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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. LAMAAS EL, Defendant and Appellant.	B287833 (Los Angeles County Super. Ct. No. BA441489)

APPEAL from a judgment of the Superior Court of Los Angeles County, Katherine Mader, Judge. Affirmed.

David M. Thompson, 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, and John Yang, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

Defendant pleaded no contest to one count of second degree robbery after executing a *Harvey* waiver[1] and agreeing to a 15-year sentence, "at 85 percent." Although the trial court ordered victim restitution on all charged counts, including the six that were dismissed, it did not impose the mandatory local crime prevention programs fine ("crime prevention fine;" Pen. Code, § 1202.5).[2]

Defendant timely appealed, but limited his appeal to issues that do not require a certificate of probable cause. Appointed counsel on appeal filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). At the court's invitation, defendant filed his own brief, raising a number of issues. After independently reviewing the record, we invited supplemental briefing to address the trial court's failure to impose the crime prevention fine and granted defendant's request to file a supplemental brief concerning the amendments to sections 667 and 1385, which, beginning January 1, 2019, will give trial courts the discretion to strike the five-year enhancement imposed pursuant to section 667, subdivision (a) for a prior felony conviction.

We affirm the judgment, find the failure to impose the crime prevention fine did not result in an unauthorized sentence that may be corrected on appeal, and conclude the bargained-for sentence does not entitle defendant to a remand for the trial court to consider whether to exercise its discretion to strike the five-year prior serious felony enhancement.

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1 *People v. Harvey* (1979) 25 Cal.3d 754, 758 (*Harvey*).

2 All statutory citations are to the Penal Code.

FACTUAL AND PROCEDURAL BACKGROUND

An information charged defendant with seven counts of second degree robbery (§ 212.5, subd. (c)) arising out of a two-month crime spree involving three different retailers. It was further alleged defendant used a dangerous weapon—a box cutter—in each charged offense, had two prior strike convictions, and served 11 prison terms for previous felony convictions.

Defendant's *Faretta* waiver was accepted, and he represented himself for a time, with appointed standby counsel. Defendant relinquished his pro. per. status in September 2017, and standby counsel became his attorney of record.

Defendant entered into a negotiated plea the following month. Defendant pleaded no contest to count 7 of the information, admitted one prior strike conviction and one prior serious felony conviction, and executed a *Harvey* waiver. In exchange, the trial court dismissed six second-degree robbery counts and sentenced defendant to an agreed-upon prison term of 15 years, to be served concurrently with his present sentence.[3] Defendant was ordered to pay restitution to the victims of all charged counts, including those that had been dismissed.

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[3] In taking the plea, the prosecutor advised defendant his own counsel agreed a conviction on all charges carried a potential sentence of 90 years to life.

The charged offenses were all similar. The police report detailing the incident that led to count 7 described an "*Estes*" robbery. (*People v. Estes* (1983) 147 Cal.App.3d 23.) According to the police report, defendant walked out of a Sears store without paying for merchandise. When confronted by security personnel, defendant dropped the merchandise at his feet and immediately pulled a box cutter out of his pocket.

Various fines and assessments were imposed, but not the section 1202.5 crime prevention fine. The 15-year sentence was calculated as follows: the high term of five years for second degree robbery, doubled for defendant's prior strike, plus five years for a prior serious felony conviction. (§§ 212.5; 667, subd. (b) - (j), 1170.12; 667, subd. (a).)

Defendant timely filed a notice of appeal, but did not request a certificate of probable cause. As noted above, appellate briefing included the following: appointed counsel's *Wende* brief, defendant's own brief raising a variety of issues, supplemental briefing by both parties addressing the crime prevention fine, and appointed counsel's supplemental brief concerning the new statutory provisions giving trial courts discretion to strike the enhancement for a prior serious felony conviction.[4]

DISCUSSION

I. Lack of a Certificate of Probable Cause Bars Issues Defendant Raised in His Brief

Defendant's notice of appeal specified it was "based on the sentence or other matters occurring after the plea that do not affect the validity of the plea." By order dated February 21 2018, we confirmed the appellate issues were limited to those that do not require a certificate of probable cause. (§ 1237.5, Cal. Rules of Court, rule 8.304(b).)

After appointed counsel filed a *Wende* brief, defendant filed his own brief with this court. He raises the following issues: (1) His no contest plea to count 7 should have been rejected because the force or fear element for second degree robbery was lacking; (2) if this claim was forfeited because his trial counsel

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[4] The Attorney General did not file a brief on this issue.

failed to object and instead joined in the plea, he received ineffective assistance of counsel; (3) store security personnel who chased him out of the store were not robbery victims as a matter of law; (4) his attorney's failure to object to the sentence constituted ineffective assistance of counsel; and (5) he should have been sentenced to one-third the midterm for second degree robbery, to be served consecutively to a sentence he was serving for a prior offense.[5]

Each issue, however, requires a certificate of probable cause. (§ 1237.5.) As the Court of Appeal explained in *People v. Hurlic* (2018) 25 Cal.App.5th 50 (*Hurlic*), there is a distinction on appeal "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 . . . . 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

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[5] The claimed sentencing error was based on a November 22, 2017 letter from the Department of Corrections and Rehabilitation (CDCR) to the trial court, with copies to defendant and counsel, asking the trial court to determine if defendant's sentence should be corrected in light of sections 667, subdivision (c)(8) and 1170.1, subdivision (a). The trial court issued a minute order acknowledging receipt of the CDCR letter and reaffirming defendant's sentence was to be served concurrently with the sentence previously imposed in another matter.

challenge to the validity of the plea' [citation]. . . . Because the parties in this case agreed to a specific . . . prison sentence, . . . appellate review is permissible only if defendant first obtains a certificate of probable cause." (*Id.* at pp. 55-56.)

The specific prison sentence defendant received was integral to the negotiated plea. The issues defendant asks this court to consider are "in substance" a challenge to the validity of the plea. Defendant's failure to obtain a certificate of probable cause precludes appellate review of them.

II. Crime Prevention Fine

In accepting defendant's no contest plea to one count of second degree robbery, the trial court neither imposed the $10 crime prevention fine mandated by section 1202.5 nor found defendant lacked "the ability to pay all or part of the fine" and all associated penalty assessments and surcharges. (§ 1202.5, subd. (a); see also *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1531-1532.) At our request, both parties briefed the issue of whether this omission constituted error and, if so, what the remedy should be.

Citing *People v. Burnett* (2004) 116 Cal.App.4th 257, 261 (*Burnett*), defendant argues, "where a mandatory fine is not imposed, on a silent record, it is presumed the trial court found defendant did not have the ability to pay." Citing *People v. Tillman* (2000) 22 Cal.4th 300, 301-302 (*Tillman*), defendant further asserts the prosecution forfeited the issue by not raising it in the trial court. The Attorney General posits the record is not "silent" because defendant's *Harvey* waiver rebutted any presumption that defendant lacked the ability to pay the local crime prevention programs fine and the failure to impose the mandatory fine resulted in an unauthorized sentence that may be

corrected at any time. For the reasons that follow, we agree with defendant.

The prosecution's failure to raise the crime prevention fine at the time of sentencing rendered the trial court record "silent" on this point. (*Burnett, supra,* 116 Cal.App.4th at p. 262.) And on a silent record, a judgment that omits the fine "does not constitute an unauthorized sentence that may be corrected on appeal." (*Ibid.*) Defendant's *Harvey* waiver and the trial court's imposition of other fines and assessments did not "unsilence" the record.

Burnett is particularly apt on this point. *Burnett* involved a no contest plea to several offenses, with the trial court imposing an agreed-upon sentence and dismissing the remaining charges. The trial court awarded victim restitution and imposed restitution fines—neither of which requires a finding that the defendant had the ability to pay. The trial court also imposed the crime prevention fine—which does require a finding of ability to pay. (*Burnett, supra,* 116 Cal.App.4th at p. 259.) The trial court did not impose the mandatory sex offender fine (§ 290.3), which also requires the trial court to determine the defendant has the ability to pay. The prosecutor did not raise the issue with the trial court or object to the failure to impose the fine at the time of sentencing.

Although one might imply from imposition of the crime prevention fine that the defendant had the ability to pay the sex offender fine, the *Burnett* court held the record was silent as to the fine that was not imposed and it would "presume the trial court made the requisite findings to support its judgment." (*Burnett, supra,* 116 Cal.App.4th at p. 262.) *Burnett* expressly rejected the notion that the sentence without imposition of the

sex offender fine was an unauthorized one subject to correction on appeal. (*Ibid.*)

We reach the same conclusion. The prosecution did not object to the trial court's failure to impose the crime prevention fine. The record is, accordingly, silent on this issue. We presume the trial court made the required findings and hold the prosecution has waived the issue. (*Tillman, supra,* 22 Cal.4th at p. 302.)

III. No Remand to Permit the Trial Court to Exercise Discretion as to the Prior Serious Felony Conviction

Effective January 1, 2019, sections 667 and 1385, as amended, will grant trial courts the discretion, in furtherance of justice, not to impose a five-year sentence enhancement pursuant to section 667, subdivision (a) for prior serious felony convictions. The amended provisions apply retroactively to defendants sentenced in 2018, but whose appeals will not be final before January 1, 2019. (*People v. Garcia* (2018) 28 Cal.App.5th 961, 973.) Defendant's appeal will not be final before the first of next year.

We agree this issue is cognizable on appeal without a certificate of probable cause. (*Hurlic, supra,* 25 Cal.App.5th at p. 57, fn. omitted.) In *Hurlic,* without a discussion in the published portion of the opinion, our colleagues in Division Two remanded the matter to the trial court to determine whether, in furtherance of justice, it would exercise its newly-granted discretion to strike that portion of a negotiated sentence that was imposed for a firearm enhancement. (*Id.* at p. 59.) Here, however, we conclude a remand would serve no purpose.

Defendant agreed to plead no contest to one count of second-degree robbery and to admit one prior strike conviction

and one prior serious felony conviction in exchange for a 15-year prison term, dismissal of six other second-degree robbery counts, and the striking of 10 prior serious felony allegations. Defendant's plea bargain eliminated the potential of a much longer prison sentence. The trial court accepted the negotiated agreement, imposed the bargained-for sentence, and did not weigh sentencing alternatives on the record. Under these circumstances, there is no reasonable likelihood the trial court would exercise its discretion on a remand to strike the five-year prior serious felony enhancement. A remand for resentencing would be an idle act and would serve no purpose. (See *People v. Fuhrman* (1997) 16 Cal.4th 930, 946; *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896; cf. *People v. McDaniels* (2018) 22 Cal.App.5th 420, 423 [remand proper where record contains no clear indication of trial court's intent not to strike firearm enhancement].)

DISPOSITION

The judgment is affirmed.

DUNNING, J.*

We concur:

BIGELOW, P. J. RUBIN, J.

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* Judge of the Orange Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.