Filed 4/24/03 P. v. Philpot CA2/2

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. STANFORD L. PHILPOT, Defendant and Appellant.	B159694 (Los Angeles County Super. Ct. No. BA216519)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark V. Mooney, Judge. Dismissed.

Stephen M. Lathrop, 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, Assistant Attorney General, Lawrence M. Daniels and Jeffrey A. Hoskinson, Deputy Attorneys General, for Plaintiff and Respondent.

Stanford L. Philpot appeals from the judgment entered upon his negotiated plea of no contest to driving under the influence causing injury (Veh. Code, § 23153, subd. (a)), evading an officer causing death (Veh. Code, § 2800.3), and voluntary manslaughter (Pen. Code, § 192, subd. (a)),[1] a lesser included offense of the charged offense of murder. He was sentenced to 12 years 4 months in prison, comprised of the upper term of 11 years for manslaughter and a consecutive sentence for evading an officer, with the sentence for driving under the influence stayed pursuant to section 654.

Appellant contends that he was denied the effective assistance of counsel at his sentencing hearing when counsel failed to argue for imposition of the middle term for manslaughter and failed to object to the trial court's imposition of the upper term without a statement of reasons.

Respondent contends that appellant's claim should be dismissed because he failed to obtain a certificate of probable cause.

We conclude that the appeal must be dismissed.

FACTS AND PROCEDURAL BACKGROUND

The record discloses that on April 18, 2001, appellant was driving a vehicle with Erika Ochoa in the passenger seat. A Los Angeles police officer driving a marked patrol car attempted to pull appellant over because a check of the license plate of appellant's vehicle revealed that the car had been reported stolen. Appellant evaded the officer, driving at high speeds and running red lights. While driving at an excessive speed, he crashed into a building. Ochoa died from the injuries she sustained in the crash. Appellant displayed signs of being under the influence of cannabis at the time. He acknowledged that earlier in the day he had smoked two "blunts" and consumed a beer.

Appellant was charged by information with murder, gross vehicular manslaughter, driving under the influence causing injury, evading an officer causing death, and the

---

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

unlawful driving or taking of a vehicle with a prior similar conviction. The unlawful driving count was set aside pursuant to appellant's section 995 motion.

The prosecutor first offered a deal in which the sentence would be 14 years 4 months, then offered 13 years 4 months. When appellant indicated he would be willing to plead in return for a sentence of 12 years 4 months, the prosecutor obtained permission from her supervisor to make that offer. Defense counsel stated, "He will accept that. The maximum here is 12.4 [*sic*] years in prison. He will enter a plea of no contest to voluntary manslaughter, evading causing injury or death and D.U.I. causing injury or death." The prosecutor advised appellant of the consequences of his plea and asked, "Do you understand the maximum time you could be sentence[d] to would be 12 years and four months in state prison based upon your plea to those charges?" Appellant replied, "Yes." Appellant waived his constitutional rights and entered a plea of no contest to voluntary manslaughter, driving under the influence, and evading an officer. On motion of the prosecutor, the trial court dismissed the gross vehicular manslaughter count.

The trial court sentenced appellant to the upper term of 11 years for manslaughter with a consecutive term of one year four months for evading an officer, and stayed the two-year midterm for driving under the influence. There was no objection to this sentence or to the absence of a statement of reasons for the upper term.[2]

DISCUSSION

Appellant contends that his trial counsel rendered ineffective assistance by failing to argue for the middle term and by failing to object to the trial court's failure to state reasons for imposing the upper term. We must first determine whether he may raise this issue in the absence of a certificate of probable cause. We conclude that, whether the plea bargain is read as providing for a sentence of 12 years 4 months or a maximum term of 12 years 4 months, the issue he raises requires a certificate of probable cause, and, in

---

2 The probation officer found no circumstances in mitigation and stated that appellant's prior convictions or adjudications of crimes were numerous or of increasing seriousness and that he was on probation or parole at the time of the offenses. The probation officer recommended the middle term.

its absence, the appeal must be dismissed. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098-1099.)

Section 1237.5 provides, in pertinent part, "No appeal shall be taken by the defendant from a judgment of conviction 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 . . . ."

California Rules of Court, rule 31(d) (rule 31(d)) provides, in pertinent part, "If a judgment of conviction is entered upon a plea of guilty or nolo contendere, the defendant shall, within 60 days after the judgment is rendered, file as an intended notice of appeal the statement required by section 1237.5 of the Penal Code; but the appeal shall not be operative unless the trial court executes and files the certificate of probable cause required by that section. . . . [¶] If the appeal from judgment of a conviction entered upon a plea of guilty or nolo contendere is based solely upon grounds . . . occurring after entry of the plea which do not challenge its validity . . . the provisions of section 1237.5 of the Penal Code requiring a statement by the defendant and a certificate of probable cause by the trial court are inapplicable, but the appeal shall not be operative unless the notice of appeal states that it is based upon such grounds."

In *People v. Panizzon* (1996) 13 Cal.4th 68 (*Panizzon*), the Supreme Court held that where a defendant is sentenced in accordance with the terms of a plea bargain that provides for a particular sentence, and then attempts to challenge that sentence on appeal, he must secure a certificate of probable cause. The court explained that since the defendant is "in fact challenging the very sentence to which he agreed as part of the plea," the challenge "attacks an integral part of the plea [and] is, in substance, a challenge to the validity of the plea, which requires compliance with the probable cause certificate requirements of section 1237.5 and rule 31(d)." (*Id*. at p. 73.) The *Panizzon* court cited with approval the "substance-of-the-appeal" test used in *People v. McNight* (1985) 171

Cal.App.3d 620, 624 (*McNight*), where the defendant attempted to challenge the agreed-upon sentence on the grounds that trial counsel provided ineffective assistance by failing to argue mitigating factors and that the trial court erred in failing to consider such factors. In that case, the court held that a certificate of probable cause was required because the defendant's contention that a lesser sentence should have been imposed constituted a challenge to the validity of the plea. (*Ibid*.)

In *People v*. *Lloyd* (1998) 17 Cal.4th 658 (*Lloyd*), the Supreme Court considered whether a certificate of probable cause was required in a challenge to the trial court's refusal to strike prior convictions in a case where there was no plea bargain or agreement as to sentence. The Supreme Court reiterated that, pursuant to section 1237.5, a certificate of probable cause is not required when the defendant "'assert[s] only that errors occurred in the . . . adversary hearings conducted by the trial court for the purpose of determining the degree of the crime and the penalty to be imposed,' and does 'not attempt[] to challenge the validity of' the 'plea' itself [citations]." (*Lloyd*, *supra*, at p. 664.)

The court in *Lloyd* further stated, "In *Panizzon*, we recognized that, even if it purportedly challenges the sentence only, a defendant's appeal from a judgment of conviction entered on a plea of guilty or nolo contendere must be dismissed in the absence of a statement of grounds by the defendant and a certificate of probable cause by the trial court if, *in substance*, it challenges the validity of the plea. (*People v. Panizzon*, *supra*, 13 Cal.4th at p. 76.) It does so if the sentence was part of a plea bargain. (*Id*. at p. 79.) It does not if it was not (*id*. at p. 78) -- especially so if the claim or claims in question were 'reserved as part of the plea agreement' (*id*. at p. 78, fn. 8)." (*Lloyd*, *supra*, 17 Cal.4th at p. 665.)

Appellant's reliance on *People v. Ward* (1967) 66 Cal.2d 571 is misplaced. In *Ward*, there was no plea bargain and no specification of the sentence to be imposed. As the court pointed out in *Panizzon*, *supra*, 13 Cal.4th at page 79, *Ward* held that "compliance with section 1237.5 is not required where the defendant asserts that error occurred in post-plea adversary hearings conducted by the trial court for the purpose of

determining the degree of the crime and the penalty to be imposed." As the *McNight* court explained, *Ward* did not require a certificate of probable cause because "the sentencing procedures were 'altogether distinct' from the defendant's guilty plea . . . ." (*McNight*, *supra*, 171 Cal.App.3d at p. 625.) In such a case, as *Lloyd* makes clear, a challenge to the sentence challenges matters arising "after entry of the plea" (rule 31(d)) and a certificate of probable cause is not required.

In *People v. Stewart* (2001) 89 Cal.App.4th 1209 (*Stewart*), the court relied on *Panizzon* and *McNight* to dismiss the appeal in the absence of a certificate of probable cause where the defendant contended that the trial court abused its discretion in imposing a six-year sentence pursuant to a plea bargain that specified a potential maximum term of six years.[3] Quoting from *People v. Young* (2000) 77 Cal.App.4th 827, 832-833, the court stated, "'[B]y attacking the maximum term, defendant seeks to void a term of the agreement to which both parties agreed to abide [citation], and is "in substance, attacking the validity of the plea." [Citation.] Accordingly, section 1237.5 requires a showing of reasonable grounds to challenge the validity of that which was agreed before an appeal can be pursued. Defendant's attack on the legality of his maximum sentence is an effort to unilaterally improve, and thus alter, the terms of that which was agreed and thus should not be permitted without a certificate of probable cause. To allow defendant to challenge a term in his plea agreement without obtaining a certificate of probable cause would defeat the purpose of the statute and undermine the benefits -- certainty and economy -- that a plea agreement is intended to achieve.' [Citation.]" (*Stewart*, *supra*, at p. 1218.)

The *Stewart* court also pointed out that the plea bargain in that case did not have any provision preserving a challenge to the trial court's imposition of the negotiated

---

[3] The issue of whether a certificate of probable cause is required to raise the claim of abuse of discretion in imposition of a sentence where the defendant pled guilty or no contest pursuant to an agreement that included that sentence as the maximum potential term is currently before the Supreme Court in *People v. Buttram* (2001) 94 Cal.App.4th 1249, review granted March 13, 2002, S103761, and other cases.

maximum term. In that way, the case before it differed from the situation in *People v. Cole* (2001) 88 Cal.App.4th 850, where the court found that a certificate of probable cause was not required to challenge the trial court's refusal to strike prior convictions because the plea agreement contemplated a hearing at which the trial court would consider that issue. (*Id*. at pp. 869-871.) In the instant case, although defense counsel stated that "[t]he maximum here is 12.4 years" and the prosecutor employed the term "maximum time" of 12 years 4 months in explaining the consequences of the plea, the offer of 12 years 4 months was made by the prosecutor only after application to her supervisor following appellant's demand for that sentence, after he rejected her offers of 14 years 4 months and 13 years 4 months, and there was no indication that the parties understood the bargained-for term to be subject to further adversary proceedings.

For purposes of the issue presently before us, we need not decide whether the plea bargain provided for a particular term or for a maximum term. The sentence which was imposed was part of a plea bargain, and no reservation of the issue of the appropriate sentence was reserved as part of that plea agreement. Whether the plea bargain is read as providing for a term of 12 years 4 months (*Panizzon, supra,* 13 Cal.4th at pp. 76-79) or for a maximum term of that length (*Stewart, supra,* 89 Cal.App.4th at pp. 1217-1218), we conclude, pursuant to existing authority, that, in the absence of a certificate of probable cause, the appeal must be dismissed.

DISPOSITION

The appeal is dismissed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P.J.
BOREN

_____, J.
NOTT