

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIA J. BENAVIDES,

Defendant and Appellant.

F064114

(Super. Ct. Nos. F10800160,  
F10903699, F11500663,  
F11500827)

**OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Carlos A. Cabrera, Judge.

Elaine Forrester, under appointment by the Court of Appeal, for Defendant Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans, Deputy Attorney General, for Plaintiff and Respondent.

-ooOoo-

After defendant Julia J. Benavides pleaded no contest to a single count of carrying a dirk or dagger in violation of former Penal Code section 12020, subdivision (a),<sup>1</sup> she was sentenced to 16 months in state prison. On appeal, Benavides raises an equal-protection challenge to her sentence, claiming she should have been sentenced to county jail pursuant to the 2011 Realignment Legislation addressing public safety (Stats. 2011, ch. 15, § 1; Stats. 2011, 1st Ex. Sess., ch. 12, § 1) (realignment). We dismiss the appeal because Benavides is attacking the validity of her plea, but has not obtained a certificate of probable cause. (Pen. Code, § 1237.5, subd. (b).)<sup>2</sup>

### **FACTUAL AND PROCEDURAL HISTORIES**

In a two-count complaint filed in June 2011, Benavides was charged with (1) carrying a dirk or dagger concealed upon her person in violation of former section 12020, subdivision (a), a felony, and (2) petty theft of a Kmart in violation of section 484, subdivision (a), a misdemeanor.

The parties reached a plea agreement. At a hearing on October 19, 2011, Benavides entered a plea of no contest to count 1 (carrying a dirk or dagger), and count 2 was dismissed. The parties agreed to a 16-month sentence, which was to run concurrently with the sentence to be imposed in three other pending criminal matters, which also were resolved by plea agreement during the hearing. The other criminal matters were a criminal complaint alleging drug-related offenses and two violations of probation.<sup>3</sup>

---

<sup>1</sup>Effective in 2012, Penal Code section 12020, subdivision (a)(4) (related to carrying a concealed dirk or dagger), was renumbered with no substantive change and is now Penal Code section 21310. (Stats. 2010, ch. 711, § 6; *People v. Mitchell* (2012) 209 Cal.App.4th 1364, 1369, fn. 1.)

<sup>2</sup>Subsequent statutory references are to the Penal Code.

<sup>3</sup>In 2010, Benavides was charged with drug-related crimes in two cases. She entered pleas and received Proposition 36 probation in both cases.

Benavides understood that she would serve the 16-month sentence in state prison. Describing the bargain the parties had reached, her attorney told the court: “[Benavides is] entering a plea of no contest to Count 1, which is Penal Code Section 12020(a). There is also a dismissal of Count 2, it’s Count 1 that makes this a non AB 109 case.”<sup>4</sup> In addition, Benavides signed a plea form and initialed the following statements:

“The maximum sentence I can receive as a result of my plea includes: [¶] ... 16 months in state prison. I could be placed on parole at the conclusion of said term for a maximum period of 3 yrs, with 1 year return to prison for every parole violation. I could also be released from prison at the conclusion of said term on a term of postrelease community supervision for a maximum period of 3 years, with up to 180 days in custody of the County Jail as the [result] of each violation of postrelease community supervision.”

The court accepted Benavides’s plea and proceeded to sentencing. Benavides was sentenced to 16 months in state prison. The court stated, “[T]his is not an AB 109 case, so the time will be in state prison.” The court imposed three additional 16-month terms for the other three pending criminal matters; pursuant to the parties’ agreement, these terms ran concurrently with the principal term of 16 months in state prison.

Benavides filed a notice of appeal. There is no certificate of probable cause in the record.

### **DISCUSSION**

“Realignment ‘shifted responsibility for housing and supervising certain felons from the state to the individual counties.’” (*People v. Torres, supra*, 213 Cal.App.4th at

---

<sup>4</sup>Assembly Bill No. 109 (2011-2012 Reg. Sess.) enacted realignment, which “‘significantly changed the sentencing and supervision of persons convicted of felony offenses.’” (*People v. Torres* (2013) 213 Cal.App.4th 1151, 1154, fn. 3.) Under realignment and subject to certain exceptions, a defendant convicted of a felony offense where the term is not specified in the underlying offense is punishable by a term of imprisonment in county jail, not state prison. (*Id.* at p. 1156; § 1170, subd. (h).) By stating this was a “non AB 109 case,” her attorney acknowledged that Benavides’s sentence would not be subject to realignment and she would not be sent to county jail.

p. 1156.) “[O]nce probation has been denied, felons who are eligible to be sentenced under realignment ... serve their terms of imprisonment in local custody rather than state prison. If the penal statute specifies the defendant shall be punished by imprisonment pursuant to section 1170, subdivision (h), without specifying a particular term of punishment, the crime is ‘punishable by a term of imprisonment in a county jail for 16 months, or two or three years.’ (*Id.*, subd. (h)(1).) If the penal statute calls for punishment pursuant to section 1170, subdivision (h), and specifies a term, the offense is ‘punishable by imprisonment in a county jail for the term described in the underlying offense’ (*id.*, subd. (h)(2)) ....” (*People v. Cruz* (2012) 207 Cal.App.4th 664, 671, fn. omitted.)

In this case, Benavides was convicted of former section 12020, subdivision (a), which did not specify that punishment was subject to section 1170, subdivision (h), but rather provided that any term of imprisonment exceeding one year was to be served in state prison. Likewise, the current (renumbered) statute concerning dirks and daggers—section 21310—does not provide for punishment pursuant to section 1170, subdivision (h).

As a result, when the parties agreed that Benavides would plead no contest to count 1 in exchange for a 16-month sentence and dismissal of count 2, they all understood that Benavides would serve her term in state prison, as provided in section 12020. Her attorney stated this was a “non AB 109 case,” meaning realignment did not apply, and the trial court agreed. This was a correct reading of the statute. (See *People v. Guillen* (2013) 212 Cal.App.4th 992, 996 [where statute did not expressly authorize punishment pursuant to § 1170, subd. (h), defendant convicted under that statute was not eligible for sentence to county jail under realignment].)

On appeal, Benavides claims for the first time that her offense should have been treated as a realignment crime based on equal-protection principles. She points out that, unlike her weapons crime, offenses involving possession or concealment of a firearm are

punishable pursuant to section 1170, subdivision (h). For example, she cites section 25300, which makes it a crime to carry a firearm in public while masked, and section 25400, related to unlawfully carrying a concealed firearm. These crimes are “punishable by imprisonment pursuant to subdivision (h) of Section 1170 ....” (See §§ 25300, subd. (b), 25400, subd. (c)(5) & (6).)

Benavides argues that requiring a defendant who possesses a knife to serve her time in state prison while a defendant who possesses a firearm is sentenced to county jail is unequal treatment without justification in violation of equal protection. We agree with the Attorney General, however, that Benavides’s claim is not cognizable on appeal because she has not obtained a certificate of probable cause.

Under section 1237.5, subdivision (b), a defendant who has entered a guilty or no-contest plea may not appeal her judgment unless the trial court has executed a certificate of probable cause. Section 1237.5 provides: “No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, ... except where both of the following are met: [¶] ... [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.” Despite the broad language of section 1237.5, courts have recognized that “issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed” may be raised on appeal without a certificate. (*People v. Panizzon* (1996) 13 Cal.4th 68, 74.) However, when “a challenge to the sentence is *in substance* a challenge to the validity of the plea ... the appeal [is] subject to the requirements of section 1237.5.” (*Id.* at p. 76.)

Benavides does not claim the trial court executed a certificate of probable cause in this case. Instead, she argues that no certificate is required because her claim on appeal is not an attack on the validity of her plea bargain. We disagree.

In *People v. Panizzon*, *supra*, 13 Cal.4th at pages 73-74, the parties reached a plea agreement, pursuant to which the defendant entered a plea of no contest to certain

charges and the People dismissed various other charges. The trial court imposed the sentence the parties agreed to—life with the possibility of parole, plus 12 years. Later, without obtaining a certificate of probable cause, the defendant filed a notice of appeal, claiming his sentence was disproportionate to the sentences imposed upon his codefendants and therefore violated the state and federal constitutional prohibitions against cruel and unusual punishment. (*Id.* at p. 74.) The appellate court considered the defendant’s claim, but our Supreme Court held the appeal should have been dismissed because there was no certificate of probable cause. (*Id.* at p. 73.) The *Panizzon* court reasoned, “[T]he sentence defendant received was part and parcel of the plea agreement he negotiated with the People. Accordingly, the statutory certificate requirement applies because defendant’s contention that the sentence violated the constitutional prohibition against cruel and unusual punishment falls squarely within the parameters of a challenge to the plea.” (*Id.* at p. 78.)

In *People v. Cuevas* (2008) 44 Cal.4th 374, 377-378, the defendant agreed to enter a plea of no contest to various charges in exchange for the People reducing two of the charges from aggravated to simple kidnapping and dropping many enhancement allegations. The parties agreed to a maximum possible sentence of 37 years 8 months, and the trial court sentenced the defendant to 35 years 8 months in prison. Without obtaining a certificate of probable cause, the defendant appealed. (*Id.* at p. 378.) The Court of Appeal determined that the sentence imposed by the trial court was improper under section 654. (*Cuevas, supra*, at p. 379.) The Supreme Court reversed, holding the defendant could not raise a section 654 claim on appeal without a certificate of probable cause because it amounted to a challenge to the plea’s validity. (*Cuevas, supra*, at p. 384.) The court explained:

“By negotiating the reduction and dismissal of these charges, defendant necessarily understood and agreed that he faced a significantly reduced sentence of 37 years eight months. This maximum sentence was ‘part and parcel’ of the plea bargain the parties negotiated. [Citations.] Thus, by

challenging the negotiated maximum sentence imposed as part of the plea bargain, defendant is challenging the validity of his plea itself.” (*People v. Cuevas, supra*, 44 Cal.4th at pp. 383-384, quoting *People v. Panizzon, supra*, 13 Cal.4th at p. 78.)

Here, Benavides negotiated a significant reduction in her possible sentence—count 2 of the complaint was dismissed and the three other pending criminal cases were to be sentenced concurrently, not consecutively. In addition, in the other pending criminal complaint, the People agreed to dismiss two of the counts. In exchange, she agreed to a maximum possible sentence of 16 months in state prison with the possibility of parole or postrelease community supervision for up to three years after her release. As the Attorney General argues, if Benavides’s equal-protection claim is successful, the prison sentence agreed to by the parties could not be imposed. This is a challenge to the validity of the plea itself. In accordance with *Panizzon* and *Cuevas*, Benavides’s appeal must be dismissed.

Benavides argues in her reply brief that nothing in the record shows that serving the sentence in state prison was an essential part of the bargain. She asserts, “[A]ppellant was sentenced to state prison not because it was ‘part and parcel’ of the plea bargain the parties negotiated but rather [because] the court and the parties believed it was required.” We are not convinced. The fact that the parties all believed count 1 required a state prison sentence demonstrates that, under the bargain struck, the People expected the sentence to be served in state prison, and Benavides agreed to do so. Perhaps Benavides first asked for dismissal of count 1 to avoid state prison, but the People insisted she serve time in state prison, or it is possible the People first offered a greater maximum term, and Benavides countered by offering a 16-month sentence in state prison with the understanding that she would be subject to community supervision after her release. The point is, we do not know how the negotiations proceeded, and we will not presume that serving the sentence in state prison was not “part and parcel” of the plea. Consequently, Benavides cannot proceed with her appeal claim without a certificate of probable cause.

**DISPOSITION**

The appeal is dismissed.

---

Wiseman, Acting P.J.

WE CONCUR:

---

Levy, J.

---

Kane, J.