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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. JONATHAN COOPER, Defendant and Appellant.	C059935 (Super. Ct. No. 07F09927)

According to the stipulated factual basis (with some augmentation from the facts summarized in the probation report), in October 2007 police observed defendant Jonathan Cooper hand a .58-gram piece of cocaine base to a person facing him; the person then dropped it on the ground when the police approached them. A complaint alleged that defendant transported cocaine base and had a prior conviction within the meaning of Penal Code section 667, subdivisions (b)-(i) (undesignated section references will be to this code).

In December 2007, defendant entered a plea of no contest to the reasonably related offense of possessing cocaine base and admitted the recidivist allegation. The plea provided that he would receive a doubled *lower* term (32 months), with a

grant of probation pursuant to section 1210.1 (which requires successful completion of a program for drug addiction as a condition). The trial court also dismissed a number of trailing misdemeanors in the interests of justice. The court released him on his own recognizance.

The probation report, prepared in December 2007, found that defendant was not eligible for a grant of probation for drug treatment because he had an admitted prior conviction for a "serious" felony and had not been free of prison custody for the previous five years (§ 1210.1, subd. (b)(1)): on parole, he had returned to prison 10 times between March 2003 and March 2007. The probation report recommended a doubled *middle* prison term of four years, in conflict with the negotiated plea. In addition to an $800 restitution fine and an $800 parole revocation fine (suspended unless parole revoked), the probation report recommended a $50 laboratory fee fine, a $150 drug program fee, a $20 court security fee, a $242.29 booking fee, and a $27.22 jail classification fee.

After a number of continuances, the court received the probation report in July 2008. Defendant reaffirmed his acceptance of the plea agreement in light of his ineligibility for probation. The court sentenced him to the agreed prison term of 32 months, incorporating the "other terms for inclusion in the commitment order [as] set forth on pages seven and eight

[of the probation report]."[1] Defendant filed a timely notice of appeal without a request for a certificate of probable cause.

We have appointed counsel to represent defendant on appeal. Counsel filed an opening brief that sets forth the facts of the case and asks us to review the record and determine whether there are any arguable issues on appeal. (*People v. Wende* (1979) 25 Cal.3d 436.) Counsel advised defendant of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant's initial supplemental letter brief did not reach us through the mail. We accepted the belated copy that counsel forwarded to us.

In his supplemental brief, defendant asserts, "My trial attorney was ineffective . . . due to the fact that he did not ask for a *Romero* motion or certificate of probable cause . . . . I am now asking the court to grant me a certificate of probable cause with the notice of appeal, so that my appeal attorney may raise any issues that need to be raised in my appeal[.]"

Upon defendant's entry of a negotiated plea, trial counsel could not request the court to consider exercising its discretion to strike the recidivist finding pursuant to section 1385. (*People v. Cunningham* (1996) 49 Cal.App.4th 1044, 1048.) Nor can defendant premise on appeal a claim of

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[1] The court also imposed a concurrent term for an unrelated 2008 misdemeanor offense to which the defendant entered a plea of no contest; it is not part of this appeal.

ineffective assistance based on the failure of trial counsel to request such a consideration as part of the negotiated plea, because we can assume the prosecutor was unwilling to include any provision to this effect. (*People v. Pope* (1979) 23 Cal.3d 412, 426.) As for the failure to obtain a certificate of probable cause, this cannot establish either the necessary breach of established professional norms or any resulting prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215, 217.) Defendant does not in fact identify any *particular* issue that the absence of a certificate of probable cause forecloses on appeal. Appellate counsel has failed to identify any arguable issues. Having undertaken an examination of the entire record, we, as well, do not find any arguable error that would result in a disposition more favorable to defendant. Therefore, it would have been a frivolous act for trial counsel to seek a certificate of probable cause, which cannot be the basis for a claim of ineffective assistance. (*People v. Riel* (2000) 22 Cal.4th 1153, 1202.)

DISPOSITION

The judgment is affirmed.

SIMS, Acting P. J.

We concur:

HULL, J.

BUTZ, J.