Filed 8/13/18 P. v. Cutting CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CARL EDWARD CUTTING, Defendant and Appellant.	B284539 (Los Angeles County Super. Ct. No. VA138509)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael A. Cowell, Judge. Affirmed in part, reversed in part and remanded with directions.

Maggie Shrout, 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., and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Carl Edward Cutting appeals the sentence he received following guilty pleas to four counts charging possession of heroin for sale, child abuse, and possession of a firearm and ammunition by a convicted felon. Cutting argues that a change in the law effective January 1, 2018, now precludes three sentencing enhancements that he received based upon prior controlled substance convictions. The enhancements added nine years to his sentence.

The Attorney General does not dispute that the new law applies to Cutting's sentence, but argues that Cutting may not seek any relief on appeal because he did not obtain a certificate of probable cause. We reject the argument. Cutting entered an open plea and his appeal therefore does not challenge any plea agreement that he made in connection with his sentencing. Thus, his appeal is not directed to the validity of his plea and no certificate of probable cause is required. Accordingly, we reverse the sentence and remand for resentencing with the direction that the trial court strike the enhancements.

BACKGROUND

According to testimony at the preliminary hearing, a search of Cutting's residence on March 5, 2015, revealed sizable quantities of heroin as well as a scale, balloons, cash, and a loaded firearm. A minor was present in the house at the time of the search.

A four-count information dated May 3, 2016, charged Cutting with: (1) possession for sale of a controlled substance in

violation of Health and Safety Code section 11351;[1] (2) possession of a firearm by a felon in violation of Penal Code section 29800, subdivision (a)(1); (3) possession of ammunition in violation of Penal Code section 30305, subdivision (a)(1); and (4) child abuse in violation of Penal Code section 273a, subdivision (a). Cutting entered an open plea of no contest or guilty to each of the four charged counts on June 5, 2017. He also admitted to three prior convictions for violations of sections 11378 (possession of controlled substance for sale) and 11379 (transportation of controlled substance), and to prior convictions under Penal Code sections 118 (perjury) and 459 (burglary).

As part of his open plea, Cutting was advised that his maximum statutory sentence for the counts to which he pleaded was 21 years 8 months plus 8 months for a violation of his probation. Cutting acknowledged that no one had made any promises about the sentence he would receive.

The trial court imposed an aggregate sentence of 19 years plus 8 months for the probation violation. The court selected count one for the base term and imposed the high term of four years on that count. The court also ordered a five-year enhancement under Penal Code section 12022, subdivision (c) for Cutting's possession of the firearm during the offense, and a one-year enhancement under Penal Code section 667.5, subdivision (b) for a prior felony conviction. Finally, the court ordered a nine-year enhancement under section 11370.2, subdivision (a),

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[1] Subsequent undesignated statutory references are to the Health and Safety Code.

composed of three enhancements of three years each for Cutting's three prior convictions under sections 11378 and 11379.

The court ordered a total of 12 years on the remaining three counts to run concurrently with count one, and also ordered a consecutive sentence of 8 months on Cutting's probation violation.

Cutting filed a notice of appeal on July 18, 2017. The notice stated that the appeal "is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea." On August 25, 2017, this court issued an order stating that Cutting's appeal "is limited to issues that do not require a Certificate of Probable Cause."

DISCUSSION

I. *Cutting Was Not Required to Obtain a Certificate of Probable Cause to Appeal the Nine-year Enhancement Under Section 11370.2*

On October 11, 2017, while this appeal was pending, a bill amending section 11370.2 became law. (See Stats. 2017, ch. 677, § 1, eff. Jan. 1, 2018.) The amendment was effective January 1, 2018. (*Ibid.*)

The amendment eliminated all but one prior conviction that can support a three-year enhancement under section 11370.2. As amended, section 11370.2 permits an enhancement only for a prior conviction for violating, or conspiring to violate, section 11380, which punishes the use or inducement of a minor to commit specified controlled substance offenses. Important for this case, the amendment eliminated sections 11378 and 11379 as predicate offenses for the three-year enhancement. Thus, under section 11370.2 as amended, Cutting was not subject to the nine-year enhancement that the trial court ordered.

Both parties agree that the amendment to section 11370.2 applies to all cases that were not final as of January 1, 2018. In

particular, the Attorney General agrees that, as explained in *People v. Millan* (2018) 20 Cal.App.5th 450 (*Millan*), the amendment to section 11370.2 applies retroactively under *People v. Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

Estrada held that, when the Legislature enacts a statute that lessens a punishment, "it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper." (*Estrada, supra,* 63 Cal.2d at p. 745.) This rebuts the ordinary presumption that the Legislature intends changes in the law to apply only prospectively. (*Ibid.*) It creates "an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply." (*Ibid.*) Such cases include those that involve acts committed before the effective date of the statute "provided the judgment convicting the defendant of the act is not final."[2] (*Ibid.*)

As the court explained in *Millan,* the 2017 amendment to section 11370.2 operates to lessen the punishment for a person whose sentence was enhanced based upon a prior conviction that may no longer serve as a predicate offense for the enhancement. (*Millan, supra,* 20 Cal.App.5th at pp. 455–456.) "Rather than being subjected to a three-year enhancement for each prior conviction, such persons are no longer subject to *any* enhanced punishment pursuant to the amended statute." (*Id.* at p. 456.)

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[2] A judgment is not final until "the availability of an appeal and the time for filing a petition for certiorari have expired." (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465.)

Consistent with the analysis in *Millan*, the Attorney General agrees that, if we reach the merits of Cutting's appeal, we should reverse the judgment and remand the case to the superior court for resentencing. However, the Attorney General argues that we should not actually order that relief, because Cutting did not obtain a certificate of probable cause for his appeal pursuant to Penal Code section 1237.5. The Attorney General claims that, absent a certificate of probable cause, we may not reach the merits of the appeal.

We disagree. Cutting's appeal does not challenge any agreed-upon component of his sentence. Indeed, this case does not involve *any* sentencing agreement. Cutting entered an open plea without receiving any promises about his sentence or any other negotiated benefit from entering the plea. His challenge to the sentence therefore does not attack the validity of his plea, and no certificate of probable cause is necessary.

a. *The certificate of probable cause requirement*

Penal Code section 1237.5 precludes an appeal from "a judgment of conviction upon a plea of guilty or nolo contendere" unless the defendant has filed a statement in the trial court showing "reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings," and the trial court has filed "a certificate of probable cause for such appeal." However, despite the broad language of this section, our Supreme Court has explained that "it is settled that two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a certificate: (1) search and seizure issues for which an appeal is provided under section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the

penalty to be imposed." (*People v. Panizzon* (1996) 13 Cal.4th 68, 74 (*Panizzon*); see *People v. French* (2008) 43 Cal.4th 36, 43 [a certificate of probable cause is not necessary "if the appeal is based upon grounds that arose after entry of the plea and that do not affect the validity of the plea"], citing Cal. Rules of Court, rule 8.304(b)(4)(B).)

Issues that go to the "validity of a plea" do require a certificate of probable cause. (*Panizzon, supra,* 13 Cal.4th at p. 76.) An appeal that challenges a specific negotiated sentence falls within that category, because such an appeal "challenges the very bargain on which the plea was rendered." (*People v. Buttram* (2003) 30 Cal.4th 773, 776 (*Buttram*), citing *Panizzon, supra,* 13 Cal.4th 68.) In contrast, an appeal that simply challenges a trial court's discretionary decision to impose a sentence that falls within the range permitted by a plea agreement does not challenge the validity of the plea and may therefore proceed without a certificate. For example, in *Buttram,* the court held that the defendant's agreement to a maximum possible sentence did not require him to obtain a certificate of probable cause to argue on appeal that the trial court abused its discretion in deciding to impose the maximum. (*Buttram*, at pp. 776–777.)

On the other hand, a defendant who agrees to a sentence "lid" may not file an appeal challenging the trial court's legal *authority* to impose the maximum sentence without first obtaining a certificate of probable cause. (*People v. Shelton* (2006) 37 Cal.4th 759, 763 (*Shelton*).) That conclusion follows from ordinary contract interpretation principles. (*Id.* at p. 767.) "[T]he specification of a maximum sentence or lid in a plea agreement normally implies a mutual understanding of the defendant and the prosecutor that the specified maximum term is one that the

trial court may lawfully impose and also a mutual understanding that, absent the agreement for the lid, the trial court might lawfully impose an even longer term." (*Id.* at p. 768.) Thus, where an agreement on a maximum sentence exists, an appeal challenging the trial court's legal authority to impose the maximum attacks a component of the plea agreement.

The same analysis generally applies to a plea agreement that fixes a maximum *statutory* sentence through the device of dropping some counts in exchange for a plea to the remaining counts. (*People v. Cuevas* (2008) 44 Cal.4th 374, 377 (*Cuevas*).) In that situation, limiting the defendant's exposure to the maximum possible sentence on the remaining counts is " 'part and parcel of the plea agreement' " that the defendant negotiates. (*Id.* at p. 381, quoting *Panizzon, supra,* 13 Cal.4th at p. 78.) Where such a plea agreement exists, an appeal that challenges the trial court's authority to impose the statutory maximum goes to the validity of the plea and requires a certificate of probable cause. (*Cuevas*, at pp. 383–384.)

b. *Cutting's plea*

Unlike the defendants in *Shelton* and *Cuevas*, Cutting did not obtain any negotiated benefit from his guilty pleas. (*Shelton, supra,* 37 Cal.4th at p. 764; *Cuevas, supra,* 44 Cal.4th at pp. 377–378.) Cutting and the Attorney General both agree that Cutting entered an open plea to all the charges against him. "An open plea is one under which the defendant is not offered any promises. [Citation.] In other words, the defendant 'plead[s] unconditionally, admitting all charges and exposing himself to the maximum possible sentence if the court later chose to impose it.' " (*Cuevas,* at p. 381, fn. 4, quoting *Liang v. Superior Court* (2002) 100 Cal.App.4th 1047, 1055–1056.)

The record confirms that is what occurred here. At sentencing, the prosecutor described Cutting's plea as an "open plea to the court." Cutting pleaded without condition to all the counts in the information. The prosecutor confirmed that Cutting intended to "enter a plea to the charges, admit all of the allegations and your probation violation, so that you may receive a sentence in the discretion of the court." Cutting was advised of the maximum possible statutory sentence based on his plea, but he was given no promises concerning the sentence that the trial court would impose. Indeed, the prosecutor solicited Cutting's agreement at sentencing that no one had "made any promises to you about the sentence that you could receive for this charge or for your probation violation."

Thus, unlike the appeals in *Shelton* and *Cuevas,* Cutting's appeal is not inconsistent with any implicit promise that he made in connection with his sentencing. Cutting neither made nor received any promises. He did not obtain any agreement on a maximum sentence, which would have implied an "understanding and belief that in its absence the trial court might lawfully have imposed a greater sentence." (*Shelton, supra,* 37 Cal.4th at p. 768.) To the contrary, he was advised that the trial court could impose the maximum sentence permitted by law. Nor did he receive the benefit of any reduced maximum sentence by avoiding some of the counts with which he was charged. (See *Cuevas, supra,* 44 Cal.4th at pp. 383–384.) He did not obtain any

negotiated benefit from his plea that would constrain his ability to challenge his sentence.[3]

Despite this record, the Attorney General argues that a certificate of probable cause is necessary because Cutting's appeal attacks the trial court's *authority* to impose the sentence that he received rather than the trial court's exercise of its sentencing discretion. Thus, the Attorney General suggests that this case is less like *Buttram* and more like *Shelton* and *Cuevas*.

It is true that Cutting's appeal challenges the legal authority for his sentence based upon current law. But that is beside the point. Unlike the defendants in *Shelton* and *Cuevas*, Cutting did not enter into any plea agreement that would preclude him from challenging the legal basis for the sentence that he received.[4] Cutting's attack on the lawfulness of his sentence therefore does not challenge the validity of his *plea*.

The Attorney General cites *People v. Zuniga* (2014) 225 Cal.App.4th 1178 and other cases standing for the proposition that a defendant may not challenge his or her plea on appeal based on subsequent changes in the law. Those cases are inapposite because, as discussed above, Cutting does not

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[3] By pleading guilty, Cutting might have obtained some benefit at sentencing from his decision to accept responsibility rather than going to trial. But that benefit, if any, resulted only from his *decision* to plead, not from any plea agreement.

[4] If, for example, the Legislature had changed the law between the time that Cutting entered his plea and the time that he was sentenced, Cutting would not have been precluded from arguing at sentencing that the trial court had no statutory authority to impose the enhancements under section 11370.2.

challenge the validity of his plea, but just the statutory basis for his sentence.

Thus, Cutting does not require a certificate of probable cause to pursue this appeal, and this court is not precluded from reaching its merits.

2. *The Case Must Be Remanded for Resentencing*

Cutting requests that this court reduce his sentence by simply striking the section 11370.2 enhancements and modifying the judgment accordingly under the authority of Penal Code section 1260. In contrast, the Attorney General suggests that, in the event we reach the merits of Cutting's appeal (as we do), we should reverse the sentence and remand with directions to the trial court to strike the enhancements and resentence Cutting. We agree with the Attorney General's approach.

"[A]n aggregate prison term is not a series of separate independent terms, but one term made up of interdependent components. The invalidity of one component infects the entire scheme." (*People v. Hill* (1986) 185 Cal.App.3d 831, 834.) The section 11370.2 enhancements here were a component of the sentence that the trial court selected to obtain an aggregate prison term. Without those enhancements, the trial court might have made different decisions with respect to other components of the sentence (such as selecting consecutive rather than concurrent terms). We therefore leave to the trial court to determine the appropriate sentence in light of all the relevant factors, including the changed legal landscape with respect to the section 11370.2 enhancements.

DISPOSITION

The judgment is reversed and the case is remanded with directions to strike the enhancements under section 11370.2 and to impose a new sentence. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.