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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. SERGIO NAVARRO, Defendant and Appellant.	G040239 (Super. Ct. No. 96CF2079) O P I N I O N
In re SERGIO NAVARRO on Habeas Corpus.	G040746

Appeal from an order of the Superior Court of Orange County, Thomas James Borris, Judge. Dismissed.

Original proceedings; petition for a writ of habeas corpus, after judgment of the Superior Court of Orange County. Dismissed.

The Law Offices of Manulkin, Glaser and Bennett, Wendy Chase Arenson and Reyna M. Tanner, for Defendant, Appellant and Petitioner.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and Marissa Bejarano, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant and petitioner Sergio Navarro challenges the superior court's denial of his request to invalidate a guilty plea he entered in 1996. He claims the plea should be overturned because at the time he made it, he was unaware of the immigration consequences it would trigger. We find the claim is procedurally barred by Navarro's failure to obtain a certificate of probable cause to appeal. Therefore, we dismiss his claims.

FACTUAL AND PROCEDURAL BACKGROUND

In 1996, Navarro was charged with one count of possessing methamphetamine. In pleading guilty to the charge, he and his Attorney Robert Van Hoy filled out a preprinted plea form. The form explained that, by pleading guilty, Navarro was giving up certain rights, and if he were not a citizen of the United States, "the conviction for the offense charged may have consequences of deportation, exclusion from admission to the United States, or denial of naturalization[.]" Navarro signed his initials in the box next to this advisement. And he initialed the advisement which states, "I offer my plea . . . with full understanding of all the matters set forth in the pleading and in this form." By signing his name at the bottom of the form, Navarro further acknowledged he had "read, understood, and personally initialed each item above and discussed them with [his] attorney . . . ." Mr. Van Hoy signed the form as well, and in so doing, he declared he had fully explained its terms to Navarro.

At the plea hearing, Navarro represented to the court that he had gone over the plea form with Mr. Van Hoy and that his initials and signature on the form were proof he had read the form and understood its contents. The court accepted Navarro's guilty plea, finding it was "knowing, intelligent and voluntary." It then sentenced him to the low term of 16 months in prison. The plea also resulted in the termination of Navarro's probation in another case involving his possession for sale of methamphetamine and marijuana. With respect to that violation, the court imposed a concurrent sentence of 16 months.

Twelve years later, in 2008, Navarro filed in the superior court a motion to vacate his guilty plea, a petition for writ of coram nobis and a petition for writ of habeas corpus. He alleged he was facing deportation proceedings as a consequence of his guilty plea,[1] and unless his plea was vacated, he had "no hope at all of remaining in the United States with his family." He claimed his plea should be vacated for two basic reasons. First, the court failed to adequately inform him of the potential immigration consequences of his plea. (See Pen. Code, § 1016.5.)[2] And second, Mr. Van Hoy rendered ineffective assistance of counsel in connection with the plea.

With regard to the second claim, Navarro alleged Mr. Van Hoy "did not adequately advise him of the consequences of the plea agreement. Mr. Van Hoy failed to conduct an investigation into the immigration consequences of the plea and did not advise [him] that a substitute disposition would not have triggered adverse immigration consequences. Mr. Van Hoy additionally gave [him] misadvice regarding the immigration consequences of his plea by informing him . . . [it] was the best plea possible. Further, Mr. Van Hoy never challenged the 1996 charge for which there was a factual basis to do so."

In a declaration submitted to the superior court, Navarro admitted that when he pleaded guilty in 1996, he was "concerned about whether [he] would still be able to naturalize and become a U.S. citizen," and he "did not want to have any immigration problems." He also admitted he signed the plea form and initialed the statement explaining the immigration consequences of his plea. However, he claimed he did so at

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[1] The record shows that on November 1, 2006, an immigration judge denied Navarro's application for voluntary departure and ordered him removed to Mexico. Navarro is currently appealing that decision in federal court.

[2] That section states, "Prior to acceptance of a plea of guilty or nolo contendre to any offense punishable as a crime under state law, . . . the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (Pen. Code, § 1016.5, subd. (a).) All further statutory references are to the Penal Code.

Mr. Van Hoy's behest and never really understood what those consequences were. He further alleged, "If Mr. Van Hoy had ever explained the immigration consequences of the plea, I would never have signed the document" or pleaded guilty "to any offense that would affect my [immigration] status."

The defense also submitted declarations from Mr. Van Hoy and Attorney Gary H. Manulkin, a certified specialist in immigration law. Mr. Van Hoy stated his file of Navarro's 1996 case has been purged, and he has no memory of the case. Mr. Manulkin opined there were various "alternate pleas" available to Navarro when he pleaded guilty that would not have resulted in his being ordered deported from the United States.

At the hearing on Navarro's motion and petitions, the court was skeptical of Navarro's claim he was unaware of the immigration consequences of his guilty plea. In fact, the court noted Navarro had personally initialed the box on his plea form pertaining to this very issue. And when defense counsel asserted Mr. Van Hoy never told Navarro he could be deported as a consequence of the plea, the court correctly pointed out, "That's not what the attorney says." At that point, defense counsel refined her argument and acknowledged Mr. Van Hoy "does not recall" talking to Navarro about the immigration consequences of his plea. Although the court did not make any detailed legal or factual findings on the issues presented in Navarro's papers, it denied his claims for relief.

Navarro then requested a certificate of probable cause from the superior court. However, the court denied the request, finding "there is not probable cause for an appeal in this case." Nonetheless, Navarro has filed an appeal in which he challenges the superior court's denial of his motion and petitions. He has also filed a petition for writ of habeas corpus. We have consolidated the filings and will consider them together in this opinion.

DISCUSSION

In his appeal, Navarro contends the trial court failed to exercise its discretion, abused its discretion and erred as a matter of law in denying his motion to vacate his guilty plea and his petitions for writ of coram nobis and habeas corpus. In his habeas petition, he reiterates his claim Mr. Van Hoy was ineffective for failing to advise him of the immigration consequences of his plea and for failing to negotiate a better disposition of the case, i.e., one that did not trigger deportation proceedings against him. Relying on the fact Navarro failed to obtain a certificate of probable cause to appeal, the Attorney General contends his appeal and habeas petition must both be dismissed. We agree.

Section 1237.5 states, "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

Section 1237.5 is not a pointless technicality. By requiring a defendant who has pleaded guilty to obtain a certificate of probable cause to appeal, section 1237.5 promotes judicial economy by weeding out frivolous guilty plea appeals. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1095.) "Its assumption is that, as a general matter, a judgment of conviction entered on a defendant's plea of guilty or nolo contendere does not present any issue warranting relief on appeal, and hence should not be reviewed thereon." (*Id*. at p. 1097.)

Nevertheless, a certificate of probable cause is not required when the defendant's appeal is based on search and seizure issues or grounds that arose after his

plea was entered and do not affect the plea's validity. (*People v. Panizzon* (1996) 13 Cal.4th 68, 74; Cal. Rules of Court, rule 8.304(b).) Navarro tries to squeeze his appeal into the latter exception, arguing it is based not so much on the validity of his underlying plea as the manner in which the superior court denied his motion and petitions. By labeling the court's decision as an abuse of discretion and failure to exercise discretion, Navarro hopes that we will overlook the stated objective of his appeal, i.e., to overturn his conviction and allow him "to withdraw his guilty plea and enter a plea of not guilty."

However, in determining whether an appeal falls within an exception to the certificate of probable cause requirement, "the crucial issue is *what* the defendant is challenging, not the time or manner in which the challenge is made." (*People v. Ribero* (1971) 4 Cal.3d 55, 63, italics added.) A defendant may not avoid the requirement "by strategic maneuverings." (*People v. Manriquez* (1993) 18 Cal.App.4th 1167, 1170.) Thus, "[i]f a defendant challenges the validity of his plea by way of a motion to withdraw the plea, he cannot avoid the requirement[] . . . by labeling the denial of the motion as an error in a proceeding subsequent to the plea. To hold otherwise would be to invite such motions as a matter of course, and would be wholly contrary to the purpose of" the statute. (*People v. Ribero*, 4 Cal.3d at p. 63, fn. omitted.) Because Navarro's appeal, at bottom, challenges the validity of his plea, he was required to obtain a certificate of probable cause. (*Ibid*.) Having failed to do so, his appeal must be dismissed. (*In re Chavez* (2003) 30 Cal.4th 643, 651; *People v. Stubbs* (1998) 61 Cal.App.4th 243; *People v. Manriquez, supra*, 18 Cal.App.4th at p. 1170.)[3]

The same is true for his petition for a writ of habeas corpus. As our Supreme Court has explained, "[A] defendant who has filed a motion to withdraw a

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[3] Navarro correctly points out that in *People v. Kraus* (1975) 47 Cal.App.3d 568, the court allowed the defendant to appeal the denial of his motion to set aside his guilty plea without obtaining a certificate of probable cause. But in so doing, the court focused on the timing of the appeal and not on the fact it was an attack on the validity of the defendant's plea. (*Id*. at pp. 572-577.) Because this emphasis is out of step with Supreme Court authority requiring us to assess "what" the defendant is challenging (*People v. Ribero, supra*, 4 Cal.3d at p. 63), as opposed to "when" he is challenging it, we decline to follow *Kraus*.

guilty plea that has been denied by the trial court still must secure a certificate of probable cause in order to challenge on appeal the validity of the guilty plea. [Citations.] *A defendant who challenges the validity of such a plea on the ground that trial counsel rendered ineffective assistance in advice regarding the plea may not circumvent the requirements of section 1237.5 by seeking a writ of habeas corpus.* [Citations.]" (*In re Chavez, supra,* 30 Cal.4th at p. 651, italics added.)

Navarro contends the italicized statement is dicta because *Chavez* considered whether the defendant could be relieved from default for failing to file a timely request for a certificate of probable cause, not whether his attorney was ineffective for failing to provide proper advice in the plea process. But, if we look at the cases upon which the italicized statement is based, it is clear it applies in this case.

In *In re Brown* (1973) 9 Cal.3d 679, the defendant did allege her attorney was ineffective in advising her in connection with her guilty plea. After the trial court denied her motion to withdraw the plea, she petitioned for a writ of habeas corpus. However, because her ineffective assistance of counsel claim was cognizable on appeal, and because she failed to obtain a certificate of probable cause to appeal, the Supreme Court denied her petition. (*Id*. at pp. 682-683.) Describing the petition as "nothing more than an alternative appeal," the Supreme Court determined she could not circumvent the certificate of probable cause requirement by passing off her claim as a petition for writ of habeas corpus. (*Id*. at p. 683.)

Likewise, in *People v. Ribero, supra*, 4 Cal.3d at pp. 62-63, the Supreme Court looked to the substance of the alleged error in deciding whether the defendant could forego the requirements of section 1237.5 in challenging the trial court's refusal to let him withdraw his guilty plea. Finding defense counsel's alleged misrepresentations in the plea process went to the validity of the plea itself, the Supreme Court ruled the defendant could not challenge the trial court's decision without complying with section 1237.5. (*Id*. at pp. 62-63.)

The claim underlying Navarro's habeas petition is similar to those presented in *Brown* and *Ribero*. In alleging Mr. Van Hoy failed to inform him of the immigration consequences of his plea, Navarro contends his plea was not knowingly and intelligently made, which, if true, would render the plea invalid. But we know from *Chavez*, *Ribero* and *Brown*, that any such attack on the validity of a guilty plea, no matter what form it takes, must be accompanied by a certificate of probable cause.[4]

Requiring a certificate of probable cause makes good sense in this case, given the overlapping nature of Navarro's filings. In his appeal, Navarro challenges the superior court's denial of his habeas corpus and coram nobis petitions, both of which were premised on Mr. Van Hoy's alleged failure to give Navarro proper advice in the plea process. And that alleged failure is also the premise of Navarro's current habeas petition. Since Mr. Van Hoy's alleged incompetence is an underlying basis for both his appeal and his petition, Navarro "may not circumvent the requirements of section 1237.5 by seeking a writ of habeas corpus. [Citations.]" (*In re Chavez, supra*, 30 Cal.4th at p. 651, italics added.)

Navarro fears that if we require defendants to obtain a certificate of probable cause before allowing them to challenge the validity of their pleas on the basis of ineffective assistance of counsel, it will deny appellate review of any claim for which the superior court denies a request for a certificate of probable cause. That is not so. "Where a certificate of probable cause has been denied on the merits the remedy is to seek review of the propriety of the denial. On a timely application therefor, the writ of mandate lies. [Citation.]" (*In re Brown, supra*, 9 Cal.3d at p. 683.) In this case, though, Navarro did not challenge the trial court's denial of his request for a certificate of

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[4] Navarro cites *In re Resendiz* (2001) 25 Cal.4th 230 in support of his claim that a habeas petitioner alleging ineffective assistance in the plea process need not obtain a certificate of probable cause to seek relief in the appellate courts. But in *Resendiz*, the probable cause issue was neither raised nor discussed. Because "a case is authority only for a proposition actually considered and decided therein" (*In re Chavez, supra*, 30 Cal.4th at p. 656), *Resendiz* does not assist Navarro's cause.

probable cause by filing a petition for a writ of mandate. Therefore, "appellate review of the trial court proceedings on the merits [cannot] be had." (*Ibid*.)

DISPOSITION

Navarro's appeal and petition for a writ of habeas corpus are dismissed.

BEDSWORTH, ACTING P. J.

WE CONCUR:

O'LEARY, J.

FYBEL, J.