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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.

RAYMOND BROWN,

Defendant and Appellant.

B242190

(Los Angeles County
Super. Ct. No. PA071959)

APPEAL from a judgment of the Superior Court of Los Angeles County, David W. Stuart and Harvey Giss, Judges. Appeal dismissed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Raymond Brown appeals from a judgment of conviction entered after he pleaded no contest to one count of transporting or selling Hydrocodone (Health & Saf. Code, § 11352, subd. (a)). On appeal, Brown contends the trial court erred in denying his motion to suppress evidence and, alternatively, his defense counsel was constitutionally ineffective. We dismiss the appeal.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to the preliminary hearing, Brown filed a motion to suppress evidence of various controlled substances seized by police (Pen. Code, § 1538.5),¹ arguing they were the fruit of an illegal search of his car. The evidence at the suppression hearing, held in conjunction with Brown's preliminary hearing, established that undercover officers detained Brown and codefendants Dariante Smith and Derrick Smith, and searched their car after observing several hand-to-hand sales occur at the car. Among the items police found inside the car were prescription vials of Hydrocodone, which had not been prescribed for Brown or his codefendants.

The trial court denied the motion to suppress and held Brown to answer. Brown subsequently moved to set aside the information under section 995 on the ground of insufficient evidence. He did not, however, either seek review of the denial of his motion to suppress or renew his motion to suppress in the trial court.² The trial court denied the motion to set aside the information.

¹ All further statutory references are to the Penal Code, unless otherwise indicated.

² At the hearing on the motion to dismiss, defense counsel told the court he was "not asking the court to review the decision that was made" by the judge who heard the motion to suppress.

Brown waived his constitutional rights and entered a negotiated plea of no contest to one count of transporting or selling Hydrocodone (Health & Saf. Code, § 11352, subd. (a)). Pursuant to the plea agreement, the trial court sentenced Brown to the middle term of four years in state prison, to be served in county jail (§ 1170, subd. (h)(2)), and on the People's motion dismissed the remaining charges of transporting or selling cocaine base and Oxycodone and the two prior drug conviction enhancements (Health & Saf. Code, § 11372, subd. (a)).

Brown timely appealed. The trial court denied Brown's request for a certificate of probable cause.

DISCUSSION

Brown argues that the trial court erred in denying his motion to suppress because the officers seized the evidence from the car pursuant to an unlawful search. In the alternative, Brown argues that, if his attorney's failure to renew the suppression motion precludes appellate review, then he received ineffective assistance of counsel. We conclude these claims are not cognizable on appeal, and the appeal must be dismissed.

A. *Brown Has Forfeited His Fourth Amendment Claim*

To obtain direct appellate review of a denial of a motion to suppress evidence, a defendant must either renew the motion in the trial court under section 1538.5, subdivision (i), or move to set aside the information for lack of probable cause under section 995 and raise the search and seizure issue in the motion to set aside. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 896; *People v. Hawkins* (2012) 211 Cal.App.4th 194, 203; *People v. Richardson* (2007) 156 Cal.App.4th 574, 584-585, 595; *People v. Hinds* (2003) 108 Cal.App.4th 897, 900.) The reason for this rule is that "it would be wholly inappropriate to reverse a superior court's judgment for error it did not commit and that was never called to its attention." (*Lilienthal, supra*, at p. 896, fn. omitted; see *People v. Burns* (1993) 20 Cal.App.4th 1266, 1271.) Because Brown did not renew his suppression

motion or raise the search and seizure issue in moving to set aside the information, his Fourth Amendment claim is not cognizable on appeal. (See *Lilienthal, supra*, at p. 896; *Hinds, supra*, at p. 900.)

B. *Brown's Claim of Ineffective Assistance Required a Certificate of Probable Cause*

Brown contends in the alternative that if his Fourth Amendment claim is not cognizable on appeal, then his attorney's failure to preserve it for appellate review constitutes ineffective assistance of counsel. We cannot address this argument because it is not among the limited issues reviewable on appeal from a judgment following a guilty plea in the absence of a certificate of probable cause.

A criminal defendant who appeals following a plea of no contest or guilty without a certificate of probable cause can only challenge the denial of a motion to suppress evidence made or renewed in superior court (§ 1538.5, subd. (m)) or raise grounds arising after the entry of the plea that do not affect the validity of the plea. (*People v. Johnson* (2009) 47 Cal.4th 668, 676-677; Cal. Rules of Court, rule 8.304(b)(4).) Because we have concluded that Brown is precluded from seeking appellate review of the trial court's denial of his suppression motion under section 1538.5, subdivision (m), we can consider his ineffective assistance of counsel claim only if it is based on "[g]rounds that arose after entry of the plea and do not affect the plea's validity." (Cal. Rules of Court, rule 8.304(b)(4)(B).)

The substance of Brown's ineffective assistance of counsel claim relates to what occurred prior to his plea and is a challenge to the validity of his plea. "In the absence of a certificate" of probable cause, an "appeal is inoperative." (*People v. Stubbs* (1998) 61 Cal.App.4th 243, 245; see *People v. Johnson, supra*, 47 Cal.4th at pp. 683-685 [claim of ineffective assistance of counsel does not obviate need for certificate of probable cause]; *People v. Richardson, supra*, 156 Cal.App.4th at pp. 595-596 [pre-plea ineffective assistance of counsel claim cannot be raised without certificate of probable cause]; *People v. Cole* (2001) 88 Cal.App.4th 850, 867 [claim that "attacks the validity of the

plea . . . cannot be entertained in the absence of a certificate of probable cause”].) In this situation, “the Court of Appeal ‘generally may not proceed to the merits of the appeal, but must order dismissal’ [Citations.]” (*In re Chavez* (2003) 30 Cal.4th 643, 651.)

DISPOSITION

The appeal is dismissed.

SEGAL, J.*

We concur:

WOODS, Acting P. J.

ZELON, J.

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