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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

HERBERTH DANILO GRANADOS,

Defendant and Appellant.

B277024

(Super. Ct. L.A. County  
No. BA 401149)

APPEAL from a postjudgment order of the Superior Court of Los Angeles, Craig J. Mitchell, Judge. Appeal dismissed.

Lise M. Breakey, 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, Michael C. Keller and

Paul M. Roadarmel, Jr., Deputy Attorneys General, for Plaintiff and Respondent.

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Herberth Danilo Granados (Granados) appeals an order denying his motion to withdraw his no contest pleas to one count of murder (Pen. Code, § 187, subd. (a), count 1)<sup>1</sup> and one count of attempted murder (§§ 664, 187, subd. (a), count 2), and asserts sentencing error. Because Granados waived his appellate rights when he entered his plea, and because he did not obtain a certificate of probable cause with respect to the denial of his motion to withdraw the plea, we dismiss the appeal.

### **FACTUAL AND PROCEDURAL SUMMARY**

On February 28, 2012, shortly before 1:00 p.m., Tomas Saquic was shot on Alvarado Street between Seventh and Eighth in Los Angeles, by an individual identified by witnesses as Granados.<sup>2</sup>

An April 18, 2013 information filed in the trial court charged Granados and Francisco Antonio Lopez (Lopez) with the February 28, 2012 first degree murder of Saquic (§ 187, subd. (a), count 1), and the attempted willful, deliberate and premeditated murder of Roman Gonzalez (also known as Casper) (§§ 664, 187, subd. (a), count 2).

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<sup>1</sup> Subsequent statutory references are to the Penal Code unless otherwise specified.

<sup>2</sup> Because this appeal raises only sentencing issues and not any issue regarding the facts of the underlying offense, we omit the traditional statement of facts. (See, e.g., *People v. White* (1997) 55 Cal.App.4th 914, 916, fn. 2.)

The information alleged as to both counts that a principal personally and intentionally discharged a firearm, a handgun, which caused great bodily injury and death to Saquic and Gonzalez within the meaning of section 12022.53, subdivisions (d) and (e)(1); that a principal personally and intentionally discharged a firearm, a handgun, within the meaning of section 12022.53, subdivisions (c) and (e)(1); and that a principal personally used a firearm, a handgun, within the meaning of section 12022.53, subdivisions (b) and (e). The information also alleged that both counts were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members, as set forth in section 186.22, subdivision (b)(1)(C). The maximum sentence Granados could have received was 102 years in prison.

On October 1, 2015, Granados entered into a plea agreement, pursuant to which he pleaded no contest to both counts and admitted the gang allegation pursuant to section 186.22, subdivision (b)(1)(C). The trial court was “apprised off the record that a disposition may have been reached” whereby, upon a plea, the trial court would impose 25 years to life as to count 1 and 7 years to life on count 2, to run concurrent with the sentence on count 1, and the trial court would stay the 10-year enhancement on the gang allegation. The trial court asked, “Is that the People’s offer?” Deputy District Attorney Christopher Baker replied, “Yes.”

After being informed by Granados’s counsel, Yusun Kang (Kang), that he wished to accept the offer, the trial court addressed Granados directly, including advising him as to the rights he would waive by accepting the offer. Among the rights the trial court described was a waiver of Granados’s right to appeal, with the trial court informing him that “[a]s a part of this disposition . . . , it is

contemplated that you will be waiving your appellate rights. What that means, Mr. Granados, is that, once I pronounce sentence, in the future you will not be able to challenge through the appellate process the sentence that I impose or any aspect of this plea. [¶] Do you understand?” Granados replied, “Yes.” The trial court inquired as to whether Granados was threatened in any way to force him to enter a plea against his will, to which he responded, “No.” Granados also responded “yes” when the trial court inquired as to whether he “had enough time to speak to Miss Kang about your case and about what you’re doing right now.” Granados, joined by Kang, accepted the offer and pleaded no contest to both counts.

After taking Granados’s plea, the trial court scheduled sentencing for December 29, 2015. At Granados’s request, this date was outside the statutorily required period because the trial court stated that “[h]e wishes to remain in local custody and put sentencing over so that he can have some time with his daughter.” At the December 29 hearing, Granados made what the trial court construed to be an oral motion to withdraw his plea. The trial court relieved Kang and appointed new counsel, bar panel attorney Adrian Baca. The sentencing hearing was continued in order to permit Baca to file a written motion to withdraw Granados’s plea.

On March 26, 2016, Granados filed his motion to withdraw his plea. The motion was grounded in Granados’s contention that he received ineffective assistance of counsel in connection with the plea. Granados provided a declaration averring that for the 10 months leading to his trial, Kang “told me there was a plea offer of 25 years to life. I always said ‘no’.” Granados testified that he felt pressured to take the plea offer, and that he was under the assumption that he would be unable to appeal if he lost at trial because “[m]y attorney [Kang] kept telling me I was going to lose at

trial. She told me if I lost at trial I could not appeal. She said she won't make any mistakes at trial and I only could appeal if she made a mistake." Granados "did not know what defense" Kang intended to present, "was not prepared before trial to get ready to testify," "did not know what witnesses [Kang] subpoenaed," "did not know if [Kang] retained or consulted with any experts," and was not aware whether Kang "ever made a motion to sever [his] trial from [Lopez's]." Granados testified that he gave a statement to police "because they said they could arrest my sister in Houston" and "[t]hey also told me that my brother was in jail." Granados "believe[d] they were trying to tell me that he could get more time in jail if I did not speak to them." He was told "that if I did not plea then my [codefendant Lopez] would testify against me" and that "I was looking at 100 years to life and that I would not be able to appeal my conviction."

On July 20, 2016, the court heard Granados's motion to withdraw his plea. Granados, through his counsel, waived the attorney client privilege for the limited purpose of calling Kang to the stand. The court conducted an evidentiary hearing, including testimony from Granados and Kang. Granados testified that Kang "had never explained to me how she was going to defend me, and I knew hardly anything about my case." He alleged that Kang did not tell him whether she had retained experts, or what witnesses she intended to call, and that he was not prepared to testify. With respect to the issue of appeal, Granados alleged that Kang "told [him] that in order to make an appeal, that something would had to have been done wrongly in the trial and that she was not going to do anything wrong, and that that's why I would not be able to get an appeal."

Kang, on the other hand, testified that she visited or conducted video conferences with Granados 23 times, discussed the case and possible defenses with him, and hired experts. Among other discussions, Kang testified that she sat with Granados for three hours in one face-to-face visit, during which they listened to the entire interrogation of Granados's codefendant, Lopez. Kang testified she informed Granados that he faced 102 years to life.

After conducting the evidentiary hearing, the trial court concluded that Kang "provided counsel that is so far short of ineffective. In fact, it's highly effective" and that Kang's "ability to share with the court this morning the discussions she had with Mr. Granados as to the likely basis for being successful on appeal, namely, judicial error or ineffective assistance of counsel, certainly underscores to this court that these were not cursory discussions that she was having with Mr. Granados, that she was attempting to explain to a lay person in very comprehensible terms the legal facts of life."

Thereafter, the court denied the motion to withdraw the plea and sentenced Granados as previously agreed: 25 years to life, 10 years for the gang allegation, which the court stayed, and 7 years to life on count 2, to be served concurrently with count 1. Granados initially received 1,087 actual days of custody credit. The court imposed a restitution fine of \$300 under section 1202.4, subdivision (b), as well as a parole revocation fine of \$300 under section 1202.45, which the trial court stayed unless parole, postrelease community supervision, or mandatory supervision was revoked. The trial court also imposed a \$30 criminal conviction assessment under Government Code section 70373 with respect to each count, a \$40 court security fee pursuant to section 1465.8,

subdivision (a)(1) with respect to each count, and victim restitution of \$5,000.

At the conclusion of the July 20 hearing, Granados’s counsel asserted that he would appeal the denial of the motion to withdraw the plea, stating that “[i]t would be my intention to file a notice of appeal and ask the trial court for a certificate of probable cause for denial of the motion to withdraw the plea. I know I can’t appeal the plea, but I can appeal—” The trial court interjected, saying, “[t]he ruling, yes, you can.” Counsel stated that he would “submit that tomorrow.” No request for a certificate of probable cause was filed.

Granados filed a notice of appeal on August 18, 2016, stating that his appeal was based on “the sentence or other matters occurring after the plea that do not affect the validity of the plea.” A second notice of appeal was filed on Granados’s behalf on August 23, 2016, appealing the denial of the motion to withdraw the plea.<sup>3</sup>

On June 6, 2017, Granados’s appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, raising no issues on appeal and requesting that we independently review the record to determine if the trial court committed any error. That same day, counsel filed a motion to withdraw the *Wende* brief, which was granted on June 12, 2017. On June 12, 2017, we also granted permission to file an opening brief. On September 8, 2017, Granados filed a motion to augment the record, which we granted on September 12, 2017. The record was augmented with a minute

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<sup>3</sup> Because two notices of appeal were filed, two clerk’s transcripts and two reporter’s transcripts were also filed. The clerk’s transcripts are identical, aside from the notices of appeal. The reporter’s transcripts contain differences that are not material to this appeal. To avoid confusion, in reviewing Granados’s appeal, we rely on the documents to which both parties refer in their briefs.

order issued by the trial court on July 20, 2016, as amended nunc pro tunc on August 14, 2017, and an amended abstract of judgment. The amended minute order modified the number of days of custody credit to 1,445, modified the restitution fine under section 1202.4, subdivision (b) from \$300 to \$200, and modified the parole revocation fine under section 1202.45 from \$300 to \$200, stayed unless parole, postrelease community supervision, or mandatory supervision was revoked. Granados filed his opening brief on August 21, 2017.

## **DISCUSSION**

In his opening brief, Granados contends that the trial court erred by imposing the 10-year gang enhancement, based on his sentence of 25 years to life and applying section 186.22, subdivisions (b)(1) and (b)(5), which provide for a minimum 15 years prior to parole consideration and preclude imposition of the 10-year enhancement. In his notice of appeal, however, Granados challenged the denial of his motion to withdraw his plea. We discuss these issues in turn, and dismiss the appeal.

### **I. Waiver of Right to Appeal; Negotiated Plea Bargain**

Granados alleges that the trial court erred in applying the 10-year gang enhancement. This contention is based on section 186.22, which provides in pertinent part that “[e]xcept as provided in paragraphs (4) and (5), any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members, shall, upon conviction of that felony, in addition and consecutive to the punishment prescribed for the felony or



attempted felony of which he or she has been convicted, be punished as follows: . . . (C) If the felony is a violent felony, as defined in subdivision (c) of Section 667.5, the person shall be punished by an additional term of 10 years.” (§ 186.22, subd. (b)(1)).

Subdivision (b)(5), however, provides in pertinent part that a “person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar years have been served.” (§ 186.22, subd. (b)(5).) The exception contained in subdivision (b)(5) precludes imposition of the 10-year enhancement in a gang related first degree murder, which is punishable by 25 years to life. (*People v. Lopez* (2005) 34 Cal.4th 1002, 1004.)

Here, however, Granados “received what he negotiated and agreed to under the plea agreement, and he must abide by the terms of the agreement. [Citation.]” (*People v. Cuevas* (2008) 44 Cal.4th 374, 384.) Where a defendant has “ ‘pleaded guilty in return for a *specified sentence*, appellate courts are not inclined to find error even though the trial court acts in excess of jurisdiction in reaching that figure, as long as the court does not lack *fundamental jurisdiction*. . . . The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to ‘trifle with the courts’ by attempting to better the bargain through the appellate process.’ [Citation.]” (*People v. Couch* (1996) 48 Cal.App.4th 1053, 1056–1057.)

Further, a defendant may waive the right to appeal in the context of a negotiated plea agreement. (*People v. Panizzon* (1996) 13 Cal.4th 68, 80 (*Panizzon*).) The trial court advised Granados that the plea agreement included a waiver of the right to appeal the conviction and sentence, and the specific sentence was disclosed to Granados at the time the plea was taken, although it

was imposed at his subsequent sentencing hearing. A criminal defendant may appeal future errors that are beyond the scope of the waiver, but here, Granados's sentence, including the gang enhancement, was disclosed at the time of the plea, compelling the conclusion that it does not represent a future error or waiver relating to an "unforeseen or unknown" event. (*Id.* at p. 85.) As such, "both the length of the sentence and the right to appeal the sentence are issues that cannot fairly be characterized as falling outside of defendant's contemplation and knowledge when the waiver was made." (*Id.* at p. 86.) This is true even if under other circumstances the enhancement might not have been imposed. (*Id.* at p. 89 ["valid, express, and unrestricted waiver of the right to appeal a negotiated sentence should be deemed to include a waiver of the right to appeal it on the ground that it is disproportional and therefore invalid"].)

For these reasons, Granados is foreclosed from raising a claim of sentencing error with respect to the imposition of the 10-year enhancement.

## **II. Failure to Obtain Certificate of Probable Cause**

A criminal defendant who pleads no contest is limited in his or her right to appeal by section 1237.5, which requires that "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," and [t]he trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." (§ 1237.5.) Granados failed to request or obtain a certificate of probable cause. The Attorney General asserts that this failure precludes Granados's appeal. We agree.

“It has long been established that issues going to the validity of a plea require compliance with section 1237.5. [Citation.] Thus, for example, a certificate must be obtained when a defendant claims that a plea was induced by misrepresentations of a fundamental nature [citation] or that the plea was entered at a time when the defendant was mentally incompetent [citation]. Similarly, a certificate is required when a defendant claims that warnings regarding the effect of a guilty plea on the right to appeal were inadequate. [Citation.]” (*Panizzon, supra*, 13 Cal.4th at p. 76.) “A defendant must obtain a certificate of probable cause in order to appeal from the denial of a motion to withdraw a guilty plea, even though such a motion involves a proceeding that occurs *after* the guilty plea. [Citation.]” (*People v. Johnson* (2009) 47 Cal.4th 668, 679.)

“Exempt from this certificate requirement are postplea claims, including sentencing issues, that do not challenge the validity of the plea. [Citations.] For example, ‘when the claim on appeal is merely that the trial court abused the discretion the parties intended it to exercise, there is, in substance, no attack on a sentence that was “part of [the] plea bargain.” [Citation.] Instead, the appellate challenge is one contemplated, and reserved, by the agreement itself.’ [Citation.]” (*People v. Cuevas, supra*, 44 Cal.4th at p. 379.) The challenge at issue in this appeal goes to the heart of the plea bargain, which was offered and accepted at the October 1, 2015 hearing, and included the 10-year enhancement and the waiver of the right to appeal. The sentencing hearing on July 20, 2016, which took place after the hearing on Granados’s motion to withdraw his plea, memorialized the deal previously made. Unlike the circumstances described in *People v. Buttram* (2003) 30 Cal.4th 773, there were no subsequent sentencing

proceedings scheduled postplea that would suggest that the court retained discretion to sentence Granados other than pursuant to the deal made at the October 1, 2015 hearing. Accordingly, Granados was required to obtain a certificate of probable cause pursuant to section 1237.5 in order to proceed with his appeal. Because he did not obtain a certificate of probable cause, and because he waived his right to appeal, we dismiss the appeal. (*Panizzon, supra*, 13 Cal.4th at p. 89.)

### DISPOSITION

The appeal is dismissed.

NOT TO BE PUBLISHED.

BENDIX, J. \*

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

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