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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DARIOUS HOUSTON,

Defendant and Appellant.

B293022

Los Angeles County
Super. Ct. No. PA086261

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Terrell, Judge. Dismissed.

Elana Goldstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Darious Houston argues the trial court erred by denying his request to continue sentencing to allow newly-retained counsel to file a motion to withdraw his no contest plea and by failing to consider his ability to pay required fines and court fees. Because neither issue is cognizable in this appeal, we dismiss the appeal.

BACKGROUND¹

By information dated March 13, 2018, defendant was charged with one count of driving under the influence with prior (Veh. Code, § 23152, subd. (a)/23550.5, subd. (a); count 1). The information also alleged one strike prior (Pen. Code,² § 667, subds. (b)–(i); § 1170.12, subds. (a)–(d)) and one prison prior (§ 667.5, subd. (b)). Defendant pled not guilty and denied the allegations.

On August 27, 2018, defendant withdrew his not guilty plea and entered a plea of no contest on the following terms: He would be granted five years' probation and participate in the Sentenced Offender Drug Court program; if he was not accepted into the program, he would be sentenced to two years in state prison. Sentencing was continued to allow the drug court to determine defendant's eligibility.

When defendant arrived in drug court two weeks later, he explained that he did not want to participate in the program after

¹ Because the facts of the case are irrelevant to the issues in this appeal, we do not address them.

² All undesignated statutory references are to the Penal Code.

all and wished to withdraw his no contest plea. He was sent back to the trial court for a hearing on the request.

Back in the trial court, defendant asked for a continuance to allow newly-retained counsel, who was not present, to file a motion to withdraw the plea.³ The court denied the request, sentenced defendant to the agreed-upon middle term of two years for count 1 (Veh. Code, § 23152, subd. (a)/23550.5, subd. (a)), and struck the prior-conviction allegations.

DISCUSSION

Defendant argues the trial court erred by denying his continuance request and by failing to consider his ability to pay required fines and court fees.

1. The Continuance Request

Defendant asserts the court erred when it denied his motion to continue sentencing to allow newly-retained counsel to file a motion to withdraw the no contest plea. This claim is not cognizable on appeal.

Under section 1237.5, with exceptions that do not apply here, a defendant may not appeal from a judgment of conviction upon a guilty or no contest plea unless he has obtained from the trial court a certificate of probable cause based on a showing of reasonable constitutional, jurisdictional, or other grounds for appeal going to the legality of the proceedings. (*People v. Johnson* (2009) 47 Cal.4th 668, 676–677 (*Johnson*).) If a defendant who pleads guilty or no contest does not obtain a certificate of probable cause before challenging the validity of his plea on

³ Defendant's court-appointed attorney could not ethically file the motion because she did not see a valid basis for it.

appeal, we must dismiss the appeal. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1096.) On the other hand, if the defendant only raises issues that occur after the plea and do not affect its validity, we may reach the merits of his appeal without a certificate of probable cause. (Cal. Rules of Court, rule 8.304(b)(4)(B).)

“In determining whether an appeal is cognizable without a certificate of probable cause, ‘ “the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.” [Citation.]’ [Citation.] If the challenge is in substance an attack on the validity of the plea, the defendant must obtain a certificate of probable cause.” (*People v. Emery* (2006) 140 Cal.App.4th 560, 564–565 [appeal challenging denial of a continuance to permit motion to withdraw requires certificate of probable cause]; *Johnson, supra*, 47 Cal.4th at pp. 679–682 [claim of ineffective assistance of counsel at hearing on motion to withdraw plea requires certificate of probable cause].) Accordingly, “[w]hether the appeal seeks a ruling by the appellate court that the guilty plea was invalid, or merely seeks an order for further proceedings aimed at obtaining a ruling by the trial court that the plea was invalid, the primary purpose of section 1237.5 is met by requiring a certificate of probable cause for an appeal whose purpose is, ultimately, to invalidate a plea of guilty or no contest.” (*Johnson*, at p. 682.)

Here, although defendant challenges not the plea itself but rather the court’s denial of a continuance to allow newly-retained counsel to submit a motion to withdraw the plea, his argument

still amounts to an attack on the plea.⁴ Because defendant did not obtain a certificate of probable cause to appeal the order denying his continuance request, that claim is not cognizable on appeal.

2. Fines and Fees

At sentencing, the court imposed the minimum required fines and court fees: a \$300 restitution fine (§ 1202.4, subd. (b)), a \$40 operations assessment (§ 1465.8), and a \$30 conviction assessment (Gov. Code, § 70373). Defendant asks us to stay the fine and strike the fees under *People v. Dueñas* (2019) 30 Cal.App.5th 1157. This claim, too, is not properly before us.

Section 1237.2 provides: “An appeal may not be taken by the defendant from a judgment of conviction on the ground of an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction in the trial court, which may be made informally in writing.” (See *People v. Alexander* (2016) 6 Cal.App.5th 798.)

To be sure, that prerequisite does not apply when the appeal also presents other issues. (§ 1237.2; *People v. Mendez*, *supra*, 19 Cal.4th at p. 1101.) But, as we explained above, defendant’s only other claim is not cognizable on appeal. Accordingly, his challenge to the court’s imposition of fines and fees must be dismissed without prejudice to any right he has to seek relief in the trial court.

⁴ We note that defendant claimed below that his plea was “invalid” because it was “signed under duress and coercion.”

DISPOSITION

The appeal is dismissed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

DHANIDINA, J.