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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. KEVIN HO, Defendant and Appellant.	G046705 (consol. with G046761) (Super. Ct. Nos. 11WF1039, 11WF0058 & 11WM02204) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregg L. Prickett, Judge. Affirmed.

Ann Bergen, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

Defendant Kevin Ho filed notices of appeal in his two criminal cases. We appointed counsel to represent Ho and consolidated the appeals. Counsel filed a brief setting forth a statement of the case, but advised this court she found no issues to support an appeal. We provided Ho 30 days to file his own written argument, but he has not responded. After conducting an independent review of the record under *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

FACTS

Case No. G046705

An information filed April 6, 2011 (O.C. Super. Ct. No. 11WF0058), alleged Ho transported cocaine base (Health & Saf. Code, § 11352, subd. (a); count 1) and possessed cocaine base for sale (Health & Saf. Code, § 11351.5; count 2) on or about December 28, 2010. At Ho's January 2012 jury trial, Westminster Police Officer Phuong Pham testified he was working undercover on December 28, 2010. He placed a telephone call[1] and arranged with "Kevin" to buy some "hang," a Vietnamese word for "goods." Kevin asked how much he wanted, and in a series of calls they ultimately agreed on a price of $100, and arranged to meet at a gas station at 3:00 p.m. Pham ran Kevin's phone number through a police database and obtained a photograph of Ho, and Ho's last known address and vehicle. Pham met Ho at the gas station, gave him the money, and Ho gave him a cigarette package containing three small balls of aluminum foil. According to Pham and a forensic scientist employed at county crime lab, each ball contained a usable quantity of cocaine base.

Ho testified a friend named Thao asked him to take a box of cigarettes to her friend "Minh" at the gas station. Ho claimed he did not know the package contained

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[1] Pham apparently obtained the phone number from a confidential informant, although this fact was not disclosed to the jury. The court denied Ho's request to disclose the informant's name and information, concluding the informant was not material to the issue of guilt or innocence.

drugs, explaining he thought Pham "might have owed [Thao] some money or he wanted to give [her] or her child some money." Ho admitted he knew what rock cocaine was. A jury found Ho guilty as charged. The court scheduled a sentencing hearing for March 2, 2012.

Case No. G046761

An information filed June 17, 2011 (O.C. Super. Ct. No. 11WF1039), alleged Ho possessed a deadly weapon, nunchaku (within the record as "nunchucks"), on or about August 23, 2009, in violation of former Penal Code section 12020, subdivision (a)(1) (repealed by Stats. 2010, ch. 711, § 4); see now as Penal Code sections 22010 and 22015. (All further statutory references are to the Penal Code, unless otherwise stated.) On March 2, 2012, Ho agreed to plead guilty. He executed an "Advisement and Waiver of Rights for a Felony Guilty Plea" form, which his attorney also signed. He agreed to a three-year sentence to run concurrently with his sentence in case no. 11WF0058, on the understanding the court would suspend execution of the sentences and place him on probation. On the record, Ho stated he had discussed the charges, defenses, and consequences of pleading guilty with his lawyer. The court advised Ho of his constitutional rights. Ho waived his rights and offered the following factual basis for his plea on the plea form and in open court: "In Orange County California, on 8/23/09, I unlawfully possessed a deadly weapon, to wit, nunchucks."

Sentencing

On March 2, 2012, the court sentenced Ho in both cases. The court imposed the low term of three years for transportation of cocaine base, imposed and stayed (§ 654) a three-year term for possession of cocaine base for sale, and imposed a three-year concurrent term for possession of nunchucks. The court suspended execution of the sentence and placed Ho on formal probation for three years on various terms and conditions. The court ordered him to serve 300 days in jail, crediting him for 11 actual

days of presentence confinement and 11 days of conduct credit. The court ordered Ho to pay various fines, assessments and fees.

DISCUSSION

Ho's appellate lawyer identifies several potential issues for our consideration. None presents an arguable issue.

Sufficiency of the Evidence in G046705

On appeal, the reviewing court must view the evidence in the light most favorable to the judgment. (*People v. Elliot* (2005) 37 Cal.4th 453, 466.) It is the trier of fact's exclusive province to assess witness credibility and to weigh and resolve conflicts in the evidence. (*People v. Sanchez* (2003) 113 Cal.App.4th 325, 330 (*Sanchez*).) We therefore presume the existence of every fact reasonably inferred from the evidence in support of the judgment. (*People v. Crittenden* (1994) 9 Cal.4th 83, 139.) The test is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt. (*Ibid.*; *People v. Johnson* (1980) 26 Cal.3d 557, 576.) In other words, reversal is not warranted even though the circumstances could be reconciled with a contrary finding. (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.) Thus, a defendant attacking the sufficiency of the evidence "bears an enormous burden." (*Sanchez*, at p. 330.)

Health and Safety Code section 11352 provides, "[E]very person who transports . . . any controlled substance . . . shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years." The prosecution was required to prove the defendant transported cocaine base, knew of its presence, knew of the substance's nature or character, and the substance was in a usable amount. (*People v. Rogers* (1971) 5 Cal.3d 129.)

Health and Safety Code section 11351.5 provides, "[E]very person who possesses for sale or purchases for purposes of sale cocaine base which is specified in paragraph (1) of subdivision (f) of Section 11054, shall be punished by imprisonment

pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of three, four, or five years." "A person is guilty of the crime of illegal possession for the sale of cocaine . . . when he or she (1) exercised control over the cocaine, (2) had knowledge of its presence and knowledge of its nature as a controlled substance, (3) the substance was in an amount sufficient to be used for sale as a controlled substance, and (4) he or she possessed the controlled substance with the specific intent to sell it." (*In re Christopher B.* (1990) 219 Cal.App.3d 455, 466.)

Here, Officer Pham's testimony, and the county's forensic scientist, amply established Ho knowingly transported cocaine base, and possessed the drug intending to sell it. The jury rejected Ho's claim he simply delivered cigarettes for his friend Thao and did not know the package contained drugs, a determination we may not second-guess.

Constitutional Validity of Guilty Plea in G046761

A defendant's guilty plea admits all matters essential to the conviction. The issues cognizable on appeal are those based on "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings" resulting in the plea. But review of these issues requires a certificate of probable cause. (§ 1237.5, subd. (a); Cal. Rules of Court, rule 8.304(b)(4)(B) & (b)(5).) Section 1237.5 is designed "'to promote judicial economy' [citation] 'by screening out wholly frivolous guilty . . . plea appeals before time and money are spent' on such matters as the preparation of the record on appeal [citation], the appointment of appellate counsel [citation], and . . . consideration and decision of the appeal itself." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1095 (*Mendez*).)

Here, Ho admitted his appeal was "based on the sentence or other matters that occurred after the plea and do not affect its validity." Because Ho did not obtain a certificate of probable cause, we may not review the constitutional validity of his plea. We also note the guilty plea form contains an advisement, and Ho's waiver, of his

constitutional rights. Both Ho and his attorney stated the attorney explained Ho's rights, and they discussed the charges, facts, and defenses. The court advised Ho of his rights on the record, and obtained his oral waiver of rights. Finally, Ho waived his right "to appeal from any and all decisions and orders made in" his case, including his guilty plea, and from "any legally authorized sentence the court imposes which is within the terms" of the plea agreement. In short, any constitutional challenge to the validity of the plea based on the record before us would be wholly frivolous. (*Mendez*, *supra*, 19 Cal.4th at pp. 1095, 1099.)

Factual Basis for Guilty Plea

Section 1192.5 requires the trial judge to ask the defendant or counsel to provide a factual basis for a guilty plea conditioned on a particular sentence. (*People v. Watts* (1977) 67 Cal.App.3d 173, 179-180 ["judge should develop the factual basis on the record, for example, by having the accused describe the conduct that gave rise to the charge, or by making specific reference to those portions of the grand jury transcript or preliminary hearing transcript which provide a factual basis for the plea, or by eliciting information from the defense attorney or the district attorney"].) Section 1192.5 ensures constitutional standards of voluntariness and intelligence are met. (*People v. Holmes* (2004) 32 Cal.4th 432-433.) Only a prima facie factual basis for the charge must be established; the trial court need not interrogate the defendant about possible defenses to the charge, nor be convinced of the defendant's guilt. (*Id.* at p. 441.) The appellate court reviews the record for abuse of discretion. (*Id.* at p. 437 [trial judge asked defendant if he did "what it says you did in Count 1 on March 24th, 2000 in Riverside County?"; inquiry held sufficient].)

Ho's failure to obtain a certificate of probable cause precludes appellate review of his claim the trial court violated section 1192.5 by failing to conduct an adequate inquiry. (See *People v. Johnson* (2009) 47 Cal.4th 668, 682 ["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"]; see also *People v. Voit* (2011) 200 Cal.App.4th 1353, 1368.) In any event, Ho's guilty plea form contained a factual basis, as noted above, and Ho admitted on the record the factual basis was true. There is no arguable issue the trial court abused its discretion under section 1192.5.

Fines and Fees

As noted, the court imposed several fines, fees and assessments. The court ordered Ho to pay a $480 restitution fine, a $50 criminal laboratory fee (Health & Saf. Code, § 11372.5), and "$70 per count as court security fee and court administrative fees."

Section 1202.4, subdivision (b), provides, "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." The restitution fine is "set at the discretion of the court and commensurate with the seriousness of the offense, but shall not be less than [certain minimums]." When the court sets "a felony restitution fine, the court may determine the amount of the fine as the product of the minimum fine . . . multiplied by the number of years of imprisonment the defendant is ordered to serve, multiplied by the number of felony counts of which the defendant is convicted." (§ 1202.4, subd. (b)(2).) Further, "In every case in which the defendant is granted probation, the court shall make the payment of restitution fines and orders imposed pursuant to this section a condition of probation." (§ 1202.4, subd. (m).)

At the time Ho committed his crimes in 2009 and 2010, the minimum restitution fine specified in section 1202.4 for felonies was $200. Ho suffered conviction of three felony counts, each with a prison term of three years. There is no arguable issue the court abused its discretion in ordering Ho to pay a total restitution fine of $480.

Section 1465.8 provides that "[t]o assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal

offense . . . . [¶] . . . [¶] (d) Notwithstanding any other law, the assessments collected pursuant to subdivision (a) shall all be deposited in a special account in the county treasury and transmitted therefrom monthly to the Controller for deposit in the Trial Court Trust Fund."

Here, the court imposed a $40 fee per count. We discern no arguable issue. (See *People v. Alford* (2007) 42 Cal.4th 749, 755 [application of court security fee to pending cases where offense was committed before effective date of statute imposing fee does not violate ex post facto rule; purpose of fee is nonpunitive, and fee is not so punitive in nature or effect that it constitutes punishment]; *People v. Schoeb* (2005) 132 Cal.App.4th 861, 865 [defendant was subject to nine $20 court security fees based on conviction of nine offenses; section unambiguously requires imposition of fee for each conviction]); *People v. Le* (2006) 137 Cal.App.4th 54, 60-61 [section 1465.8 applies to felonies, misdemeanors, and infractions]; *People v. Crittle* (2007) 154 Cal.App.4th 368, 370 [court security fee is properly imposed based on conviction that has been stayed pursuant to section 654 because court security fee is not punishment]; *People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327-1328 [trial court's failure to impose court security fee required remand for imposition of fee, rather than mere modification of abstract of judgment]; *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1402 [court security fee may not be imposed as condition of probation; fee is collateral to crime and punishment]; *People v. Woods* (2010) 191 Cal.App.4th 269, 271-272 [court security fee is mandatory; there is no authority to impose and stay fee].)

Government Code section 70373 provides, "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . . The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony and in the amount of thirty-five dollars ($35) for each infraction. [¶] . . . [¶] (d) Notwithstanding any other law, the assessments collected pursuant to subdivision (a) shall all be deposited in a special account in the

county treasury and transmitted therefrom monthly to the Controller for deposit in the Immediate and Critical Needs Account of the State Court Facilities Construction Fund, established in [Government Code] Section 70371.5."

Here, the trial court imposed a $30 assessment per count. We discern no arguable issue.

Health and Safety Code section 11372.5 provides, "Every person who is convicted of a violation of Section . . . 11351.5 [or] 11352 . . . shall pay a criminal laboratory analysis fee in the amount of fifty dollars ($50) for each separate offense," which is placed in a "criminalistics laboratories fund" to pay "(1) costs incurred by criminalistics laboratories providing microscopic and chemical analyses for controlled substances, in connection with criminal investigations conducted within both the incorporated or unincorporated portions of the county, (2) the purchase and maintenance of equipment for use by these laboratories in performing the analyses, and (3) for continuing education, training, and scientific development of forensic scientists regularly employed by these laboratories."

Here, the court imposed a $50 fee for Ho's unstayed count 1 conviction for possession of cocaine base for sale. We discern no arguable issue.

DISPOSITION

The judgments in cases G046705 and G046761 are affirmed.

ARONSON, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.