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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ELMER VENTURA,

Defendant and Appellant.

B231908

(Los Angeles County  
Super. Ct. No. BA347204)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Drew E. Edwards, Judge. Reversed and Remanded.

Marilyn Drath, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant  
Attorney General, Lance E. Winters, Assistant Attorney General, Kenneth C.  
Byrne and E. Carlos Dominguez, Deputy Attorneys General, for Plaintiff and  
Respondent.

Defendant Elmer Ventura appeals from the judgment following his plea of no contest to conspiracy to possess negotiable instruments with the intent to purchase cocaine (count 1), and possession of money in excess of \$100,000 obtained by narcotics trafficking (count 2). (Pen. Code, § 182, subd. (a)(1), and Health & Saf. Code, § 11370.6, subd. (a), respectively). He contends that the case must be remanded to permit him to withdraw his plea, because it was induced by the improper promise that he could obtain review on appeal of the trial court's denial of his motion to disclose the identity of a confidential informant. Respondent concedes that the case must be remanded, and we agree.

### **BACKGROUND**

Defendant initially pled not guilty to the charges. By an initial and supplemental motion, he sought discovery of the identity of a confidential informant and related information. The court ordered the prosecution to produce police reports related to the internal tracking numbers submitted by the Fresno Police Department for an in camera review. Defendant later filed a second and third supplemental motion for informant discovery. The record reflects that the court and counsel conferred on discovery issues, but we have not been provided a reporter's transcript of the discovery proceedings and the record does not show the result of the in camera hearing or any dispositive rulings on defendant's discovery motions. However, according to defendant's second supplemental motion, the court denied disclosure of any information other than a summary of payments to the informant in 30 other cases and a Fresno police report – information the defense already possessed.

In a later proceeding on February 2, 2011, the court stated: "I've indicated to [defense counsel] that, if [defendant] elects to plead open to the court, the

indicated sentence would be the low term of two years in the state prison, the other count would be stayed pursuant to Penal Code section 654, and I would allow [defendant] bail on appeal and the right to appeal the discovery issues in this case.” The prosecutor then took defendant’s no contest plea to both counts.

Following the pleas, the court agreed to sign a certificate of probable cause. Defense counsel clarified: “The defendant is appealing . . . whether or not the court properly denied his motion for discovery and for production of certain information. And for the purpose of the record, both sides agree that that matter affected the defendant’s decision whether to plead guilty or not, so it’s a material matter so that the court will understand that he’s only pleading guilty, one of the reasons is because of the denial of the motion.” The court replied, “That will be noted for the record,” and asked the prosecutor whether he would stipulate “that’s a part of the reason [that defendant] is electing to plead open to the court at this time.” The prosecutor declined to “get involved” in the reasons for defendant’s plea.

Defense counsel then stated: “Well, in any event, I think the record is clear that we only took the plea because it materially affected . . . in our opinion his rights and the evidence he needed to go to trial since the court denied the motion. We’re appealing that as a matter of law pursuant to Penal Code section 1259.”<sup>1</sup> The court then found that defendant had knowingly and voluntarily waived his rights, and the court accepted the plea. The court sentenced defendant to the low term of two years on count 2, stayed the sentence on count 1 under Penal Code section 654, and released defendant on bail pending appeal. The court also signed

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<sup>1</sup> Counsel was apparently referring to that portion of Penal Code section 1259 which provides in relevant part: “Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling.”

a certificate of probable cause which described the issue to be raised as “The Court’s denial of defendant’s motion for discovery regarding informants deprived the defendant of a fair trial in this matter, effectively inducing his plea.”

## **DISCUSSION**

A claim that a guilty or no contest plea was induced by a promise beyond the court’s power to make is cognizable on appeal. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 896 (*DeVaughn*).) As respondent concedes, here the record makes clear that defendant’s plea was predicated on his right to appeal the denial of informant related discovery. However, the court’s denial of informant discovery cannot be raised following a guilty or no contest plea (*People v. Collins* (2004) 115 Cal.App.4th 137, 149; *People v. Castro* (1974) 42 Cal.App.3d 960, 963), and the court’s signing of a certificate of probable cause does not make it appealable (*DeVaughn, supra*, 18 Cal.3d at p. 895). Defendant’s remedy is a reversal of the judgment and a remand to the trial court to permit him to withdraw his plea if he chooses. (*People v. Hollins* (1993) 15 Cal.App.4th 567, 574-575.) If he does not withdraw his plea, the judgment should be reinstated.

## **DISPOSITION**

The judgment is reversed and the case is remanded to the superior court with instructions to permit defendant to withdraw his no contest plea if he chooses. If he does not withdraw the plea, the judgment shall be reinstated.

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WILLHITE, Acting P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.