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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. FRANCISCO BALTAZAR LEON, Defendant and Appellant.	B291900 (Los Angeles County Super. Ct. No. BA459687)

APPEAL from orders of the Superior Court of Los Angeles County. Henry J. Hall, Judge. Affirmed.

Carlo Andreani, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Francisco Leon appeals the denial of a motion to withdraw his plea of no contest. He also contends, pursuant to *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), that the matter should be remanded to the trial court for a determination of his ability to pay the restitution fine (Pen. Code,[1] § 1202.4, subd. (b)(1)), the court operations assessment (§ 1465.8, subd. (a)(1)), and the criminal conviction assessment (Gov. Code, § 70373) imposed at sentencing. Only appellant's *Dueñas* claim, which we reject, is cognizable in this appeal: Because he did not obtain a certificate of probable cause, appellant cannot challenge the denial of his request to withdraw his no contest plea.[2] Accordingly, we affirm.

PROCEDURAL BACKGROUND

Appellant was charged by information with committing a lewd act upon a child (§ 288a; count 1), forcible rape (§ 261, subd. (a)(2); count 2), and sodomy by use of force (§ 286, subd. (c)(2)(A); count 3). It was further alleged as to count 1 that appellant personally inflicted bodily harm on the victim who was under 14 years of age (§ 667.61, subds. (a), (d)(7)), and as to all three counts that the offenses were committed against more than one victim (§ 667.61, subds. (b), (c), (e)). The prosecution subsequently moved without objection to amend the information

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[1] Undesignated statutory references are to the Penal Code.

[2] "Even if the appeal goes forward without a certificate of probable cause, based upon claims that do not require one, the defendant may not raise additional claims that do require a certificate." (*People v. Johnson* (2009) 47 Cal.4th 668, 678, fn. 4 (*Johnson*).)

to add count 4, forcible lewd act on a child (§ 288, subd. (b)(1)) with a great bodily injury allegation (§ 12022.8).

Appellant pleaded no contest to counts 1 through 4 and admitted the section 12022.8 allegation for an agreed determinate sentence of 33 years in state prison.[3] At the sentencing hearing a month later, appellant moved to withdraw his plea, stating (over defense counsel's objection), "I would like to let you know that I want to take back the offer I accepted. I don't want it." Defense counsel was unaware of any legal reason to set aside the plea, and the trial court denied the request, stating, "Well, unfortunately, or fortunately, buyer's remorse is not a reason for setting aside a plea. And I find there is a factual basis for this plea. We're going to proceed." The court then sentenced appellant to the agreed-upon term of 33 years in state prison, awarded presentence custody credit, and imposed a $40 court operations assessment (§ 1465.8, subd. (a)(1)) for each count of conviction, a $30 criminal conviction assessment (Gov. Code, § 70373) for each count of conviction, and a $300 restitution fine (§ 1202.4, subd. (b)(1)) for a total of $580.

Appellant filed a timely notice of appeal challenging the validity of the plea as well as the sentence or other matters occurring after the plea. In his accompanying request for certificate of probable cause, appellant declared under penalty of perjury:

"I have requested a certificate of probable cause, because I was mislead [*sic*] in the proceedings of basic law, and was taken

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[3] Appellant's maximum exposure on counts 1, 2, and 3 was 55 years to life.

advantage of by my attorney on my case. I was told by my 'Attorney' on record, that I did not have a right to an 'Appeal,' because I am not a[n] 'American' citizen. After an investigation I discovered that I did have a right to an Appeal like Americans do, and even if I am a non-citizen, Guranteed [*sic*] by the 'United States Constitution.' My lawyer intimidated me, coerced, maliciously mislead [*sic*] me. After asking numerous times that I want to go to trial! If I would have known or understood before my lawyer 'tricked' and 'intimidated' me, about my right to an 'Appeal,' I would have taken my charges to trial, because I am a[n] innocent man. So please help me in the interest of true Justice, I hear so much about in America. Thank you so much!"

The trial court denied the request for certificate of probable cause on the ground that "Defendant's issue cannot be reached by way of appeal." This court denied appellant's petition for writ of mandate, and the California Supreme Court denied his petition for review.[4]

DISCUSSION

I. Without a Certificate of Probable Cause from the Trial Court, Appellant's Challenge to the Denial of his Request to Withdraw His Plea Is Not Cognizable on Appeal

Notwithstanding his failure to obtain a certificate of probable cause, appellant contends that the trial court

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[4] Appellant filed his petition for writ of mandate in case number B295553, and his petition for review in case number S254360. As requested by respondent, we have taken judicial notice of our file containing the records of appellant's petition for writ of mandate. (Evid. Code, § 452, subd. (d).)

erroneously denied his motion to withdraw his plea. He argues that he is entitled to raise this claim without a certificate because the trial court failed to advise appellant of his right to appeal and the court's denial of the certificate constituted an error of law. Appellant is wrong.

In general, unless a defendant obtains a certificate of probable cause, no appeal will lie from the judgment following entry of a plea of guilty or no contest with an agreed upon sentence.[5] (§ 1237.5; *People v. Panizzon* (1996) 13 Cal.4th 68, 76; *People v. Hurlic* (2018) 25 Cal.App.5th 50, 53 (*Hurlic*).) The California Supreme Court has declared that this prerequisite to an appeal from a conviction on a plea "should be applied in a strict manner." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098.) "Thus, for example, a certificate must be obtained when a defendant claims that a plea was induced by misrepresentations of a fundamental nature [citation] or that the plea was entered at a time when the defendant was mentally incompetent [citation]. Similarly, a certificate is required when a defendant claims that warnings regarding the effect of a guilty plea on the right to

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[5] "The requirements of section 1237.5 are implemented by California Rules of Court, rule 8.304(b), which provides that an appeal from a judgment after a plea of guilty or nolo contendere may proceed without a certificate if the notice of appeal states that the appeal is based on the denial of a motion to suppress evidence under section 1538.5 or on '[g]rounds that arose after entry of the plea and do not affect the plea's validity.' (Cal. Rules of Court, rule 8.304(b)(4)(B).)" (*Johnson*, *supra*, 47 Cal.4th at p. 677, fn. 3; see *People v. Kaanehe* (1977) 19 Cal.3d 1, 8 (*Kaanehe*).)

appeal were inadequate. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 8.)" (*Panizzon*, at p. 76.) The high court has also held that "[a] defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea, even though such a motion involves a proceeding that occurs *after* the guilty plea." (*Johnson*, *supra*, 47 Cal.4th at p. 679.)

Although appellant recognizes that the trial court's denial of a certificate of probable cause would "normally" foreclose any right to appeal the denial of his request to withdraw his plea, he contends the appeal is cognizable here because the trial court failed to advise him of his appellate rights after sentencing and abused its discretion in denying the certificate of probable cause. Both assertions lack merit.

Appellant cites no relevant authority in support of his claim that the trial court's failure to advise him of his appellate rights eliminated the necessity for a certificate of probable cause. California Rules of Court, rule 4.305, cited by appellant, does not support his position. By its terms, the rule requires the trial court to advise the defendant of the right to appeal and the necessary steps and time for taking an appeal only "[a]fter imposing sentence or making an order deemed to be a final judgment in a criminal case on conviction *after trial*." (Cal. Rules of Court, rule 4.305, italics added.) There was no trial here; hence the trial court had no duty to advise appellant of his appellate rights under rule 4.305.

None of the cases appellant cites has anything to do with appellant's assertion that a trial court's failure to advise a defendant of his appellate rights following the entry of a no contest plea eliminates the prerequisites to an appeal under section 1237.5. (See *People v. Leftwich* (1979) 97 Cal.App.3d

Supp. 6, 9 [court granted motion for relief from default based on attorney's failure to file notice of appeal as promised, treating it as motion to allow the late filing of the notice of appeal]; *People v. Baltor* (1978) 77 Cal.App.3d 227, 230–233 [defendant failed to establish right to relief from untimely filing of notice of appeal "merely because the trial court did not advise him of his rights to appeal"]; *People v. Serrano* (1973) 33 Cal.App.3d 331, 337–338 [former superior court rule requiring trial judge to advise defendant of right to appeal inapplicable where defendant had pleaded guilty].)

Appellant's reliance on our decision in *Hurlic* is misplaced. In *Hurlic*, the defendant entered a no contest plea and admitted a sentencing enhancement allegation under section 12022.53, subdivision (c). (*Hurlic*, *supra*, 25 Cal.App.5th at pp. 53–54.) The trial court imposed the agreed-upon sentence in September 2017, and defendant filed a timely notice of appeal without obtaining a certificate of probable cause. (*Id.* at p. 54.) On October 11, 2017, the Governor signed Senate Bill No. 620 (2017–2018 Reg. Sess.) into law, which granted trial courts the discretion to strike the firearm enhancements under section 12022.53. (§ 12022.53, subd. (h), as amended by Stats. 2017, ch. 682, § 2.) The new law became effective on January 1, 2018, while Hurlic's appeal—in which he sought relief under Senate Bill No. 620—was pending. In reaching the merits of the appeal, we held that no certificate of probable cause was required to challenge an agreed-upon sentence where, after sentencing, the Legislature enacted a statute that retroactively granted the trial court discretion to waive a previously mandatory sentencing enhancement. (*Hurlic*, *supra*, 25 Cal.App.5th at p. 53.)

Hurlic has no application to the instant case simply because no new law that could affect appellant's sentence in any way has been enacted or has become operative during the pendency of this appeal. For the same reason, our Supreme Court's grants of review in *People v. Kelly* (2019) 32 Cal.App.5th 1013 (review granted June 12, 2019, S255145[6]) and *People v. Barton* (2019) 32 Cal.App.5th 1088 (review granted June 19, 2019, S255214[7]) have no bearing here because, unlike those cases, there has been no ameliorative change in the law that might conflict with section 1237.5's certificate requirement.

Appellant further maintains that trial counsel was ineffective for failing to consult with appellant to discover his

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[6] The high court articulated the following issue: "Is a certificate of probable cause required for a defendant to challenge a negotiated sentence based on a subsequent ameliorative, retroactive change in the law?" (<https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2283336&doc_no=S255145&request_token=NiIwLSIkTkg%2BWzBdSCJNSENIQFg0UDxTJiNOQz5SICAgCg%3D%3D&bck=yes> [as of Nov. 14, 2019], archived at <https://perma.cc/9MJL-WHB6>.)

[7] In granting review, our Supreme Court stated, "This case includes the following issue: Does a defendant's waiver of the right to appeal his or her sentence as part of a plea agreement preclude a future challenge to the stipulated sentence based on an ameliorative, retroactive change in the law?" (<https://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2283754&doc_no=S255214&request_token=NiIwLSIkTkg%2BWzBdSCJdXElIQFw0UDxTJiNOTztSMCAgCg%3D%3D&bck=yes> [as of Nov. 14, 2019], archived at <https://perma.cc/2NYS-JKUU>.)

wishes and for failing to file a notice of appeal and/or a certificate of probable cause. He argues the matter "should be reversed and remanded for an evidentiary hearing on the denials of Sixth Amendment effective assistance and Fourteenth Amendment Due Process." But appellant's failure to obtain a certificate of probable cause stands as a roadblock to this claim as well.

Our Supreme Court has held that claims of ineffective representation on a motion to withdraw a plea are not exempt from the requirement that the defendant obtain a certificate of probable cause as a condition for raising the issue on appeal. (§ 1237.5; *Johnson*, *supra*, 47 Cal.4th at pp. 684–685; see *People v. Stubbs* (1998) 61 Cal.App.4th 243, 244–245.) As the high court explained, "If all appeals alleging that the defendant was deprived of effective representation on a motion to withdraw his or her plea were permitted to go forward without a certificate, many frivolous appeals likely would result. Requiring the trial court, which is familiar with the record, to determine in the first instance whether a nonfrivolous claim exists serves the purposes of section 1237.5 without interfering with a defendant's right to pursue a nonfrivolous appeal." (*Johnson*, at p. 685.) On the other hand, if the trial court is not in a position to issue a certificate of probable cause because of factual issues outside the record requiring an evidentiary hearing, then any such "claim of ineffective assistance 'is more appropriately decided in a habeas corpus proceeding.' " (*Johnson*, at p. 684; see *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

Contrary to appellant's assertion, the recent United States Supreme Court decision in *Garza v. Idaho* (2019) __ U.S. __ [139 S.Ct. 738] (*Garza*), is irrelevant to this case. In *Garza*, the defendant signed plea agreements arising from state criminal

charges in which he waived his right to appeal. (*Garza*, *supra*, 139 S.Ct. at p. 742.) Despite the defendant's repeated requests, his attorney failed to file a notice of appeal, and the time for defendant to pursue an appeal lapsed. (*Id.* at p. 743.) Defendant alleged that his trial counsel rendered ineffective assistance by failing to file notices of appeal. (*Ibid*.) The high court reversed, applying the rule announced in *Roe v. Flores-Ortega* (2000) 528 U.S. 470, 484, "that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice to the defendant should be presumed 'with no further showing from the defendant of the merits of his underlying claims.' " (*Garza*, *supra*, 139 S.Ct. at p. 742.) In so holding, the court declared that "the presumption of prejudice recognized in *Flores-Ortega* applies regardless of whether the defendant has signed an appeal waiver." (*Ibid*.)

Garza has no bearing whatsoever on the requirement under section 1237.5 that a defendant must obtain a certificate of probable cause in order to pursue an appeal following entry of a guilty or no contest plea. *Garza* thus has no application here because the appeal is precluded for want of a certificate of probable cause, not because appellant's attorney failed to file a notice of appeal on his behalf based on his execution of an appeal waiver.

Finally, on August 16, 2018, this court issued the following order: "This appeal, initiated by a notice filed on August 6, 2018, is limited to issues that do not require a certificate of probable cause." Appellant's attempt to claim on appeal that the trial court erred in refusing to allow him to withdraw his plea plainly requires a certificate of probable cause and thus violates this court's order. The issue is not cognizable on appeal. (*People v.*

Hoffard (1995) 10 Cal.4th 1170, 1180, fn. 8 [appellate court correctly declines to hear issues going to validity of plea where trial court denied certificate of probable cause]; *People v. Castelan* (1995) 32 Cal.App.4th 1185, 1187–1189.)

II. *Appellant Is Not Entitled to a Hearing to Determine His Ability to Pay the Restitution Fine and Assessments*

Appellant contends he is entitled to a remand to the trial court for a hearing on his ability to pay the restitution fine and court assessments under *Dueñas*, *supra*, 30 Cal.App.5th 1157. We reject the claim.

First, in *People v. Hicks* (2019) 40 Cal.App.5th 320, 322, 329, we concluded *Dueñas* was wrongly decided and rejected its holding that "due process precludes a court from 'impos[ing]' certain assessments and fines when sentencing a criminal defendant absent a finding that the defendant has a 'present ability to pay' them." (Accord, *People v. Aviles* (2019) 39 Cal.App.5th 1055, 1067–1068 ["*Dueñas* was wrongly decided"]; *People v. Caceres* (2019) 39 Cal.App.5th 917, 923, 926–927 [*Dueñas*'s due process analysis does not justify extending its "broad holding" beyond its "extreme facts"]; *People v. Kopp* (2019) 38 Cal.App.5th 47, 96–97 ["there is no due process requirement that the court hold an ability to pay hearing before imposing a punitive fine and only impose the fine if it determines the defendant can afford to pay it"].)

Second, we agree with the People that appellant's failure to object to the imposition of the restitution fine or assessments and his failure to assert any ability to pay them (unlike the defendant in *Dueñas*) forfeited the issue on appeal. Generally, where a defendant has failed to object to a restitution fine or court fees

based on an inability to pay, the issue is forfeited on appeal. (*People v. Aguilar* (2015) 60 Cal.4th 862, 864 ["defendant's failure to challenge the fees in the trial court precludes him from doing so on appeal"]; *People v. Avila* (2009) 46 Cal.4th 680, 729.) We agree with our colleagues in Division Eight that this general rule applies here to the restitution fine and the assessments imposed under the Penal and Government codes. (*People v. Bipialaka* (2019) 34 Cal.App.5th 455, 464; *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1153–1155; but see *People v. Castellano* (2019) 33 Cal.App.5th 485, 488.)

Finally, even if *Dueñas* were good law, we would conclude the trial court's failure to conduct an ability to pay hearing when imposing $580 in monetary obligations was harmless because the prison wages appellant earns while serving his 33-year sentence will certainly eclipse that amount. (See *People v. Johnson* (2019) 35 Cal.App.5th 134, 139 ["The idea that [defendant] cannot afford to pay $370 while serving an eight-year prison sentence is unsustainable"]; *People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837 [defendant's ability to pay includes the future ability to obtain prison wages and to earn money after release from custody].)

DISPOSITION

The orders of the superior court are affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.