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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GREGORY ERIK CANTRELL,

Defendant and Appellant.

G045365

(Super. Ct. No. 07CF3661)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Dan McNerney, Judge. Dismissed.

Law Offices of William J. Kopeny and William J. Kopeny for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Gregory Cantrell contends the court abused its discretion by imposing a three-year prison term instead of granting probation. But in his plea agreement, defendant waived his right to appeal from any lawful sentence not exceeding three years in state prison. We dismiss his appeal.

FACTS

Defendant pleaded guilty in November 2010 to three counts of committing lewd acts upon a child under 14. (Pen. Code, § 288, subd. (a).)¹ He signed a written form entitled “ADVISEMENT AND WAIVER OF RIGHTS FOR A FELONY GUILTY PLEA,” initialing a paragraph providing he understood the form and discussed it with counsel. Counsel signed a statement providing counsel had explained the form to defendant, concurred with his decision to plead guilty, and “agree[d] that this form may be received by the court as evidence of defendant’s advisement and voluntary, intelligent, knowing, and express waiver of the rights set forth on this form.”

Defendant initialed other paragraphs reflecting the plea agreement’s basic terms. One paragraph provided he understood the charged offenses carried a possible penalty of 12 years in state prison. Another paragraph provided he understood the court would “[c]onsider [his] application for probation,” but might “deny [his] application for probation and sentence [him] to state prison for a maximum period of 3 years and ___ months.”

Defendant also waived his appellate rights. He initialed the following paragraph: “**Appeal waiver:** I understand I have the right to appeal from decisions and orders of the Superior Court. I waive and give up my right to appeal from any and all decisions and orders made in my case I waive and give up my right to appeal from

¹ All further statutory references are to the Penal Code.

my guilty plea. I waive and give up my right to appeal from any legally authorized sentence the court imposes which is within the terms and limits of this plea agreement.”

At the sentencing hearing, the court considered defendant’s sentencing brief, the probation department’s report, psychological reports, and letters submitted by defendant. It denied his probation request and sentenced him to three years in state prison.

DISCUSSION

“The negotiated plea agreement, which results in the waiver of important constitutional rights, ‘is an accepted and integral part of our criminal justice system.’ [Citations.] Such agreements benefit the system by promoting speed, economy and finality of judgments. [Citation.] [¶] ‘When a guilty . . . plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties . . . must abide by the terms of the agreement.’” (*People v. Panizzon* (1996) 13 Cal.4th 68, 79-80 (*Panizzon*).

“[A] challenge to a negotiated sentence imposed as part of a plea bargain is properly viewed as a challenge to the validity of the plea itself.” (*Panizzon, supra*, 13 Cal.4th at p. 79.) And “[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty” (§ 1237.5) unless the “trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.” (*id.*, subd. (b).) “The purpose for requiring a certificate of probable cause is to discourage and weed out frivolous or vexatious appeals challenging convictions following guilty and nolo contendere pleas. [Citations.] The objective is to promote judicial economy ‘by screening out wholly frivolous guilty . . . plea appeals before time and money is spent preparing the record and the briefs for consideration by the reviewing court.’” (*Panizzon*, at pp. 75-76.) “[T]he purposes behind section 1237.5 will remain

vital only if appellate courts insist on compliance with its procedures.” (*Id.* at p. 89, fn. 15.)

Thus, this appeal is doomed. Defendant cannot challenge his prison term on appeal. He agreed not to — and ““must abide by the terms of the agreement.”” (*Panizzon, supra*, 13 Cal.4th at p. 80.) Moreover, “it was incumbent upon defendant to seek and obtain a probable cause certificate” from the court, which he failed to do. (*Id.* at p. 79; accord § 1237.5.) We will “insist on compliance” with the probable cause certificate requirement. (*Panizzon*, at p. 89, fn. 15.)

Defendant questions the validity of his waiver. He complains the court did not orally admonish him about the effect of waiving his right to challenge his sentence on appeal. And he asserts the waiver and plea agreement form was “confusing and difficult to understand.”

“To be enforceable, a defendant’s waiver of the right to appeal must be knowing, intelligent, and voluntary. [Citations.] Waivers may be manifested either orally or in writing.” (*Panizzon, supra*, 13 Cal.4th at p. 80.) Thus, “a court may rely upon a defendant’s validly executed waiver form as a proper substitute for a personal admonishment.” (*Id.* at p. 83.) “The voluntariness of a waiver is a question of law which appellate courts review de novo.” (*Id.* at p. 80.)

Here, defendant effectively waived his appellate rights. As was true in *Panizzon*: “[T]he record in this case demonstrates an enforceable waiver of defendant’s right to appeal his sentence. Even though the trial court did not admonish defendant regarding the right to appeal, the Waiver and Plea agreement signed by defendant and his attorney contains defendant’s representations that he understood the sentence that would be imposed if he pleaded [guilty], that he had discussed with his attorney both the paragraph specifying the sentence to be imposed and the paragraph containing the waiver of the right to appeal the sentence, and that he fully understood all matters set forth in the document without exception. The Waiver and Plea agreement also reflects defense

counsel's representation that he personally went over the document with defendant and concurred in defendant's decision to waive the rights specified in the document, as well as counsel's stipulation that the trial court could consider the document as evidence of defendant's intelligent waiver of such rights. At the court hearing, both defendant and his attorney attested to the document's valid execution. Additionally, the in-court questioning of defendant and his attorney raised no doubts as to defendant's understanding of his rights and the consequences of his no contest plea. Under these circumstances, we are satisfied that defendant's waiver of the right to appeal the bargained sentence was knowing, intelligent, and voluntary despite the absence of a specific admonishment by the trial court." (*Panizzon, supra*, 13 Cal.4th at p. 84.)

Undeterred, defendant asserts his appellate rights survive his agreement otherwise. He notes *Panizzon* involved a plea agreement to a specific term. (*Panizzon, supra*, 13 Cal.4th at p. 73.) But he agreed only to a maximum term, leaving the court with discretion both to consider his probation request and to impose a lesser sentence. Defendant asserts "where, as here, the plea bargain is for a sentence within a particular range (rather than for a particular agreed sentence) the defendant does not thereby automatically waive his right to appeal any sentence imposed as an abuse of discretion."

That last point is correct, as far as it goes. Waiver is not automatic. "[A]bsent contrary provisions in the plea agreement itself, a certificate of probable cause is not required to challenge the exercise of individualized sentencing discretion within an agreed maximum sentence. Such an agreement, by its nature, contemplates that the court will choose from among a range of permissible sentences within the maximum, and that abuses of this discretionary sentencing authority will be reviewable on appeal, as they would otherwise be. Accordingly, such appellate claims do not constitute an attack on the validity of the plea, for which a certificate is necessary." (*People v. Buttram* (2003) 30 Cal.4th 773, 790-791 (*Buttram*).

But here there are “contrary provisions in the plea agreement.” (*Buttram, supra*, 30 Cal.4th at p. 790.) Defendant expressly waived his right “to appeal from any legally authorized sentence the court imposes which is within the terms and limits of this plea agreement.” There was no such waiver in *Buttram* — “[t]he agreement included no waiver of defendant’s right to appeal sentencing issues.” (*Id.* at p. 776.)

Buttram stressed this point over and over, qualifying its holding at least three times. First, it explained “[d]efendant thus seeks only to raise issues reserved by the plea agreement, *and as to which he did not expressly waive the right to appeal.*” (*Buttram, supra*, 30 Cal.4th at p. 787, italics added.) Second, it held that “[u]nless the agreement itself specifies otherwise, appellate issues relating to this reserved [sentencing] discretion are therefore outside the plea bargain and cannot constitute an attack upon its validity.” (*Id.* at p. 789, italics added.) Finally, it concluded that “*absent contrary provisions in the plea agreement itself*, a certificate of probable cause is not required to challenge the exercise of individualized sentencing discretion within an agreed maximum sentence.” (*Id.* at p. 790, italics added.)

And *Buttram*’s author wrote a concurrence to hammer the point home. “A prime reason why we conclude here that defendant *Buttram* may take his appeal without a certificate, and that the Court of Appeal must address it on the merits, is that *Buttram*’s plea *is silent on the appealability* of the trial court’s sentencing choice. [¶] Yet it is well settled that a plea bargain may include a waiver of the right to appeal.” (*Buttram, supra*, 30 Cal.4th at p. 791 [conc. opn. of Baxter, J.].) “If *Buttram*’s bargain had included an express waiver of appeal, a number of consequences would flow. [¶] First, an attempt to appeal the sentence notwithstanding the waiver would necessarily be an attack on an express term, and thus on the validity, of the plea. [Citation.] A certificate of probable cause would therefore be necessary to make the appeal ‘operative,’ and in the absence of a certificate, the superior court clerk would not be put to the time and expense of preparing a record on appeal.” (*Id.* at pp. 792-793, italics omitted.) “Second, even if the

defendant obtained a certificate, and the appeal was thereby made operative [citation], the express waiver of appeal would permit the appellate court to decline to address the defendant's claim on the merits, assuming that after de novo review, it found the waiver knowing, voluntary, and intelligent [citation]." (*Id.* at p. 793.)

Panizzon, Buttram, and section 1237.5 dispose of this appeal. Because defendant knowingly, voluntarily, and intelligently waived his appellate rights — and failed to obtain a probable cause certificate — nothing remains for our review. (See *Panizzon, supra*, 13 Cal.4th at p. 90 [remanding matter to Court of Appeal “with directions to dismiss defendant’s appeal”].)

DISPOSITION

The appeal is dismissed.

IKOLA, J.

WE CONCUR:

O’LEARY, P. J.

MOORE, J.