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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ERIC COOK, Defendant and Appellant.	B285420 (Los Angeles County Super. Ct. No. TA140428)

APPEAL from a judgment of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed in part with directions and dismissed in part.

Adrian K. Panton, 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, Scott A. Taryle, Stacy S. Schwartz and Christopher G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Eric Cook pleaded no contest to one count of attempted murder and one count of voluntary manslaughter and admitted certain sentencing enhancements. In accordance with his plea agreement, Cook was sentenced to an aggregate state prison term of 27 years four months. On appeal Cook argues the court erred by failing to apply the one-third limit for a consecutive subordinate term to the sentence imposed for a firearm enhancement. Cook also requests this court correct errors that appear in the minutes of the July 28, 2017 sentencing hearing and the abstract of judgment. We agree that errors in the minute order and abstract of judgment must be corrected. However, because Cook pleaded no contest and failed to obtain a certificate of probable cause, the remainder of his appeal must be dismissed as inoperative.

FACTUAL AND PROCEDURAL BACKGROUND

On July 17, 2017 Cook was charged by an amended information with one count of murder (Pen. Code, § 187, subd. (a))[1] (count 1) and one count of attempted willful, deliberate and premeditated murder (§§ 187, subd. (a), 664) (count 2). As to both counts the information specially alleged Cook had personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (b), (c) and (d), and that the offenses were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). If convicted, Cook would have been subject to a maximum aggregate indeterminate sentence of 75 years to life in state prison: an indeterminate term of life for attempted premeditated murder, plus three consecutive

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[1] Statutory references are to this code.

indeterminate sentences of 25 years to life for murder and for the two firearm enhancements.[2]

The first trial took place in April 2017 (on an initial, substantially similar information) and ended in a mistrial when the jury was unable to reach a verdict. The retrial began on July 19, 2017. On the third day of deliberations, after requesting readback of multiple witnesses' testimony and copies of multiple exhibits, the jury informed the court it was unable to reach a unanimous decision on the charges. The court admonished the jurors to continue deliberating and attempt to reach a verdict.

Shortly after the jury resumed deliberations, the prosecutor informed the court the parties had agreed the prosecutor would seek to amend the information to add a count of voluntary manslaughter (§ 192, subd. (a)) (count 3), dismiss count 1, strike the allegation of premeditation from count 2 and add a special allegation as to count 2 that Cook had personally used a firearm during the attempted murder (§ 12022.5).[3] In exchange for pleading no contest to counts 2 and 3 and admitting the criminal street gang and firearm-use allegations, Cook would receive a sentence of 27 years four months. As the prosecutor explained,

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[2] The life term for attempted premeditated murder and the 25-year-to-life term for first degree murder would each be subject to a 15-year minimum parole eligibility date. (§ 186.22, subd. (b)(5).)

[3] Neither the reporter's transcript nor the July 28, 2017 minute order explicitly state an allegation pursuant to section 12022.5 was added to the amended information. However, the discussion on the record and the transcript of Cook's plea indicate such an amendment was contemplated by all parties.

"the offer would be high term of 11 years [for count 3], plus an additional 10 years for the gang allegation" plus "one-third the mid term [for count 2], which would be seven years. So one-third of seven years would be two years, four months. Plus an additional four years for the gun allegation . . . ." The court then stated, "So I am at 27 years, four months. . . . All right. So Mr. Cook, do you want to accept that offer, sir?" Cook replied, "Yes."

The trial court granted the prosecutor's request to amend the information. Prior to taking Cook's plea, the court addressed Cook, stating, "In this case, you are going to go to state prison for 27 years, four months." The court informed Cook of the consequences of his plea and asked, "Do you understand all of those consequences, sir?" Cook replied that he did. Cook pleaded no contest to count 2, attempted murder, and admitted personally using a firearm during commission of the offense. He also pleaded no contest to count 3, voluntary manslaughter, and admitted the crime was committed for the benefit of a criminal street gang.

The court pronounced the sentence in accordance with the plea agreement, "As to count 3, the court is going to pick the high term, which is 11 years. Pursuant to the 186.22, admitting to being true, pursuant to 667.5, an additional 10 years, which is a total of 21 years. As to count 2, one-third the mid term, which is two years, four months, plus the 12022.5, for an additional four years on that count. It would be six years, four months. And the total sentence would be 27 years, four months."

Cook filed a timely notice of appeal in which he checked the preprinted box indicating, "This appeal is based on the sentence or other matters occurring after the plea that do not affect the

validity of the plea." Cook did not obtain a certificate of probable cause.

DISCUSSION

1. *Cook's Challenge To His Sentence Is Barred by His Failure To Obtain a Certificate of Probable Cause*

a. *Governing law*

Section 1237.5 "provides that a defendant may not appeal 'from a judgment of conviction upon a plea of guilty or nolo contendere' unless the defendant has applied to the trial court for, and the trial court has executed and filed, 'a certificate of probable cause for such appeal.'" (*People v. Shelton* (2006) 37 Cal.4th 759, 766.) "'The purpose and effect of section 1237.5 . . . are . . . to create a mechanism for trial court determination of whether an appeal raises *any nonfrivolous* cognizable issue, i.e., any nonfrivolous issue going to the legality of the proceedings. . . . Section 1237.5 was intended to remedy the unnecessary expenditure of judicial resources by preventing the prosecution of frivolous appeals challenging convictions on a plea of guilty.'" (*People v. Johnson* (2009) 47 Cal.4th 668, 676 (*Johnson*).) If a defendant files a notice of appeal without obtaining a certificate of probable cause, the notice of appeal will be deemed inoperative. (Cal. Rules of Court, rule 8.304(b)(3); *Shelton,* at p. 769 ["[a]bsent a certificate of probable cause, the Court of Appeal could not entertain [defendant's] sentence challenge . . . and it had no alternative but to dismiss the appeal"].) The certificate requirement "should be applied in a strict manner." (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098.)

The Supreme Court has "long recognized two exceptions to [the] requirement of a certificate of probable cause. First, a

defendant may appeal from a ruling involving a search and seizure issue without obtaining a certificate . . . . Second, a defendant is 'not required to comply with the provisions of section 1237.5 where . . . he is not attempting to challenge the validity of his plea of guilty but is asserting only that errors occurred in the subsequent adversary hearings conducted by the trial court for the purpose of determining the degree of the crime and the penalty to be imposed.'" (*Johnson*, *supra*, 47 Cal.4th at p. 677; accord, *People v. Cuevas* (2008) 44 Cal.4th 374, 379 (*Cuevas*) ["[e]xempt from this certificate requirement are postplea claims, including sentencing issues, that do not challenge the validity of the plea"]; *People v. Buttram* (2003) 30 Cal.4th 773, 781 (*Buttram*) ["'[i]t has long been established that issues going to the validity of a plea require compliance with section 1237.5'"].)

The determination whether a defendant's appeal from a plea of guilty or no contest constitutes a challenge to the validity of the plea, and is therefore subject to the certificate requirement, "has involved difficult, and sometimes confusing, line-drawing." (*Buttram*, *supra,* 30 Cal.4th at p. 790.) As our colleagues in Division Two recently explained, courts interpreting the certificate of probable cause requirement "draw[] a line between pleas in which the parties agree that the court will impose a specific, agreed-upon sentence, and pleas in which the parties agree that the court may impose any sentence at or below an agreed-upon maximum. A certificate of probable cause is required for the former [citations], but not the latter (except where the defendant challenges the legal validity of the maximum sentence itself) [citations]. This differential treatment flows directly from the substance of the parties' agreement:

Where the parties agree to a specific sentence, the court's '[a]cceptance of the agreement binds the court and the parties to the agreement' [citation], and a defendant's challenge to the specific sentence is '*in substance* a challenge to the validity of the plea' [citation]. But where the parties agree to any sentence at or beneath an agreed-upon maximum, that 'agreement, by its nature, contemplates that the court will choose from among a range of permissible sentences within the maximum, and that abuses of this discretionary sentencing authority' do not attack the validity of the plea and 'will be reviewable on appeal' without a certificate of probable cause." (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 55-56.)

While this characterization of the requirement is a helpful starting point, application of section 1237.5 "require[s] an individual analysis whether the appellate claim at issue constitutes, in substance, an attack on the validity of the plea." (*Buttram*, *supra*, 30 Cal.4th at p. 790.) "[C]ourts must 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.' [Citations.] 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." (*People v. Panizzon* (1996) 13 Cal.4th 68, 76; see also *Johnson*, *supra*, 47 Cal.4th at p. 678 ["[e]ven when a defendant purports to challenge only the sentence imposed, a certificate of probable cause is required if the challenge goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement"].)

b. *Cook's challenge to his sentence is an attack on the validity of his plea*

Cook argues his sentence was unauthorized because the trial court imposed the full middle term of four years for the firearm enhancement (§ 12022.5) rather than imposing one-third the middle term, as is required when imposing a sentence enhancement as part of a consecutive subordinate term.[4] Accordingly, he contends we should reduce the sentence for the firearm enhancement to 16 months, thus reducing his aggregate sentence to 24 years eight months. In their respondent's brief the People concede the imposition of the full four-year sentence for the subordinate firearm enhancement was unlawful but argue the matter "should be remanded to allow the prosecution to present a new plea agreement that results in the same sentence."

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[4] Cook's description of how subordinate consecutive conduct enhancements are calculated is not quite right. Section 1170.1, subdivision (a), specifies "[t]he subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed." However, the term for subordinate consecutive conduct enhancements is "one-third of the term imposed for any specific enhancements applicable to those subordinate offenses." (*Ibid.*) Because section 12022.5, subdivision (a), specifies three possible terms for the personal firearm-use enhancement—three years, four years or 10 years—the proper sentence enhancement is not necessarily one-third of four years, as Cook argues, but could also be one-third of 10 years, or three years four months. (See *People v. Hill* (2004) 119 Cal.App.4th 85, 88 [section 1170.1, subdivision (a), permits trial court to use the upper term in calculating the subordinate, section 12022.5 firearm-use enhancement].)

After argument had been scheduled in this case, the People submitted a supplemental letter brief in which they argued the appeal must be dismissed because Cook failed to obtain a certificate of probable cause. In addition, despite their prior concession, the People argued Cook is estopped from contesting the legality of a sentence to which he had agreed. In response Cook maintains a certificate of probable cause is not necessary to challenge the legality of a sentence imposed as part of a plea agreement.

Despite Cook's contention that his appeal raises only a sentencing issue that does not challenge the validity of his plea, the agreed-upon sentence was an integral part of the plea agreement in this case. Cook was present when the prosecutor explained the details of the plea offer to the court, including the full four-year middle term for the firearm enhancement and the agreed-upon aggregate 27-year four-month sentence. The court immediately asked Cook if he wanted to accept the offer. Cook replied affirmatively. The court repeated the agreed-upon aggregate sentence while explaining to Cook the consequences of his plea. After accepting the no contest plea as having been freely and voluntarily made, the court imposed the precise sentence proposed by the prosecutor and agreed to by Cook. It is clear from this record Cook's no contest plea was entered not only in exchange for the dismissal of other charges and enhancements, but also in exchange for receiving the specific agreed-upon sentence. Thus, the sentence itself was an integral part of the plea agreement, and a certificate of probable cause is required. (See *Johnson*, *supra*, 47 Cal.4th at p. 678 ["an agreed-upon aspect of the sentence cannot be challenged without undermining the plea agreement itself"]; *Cuevas, supra*, 44 Cal.4th at p. 382

[certificate of probable cause required where defendant "is challenging the very sentence he negotiated as part of the plea bargain, and, in substance is attacking the validity of his plea"].)

Cook's argument the sentence violated section 1170.1 does not change this result. Cook relies on the rule that an appellate court may correct an unauthorized sentence at any time. However, this principle is applied as an exception to the rule that objections not made in the trial court cannot be raised on appeal. (See, e.g., *People v. Smith* (2001) 24 Cal.4th 849, 852 ["[b]ecause these sentences 'could not lawfully be imposed under any circumstance in the particular case' [citation], they are reviewable 'regardless of whether an objection or argument was raised in the trial and/or reviewing court'"].) "This principle cannot be employed to sidestep the additional hurdle of section 1237.5, which is triggered by entry of a guilty or no contest plea." (*People v. Zuniga* (2014) 225 Cal.App.4th 1178, 1186.)

Cook's argument is further unavailing because, by agreeing to the specific sentence imposed, Cook implicitly agreed the court had authority to impose the sentence. The specification of a particular sentence in a plea agreement "normally implies a mutual understanding of the defendant and the prosecutor that the specified [sentence] is one that the trial court may lawfully impose . . . ." (*People v. Shelton, supra*, 37 Cal.4th at p. 768.) Thus, the contention the sentence is unlawful is "in substance a challenge to the plea's validity and thus require[s] a certificate of probable cause." (*Id.* at p. 769 [certificate of probable cause required where defendant argued agreed-upon maximum sentence violated section 654's prohibition against multiple punishment]; see also *Cuevas*, *supra*, 44 Cal.4th at p. 384 ["[i]n

asserting that section 654 requires the trial court to stay any duplicative counts, defendant is not challenging the court's exercise of sentencing discretion, but attacking its *authority* to impose consecutive terms for these counts. This amounts to a challenge to the plea's validity, requiring a certificate of probable cause"]; *People v. Young* (2000) 77 Cal.App.4th 827, 832 ["[b]y arguing that the maximum sentence is unconstitutional, [defendant] is arguing that part of his plea bargain is illegal and is thus attacking the validity of the plea. Having failed to obtain a certificate of probable cause, defendant cannot appeal"].)

2. *The July 28, 2017 Minute Order and Abstract of Judgment Must Be Corrected*

Cook requests this court correct errors that appear in the July 28, 2017 minute order and the abstract of judgment. The People agree correction is necessary.

The reporter's transcript from the July 28, 2017 hearing reflects the trial court imposed a sentence of 21 years for count 3 (the upper term of 11 years, plus 10 years for the gang enhancement) as the principal determinate term and a consecutive sentence of six years four months for count 2 (two years four months as one-third the middle term, plus four years for the firearm enhancement), as the subordinate term. The July 28, 2017 minute order incorrectly identified count 2 as the principal term and misidentified the term imposed for count 2 as the term imposed for count three and vice versa. The abstract of judgment repeated these mistakes.

We order the correction of these clerical errors so that the minute order and abstract of judgment accurately reflect the court's sentencing pronouncement. (See *People v. Farell* (2002) 28 Cal.4th 381, 384, fn. 2 [record of court's oral pronouncement

controls over clerk's minute order]; *People v. Mitchell* (2001) 26 Cal.4th 181, 186-187 [appellate court may correct clerical errors on its own motion or upon application of the parties].)

DISPOSITION

The minute order of July 28, 2017 is modified to reflect the trial court's imposition of a 21-year principal term on count 3 and a consecutive six-year four-month subordinate term on count 2. The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation. The appeal is otherwise dismissed.

PERLUSS, P. J.

We concur:

ZELON, J.

FEUER, J.