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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.

JOSE FRANCISCO GONZALES,

Defendant and Appellant.

G046828

(Super. Ct. No. 12NF0323)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Roger B. Robbins, Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

Jose Francisco Gonzales entered into a plea agreement whereby he pled guilty to second degree burglary (Pen. Code, §§ 459/4600), fraudulent use of a credit card (Pen. Code, § 484g, subd. (a)) and attempted grand theft (Pen. Code, §§ 664/487). He was placed on probation for three years with typical terms and conditions, including incarceration (for which he was given credit for the time he had already served, and was released). As part of his plea agreement, he waived his right to appeal from any legally authorized sentence the court might impose within the limits of the plea agreement.

Nonetheless, Gonzales timely filed a notice of appeal, challenging both the plea and admissions and the sentence. He sought a certificate of probable cause pursuant to Penal Code section 1237.5 and was denied.

We appointed counsel to represent Gonzales on appeal. Appellate counsel considered several possible appellate arguments, but could not make any of them fly. She therefore filed with this court a *Wende* brief (*People v. Wende* (1979) 25 Cal.3d 436), complying with *Anders v. California* (1967) 386 U.S. 738, by setting forth the procedural facts of the case (there was no record of the actual incidents that led to Gonzales' prosecution) and the possible arguments she had investigated and abandoned. We have reviewed the points she considered and examined the record for others. We find ourselves in agreement with her that there is no arguable issue on appeal.¹

Defendant having pled guilty, counsel's review concentrated on putative errors in the plea and sentencing process. This went nowhere because no certificate of probable cause had been obtained. Appellant has not suggested, his attorney could not conceive of, and we cannot imagine a way around that requirement on the facts of this case. "A defendant who has pleaded guilty or nolo contendere to a charge in the superior court, and who seeks to take an appeal from a judgment of conviction entered thereon,

¹ We notified appellant of the filing of the *Wende* brief and invited him to file his own brief. He did not do so.

may not obtain review of so-called ‘certificate’ issues, that is, questions going to the legality of the proceedings, including the validity of his plea, unless he has complied with section 1237.5 of the Penal Code and the first paragraph of rule 31(d) of the California Rules of Court – which require him to file in the superior court a statement of certificate grounds as an intended notice of appeal within 60 days after rendition of judgment, and to obtain from the superior court a certificate of probable cause for the appeal within 20 days after filing of the statement and, hence, within a maximum of 80 days after rendition of judgment.” (*People v. Mendez* (1999) 19 Cal.4th 1084, 1088, fns. omitted.) Appellant having failed to do so – and in our opinion, being unable to do so, there being no grounds therefore – he is precluded from such a challenge and appellate counsel correctly abandoned that as a ground of appeal.

In fact, without a certificate of probable cause, appellant may obtain review solely of so-called “noncertificate” issues. These are “postplea questions not challenging his plea’s validity and/or questions involving a search or seizure whose lawfulness was contested pursuant to [Penal Code] section 1538.5.” (*People v. Mendez, supra*, 19 Cal.4th at p. 1088.)

This is not a meaningless formality. The certificate of probable cause is designed for situations in which valid, contestable legal issues exist but a party, for whatever reason, wishes to plead guilty – often to take advantage of a lenient sentence such as the one appellant received. To distinguish those cases from ones in which there is no serious legal issue, we require the trial courts to screen such requests through the certificate process. The trial court, having been there when the plea was entered, is well situated to evaluate the bona fides of issues that might be raised and avoid drains upon the public fisc in pursuit of quixotic arguments.

In his request for a certificate of probable cause, Gonzales asserted inadequate assistance of counsel. He says his plea has led to removal proceedings by Immigration and Customs officials, even though he was in this country legally and had

never previously been in trouble. He asserts that when he inquired of his attorney about the immigration consequences of his plea, the attorney told him he did not know what they would be. This is, of course, an issue for which there is no appellate record. It is one that, on the facts alleged by Gonzales – compared to the record before this court – could only be raised via writ of habeas corpus, which would allow the development of the facts asserted by Gonzales in his request for a certificate of probable cause.

Complaints such as this require a showing most clearly set forth in *In re Resendiz* (2001) 25 Cal.4th 230. In *Resendiz*, the defendant, a legal resident, was arrested on drug charges. He was given the statutory advisement regarding the immigration consequences of pleading guilty – as was Gonzales. He was subsequently detained by immigration authorities and threatened with deportation – as was Gonzales. He then moved to withdraw his guilty plea, saying his lawyer told him he would go to jail for a much longer time if he did not plead guilty, and he would not have so pleaded if he had known he could be deported as a result – an argument indistinguishable from Gonzales’.

The Supreme Court held a valid claim for ineffective assistance of counsel could arise from incorrect immigration advice, but pointed out it was the defendant’s burden to show prejudice. “[Defendant’s] assertion he would not have pled guilty if given competent advice ‘must be corroborated independently by objective evidence.’ [Citations.] ‘In determining whether a defendant, with effective assistance, would have accepted [or rejected a plea] offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer, and whether the defendant indicated he or she was amenable to negotiating a plea bargain.’ [Citation.]” (*In re Resendiz, supra*, 25 Cal.4th at p. 253.) It is clear from *Resendiz* that complaints such as the one set forth in Gonzales’ request for a certificate of probable

cause require considerably more development of a record than presents itself in this appeal – or indeed in most appeals.

So appellate counsel was correct that there are no arguable issues presentable on appeal in this case.² Issuance of a certificate of probable cause rests within the sound discretion of the trial court, and we see nothing to indicate the trial court abused that discretion in this case. There was obviously no record on which to hang an inadequate assistance of counsel claim, and Gonzales presented no other reason for his request.

The judgment is affirmed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

FYBEL, J.

THOMPSON, J.

² None of the other half-dozen issues she investigated is arguable, and our own perusal of the record has suggested none.