Filed 8/25/17 P. v. Sanchez CA2/4

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>GABRIEL CHARLES SANCHEZ,<br><br>Defendant and Appellant. | B276307<br><br>(Los Angeles County Super. Ct. No. KA112731) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Rogelio Delgado, Judge. Dismissed.

James Koester, 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, Assistant Attorney General, Mary Sanchez and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

The Los Angeles County District Attorney (the People) alleged that defendant Gabriel Charles Sanchez committed a single felony count of driving or taking a vehicle without consent under Vehicle Code section 10851, subdivision (a) (section 10851(a)). Before and during the preliminary hearing, defendant moved to have the charge reduced to a misdemeanor based on Proposition 47. The court denied defendant's request. Defendant appealed, but subsequently pled no contest to the felony charge.

Defendant acknowledges in his reply brief that the court's order was not appealable, and asks that we treat his appeal as a writ of prohibition under Penal Code section 999a.[1] Writ relief is not appropriate in this case. We therefore dismiss the appeal.

## FACTUAL AND PROCEDURAL BACKGROUND

On June 6, 2016, the People filed a felony complaint asserting a single count of driving or taking a vehicle without consent after a prior conviction, in violation of section 10851(a) and section 666.5. The complaint also alleged that defendant had two prior convictions, including a prison prior and a prior conviction for a serious or violent felony. The complaint alleged that on June 2, 2016, defendant "did drive and/or take a vehicle, a 1993 Honda Civic . . . without the consent of the owner . . . and with the intent to deprive the owner of title to or possession of the vehicle." At the arraignment, defendant pled not guilty. Defendant filed a document titled "Defendant's Felony Charge Is Now a Misdemeanor Charge." It said defendant was accused of committing a theft crime under section 10851, and although "Proposition 47 did not specifically" include a violation of section

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

10851, "the language in Penal Code section 490.2 says that . . . obtaining any property by theft where the value does not exceed $950, shall be considered petty theft, and shall be punished as a misdemeanor." The request asserted that the vehicle at issue was a 1993 Honda Civic, which the police report stated was in fair condition. The Kelley Blue Book value for this model car in fair condition was $849.

Defendant attached the Sheriff's Department incident report, which listed one of the offenses as "driving vehicle without owner's consent" under section 10851. The narrative portion of the incident report stated that the reporting deputy, Sergio Lopez, was on patrol when he saw defendant driving the vehicle at issue; Lopez recognized defendant from previous contacts. Defendant tried to distance himself from Lopez by speeding away, then he parked the car and ran away on foot. Lopez requested backup, and checked the license plate of the vehicle defendant had been driving. The vehicle had been reported as stolen on May 31, 2016. After backup arrived, defendant eventually emerged from a nearby residence and was arrested.

Defendant also submitted a printed document regarding the vehicle, which noted "damage[d] hood and cracked windshield." A vehicle report noted that the car had 314,821 miles on the odometer, and the car was in fair condition. Two printouts from the Kelley Blue Book website indicated that the private party value for a 1993 Honda Civic with 315,000 miles was $849 if the car was in fair condition, and $954 if the car was in good condition.

The court considered defendant's motion at a hearing on July 6, 2016. Defense counsel argued that the vehicle was worth less than $950 based on the Kelley Blue Book values and the

police report noting that the vehicle was in fair condition, and therefore the charge should be reduced to a misdemeanor under section 490.2. The prosecutor argued that Proposition 47 does not apply to section 10851. The court denied the motion and set the case for a preliminary hearing.

At the preliminary hearing, Lopez testified about the facts stated in his incident report. Lopez testified that after defendant got out of the car, the officers "set up a containment" on the cul-de-sac, and defendant eventually emerged from one of the houses. Lopez noticed the car's ignition had been tampered with, and dispatch told him the car had been reported stolen. Lopez later spoke with the registered owner of the car by phone; the owner said he did not know defendant and had not given him permission to drive the car.

Defense counsel attempted to elicit additional information from Lopez relevant to the argument that the vehicle was worth less than $950. The court sustained the prosecution's relevance objection, and stated that the court was conducting a probable cause hearing, not a motion hearing. In closing, defense counsel moved to dismiss the charge for insufficiency of the evidence and to reduce the charge to a misdemeanor under Proposition 47. The court denied the motions and set an arraignment hearing.

On July 20, 2016, defendant filed a notice of appeal, which stated, "Defendant Gabriel Sanchez hereby appeals from the judgment rendered on July 6, 2016, in Department 4 of the Los Angeles Superior Court."

On August 1, 2016, the People filed a single-count information charging defendant with violating section 10851(a) and section 666.5. On August 20, 2016, defendant withdrew his plea of not guilty and pled no contest to the allegations. The

court sentenced defendant to four years in prison, consisting of the low term of two years plus two years pursuant to sections 667, subdivision (d) and 1170.12, subdivision (b). The court also imposed various fines and fees. Defendant did not appeal from his conviction.

## DISCUSSION

### A. The parties' arguments

In his opening brief, defendant argues he is entitled to appeal the trial court's denial of his motion to reduce the charges against him because "the prosecution did not present any evidence regarding the valuation of the 1993 Honda automobile." Defendant contends that Proposition 47 applies to section 10851, and as a result, "there was absolutely no evidence regarding the value of the Honda upon which the court could find that the prosecution had met its burden of showing probable cause . . . necessary to bind [defendant's] case over as felony grand theft."

Defendant also asserts that the filing of his notice of appeal "divested the trial court of jurisdiction." As a result, defendant's subsequent no contest plea was "beyond the court's jurisdiction and should be vacated." He argues that in the alternative, his "arguably premature notice of appeal" should be considered timely.

The Attorney General argues that the appeal should be dismissed for a variety of reasons. First, defendant appealed from a non-appealable order: "Because no statute or rule authorized an appeal from the magistrate's orders issue prior to final judgment, [defendant's] notice of appeal was not valid or operative and did not divest jurisdiction from the superior court. This appeal should be dismissed." The Attorney General notes that defendant stated in his notice of appeal that his appeal was

from a judgment, and asserts that defendant "could not divest the superior court of jurisdiction by falsely claiming to appeal from a judgment when none existed." Second, because defendant pled no contest and did not get a certificate of probable cause as required by section 1237.5,[2] the appeal must be dismissed and no relief from default is available. Third, section 995 governs the means to challenge a magistrate's rulings at a preliminary hearing. Because defendant did not move to set aside the information pursuant to section 995, he did not preserve this argument for appeal.

In his reply, defendant "acknowledges that his notice of appeal was technically deficient." The proper procedure, defendant says, would have been to file a writ of prohibition under section 999a. Although defendant's notice of appeal said he was appealing from a judgment, defendant blames the clerk for failing to correct his erroneous notice of appeal: "Had the clerk of the court properly recognized the technical defect in appellant's filing of the notice of appeal and alerted appellant of the defect, appellant could have timely corrected the deficiency and properly filed and labeled the filing as a notice for a writ of prohibition. Thus, some of the noted deficiencies in the now posture of appellant's appeal may be attributable to the court

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[2] Section 1237.5 states, "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of . . . nolo contendere . . . except where both of the following are met: (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

clerk's erroneously accepting and filing the notice of appeal and then preparing the record for appellate review." Defendant continues, "[T]he clerk's failure to note the filing deficiencies should allow this court to equitably construe appellant's notice of appeal as a petition for writ of prohibition and consider the merits of this case."

**B. Discussion**

Defendant contends that we should consider his appeal as a writ of prohibition under section 999a. Section 999a focuses on lack of probable cause for an information: "A petition for a writ of prohibition, predicated upon the ground . . . that the defendant had been committed on an information without reasonable or probable cause . . . must be filed in the appellate court within 15 days after a motion made under Section 995 . . . that the defendant had been committed on an information without reasonable or probable cause, has been denied by the trial court."

Writ review under section 999a is not available here, because defendant never moved to set aside the information under section 995. Section 995 applies in two situations that are not applicable here. First, a defendant may move to set aside an indictment where "the defendant has been indicted without reasonable or probable cause" (§ 995, subd. (a)(1)(B)). Second, a defendant may move to set aside an information where "the defendant had been committed without reasonable or probable cause." (§ 995, subd. (a)(2)(B).) Here, defendant filed his request to reduce the charge before the preliminary hearing, and before the information had been filed. Defendant then sought to introduce evidence about the value of the car at the preliminary hearing. He filed his notice of appeal on July 20, 2016, before the

information was filed on August 1, 2016. Defendant did not move under section 995 to set aside the information in the trial court.

Failure to challenge the information under section 995 is fatal to defendant's arguments on appeal. "'Penal Code section 995 gives the defendant the opportunity to challenge the regularity of the grand jury proceedings or the preliminary examination, as well as the existence of probable cause, by motion prior to entering his plea. Penal Code section 996 provides that if such a motion is not made, "the defendant is precluded from afterwards taking the objections mentioned" in section 995. Numerous decisions of the courts have consistently held that failure to make a timely motion under section 995 constitutes a waiver of any further review of such issues.'" (*People v. Padfield* (1982) 136 Cal.App.3d 218, 226; see also § 996 ["If the motion to set aside the indictment or information is not made, the defendant is precluded from afterwards taking the objections mentioned in Section 995"]; *People v. Sering* (1991) 232 Cal.App.3d 677, 687 ["the procedural protections afforded by section 995 are waived by failure to timely interpose the motion or objection (see § 996)"].)

Moreover, defendant pled no contest to the charges in the information. A no contest plea admits every element of the crime. (*People v. French* (2008) 43 Cal.4th 36, 49; *People v. Hoffard* (1995) 10 Cal.4th 1170, 1177.) "In essence, a [no contest] plea 'concedes that the prosecution possesses legally admissible evidence sufficient to prove defendant's guilt beyond a reasonable doubt.' [Citation.]" (*People v. Egbert* (1997) 59 Cal.App.4th 503, 509.) Once the elements of a crime have been established at trial or through a no contest plea, a defendant cannot demonstrate prejudice from a purported lack of probable cause for the

information. (See *People v. Shaw* (1986) 182 Cal.App.3d 682, 684.) Where a defendant fails to challenge a pretrial ruling by a writ proceeding "and thereafter the defendant is convicted of the subject crime on sufficient evidence, the trial court's pretrial ruling is no longer subject to review." (*People v. Cabrera* (2007) 152 Cal.App.4th 695, 701.)

The court's order is not appealable, and writ review is inappropriate because defendant has not preserved the issue for review. We therefore dismiss the appeal. (See *People v. Turrin* (2009) 176 Cal.App.4th 1200, 1208; *People v. Chlad* (1992) 6 Cal.App.4th 1719, 1726-1727; *People v. Mendez* (2012) 209 Cal.App.4th 32, 34.)

Even if we were to consider the substance of defendant's arguments on the merits, his claims would fail because he has not shown that he was entitled to a reduction under Proposition 47. Defendant contends that Proposition 47 applies to section 10851(a), but notes that this issue is unsettled in California and is currently pending before the Supreme Court. (See *People v. Page*, Case No. S230793; see also *People v. Sauceda* (2016) 3 Cal.App.5th 635, 639 [review granted Nov. 30, 2016, S237975, holding that Proposition 47 does not apply to section 10851(a)]; *People v. Van Orden* (2017) 9 Cal.App.5th 1277 [review granted June 14, 2017, S241574, holding that Proposition 47 does apply to section 10851(a)].)

Proposition 47 added section 490.2 to the Penal Code. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1091.) Section 490.2 states in part, "Notwithstanding Section 487 or any other provision of law defining grand theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950)

shall be considered petty theft and shall be punished as a misdemeanor." Defendant argues that a violation of section 10851(a) is a "theft offense," and therefore if the vehicle at issue had a value of $950 or less, it necessarily falls under the definition of misdemeanor petty theft in section 490.2.

A violation of section 10581(a), however, is not necessarily a theft offense. "A person can violate section 10851(a) 'either by taking a vehicle with the intent to steal it or by driving it with the intent only to temporarily deprive its owner of possession (i.e., joyriding).' [Citations]." (*People v. Garza* (2005) 35 Cal.4th 866, 876 (*Garza*).) A section 10851(a) conviction may also be "based on posttheft driving." (*Ibid.*) "Thus, a defendant who steals a vehicle and then continues to drive it after the theft is complete commits separate and distinct violations of section 10851(a)." (*Id.* at p. 880.) The Supreme Court in *Garza* discussed other cases holding that theft may become posttheft driving "when the driving is no longer part of a '"continuous journey away from the locus of the theft"'" or "when the taker reaches a place of temporary safety." (*Ibid.*) The Court concluded, "Whatever the precise demarcation point may be . . . once a person who has stolen a car has passed that point, further driving of the vehicle is a separate violation of section 10851(a) that is properly regarded as a nontheft offense. . . ." (*Id.* at p. 880-881.)

Here, the car at issue was reported stolen on May 31, 2016. Defendant was found driving the car a week later, on June 6, 2016. Even assuming section 490.2 applies to theft offenses under section 10851(a), and assuming the value of the car was

$950 or less,[3] defendant has not established that he committed a theft offense. The time that elapsed between the theft and the date defendant was found driving the vehicle suggests that defendant was not in the process of the theft when he was stopped. Instead, the evidence suggests that defendant may have been engaged in posttheft driving, a separate violation of section 10851(a). Thus even if we were to assume that the order was appealable and that the value of the vehicle was $950 or less, based on the facts in the record, defendant has not demonstrated that the trial court erred by denying the motion to reduce the charge to a misdemeanor, nor has he demonstrated that he was prejudiced by the court's order. (*People v. Sivongxxay* (2017) 3 Cal.5th 151, 178 ["to obtain reversal of the judgment based on a violation of a state statute, a defendant must demonstrate that it is 'reasonably probable that a result more favorable to [the defendant] would have been reached in the absence of the error.'"]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [299 P.2d 243].)

[3] Defendant presented evidence of the car's value at the time of his arrest, but did not present evidence that the car was worth $950 or less at the time it was stolen. Statements in the probation report suggest several computers had been in the car when it was stolen, and much of the damage to the car occurred after the theft. Neither party addressed how these issues may have affected the value of the property stolen.

## DISPOSITION

The appeal is dismissed without prejudice to any future motion defendant may bring pursuant to Proposition 47.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.