Filed 10/24/17 P. v. Medina CA2/6

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>FABIAN ANDREW MEDINA,<br><br>Defendant and Appellant. | 2d Crim. No. B280622<br>(Super. Ct. No. 2014025554)<br>(Ventura County) |

Fabian Andrew Medina pled guilty to one count of second degree commercial burglary (Pen. Code,[1] §§ 459, 460) and one count of identity theft (§ 530.5, subd. (a)). The trial court sentenced him to 16 months in state prison. Medina contends we should reverse his conviction and sentence because entry into a commercial establishment to use stolen credit cards must be charged as misdemeanor shoplifting pursuant to the provisions of Proposition 47, the Safe Neighborhoods and Schools Act. (§ 459.5, subd. (b); see *People v. Gonzales* (2017) 2 Cal.5th 858,

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

876-877 (*Gonzales*).) The Attorney General argues we should dismiss Medina's appeal because he neither filed a petition for resentencing (§ 1170.18, subds. (a) & (f)) nor obtained a certificate of probable cause (§ 1237.5). We agree with the Attorney General's second argument, and dismiss the appeal.

## BACKGROUND

Surveillance video shows Medina using a stolen credit card to purchase goods at a discount store in Simi Valley. Additional video shows him attempting to use another stolen credit card to purchase goods at a Thousand Oaks department store. When police arrested Medina and his codefendant a few days later, they found receipts for one of the transactions on the codefendant.

A magistrate held Medina to answer for two counts of burglary and two counts of identity theft. Medina moved to set aside the information, arguing he should be charged with shoplifting under Proposition 47. The trial court noted that the issue of whether Medina's crimes should be charged as misdemeanors was pending before the Supreme Court, but denied the motion. Medina then pled guilty to one count of second degree commercial burglary and one count of identity theft.

Medina did not seek or obtain a certificate of probable cause from the trial court. He timely filed a notice of appeal. The notice states that the appeal does not attack the validity of his plea.

## DISCUSSION

The Attorney General argues we should dismiss the appeal because Medina did not obtain a certificate of probable cause from the trial court. We agree.

In general, a defendant may not appeal a guilty plea unless the trial court has executed and filed a certificate of probable cause. (§ 1237.5, subd. (b).) A certificate is required for "a challenge to a negotiated sentence imposed as part of a plea bargain" (*People v. Panizzon* (1996) 13 Cal.4th 68, 79 (*Panizzon*)) because "[s]uch an agreed-upon aspect of the sentence cannot be challenged without undermining the plea agreement itself" (*People v. Johnson* (2009) 47 Cal.4th 668, 678). A certificate is not required if the appeal is based on "[g]rounds that arose after entry of the plea and do not affect the plea's validity," however. (Cal. Rules of Court, rule 8.304(b)(4)(B).) This exception permits a defendant to appeal "issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed." (*Panizzon*, at p. 74.) "[T]he 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. [Citation.]" (*Id*. at p. 76, original italics.)

Medina's appeal must be dismissed because his challenge is, in substance, a challenge to the validity of his plea. (*People v. Jones* (1995) 33 Cal.App.4th 1087, 1092 ["Claims regarding the illegality of the judgment, whether on jurisdictional or other grounds, are precisely the types of claims which are covered by [section 1237.5] and require a certificate of probable cause"].) The sentence imposed—16 months—was substantially less than the nine years and four months delineated in his plea agreement. He was thus required to obtain a certificate of probable cause to appeal. (*People v. Cuevas* (2008) 44 Cal.4th 374, 376-378 [certificate required where sentence less than maximum exposure set forth in plea agreement]; *People v.*

*Shelton* (2006) 37 Cal.4th 759, 763 [certificate required where sentence imposed is the maximum specified in the plea agreement].)

That the Supreme Court subsequently declared Medina's offenses to be misdemeanors in *Gonzales* does not change our conclusion. (*People v. Camenisch* (1985) 166 Cal.App.3d 594, 608-609 [subsequent changes in law do not nullify a defendant's guilty plea]; *People v. Powers* (1984) 151 Cal.App.3d 905, 917 [same].) When a defendant pleads guilty, "'he does [so] under the law then existing. . . .' [Citation.]" (*People v. Barton* (1971) 19 Cal.App.3d 990, 995.) "'Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction unless he can allege and prove serious derelictions on the part of counsel sufficient to show that his plea was not, after all, a knowing and intelligent act.' [Citation.]" (*Ibid.*; accord, *Doe v. Harris* (2013) 57 Cal.4th 64, 70 ["the parties to a plea agreement . . . are deemed to know and understand that the state . . . may enact laws that will affect the consequences attending the conviction entered upon the plea"].) Medina has not done so here.

*People v. Zuniga* (2014) 225 Cal.App.4th 1178 (*Zuniga*) illustrates these principles. In *Zuniga*, the defendant contended his conviction was void because, based on a Supreme Court case decided after he filed his notice of appeal, there was no longer a factual basis for his plea. (*Id.* at p. 1186.) The *Zuniga* court rejected this contention: The defendant's challenge to the factual basis of the plea was "'properly viewed as a challenge to the validity of the plea itself.' [Citation.]" (*Id.* at p. 1187.) Because he did not obtain a certificate of probable cause, his challenge was barred. (*Ibid.*; accord, *People v. Pinon* (1979)

96 Cal.App.3d 904, 910 [because a plea removes all questions of guilt essential to a conviction, whether a prior conviction was a misdemeanor or felony is not cognizable on appeal].)

Medina's reliance on *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) is unavailing. In *Estrada*, the Supreme Court held that when the Legislature amends a criminal statute to mitigate punishment after the defendant commits a prohibited act but before final judgment, the punishment mandated by the amended statute applies. (*Id*. at p. 744.) But applying the *Estrada* rule here would require us to examine the underlying facts of the case to determine whether *Gonzales* requires Medina's crimes to be punished as misdemeanors rather than felonies. That we cannot do without a certificate of probable cause. (*Zuniga*, *supra*, 225 Cal.App.4th at pp. 1186-1187; see also *People v. Breckenridge* (1992) 5 Cal.App.4th 1096, 1098 [consideration of whether defendant's admission of a prior conviction was valid where he was not fully informed of his rights required a certificate of probable cause], disapproved of on another ground by *In re Chavez* (2003) 30 Cal.4th 643, 657, fn. 6; *People v. Arwood* (1985) 165 Cal.App.3d 167, 172 [determining whether defendant's prior conviction qualified as a serious felony required certificate of probable cause].)

DISPOSITION

The appeal is dismissed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Nancy L. Ayers, Judge

Superior Court County of Ventura

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Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

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