Filed 10/30/18 P. v. Cardoso CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>CARLOS CARDOSO,<br><br>Defendant and Appellant. | B286671<br><br>(Los Angeles County Super. Ct. No. NA107726) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Appeal dismissed.

Rich Pfeiffer, 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, Paul M. Roadarmel, Jr. and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Carlos Cardoso pled no contest to unlawfully driving or taking a vehicle. The trial court sentenced him to a term of 28 months in prison. Cardoso appeals, contending the trial court abused its discretion by declining his request to recommend that he be placed in fire camp. Because Cardoso failed to obtain a certificate of probable cause and, in any event, his appeal is moot, we order it dismissed.

## PROCEDURAL BACKGROUND

Cardoso was charged in a felony complaint with two counts of unlawfully driving or taking a vehicle without the owner's consent (Veh. Code, § 10851, subd. (a)) and receiving a stolen vehicle (Pen. Code, § 496d),[1] based on offenses against two different victims, occurring in August and October, 2017.[2] The complaint also alleged Cardoso had suffered a prior "strike" for making criminal threats (§ 422) in 2008, and had served a prior prison term within the meaning of section 667.5, subdivision (b).

Pursuant to a negotiated disposition, on November 9, 2017, Cardoso pled no contest to one of the Vehicle Code section 10851 counts. Prior to the plea, the trial court confirmed: "It's my understanding you will take 28 months in state prison. You will pay restitution to all victims in all counts in this case, am I right?" Cardoso answered, "Yes." Before taking the plea, the prosecutor informed Cardoso of the maximum possible sentence and explained: "The deal is you will receive 28 months. You will [be] eligible for half time, but you have to serve that in state

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[1] All further undesignated statutory references are to the Penal Code.

[2] Because the facts underlying the offenses are not relevant to the issues on appeal, we do not discuss them.

prison, do you understand all that?" Cardoso replied, "Yes." Cardoso affirmed he wished to accept the plea deal. The prosecutor advised Cardoso, among other things, of his rights to a jury trial, to confront witnesses, to present a defense, and against self-incrimination, as well as the potential immigration consequences of his plea. The prosecutor then stated: "Sir, you are going to be doing your time in state prison," and explained that upon his release, he would be placed on parole and subject to return to custody for parole violations. Cardoso indicated he understood. Cardoso then entered his plea. He waived his right to be sentenced by the same judge who took the plea,[3] and the sentencing hearing was continued, to be conducted by a different judge.

At the November 21, 2017 sentencing hearing, the trial court sentenced Cardoso to 16 months on the Vehicle Code section 10851 count, and one year consecutive for the section 667.5, subdivision (b) enhancement, for a total of 28 months, as agreed. It dismissed the remaining two counts. The court awarded Cardoso 28 days of actual custody credit and 28 days of presentence conduct credit, for a total of 56 days. It imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment.

The following colloquy then transpired:

"[Defense counsel]: Would the court recommend fire camp?

"The Court: I don't recommend fire camp.

"[Defense counsel]: Why is that, Your Honor?

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[3] *People v. Arbuckle* (1978) 22 Cal.3d 749.

"The Court: There is a reason why because the custody credits whether or not they do fire camp or not is automatically reduced to a certain percentage.

"[Defense counsel]: I'm aware of what the court is talking about. Under the current regulations, his current commitment, he would get the same credits. It's one-third time for somebody who gets half time.

"[Prosecutor]: He is doing 30 percent?

"[Defense counsel]: In theory they do one-third time under the new —

"[Prosecutor]: Beautiful.

"The Court: I don't recommend fire camp. I think one of the things that upset me is the Department of Corrections never told the judges and it's not in the statute. It is just kind of like we got blind sided. He can ask the Department of Corrections. I would be happy to let him do that.

"[Defense counsel]: May I ask the court to have a transcript of that made, so I [may] take a writ?

"The Court: Sure.

"[Defense counsel]: I will let my appellate department know if I'm interested in doing that.

"The Court: I apologize to your client. I don't recommend it because we were never told about it. It reduces the sentence and custody credits and I wish we were advised of that. I have to find it out through a different source. It would be 30 percent time. Here is what happened, I have second strikers, people who are supposed to do 80 or 85 percent time, I recommend fire camp then they end up doing 30 percent. And I have other people doing 50 percent time that never ask for fire camp and they end up doing more time than the people who are doing the serious or

violent felonies who ask for fire camp. Because I recommend fire camp, there is a disparity, that's why I don't do it. Let the Department of Corrections make that decision.

"[Defense counsel]: If he does fire camp he is doing — working the same amount of time, based on the way this plea is structured. Based on that not recommending fire camp puts him in the position of not being able to earn money to pay the restitution. The court puts the victim in a worse position for him not being able to earn $500 a month or whatever it is towards restitution. Then the possible earning is 52 cents an hour that he can earn sweeping the floors in the jail. [¶] It seems in the larger scope of things that the restitution amount . . . can be paid. Again, it would be a benefit to society since the time would be the same. I don't see why the court would take . . . such a strong absolute position.

"The Court: Again, he is welcome to ask the warden for fire camp. I'm not saying I prohibit the warden from doing that. I don't recommend it."

On December 4, 2017, Cardoso filed a timely notice of appeal, stating that the appeal was based on the sentence or other matters occurring after the plea that did not affect its validity. Cardoso did not obtain a certificate of probable cause.

## DISCUSSION

Cardoso argues the trial court's refusal to recommend fire camp, based on its blanket policy and its purported misunderstanding of the law, was an abuse of discretion. Therefore, he urges, the matter must be remanded for resentencing. We disagree.

1. *The appeal must be dismissed because Cardoso failed to obtain a certificate of probable cause*

After the parties' briefing was complete, we sought supplemental briefing on the question of whether Cardoso's appeal was barred because he failed to obtain a certificate of probable cause. Having received and considered the parties' supplemental briefs, we conclude the appeal must be dismissed.

Section 1237.5 provides that a defendant may not appeal from a judgment of conviction upon a plea of guilty or no contest unless he or she has applied to the trial court for, and the trial court has executed and filed, a certificate of probable cause. (*People v. Shelton* (2006) 37 Cal.4th 759, 766; *People v. Mendez* (1999) 19 Cal.4th 1084, 1094–1095; Cal. Rules of Court, rule 8.304(b).) A certificate is not required if the appeal is based on grounds that arose after the entry of the plea and do not affect the plea's validity. (*People v. Cuevas* (2008) 44 Cal.4th 374, 379; Cal. Rules of Court, rule 8.304(b)(4)(B).) "Even 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." (*People v. Johnson* (2009) 47 Cal.4th 668, 678.) Noncertificate issues, on the other hand, include "attacks on the trial court's *discretionary* sentencing choices left open by the plea agreement. [Citations.]" (*People v. Williams* (2007) 156 Cal.App.4th 898, 910.)

In determining whether a certificate was required, we look to the substance of the appeal. " ' "[T]he 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. [Citations.]' " (*People v. Buttram* (2003) 30 Cal.4th 773, 781–782; *People v. French* (2008) 43 Cal.4th 36, 44; *People v. Panizzon* (1996) 13 Cal.4th 68, 79.) The requirements of section 1237.5 must be strictly applied. (*People v. Mendez*, *supra*, 19 Cal.4th at p. 1098; *People v. Mashburn* (2013) 222 Cal.App.4th 937, 941.)

In *People v. Panizzon*, *supra*, 13 Cal.4th 68, the court held that a defendant who agrees to a *specific* sentence in return for his plea must obtain a certificate of probable cause as a prerequisite to bringing a constitutional challenge to the sentence. (*Id.* at p. 73.) There, the defendant agreed to a plea bargain that called for a specified sentence. He received the agreed-upon sentence, but appealed without obtaining a certificate of probable cause, contending the negotiated sentence constituted cruel and unusual punishment. *Panizzon* concluded that, because the defendant was "in fact challenging the very sentence to which he agreed as part of the plea," the challenge "attack[ed] an integral part of the plea" and was "in substance, a challenge to the validity of the plea," requiring compliance with section 1237.5's certificate requirement. (*People v. Panizzon*, *supra*, at p. 73; see *People v. Williams*, *supra*, 156 Cal.App.4th at pp. 910–911 [failure to obtain certificate was fatal to contention that court applied the wrong sentencing rules; the appeal challenged both the plea's validity and the specific negotiated terms of the plea bargain, rather than sentencing choices left to the court's discretion].)

On the other hand, *People v. Buttram*, *supra*, 30 Cal.4th 773, held that no certificate is required when a defendant who pleads in return for an agreed *maximum* sentence challenges the

trial court's exercise of discretion in imposing sentence. (*Id.* at p. 777.) *Buttram* explained, "where the terms of the plea agreement leave issues open for resolution by litigation, appellate claims arising within the scope of that litigation do not attack the validity of the plea, and thus do not require a certificate of probable cause." (*Id.* at p. 783.) A negotiated plea term that provides for a maximum sentence, rather than a specified sentence, necessarily contemplates further adversary proceedings in which the court must exercise its discretion to determine the appropriate sentence within the constraints of the bargain. (*Id.* at p. 785.) "An appellate challenge to the exercise of the discretion reserved under the bargain is therefore a postplea sentencing matter extraneous to the plea agreement," and does not require a certificate. (*Id.* at p. 777.)

As in *Panizzon* and unlike in *Buttram*, Cardoso agreed to a specified sentence, which included the condition that he serve his time *in prison*. A fire camp recommendation was not part of the negotiated disposition. The plea agreement did not leave open the question of whether the court might recommend fire camp; it specified Cardoso would go to prison. Thus, the plea agreement did not leave the issue of fire camp open for resolution by future litigation, nor did it contemplate further adversary proceedings in which the court would exercise discretion. Cardoso pleaded no contest in exchange for a term of 28 months *in prison* and dismissal of two counts, which was precisely what he got. Thus, an appellate attack on the failure to recommend fire camp is an attack on the plea itself. "The parties to a plea agreement are free to make any lawful bargain they choose, and the exact bargain they make affects whether a subsequent appeal, in

substance, is an attack on the validity of the plea." (*People v. Buttram*, *supra*, 30 Cal.4th at p. 785.)

Cardoso argues that "fire camp *is* state prison." Therefore, he urges, "Because fire camp is a part of the California prison system, requesting a recommendation to serve the sentence in a fire camp did not in any way alter, or attempt to alter, the plea agreement." In support, he cites *People v. Lavaie* (1999) 70 Cal.App.4th 456. There, the defendant, an inmate in a camp facility, was convicted of escape in violation of section 4530. But *People v. Lavaie* did not consider whether "fire camp" and "state prison" were interchangeable terms, or whether fire camp and state prison are one and the same in the context of a plea agreement. Cases are not authority for propositions not considered. (*People v. Brown* (2012) 54 Cal.4th 314, 330.) Moreover, the statute at issue, section 4530, does not support the conclusion that "fire camp" and "prison" are equivalents for all purposes; instead section 4530's language references escapes from "any prison road camp, prison forestry camp, or other prison camp or prison farm or other place while under the custody of prison officials." The express inclusion of these other facilities, in addition to the words "state prison," undercuts appellant's contention. (Cf. *Austin v. Medicis* (2018) 21 Cal.App.5th 577, 582, 590, 597 [a person is " 'imprisoned on a criminal charge' " for purposes of Code of Civil Procedure section 352.1, subdivision (a), if he is serving a term of imprisonment in the state prison, but not if he is incarcerated in county jail].)

Cardoso's contention that prison and fire camp are synonymous fails, on the facts here, for another reason. The People point out that prison inmates earn custody credits at a different rate than those housed in fire camp. Inmates who are

serving terms for non-violent felonies and who are housed at fire camp earn credits at the rate of 66.6 percent, or two days of credit for each day of incarceration. (Cal. Code Regs., tit. 15, § 3043.2, subd. (b)(5)(B), (C).) Inmates serving time for non-violent offenses in non-camp facilities earn credit at the rate of 50 percent, or one day of credit for each day of incarceration. (Cal. Code Regs., tit. 15, § 3043.2, subd. (b)(4)(A).) Here, not only did Cardoso agree to serve his sentence in prison, but agreed he would earn custody credit at a 50 percent rate. Cardoso was informed "you will receive 28 months. *You will be eligible for half time, but you have to serve that in state prison*." (Italics added.) Thus, incarceration in fire camp, rather than prison, would have had a material effect on the amount of time he actually served, and therefore his request for fire camp directly impacted his plea agreement. In sum, his appeal amounts to an attack on the terms of his plea, and is not operative absent a certificate of probable cause.

2. *The appeal must be dismissed because it is moot*

Even if a certificate of probable cause was not required, the appeal must nonetheless be dismissed as moot. The parties agree that Cardoso's claim is moot, because he does not have sufficient time remaining on his sentence to complete training and be transferred to a fire camp. " 'A case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief.' [Citations.]" (*In re Stephon L.* (2010) 181 Cal.App.4th 1227, 1231; *In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1054 [an "appellate court will not review questions which are moot and only of academic importance, nor will it determine abstract questions of law at the request of a party who shows no substantial rights can be affected by the

decision either way"].) This court is bound to " 'decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.' [Citations.]" (*In re Miranda* (2011) 191 Cal.App.4th 757, 762; *In re Stephon L.*, at p. 1231.) Cardoso argues that the issue should nonetheless be decided because it is likely to recur yet evade review, and involves the public interest. (*In re Sheena K.* (2007) 40 Cal.4th 875, 879; *People v. Cheek* (2001) 25 Cal.4th 894, 897–898; *People v. Rish* (2008) 163 Cal.App.4th 1370, 1380–1381.) We disagree.

As the People point out, a trial court's fire camp recommendation is not dispositive in regard to a defendant's placement. (See *People v. Lara* (1984) 155 Cal.App.3d 570, 576 [ordinarily, the judicial sentencing function is confined to the determination of whether incarceration in state prison is appropriate, and authority to determine the place of incarceration is vested in correctional officials; the trial court may "suggest but not order"]; *Bradshaw v. Duffy* (1980) 104 Cal.App.3d 475, 478 [court may recommend honor camp, but lacks power to commit prisoner to such a placement]; *People v. Flower* (1976) 62 Cal.App.3d 904, 912–914 [rejecting contention that court should have ordered defendant to be incarcerated out of state; the "responsibility of assigning prisoners to specific institutions falls upon the Director of Corrections."].) The Department of Corrections and Rehabilitation (CDCR) has broad authority over inmates' supervision and custody arrangements. Statutes and CDCR regulations govern how inmates are assessed, classified, and housed. (See, e.g., § 5068; Cal. Code Regs., tit. 15, §§ 3375, 3375.1, 3375.2.) Thus, the issue of fire

camp recommendation does not present a compelling public policy question.

Further, Cardoso has failed to provide adequate information to establish he would have been entitled to relief even had his appeal not been moot. He makes no attempt to show that, under the applicable regulations or statutes, he would have been eligible for fire camp. (See generally *Bradshaw v. Duffy*, *supra*, 104 Cal.App.3d at pp. 481–482.) He also fails to establish that the trial court's reasoning was incorrect. Cardoso's contention that the trial court abused its discretion is based largely on the premise that the court was mistaken about custody credit percentages, and that in fact fire camp and prison inmates earn credits at the same rate.[4] The only support offered for this proposition is a bare citation to the CDCR's general website relating to Proposition 57. That website does not support appellant's contention. An appellant must support a point with reasoned argument and citations to authority. (*People v. Evans*

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[4] Cardoso also argues the trial court was "angry" it had not been apprised of the custody credits earned in fire camp, and refused to recommend fire camp due to this lack of information and the CDCR's failure to "hold a training seminar for judges." Unquestionably, the trial court did make several remarks indicating it was displeased by a lack of information. But, fairly read, its comments do not show it denied appellant's request simply because it was piqued about a perceived lack of communication from the CDCR. The gist of the court's remarks was that it declined to make fire camp recommendations because it wished to ensure defendants served the sentences the court anticipated, rather than lesser periods. The court's comments do not indicate it based its decision on a non-individualized consideration of sentencing factors, as Cardoso argues.

(2011) 200 Cal.App.4th 735, 756, fn. 12; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396–1397; *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4.) In any event, Cardoso's underlying premise appears to be incorrect: as noted *ante*, under the relevant regulations, inmates assigned to fire camp earn credits at a considerably higher rate than do inmates in the general prison population. (See Cal. Code Regs., tit. 15, § 3043.2, subds. (b)(4)(A) & (b)(5)(B), (C).)

Given the foregoing, Cardoso's appeal must be dismissed as moot.

**DISPOSITION**

The appeal is dismissed.

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EDMON, P. J.

We concur:

LAVIN, J.

DHANIDINA, J.