appeal.’ ” (*Id.* at p. 1360.)

Hernandez disagreed and distinguished the case from the situation in *Lee*. (*Hernandez, supra*, 6 Cal.App.4th at pp. 1361-1362, fn. 6.) “As pertinent to this contention, the change of plea form signed by defendant merely recites that ‘Deft Remain Free Pending Appeal’ In accepting the plea, the court merely ensured that defendant understood the rights he was giving up and that the court was bound only by a midterm ‘lid.’ At the actual sentencing, the court apparently signed a certificate of probable cause [citation], as to which it is only apparent that some earlier discussions had been held. *The record contains no representation by the court that an appeal would be permitted, nor any understanding that defendant’s plea was conditioned upon such an assumption.*” (*Id.* at pp. 1360-1361, italics added, fn. omitted.)

Hernandez further explained:

“[T]he trial court’s acquiescence in a defendant’s expressed intention to appeal is wholly ineffective to confer jurisdiction on the appellate court if the issue proposed to be raised is in fact not cognizable on appeal. ‘Obtaining a certificate of probable cause does not make cognizable those issues which have been waived by a plea of guilty.’ [Citations.] Even if we were to read the record as containing some sort of agreement by the trial court that defendant could appeal the denial of the two motions, we would not be bound by such an agreement, but would remain subject to the statutory limitations on our jurisdiction imposed by the Legislature and encompassed by section 1237.5.” (*Hernandez, supra*, 6 Cal.App.4th at p. 1361, fn. omitted.)

In the instant case, in contrast to *Lee*, defendant did not enter his pleas pursuant to a negotiated disposition that expressly provided that he could seek appellate review of his speedy trial contentions. Instead, as in *Hernandez*, defendant entered into his pleas and admissions without making any representations or statements that he believed he was preserving his right to seek appellate review of his speedy trial issues. Moreover, the court’s decision to grant defendant’s request for a certificate of probable cause did not amount to a representation that such an act was a condition of the plea agreement.

Defendant asserts he entered his pleas and admissions with the understanding that he could seek appellate review and points to comments made by his attorney at the hearings on April 21, 2011, and June 10, 2011. The lengthy procedural history of this case refutes these contentions. At the time of both hearings, defendant objected to the motions made by his codefendants to continue a joint trial. Defendant repeatedly argued that he was ready for trial, that there was no good cause to continue his case, he should be tried separately, and that further delay would violate his right to a speedy trial. During the June 10, 2011, hearing, defendant acknowledged that the prosecutor had offered a “package” plea to all defendants, but he had refused to accept the offer because the prosecutor had added a prior strike conviction in the first amended joint information. Defendant never said that he was trying to preserve his appellate rights as part of the plea.

On June 24, 2011, the court conducted the plea proceedings for defendant, Upchurch, and Boyd. Defense counsel stated the terms of the negotiated disposition, and specifically stated that the parties had agreed that defendant could admit his prior conviction, but that the court would determine whether that prior conviction was a strike. Such a condition was also included in the written plea agreement. The court asked defendant if additional promises had been made, other than what had been stated in open court, and defendant said no. When defendant subsequently filed his trial brief on the strike issue, he stated that he explicitly reserved that issue when he entered his pleas and admissions. On August 8, 2011, the court found the prior conviction was not a strike and sentenced defendant to the stipulated term of seven years.

Having reviewed the entirety of the record, there is no evidence the superior court represented to defendant that an appeal would be permitted as to his speedy trial issues, or that there was an understanding that defendant's pleas were conditioned upon such an assumption. (See, e.g., *Hernandez, supra*, 6 Cal.App.4th at p. 1361.)

Finally, defendant contends that his plea contemplated appellate review of his speedy trial issues based on the certificate of probable cause. On August 8, 2011, defendant was sentenced. On August 11, 2011, defendant filed a notice of appeal and request for a certificate of probable cause, which stated that it was based on the alleged violation of his speedy trial rights. In light of the record before this court, the superior court's decision to grant defendant's request for a certificate of probable cause does not mean that defendant's appellate rights were contemplated as part of the negotiated disposition. "It is well settled that the right to appeal is wholly statutory and that a judgment or order is simply not appealable unless expressly made so by statute. [Citations.]" (*Ricki J. v. Superior Court, supra*, 128 Cal.App.4th at pp. 788-789.) " 'Obtaining a certificate of probable cause does not make cognizable those issues which have been waived by a plea of guilty.' [Citations.]" (*Hernandez, supra*, 6 Cal.App.4th at p. 1361; *People v. Lovings* (2004) 118 Cal.App.4th 1305, 1311.)

We thus find this case inapposite to *Lee*, and the matter need not be remanded for defendant to withdraw his pleas and admissions.

DISPOSITION

The appeal is dismissed.