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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER L. BURCHETT,

Defendant and Appellant.

B281502

(Los Angeles County
Super. Ct. No. BA447928)

APPEAL from a judgment of the Superior Court of Los Angeles County, Fredrick N. Wapner, Judge. Affirmed.

Mark S. Devore, 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, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Allison H. Chung, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

After pleading no contest to felony assault with a deadly weapon and admitting three prior Illinois felony convictions (two of which the trial court subsequently struck), defendant Peter L. Burchett contends he received ineffective assistance of counsel and seeks reversal and a remand for resentencing. The trial court signed a certificate of probable cause, but it did not include any facts to support its issuance. Defendant has not demonstrated any prejudice, and we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant's attack on the victim with a metal pole was captured on a security video. The victim refused treatment and refused to identify himself.

Defendant was charged with assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)).¹ The information alleged he had three prior strike convictions in Illinois for rape, robbery, and sexual assault.

In the midst of jury selection, defense counsel announced defendant "wishe[d] to plead open to the court." After a considerable exchange with the trial court concerning the potential range of any prison sentence and the appropriate advisements and waivers, defendant pleaded no contest to the pending charge of assault with a deadly weapon in violation of section 245, subdivision (a)(1). Defendant also admitted the three prior Illinois convictions. The matter was continued for sentencing.

On the first scheduled date for the sentencing hearing, defense counsel requested a continuance to finish preparation of

¹ All statutory references are to the Penal Code.

a *Romero*² motion. On the next scheduled date, defendant objected to the prosecutor's involvement in the sentencing hearing and said, "So now I feel like I'm ready to go to bench trial instead of jury trial. That way I know for a fact that it will be up to the judge." Defendant added that if he proceeded with a bench trial, his lawyer "would probably convince you [the judge] that it was a different charge instead of what it is," i.e., a lesser offense than assault with a deadly weapon.

After the exchange, the trial court asked if defense counsel believed there were grounds to withdraw the plea. Defense counsel did not; and the trial court ruled, "to the extent that [defendant's] statement is a motion to withdraw the plea, it's denied."

Counsel then addressed the *Romero* motion and sentencing issues. Defense counsel asked that the three Illinois strikes be stricken and defendant sentenced to nine years in prison "at 50 percent." The prosecution argued no more than one strike should be stricken and defendant should be sentenced to 30 years to life.

The trial court granted the *Romero* motion in part and struck the robbery and sexual assault prior convictions. Defendant was sentenced to the middle term of three years for the assault with a deadly weapon, doubled for the remaining rape strike, plus five years for the prior rape conviction, for a total sentence of 11 years "at 80 percent."

Defendant filed a notice of appeal in pro per. The trial court signed a certificate of probable cause, but it contained no facts that supported its issuance. We ordered the appointment of counsel for defendant and asked the parties to brief "the issue of whether this matter is appealable."

² *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

Appointed counsel filed a letter brief in response. He urged the matter was appealable in part “because in substance [defendant] attacks the legality of his open plea to the court [and] no certificate of probable cause was necessary.” The Attorney General did not submit a response.

DISCUSSION

Defendant raises a single issue on appeal. He asserts defendant’s trial counsel was ineffective for failing to challenge the validity of the Illinois robbery conviction on the basis the crime of robbery in that state does not include the intent to permanently deprive the victim of the property. The Attorney General addresses the issue on the merits, arguing substantial evidence supported a finding that the Illinois robbery conviction constituted robbery under California law. Alternatively, the Attorney General argues if the record is not sufficient to “show that the Illinois robbery was a serious felony, a retrial of that strike allegation is permissible.”

Neither side addresses the certificate of probable cause/appealability issue in the briefs. Additionally, on one page of the opening brief, defendant’s appellate counsel acknowledges both the robbery and sexual assault convictions were stricken; but on the next page, he argues if the robbery conviction had been dismissed and defendant left with “only two strikes,” there was “a reasonable probability . . . the [trial] court would have remanded a no-strike sentence.”

To the extent defendant contends counsel was ineffective for permitting him to plead no contest to the out-of-state robbery conviction, a certificate of probable cause was required. (§ 1237.5; Cal. Rules of Court, rule 8.304(b).) The certificate of

probable cause signed by the trial court did not include any facts that justified its issuance. Nor did the notice of appeal include a statement of grounds relating to the robbery conviction. (Cal. Rules of Court, rule 8.304(b).)

Defendant's reliance on *People v. Panizzon* (1996) 13 Cal.4th 68 (*Panizzon*) and *People v. Lloyd* (1998) 17 Cal.4th 658 (*Lloyd*) to argue no certificate of probable cause was required because he made an "open plea to the court" overstates the holdings in those opinions. In *Panizzon*, the Supreme Court noted, "the critical inquiry is whether a challenge to the sentence is *in substance* a challenge to the validity of the plea, thus rendering the appeal subject to the requirements of section 1237.5." (*Panizzon, supra*, 13 Cal.4th at p. 76; see also *Lloyd, supra*, 17 Cal.4th at p. 665.) Here, the substance of defendant's appeal *is* his challenge to the validity of the plea, i.e., he was provided ineffective assistance of counsel when his attorney did not contest the Illinois robbery conviction under California law and instead permitted defendant to admit it. A certificate of probable cause was required.

Although the certificate of probable cause was not supported by any facts, it issued. Accordingly, we turn to the merits of defendant's appeal. But we find no basis for reversal.

The trial court struck the Illinois robbery and sexual assault convictions. Defendant has not explained how he was prejudiced by his attorney's failure to seek dismissal of the out-of-state robbery conviction when it was stricken and did not factor into the trial court's sentencing decision. Defendant admitted the prior rape conviction, and the trial court properly used it to double the middle term sentence for the current offense under the Three Strikes Law and add a consecutive five years for the prior

serious felony (rape) conviction (§ 667, subd. (a)). There was no error.

DISPOSITION

The judgment is affirmed.

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DUNNING, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

* Judge of the Orange Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.