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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KAREN ROXANNA GUTH,

Defendant and Appellant.

2d Crim. No. B244419
(Super. Ct. No. F423908)
(San Luis Obispo County)

Karen Roxanna Guth appeals the denial of a \$175,000 homestead exemption following the court-ordered sale of her \$3.2 million residence to pay victim restitution. (Pen. Code, §§ 1202.4, subd. (f); 186.11, subds. (h) & (i).)¹ The property was assigned and transferred to the San Luis Obispo County District Attorney pursuant to a negotiated plea in which appellant pled guilty to 26 counts of securities fraud (Corp. Code, §§ 25110, 25401, 25541) and admitted various enhancements including an aggravated white collar crime enhancement (§ 186.11, subd. (a)(2).) In exchange for a 12-year state prison sentence, appellant was ordered to pay approximately \$200,000,000 victim restitution to more than 900 victims. The plea agreement provided that the property would be sold by a court-appointed receiver and the sale proceeds distributed to appellant's victims and creditors pursuant to section 186.11.

¹ All statutory references are to the Penal Code unless otherwise stated.

Appellant contends that the disbursement of all the sale proceeds to the victims violates her right to a \$175,000 homestead exemption. (Code Civ. Proc., §§ 704.720; 704.730, subd. (a)(3).) We dismiss the appeal on the ground that it attacks a key component of the plea agreement and is barred by appellant's failure to obtain a certificate of probable cause as required by section 1237.5.

Procedural History

Appellant entered a change of plea on October 5, 2009, after her personal and real property was seized pursuant to section 186.11, commonly known as the "Freeze and Seize Law." (*People v. Semaan* (2007) 42 Cal.4th 79, 82.) Section 186.11 provides that in aggravated white collar criminal cases, the superior court may take possession of assets under the criminal defendant's control and preserve the assets for the payment of victim restitution. (*Id.*, at p. 82.) There is no requirement that the seized assets be connected to or with criminal activity. (*Id.*, at pp. 86-87.) "Where a defendant is *convicted* of a section 186.11 offense, the trial court is required to make a finding at that time as to what portion of the frozen property or assets, if any, may be levied upon to pay fines or victim restitution. [Citation.]" (*Q-Soft, Inc. v. Superior Court* (2007) 157 Cal.App.4th 441, 447.)

On December 7, 2009, appellant was sentenced to 12 years state prison and ordered to pay victim restitution in an amount to be determined by the trial court. At the conclusion of the hearing, appellant said that she had some personal property of no monetary value (clothes, pots and pans in the house) that should be returned. The trial court directed counsel to file a motion listing the property.

On January 12, 2010, appellant filed a motion for the return of personal property (clothing, pots and pans, cookbooks, etc.) that was exempt from execution and sought a \$150,000 homestead exemption on her residence at 8530 Vineyard Drive, Templeton, California. The motion noted that the trial court "has not yet entered an order as part of the judgment and sentence [to] make the order imposing restitution enforceable pursuant to Title 9 (commencing with Section 680.020 of Part 2 of the Code of Civil Procedure." Appellant argued that such an order, when made, would be subject to the

exemptions listed in Code of Civil Procedure section 703.010 et seq. for the enforcement of a money judgment. The district attorney opposed the motion on the ground that appellant, as a term of the plea, made an unequivocal assignment and transfer of the Vineyard Drive property to pay victim restitution. (See § 186.11, subd. (h)(1)(A).)² The victim restitution amount would not be known until all the victims (estimated to be 3,000) submitted claims.

On April 21, 2011, the trial court ordered appellant to pay \$202,003,233.73 victim restitution. Appellant appealed the order which was affirmed in an unpublished opinion. (B237956.) We take judicial notice of the opinion and the record on appeal in B237956. (Evid. Code, §§ 452, subd. (d); 459.)

On August 24, 2012, the trial court ordered that certain personal property (cosmetics, clothing, etc.) be returned to appellant but that appellant receive no money from the sale of the Vineyard Drive property. The court found that the sale proceeds only slightly mitigated the victims' losses and "there is no homestead exemption available to a defendant under [section] 186.11 [I]t would [be] unreasonable in light of [appellant's] debts to her victims for the Court to release to Defendant Guth any portion of the proceeds of the sale of the home."

Pursuant to appellant's request, the receiver was ordered to set aside \$150,000 from the sale proceeds to permit appellate review of the homestead exemption claim. On September 10, 2012, the withholding amount was increased by stipulation to \$175,000 to reflect the current homestead exemption cap. (Code Civ. Proc., § 704.730, subd. (a)(3).) Appellant filed a notice of appeal on November 2, 2012.

² Section 186.11, subdivision (h)(1)(A) provides: "The court may order the immediate transfer of the property or assets to satisfy any judgment and sentence made pursuant to this section. Additionally, upon motion of the prosecution, the court may enter an order as part of the judgment and sentence making the order imposing fines and restitution pursuant to this action enforceable pursuant to Title 9 (commencing with Section 680.010) of Part 2 of the Code of Civil Procedure."

Certificate of Probable Cause

The Attorney General contends, and we agree, that the appeal must be dismissed because appellant did not obtain a certificate of probable cause. (§ 1237.5; *People v. Panizzon* (1996) 13 Cal.4th 68, 74-76. (*Panizzon*).) Under section 1237.5 and California Rules of Court, rule 8.304(b), a defendant seeking to appeal an order on a guilty plea generally must first obtain a certificate of probable cause. (*Id.*, at pp. 76-79.)

Appellant argues that a certificate of probable cause is not required if the appeal is based on the sentence or matters occurring after entry of the plea that do not affect the validity of the plea. (Cal. Rules of Court, rule 8.304(b)(4)(B).) In determining whether an appeal may proceed without a certificate of probable cause, courts "look to the substance of the appeal: 'the crucial issue is what the defendant is challenging, not the time or manner in which the challenge is made.' [Citation.] Hence, 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. [Citation.]" (*Panizzon, supra*, 13 Cal.4th at p. 76.)

Appellant argues that distribution of all the sale proceeds to the victims contravenes the homestead exemption law which is recognized by our State Constitution. (Cal. Const. art. XX, § 1.5; *Kono v. Meeker* (2011) 196 Cal.App.4th 81, 86.) The disbursement order, however, is part and parcel of the plea agreement. Appellant is, in substance, attacking the validity of the plea. (*Panizzon, supra*, 13 Cal.4th at p. 78; *People v. Shelton* (2006) 37 Cal.4th 759, 768-771 [probable cause certificate required where defendant challenges trial court's authority to impose negotiated sentence lid].) In exchange for a 12 year sentence, appellant agreed to assign and transfer all her real and personal property to the district attorney with the understanding that the property or proceeds from the sale of the property would be distributed to appellant's victims in accordance with section 186.11. Appellant waived her right to object to "the disposition of any an all assets frozen or seized" and waived the right to object to "the disposition of any proceedings from the sale of assets frozen or seized."

Appellant's homestead exemption claim is a new found issue and affects a key component of the plea bargain: the constitutional right to victim restitution and how it will be paid. (Cal. Const., art. I, § 28, subd. (b)(13)(A).) Although the trial court set aside \$175,000 of the sale proceeds so that appellant could seek review of the order, appellant was required to timely comply with section 1237.5 and obtain a certificate of probable cause before appealing. (See *People v. Mendez* (1999) 19 Cal.4th 1084, 1098-1099; *People v. Brown* (2010) 181 Cal.App.4th 356, 361-362.) Absent full compliance and a certificate of probable cause, a reviewing court may not reach the merits of any issue challenging the validity of the plea. (*People v. Mendez, supra*, 19 Cal.4th at p. 1099.)

The appeal is dismissed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Jac A. Crawford, Judge

Superior Court County of San Luis Obispo

Richard E. Holly, under appointment by the Court of Appeal, for Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Mark E. Weber, Deputy Attorney General, for Plaintiff and Respondent.