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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. RUDOLPH DARRYL JONES, Defendant and Appellant.	B170341 (Los Angeles County Super. Ct. No. LA039655)

APPEAL from a judgment of the Superior Court of Los Angeles County. Darlene E. Schempp, Judge. Affirmed.

Valerie G. Wass, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Jeffrey B. Kahan and Michael J. Wise, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Appellant Rudolph Jones was charged with nine robberies, evading a police officer, attempted robbery, and attempted murder. It was alleged that a principal was armed with a firearm and/or that appellant personally used a firearm during some of the felonies. It was also alleged that appellant had a total of 13 prior "strike" convictions. Appellant entered a plea of not guilty, and the matter proceeded to a jury trial as to appellant and his brother, Charles Jones, who was a codefendant in most of the charges.[1] In total, appellant was facing a maximum of approximately 321 years and Charles Jones was facing approximately 288 years.

On May 28, 2003, after five days of trial and the testimony of 11 prosecution witnesses, appellant entered a plea of guilty to count 9, pursuant to *People v. West* (1970) 3 Cal.3d 595. Count 9 involved the robbery of a liquor store and a liquor store patron by appellant and Charles Jones. Both men were armed with a handgun. Appellant admitted that he used a firearm in the commission of the offense, and also admitted two prior robbery convictions under the "three strikes" law. The plea agreement was for a determinate sentence of 40 years for Charles Jones and an indeterminate sentence of 40 years for appellant. On the same day and at the same time, Charles Jones entered a guilty plea and was immediately sentenced to 40 years as agreed.

Appellant asked that his sentencing be put over until August 15, 2003. The motion was granted. On August 15, 2003, again at appellant's request, sentencing was continued until September 25, 2003. On that date, at 9:45 a.m., appellant moved for yet another continuance, this time for two or three weeks so that appellant could obtain different counsel to file a motion to withdraw his plea. The trial court denied the motion for continuance, but put the matter over until that same morning at 11:30 a.m.

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[1] Charles Jones is not a party to this appeal.

When court reconvened, the trial judge indicated it was not inclined to continue the matter further, and inquired as to what would be the basis of a motion to withdraw the plea. Counsel for appellant stated that it would be based on the argument that appellant was "psychologically coerced" into agreeing to the plea in order for his brother to get a good deal. Argument by the parties proceeded back and forth on the subject. The prosecutor made the unrebutted statement that discussions for the plea bargain were initiated by the two defendants, at a time when the prosecution was virtually finished with its case-in-chief.

The motion for continuance was denied. The minute order states also that the motion to withdraw the plea was made and denied.[2] Appellant was sentenced to 40 years, calculated as 25 years to life, plus 10 years for the gun use; plus five years under the mandatory enhancement provided by Penal Code section 667, subdivision (a).

CONTENTIONS ON APPEAL

Appellant contends that his state and federal due process rights were violated by the trial court's refusal to grant a further continuance of the sentencing hearing, to allow appellant to file a written motion to withdraw his plea. In the alternative, appellant alleges that if his due process rights were not violated, he received

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[2] The parties take opposing views as to whether defense counsel actually made a motion to withdraw the plea or whether the court formally denied it. The reporter's transcript shows that the trial court invited defense counsel to explain why the plea was subject to being withdrawn. At the conclusion of argument by the parties, the trial court weighed the competing arguments and concluded by stating that the court was "going to proceed with sentence." We hold that a fair inference from the entirety of the reporter's transcript is that: the court denied the motion for a continuance; the court requested that the grounds for a motion to withdraw the plea be immediately made; such motion was made; the trial court gave each side ample opportunity to be heard; the trial court assessed the positions of each side; and the trial court impliedly denied the motion to withdraw the plea.

ineffective assistance of counsel for counsel's failure to timely bring a motion to withdraw his plea.

DISCUSSION

A criminal defendant convicted by a plea of guilty or nolo contendere may not appeal without first obtaining a certificate of probable cause (CPC) from the trial court. (Pen. Code, § 1237.5;[3] Cal. Rules of Court, rule 30(b).[4])

Appellant has not complied with either Penal Code section 1237.5 or rule 30(b) of the California Rules of Court. He attempts to avoid the impact of failing to do so by making the assertion that the failure of the trial court to grant him a further continuance of the sentencing hearing violated his state and federal due process rights. Citing *People v. Osorio* (1987) 194 Cal.App.3d 183 (*Osorio*), appellant argues that the postplea abuse of discretion by the trial court does not go to the validity of the plea,

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[3] Penal Code section 1237.5 states, in pertinent part: "No appeal shall be taken from a judgment upon a plea of guilty or nolo contendere . . . 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.

[4] California Rules of Court, rule 30 provides, in relevant part: "(b)(1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere . . . , the defendant must file in that superior court -- in addition to the notice of appeal required by (a) -- the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. . . . [¶] (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: [¶] (A) the denial of a motion to suppress evidence under Penal Code section 1538.5, or [¶] (B) grounds that arose after the entry of the plea *and do not affect the plea's validity*. [¶] (5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1)." (Italics added.)

and thus he may directly appeal that issue without the necessity of a CPC. We disagree.

In *Osorio*, the defendant was arrested for the transportation and sale of a large amount of heroin. He was facing 15 years in prison, but negotiated a plea bargain for five years. At sentencing, over the strenuous advice of his attorney, the defendant stated that he wished to withdraw his plea. The court continued the sentencing hearing for a few days to allow the defendant and his counsel to further confer. When the hearing reconvened several days later, the defendant was adamant about withdrawing his plea, and his attorney was equally adamant about not making such a motion. Thereafter, the motion was not made and the defendant was sentenced to the agreed-on five years. On appeal, the defendant urged that he had the right to have a motion to withdraw his plea heard by the court, without the necessity of a CPC. The appellate court agreed, stating that the appeal went to a postplea proceeding, and did not go to the validity of the plea itself. (*Osorio, supra*, 194 Cal.App.3d at p. 187.)

Osorio is not persuasive for several reasons. First, in the present matter, the motion to withdraw the plea was made (albeit orally) and denied by the court. Thus, appellant has had his hearing on the matter. Second, even if a motion to withdraw was not made, the logic used in *Osorio* and other appellate decisions relative to the avoidance of obtaining a CPC was disapproved in *People v. Panizzon* (1996) 13 Cal.4th 68, 89, footnote 15 (*Panizzon*).

In *Panizzon*, the defendant entered a no contest plea in exchange for a sentence of life with the possibility of parole, plus 12 years. He also agreed to waive his right to appeal. In exchange, the prosecution dismissed at least 10 other serious felony counts. After sentencing, the defendant made a motion to withdraw his plea on the basis that the sentence was cruel and unusual punishment. The People responded that the defendant failed to obtain a CPC, and in any event, waived his right to appeal as part of the plea bargain. The Supreme Court held that even though the challenge to the plea was couched in constitutional terms, it was still a contest to the sentencing itself,

and thus a CPC was required. (*Panizzon, supra*, 13 Cal.4th at p. 89.)[5] The court stated that the crucial inquiry as to whether a CPC is required is whether the challenge is *in substance* a challenge to the validity of the plea. (*Id.* at p. 76.)

In the present matter, the reason for the motion to continue the sentencing was to hire a new attorney to make a motion to withdraw the plea. Thus, the motion for a continuance in essence ran to the validity of the plea itself. Accordingly, appellant was required to obtain a CPC, and his failure to do so is fatal to this appeal. In sum, we conclude that whether a motion to withdraw was made or not, appellant was required to obtain a CPC, and his failure to do so dooms this appeal.

Our decision renders moot any further issues raised by appellant. However, we note that the ineffective assistance of counsel (IAC) contention of appellant is without merit. First, a motion to withdraw the plea was made, and appellant does not point out how defense counsel's argument in that regard was deficient. Second, even if it was determined that the discussions between the court and counsel did not amount to a motion to withdraw, appellant would fare no better. It is axiomatic that to prevail on a claim of IAC, appellant must show that, but for the error of counsel, a more favorable result would have ensued. (*Strickland v. Washington* (1984) 466 U.S. 668, 689.) Appellant has presented nothing to show that he would be able to provide any facts or argument different from that already presented to the trial court, or that any new facts or argument would result in the plea being set aside. We agree with the trial court's assessment that appellant knew exactly what he was doing when he entered the plea, that the plea bargain was very favorable to appellant, and that his protestations are nothing more than "buyer's remorse."

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[5] The Supreme Court also ruled that the waiver of appeal by the defendant was valid and enforceable.

DISPOSITION

The judgment is affirmed.

NOT FOR PUBLICATION.

_____, Acting P.J.

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We concur:

_____, J.

DOI TODD

_____, J.

ASHMANN-GERST