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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JOE HAY, Defendant and Appellant.	B203422 (Los Angeles County Super. Ct. Nos. BA291832, BA308550 & BA310026)

THE COURT:*

Joe Hay appeals following his plea of no contest to a violation of Health and Safety Code section 11351.5, possession for sale of cocaine base in case No. BA308550. Appellant admitted being in violation of the terms and conditions of probation in case No. BA291832. The trial court sentenced appellant to the high term of five years in accordance with appellant's plea agreement.

We appointed counsel to represent appellant on this appeal. After examination of the record, counsel filed an "Opening Brief" containing an acknowledgment that he had been unable to find any arguable issues. On July 30, 2008, we advised appellant that he

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* DOI TODD, Acting P. J., ASHMANN-GERST, J., CHAVEZ, J.

had 30 days within which to personally submit any contentions or issues that he wished us to consider. No response has been received to date.

The record shows that after preliminary hearings in case Nos. BA308550 and BA310026, appellant was held to answer. Probation was revoked in appellant's prior case, case No. BA291832.

In case No. BA308550, Officer Rafael Rodriguez of the Los Angeles Police Department testified that on August 31, 2006, he saw someone hand some money to appellant, who was holding a Chapstick canister in one hand. Appellant looked directly at the officer as he approached. He then raised the Chapstick canister to his mouth and emptied its contents into his mouth. As appellant spoke to the officer, a single off-white solid was ejected from his mouth, hitting Officer Rodriguez's partner, Officer Ziesmer, in the chest. Officer Rodriguez saw at least three other off-white pieces in appellant's mouth. Officer Rodriguez also recovered a pipe commonly used for smoking cocaine. Officer Rodriguez was of the opinion that the solids consisted of cocaine base and were for sale.

In case No. BA310026, Officer Rodriguez testified that he saw appellant during his patrol on September 28, 2006. An unknown male had his hand extended towards appellant with money in the hand, and appellant had his right hand cupped in front of him. When appellant saw Officer Rodriguez approaching, he placed the contents of his hand into his mouth. Numerous off-white solids resembling rock cocaine fell from appellant's mouth and were recovered. Officer Rodriguez was of the opinion that the solids were cocaine base and were for sale.

After an in camera hearing on appellant's *Pitchess*[1] motion on December 11, 2006, the trial court ordered discovery to the defense with respect to five incidents with Officer Rodriguez and Officer Ziesmer. On March 14, 2007, the trial court granted the People's motion to consolidate case Nos. BA308550 and BA310026 under the lower number. On March 20, 2007, the people filed a three-count information that charged

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1 *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

appellant with the two cases of possession for sale as well as the crime of possession of a smoking device. The information also alleged that appellant had suffered five prison priors (Pen. Code, § 667.5, subd. (b))[2] and two prior convictions for serious or violent felonies (strikes) (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). On March 20, 2007, the trial court conducted a *Marsden*[3] hearing and denied appellant's *Marsden* motion.

On March 28, 2007, appellant accepted the People's offer to plead to count 2 of the consolidated information and to receive the high term of five years. The People would strike all allegations. Appellant would serve the five years concurrently with his five-year suspended sentence in case No. BA291832 (the probation case). Appellant received the appropriate admonitions and pleaded "no contest." The trial court sentenced appellant in accordance with the agreement.

On May 23, 2007, the trial court denied appellant's request for modification or recall of his sentence. On May 24, 2007, appellant filed a notice of appeal ostensibly based on the sentence or other matters occurring after his plea as well as a challenge to the validity of the plea. Appellant also filed a request for a certificate of probable cause consisting of 15 pages discussing four issues.

On September 7, 2007, the trial court denied appellant's motion for correction of an error in defendant's presentence credit calculations, noting that appellant did receive the additional credits that were the subject of the motion. On December 13, 2007, the trial court denied appellant's request for a certificate of probable cause in a detailed memorandum addressing each of appellant's issues.

Under section 1237.5, a defendant may not appeal from a judgment of conviction following a guilty or no contest plea, unless he files with the trial court a written, sworn statement "showing reasonable, constitutional, jurisdictional, or other grounds going to the legality of the proceedings," (§1237.5, subd. (a)), and the trial court executes and files

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[2] All further statutory references are to the Penal Code unless otherwise indicated.

[3] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

"a certificate of probable cause for such appeal with the clerk of the court" (§ 1237.5, subd. (b); see *People v. Mendez* (1999) 19 Cal.4th 1084, 1094–1095.) In compliance with section 1237.5, the first paragraph of California Rules of Court, rule 8.304(b)[4] requires the defendant to file "the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause" in order to perfect his appeal. Rule 8.304 further provides that the notice of appeal must be marked "Inoperative" if the superior court denies a certificate of probable cause. The requirements of section 1237.5 and the first paragraph of rule 8.304 (former rule 31(b)) must be strictly applied. (*People v. Mendez*, *supra*, 19 Cal.4th at pp. 1098–1099.)

In his appeal form appellant argued several issues that were attacks on the validity of his plea and that were not cognizable on appeal because he failed to obtain a certificate of probable cause. He argued that the trial court did not explain fully the rights he was giving up, deceived him into believing he would be sent to a prison that would allow him to receive 65 percent credits, and did not apply all credits. He contended that the court erred and severely prejudiced him by allowing a conflict of interest to continue between him and his attorneys. He argued that the court erred by severely limiting continuances for discovery and prejudicing his right to a fair trial. He maintained that he received ineffective assistance of counsel.

The trial court thoroughly discussed each of appellant's contentions and showed that they were without merit. Appellant received everything he had bargained for and the correct number of credits. The trial court found no support for his claims of conflicts of interest. The trial court summarized the record showing that many continuances had been granted and that appellant's discovery rights had not been unconstitutionally circumscribed. Without deciding whether appellant's contentions regarding ineffective assistance of counsel were supported, the trial court found appellant had not shown prejudice. After examining the record, we conclude that the trial court's findings were correct.

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4 All further references to rules are to the California Rules of Court.

In the only issue raised by appellant that related to his sentencing, appellant claimed that the trial court illegally enhanced his sentence after the plea bargain by sentencing him to five years consecutive to the five years he received on the probation violation. This claim is clearly erroneous, since the transcript of the sentencing and the abstract of judgment show that appellant was sentenced to concurrent terms. Moreover, appellant specifically bargained for the high term, waiving his right to a jury trial on the issue of the use of his prior convictions as an aggravating factor. Appellant's claim relating to sentencing is without merit.

We have examined the entire record, including the transcripts and documents pertaining to appellant's *Marsden* and *Pitchess* motions, and we are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Wende* (1979) 25 Cal.3d 436, 441.)

The judgment is affirmed.

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