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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.

EVELYN LILLIAN PIERCE,

Defendant and Appellant.

B295687

Los Angeles County
Super. Ct. No. KA119504

APPEAL from a judgment of the Superior Court of Los Angeles County, Stacy Wiese, Judge. Appeal dismissed.

Aurora Elizabeth Bewicke, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Assistant Attorney General, Jason Tran and Shezad H. Thakor, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Evelyn Lillian Pierce appeals from the judgment entered after she pled no contest to identity theft with prior. She argues the trial court erred by failing to award her 52 days of custody credit and failing to consider her ability to pay required fines and court fees. Because neither issue is cognizable in this appeal, we dismiss the appeal.

BACKGROUND¹

On February 16, 2018, defendant was convicted, in Los Angeles Superior Court case No. KA116807, of one count of identity theft (Pen. Code,² § 530.5, subd. (a)) and one count of bringing drugs into a prison (§ 4573.5). The court suspended imposition of sentence and placed her on three years' formal probation.

In this matter, case No. KA119504, by felony complaint dated November 13, 2018, the People alleged defendant had committed two counts of felony identity theft with prior (§ 530.5, subd. (c)(2); counts 1 & 2) and one count of misdemeanor possession of a smoking device (Health & Saf. Code, § 11364; count 3). Defendant pled not guilty and denied the allegations.

On December 3, 2018, defendant withdrew her not guilty plea and entered a negotiated plea of no contest to count 1. The court sentenced her to the middle term of two years in local custody, ordered her to pay a \$300 restitution fine (§ 1202.4,

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

² All undesignated statutory references are to the Penal Code.

subd. (b)), a \$40 operations assessment (§ 1465.8, subd. (a)(1)), and a \$30 conviction assessment (Gov. Code, § 70373), and awarded her zero days of custody credit. The court dismissed the remaining counts.

Based on the no contest plea in this case, the court found defendant in violation of her probation in case No. KA116807. The court terminated probation in that case, sentenced defendant to 52 days in county jail, and awarded her 52 days of custody credit. The court waived all non-mandatory fees based on defendant's inability to pay.

Defendant filed a timely notice of appeal. Though she asked the court to issue a certificate of probable cause, the court did not act on the request.

DISCUSSION

Defendant argues she is entitled to 52 days of presentence custody credit in this matter and asks us to remand to allow the court to determine her ability to pay fines and fees under *People v. Dueñas* (2019) 30 Cal.App.5th 1157.

1. **The custody credit issue is not cognizable in this appeal because defendant did not obtain a certificate of probable cause.**

1.1. Plea Bargains

A plea bargain is “a negotiated agreement between the prosecution and the defendant by which a defendant pleads guilty to one or more charges in return for dismissal of one or more other charges.” (*People v. Martin* (2010) 51 Cal.4th 75, 79.) The agreement must be submitted to the trial court for approval. (§ 1192.5.)

Although the court can reject a plea agreement in its entirety, it may not change its terms unless the parties agree. (*People v. Segura* (2008) 44 Cal.4th 921, 931; § 1192.5 [court accepting a plea bargain “may not proceed as to the plea other than as specified in the plea”].) If the court approves the agreement, both parties must adhere to its terms. (*People v. Walker* (1991) 54 Cal.3d 1013, 1020, overruled on another point by *People v. Villalobos* (2012) 54 Cal.4th 177, 184; *Santobello v. New York* (1971) 404 U.S. 257, 262.) The trial court’s approval also “binds the court to the terms of the plea bargain, and the defendant’s sentence must be within the negotiated terms.” (*People v. Martin, supra*, 51 Cal.4th at p. 79.)

Under section 2900.5, the “ ‘court imposing a sentence’ ” in a criminal case must “calculate the exact number of days the defendant has been in custody ‘prior to sentencing,’ add applicable good behavior credits earned pursuant to section 4019, and reflect the total in the abstract of judgment. [Citations.]” (*People v. Buckhalter* (2001) 26 Cal.4th 20, 30.) But a defendant may, as part of a plea agreement, validly waive custody credits to which she would otherwise be entitled. (*People v. Johnson* (2002) 28 Cal.4th 1050, 1053–1055.)³

1.2. Certificate of Probable Cause

Under section 1237.5, with exceptions that do not apply here, a defendant may not appeal from a judgment of conviction

³ “As with the waiver of any significant right by a criminal defendant, a defendant’s waiver of entitlement to section 2900.5 custody credits must, of course, be knowing and intelligent.” (*People v. Johnson, supra*, 28 Cal.4th at p. 1055; see *People v. Arnold* (2004) 33 Cal.4th 294, 308 [test for valid waiver].)

upon a guilty or no contest plea unless she 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.) If a defendant who pleads guilty or no contest does not obtain a certificate of probable cause before challenging the validity of her plea on 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 her appeal without a certificate of probable cause. (Cal. Rules of Court, rule 8.304(b)(4)(B).) Thus, the crucial question here, disputed by the parties, is whether defendant’s challenge to the court’s failure to award custody credits is a challenge to the validity of the plea. (*People v. Buttram* (2003) 30 Cal.4th 773, 781–782.)

Generally, when the parties agree to a specific sentence, a defendant seeking to reduce that sentence on appeal is necessarily challenging the validity of the plea itself and must obtain a certificate of probable cause. (*People v. Panizzon* (1996) 13 Cal.4th 68, 73, 79.) Similarly, “a certificate of probable cause is required if the challenge goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement” because “an attack upon an integral part of the plea agreement ‘is, in substance, a challenge to the validity of the plea’” (*People v. Johnson, supra*, 47 Cal.4th at pp. 678–679.)

Here, the People argue defendant waived her right to presentence custody credit as part of her plea agreement;

defendant argues she did not.⁴ To resolve this issue, we must examine the plea agreement.

1.3. A plea bargain is interpreted as a contract.

“A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. [Citations.]” (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) The existence and scope of any waiver, therefore, “ ‘is approached like a question of contract interpretation—to what did the parties expressly or by reasonable implication agree? [Citations.]’ [Citation.]” (*People v. Becerra* (2019) 32 Cal.App.5th 178, 189.)

“ ‘The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.] If contractual language is clear and explicit, it governs. [Citation.]’ ” (*People v. Shelton, supra*, 37 Cal.4th at p. 767.) If the terms are ambiguous, the “ ‘mutual intention to which the courts give effect is determined by objective manifestations of the parties’ intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties. [Citations.]’ [Citations.]” (*Ibid.*)

⁴ While defendant also argues her waiver was not knowing and intelligent, she never explains why that claim is cognizable in this appeal despite her failure to obtain a certificate of probable cause. (See *People v. Espinoza* (2018) 22 Cal.App.5th 794, 800–802 [claim that waiver was not knowing and intelligent requires certificate of probable cause].) Accordingly, we do not address the point.

“The burden is on the party claiming the existence of the waiver to prove it by evidence that does not leave the matter to speculation, and doubtful cases will be resolved against a waiver. [Citation.]’ ” (*People v. Wright* (2019) 31 Cal.App.5th 749, 754.) Here, the record demonstrates that the waiver was a term of the plea bargain, and that the term was integral to the agreement.

1.4. The credit waiver was an integral term of the plea bargain.

On December 3, 2018, the court held a joint hearing in this case (No. KA119504) and the probation case (No. KA116807). The court explained, “it’s my understanding [that] in case 9504, you will enter a no contest plea to count 1, which is the crime of identity theft, and also admit your prior conviction, and the court will find you in violation in case 6807 based upon your plea. In 9504, which is the new case, you’ll get two years’ local custody, no credit. Then, the court will give you your credit in [case] 6807, which is 52 days, and terminate your probation in [that] case.” The court asked, “Is that your understanding?” Defendant answered, “Yes.”

In taking the plea, the prosecutor explained that defendant was charged in this case (No. KA119504), in count 1, with identity theft with prior (§ 530.5, subd. (c)(2)), and that it was alleged that she had been convicted in case No. KA116807 of one count of identity theft (§ 530.5, subd. (a)). Defendant said she understood the charge and allegation. After waiving her constitutional rights, defendant pled no contest to count 1 in this case and admitted the prior conviction in the probation case.

The court proceeded to sentencing. In this case (No. KA119504), the court ordered: “You are ordered to serve two years in state prison. On this case, you have zero custody credits.

That is [the] midterm on count 1. Pursuant to Penal Code section 1170(h), this is to be served in county jail.” The remaining counts were dismissed.

Then, in the probation case (No. KA116807), the court ordered: “The court is going to find you in violation of your probation based upon your plea in 9504. Probation remains revoked. You are ordered to serve 52 days in Los Angeles County Jail. You have credit for 52 [days]. That’s 26 actual plus 26 good time/work time. ... All obligations on this case are deleted. Probation is terminated.”

On this record, the terms of the agreement are clear. Defendant faced a maximum sentence of five and a half years across her two cases—four years two months in this case and 16 months in the probation case, for which imposition of sentence had been suspended. Defendant agreed to plead no contest to count 1 in this case, thereby admitting the probation violation in the earlier case. In exchange, she would receive two years’ local time in this case, the remaining counts in this case would be dismissed, *and* she would be sentenced to only 52 days in the probation case. That is, instead of five and a half years for the two cases, defendant received just under two and a half years.

Because the custody credit defendant had earned comprised her entire sentence in the probation matter, waiving that credit for the new case ensured she would serve that sentence consecutively to rather than concurrently to her new sentence. As such, it was an integral term of the plea agreement—and because it was an integral term of the agreement, to challenge it, defendant was required to obtain a certificate of probable cause. (*People v. Buttram, supra*, 30 Cal.4th at pp. 781–782.)

2. Defendant's ability to pay fines and fees is not cognizable in this appeal because she failed to comply with section 1273.2.

Defendant contends the court erred by imposing a \$300 restitution fine (§ 1202.4, subd. (b)), a \$40 operations assessment (§ 1465.8, subd. (a)(1)), and a \$30 conviction assessment (Gov. Code, § 70373) without first determining her ability to pay. The People argue the issue is not cognizable in this appeal because defendant failed to comply with section 1237.2.

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 properly before us. Accordingly, her challenge to the court's imposition of fines and fees must be dismissed without prejudice to any right she has to seek relief in the trial court.

DISPOSITION

The appeal is dismissed.

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LAVIN, Acting P. J.

WE CONCUR:

EGERTON, J.

DHANIDINA, J.