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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY MARK DEVAUGHN, Defendant and Appellant.	B286030 (Los Angeles County Super. Ct. No. BA324510)

APPEAL from a judgment of the Superior Court of Los Angeles County, Fred N. Wapner, Judge. Affirmed.

Lenore O. DeVita, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant Anthony Mark DeVaughn and his brother were charged with numerous felony offenses in connection with an alleged real estate fraud scheme. Defendant's appointed trial counsel negotiated a plea deal pursuant to which he pled no contest to a single interlineated count of accessory after the fact. After defendant's plea but before his sentencing, the prosecution determined it was unable to proceed against defendant's brother and dropped all charges against him. Defendant then moved to withdraw his plea, arguing that his attorney was ineffective and pressured him into the plea. The trial court denied the motion and sentenced defendant pursuant to the plea agreement: one year of summary probation, which was immediately terminated, and dismissal of the case under Penal Code section 1203.4.[1]

Defendant's appointed appellate counsel filed an opening brief requesting this court to independently review the record pursuant to the holding of *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Defendant filed a supplemental brief contending that the trial court improperly denied his motion to suppress evidence and his motion to withdraw his plea. Defendant also seeks remand to develop facts supporting his actual innocence and misconduct by the prosecution. After reviewing the entire record in accordance with *Wende*, *supra*, 25 Cal.3d at pp. 441-442, we conclude no arguable issues exist and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In 2005, defendant and his brother, Michael DeVaughn, allegedly engaged in a scheme to defraud real estate owners in Los Angeles County. Using stolen identities, a bogus escrow company, and forged documents, the brothers allegedly

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

purchased three properties, defrauding both the property owners and various financial institutions.

An amended information filed in May 2011 charged defendant with 15 felony counts and his brother with 21. As to defendant, the information alleged three counts of grand theft of real property valued at more than $400 (§ 487, subd. (a)); five counts of grand theft of personal property, all six-figure sums of money (§ 487, subd. (a)); two counts of making false financial statements (§ 532a, subd. (1)); two counts of identity theft (§ 530.5, subd. (a)); two counts of recording false or forged instruments (§ 115, subd. (a)); and one count of forgery (§ 470, subd. (a)). The information further alleged that all of the offenses were related felonies involving fraud or embezzlement in excess of $500,000 (§ 186.11, subd. (a)(1)) and that the offenses involved property with a value exceeding $1 million (former § 12022.6, subd. (a)(3)).

Defendant, who represented himself for much of the proceedings, engaged in substantial motion practice from 2011 to 2013. He filed a demurrer based on the statute of limitations and motions to dismiss based on section 654, section 995, speedy trial, and "non-statutory" grounds. Defendant also moved to suppress evidence obtained from banks and from his home, and to traverse the warrant underlying some of the searches. In addition, defendant filed a motion to recuse the district attorney's office from the case. The trial court heard and overruled the demurrer and heard and denied all of the motions.

Defendant relinquished his in propria persona status on August 30, 2013. Defendant's standby counsel was appointed to represent him that same day. The matter subsequently was continued several times.

On February 20, 2015, pursuant to a negotiated plea agreement with defendant, the prosecution amended the information to add count 24, a single count of accessory after the fact (§ 32). In exchange for defendant's plea of no contest to that count and his remaining crime-free for the next six months, the prosecution agreed to a misdemeanor sentence followed by the immediate termination of probation.

Defendant told the court that no one had made any promises, threats, or other deals to induce his plea. He also told the court he had enough time to discuss the deal with his lawyer, and that he was entering the agreement freely and voluntarily. The court found that defendant "underst[oo]d the nature of the charges against you and the consequences of your plea," "made a knowing, intelligent, free, and voluntary waiver of [his] . . . rights," and that the plea itself was "freely and voluntarily made." Defense counsel joined the waivers, concurred in the plea, and stipulated to a factual basis based on the police report and preliminary hearing transcript. The court accepted the plea and set the matter for sentencing in six months.

Two months later, in May 2015, the prosecution dismissed all of the charges against defendant's brother.

At his October 2, 2015 continued sentencing hearing, defendant, still represented by counsel, filed a pro. per. motion to withdraw his no contest plea pursuant to section 1018. In his motion, he argued that his counsel rendered ineffective assistance by failing to properly investigate the case and by misleading defendant into believing that the prosecution was prepared to try the charges against him. The trial court appointed new counsel for the sole purpose of handling the motion and continued the matter.

On April 6, 2016, defendant withdrew his pro. per. motion to withdraw the plea. His recently appointed counsel filed a new motion to withdraw the plea on August 29, 2016. Counsel argued that defendant was pressured into pleading and did so involuntarily and under duress, and that defendant's prior counsel was ineffective. Counsel further argued that defendant "deserves the same dismissal" his brother received "under Penal Code section 1382/1385 in the interest of justice." Counsel reiterated these assertions in a supplemental motion filed on September 9, 2016. The prosecution opposed the motions to withdraw the plea. Both defendant and his counsel filed replies.

The trial court held a hearing on the motion on September 1, 2017. Defendant testified, by declaration, that he learned after pleading that his prior counsel had never contacted his investigator, a real estate expert, or defendant's brother. Prior counsel provided a declaration for the prosecution and testified that he received and reviewed all of the discovery in defendant's case, including witness and victim statements. He did not, however, contact the private investigator defendant used while acting in propria persona, nor did he obtain his own investigator or contact any witnesses or victims. Regarding the plea deal, prior counsel testified that he had "numerous" discussions with the prosecutor because defendant was interested in settling the case. He and the prosecutor eventually agreed upon a deal, which defendant accepted after discussing with prior counsel the benefits and risks of pleading. After the charges were dropped against defendant's brother, prior counsel had a conversation with the prosecutor, the court, and defendant "as to . . . why not just dismiss the case against Mr. DeVaughn, like you dismissed it against his brother Michael, in the interest of justice or unable to

proceed."

The trial court denied defendant's motion to withdraw his plea, finding that defendant failed to carry his burden of proving good cause by clear and convincing evidence. It explained, "I don't think this is a close call. . . . I think this is basically buyer's remorse. Hey, my brother got a better deal than I did so I want that too." The court found that prior counsel "wasn't ineffective," and that defendant's "will wasn't overborne." The court observed that defendant "represented himself forever" before prior counsel stepped in and "knew the case better than" he did; "[t]his is not one of those situations where some newbie defendant comes into court wide eyed." The court also agreed with prior counsel's recollection of the conversation the parties had after the charges against defendant's brother were dropped: "we had that discussion; and I told the People I thought it would be a reasonable thing to do. They didn't agree. Okay. They don't have to agree. They made a deal. They're entitled to their deal as well."

After denying the motion, the court sentenced defendant in accordance with the plea agreement. "As to section 32 of the Penal Code, he's sentenced as a misdemeanor and so imposition of sentence is suspended. He's placed on summary probation for one year under the following terms and conditions: that he pay $150 restitution fine; $40 court security fee; $30 criminal conviction fee. Probation is now terminated pursuant to 1203.3. And the case is dismissed pursuant to 1203.4 of the Penal Code." The court also formally dismissed all of the other charges against defendant.

Defendant timely appealed. He did not seek or receive a certificate of probable cause.

Defendant's appointed appellate counsel filed an opening brief requesting this court to independently review the record pursuant to the holding of *Wende*, *supra*, 25 Cal.3d 436. On January 29, 2018, we advised defendant that he had 30 days in which to submit by brief or letter any grounds of appeal, contentions, or argument he wished this court to consider. We granted defendant's request for an extension of time, and he filed a seven-page brief accompanied by approximately 100 pages of supporting exhibits on April 6, 2018.

DISCUSSION

In his supplemental brief, defendant presents four issues or claims. First, he contends that the trial court erroneously denied his motion to suppress. Second, he contends that the trial court abused its discretion by denying his motion to withdraw his no contest plea, and suggests that his counsel provided ineffective assistance in connection with the plea. Third, defendant requests "limited remand" to develop facts regarding alleged misconduct by the prosecution and his own actual innocence. Finally, he contends that he should be appointed new appellate counsel to fully brief the claims he identified.

I. Most Claims Barred by Lack of Certificate of Probable Cause

Section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, . . . except where both of the following are met: [¶] (a) 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. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court." "'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.'" (*People v. Johnson* (2009) 47 Cal.4th 668, 676, quoting *People v. Hoffard* (1995) 10 Cal.4th 1170, 1179.) "'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. Hoffard*[, *supra*,] 10 Cal.4th [at p.] 1179.)" (*People v. Johnson*, *supra*, 47 Cal.4th at p. 676.)

Section 1237.5 is applied in a strict manner. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098.) Thus, a certificate of probable cause is required "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." (*People v. Johnson*, *supra*, 47 Cal.4th at p. 679; see Cal. Rules of Court, rule 8.304(b)(4)(B).) A certificate of probable cause also is required "when a defendant claims that a plea was induced by misrepresentations of a fundamental nature" (*People v. Panizzon* (1996) 13 Cal.4th 68, 76), or that he or she received ineffective assistance of counsel prior to the plea (*People v. Stubbs* (1998) 61 Cal.App.4th 243, 244-245). Absent a certificate of probable cause, we can address a claim of ineffective assistance "only if that claim relates to 'proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.'" (*People v. Richardson* (2007) 156 Cal.App.4th 574, 596.)

Defendant did not seek or obtain a certificate of probable cause. We accordingly cannot and do not address his claims concerning his motion to withdraw his plea or the efficacy of his trial counsel.

However, there is a limited exception to the certificate of probable cause requirement: "a defendant may appeal from a ruling involving a search and seizure issue without obtaining a certificate, because an appeal from such a ruling explicitly is authorized by section 1538.5." (*People v. Johnson*, *supra*, 47 Cal.4th at p. 677.) Section 1538.5, subdivision (m) provides that "A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty." (§ 1538.5, subd. (m); see also Cal. Rules of Court, rule 8.304(b)(4)(A) [no certificate of probable cause needed where "the notice of appeal states that the appeal is based on . . . [t]he denial of a motion to suppress evidence under Penal Code section 1538.5".) Although defendant did not identify the denial of his motion to suppress in his notice of appeal, which lists as the only basis of appeal "Denial of Motion to Withdraw Guilty Plea, Penal Code § 1018," he squarely raised the issue in his supplemental brief. We therefore consider it as follows.

II. Denial of Motion to Suppress

In his motion to suppress, defendant argued that information investigators obtained by communicating with financial institutions prior to securing a search warrant should be suppressed. He contended that the institutions disclosed the information in violation of federal and state financial privacy laws, thereby violating his reasonable expectation of privacy and thus his Fourth Amendment rights. The trial court rejected

these arguments and denied the motion.

"'In ruling on a motion to suppress, the trial court must find the historical facts, select the rule of law, and apply it to the facts in order to determine whether the law as applied has been violated. We review the court's resolution of the factual inquiry under the deferential substantial-evidence standard. The ruling on whether the applicable law applies to the facts is a mixed question of law and fact that is subject to independent review.' [Citation.] On appeal we consider the correctness of the trial court's ruling *itself*, not the correctness of the trial court's *reasons* for reaching its decision." (*People v. Letner* (2010) 50 Cal.4th 99, 145.)

The trial court's ruling was correct. The Fourth Amendment protects "against unreasonable searches and seizures" by the police. (U.S. Const., 4th Amend.) To claim Fourth Amendment protection, a defendant must first demonstrate a reasonable expectation of privacy in the things or place searched. (*Minnesota v. Carter* (1998) 525 U.S. 83, 88.) An expectation is reasonable when it is "one that has 'a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society.'" (*Ibid.*) Defendant claimed he had reasonable expectations of privacy supported by federal and state financial privacy statutes.

The federal Right to Financial Privacy Act (12 U.S.C. §§ 3401 et seq.) provides that "no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and" certain procedures are followed, including obtaining a subpoena or

warrant. (12 U.S.C. § 3402.) The federal act defines "Government authority" as "any agency of or department of the United States, or any officer, employee, or agent thereof." (12 U.S.C. § 3401(3).) That definition does not include state and local law enforcement. The federal act accordingly does not apply to the investigators whom defendant alleged violated it. Thus, the federal act did not afford defendant a reasonable expectation of privacy that the state investigators violated.

Defendant also claimed that the analogous state law, the California Right to Financial Privacy Act (Gov. Code, §§ 7460, et seq.) afforded him a reasonable expectation of privacy in his financial records. The state act provides that "no officer, employee, or agent of a state or local agency or department thereof, in connection with a civil or criminal investigation of a customer, whether or not such investigation is being conducted pursuant to formal judicial or administrative proceedings, may request or receive copies of, or the information contained in, the financial records of any customer unless the records are described with particularity and are consistent with the scope and requirements of the investigation giving rise to such request," and certain procedures are followed. (Gov. Code, § 7470, subd. (a).)

The state act further provides, however, that it does not preclude "a police or sheriff's department or district attorney . . .from requesting from an office or branch of a financial institution, and the office or branch from responding to a request, as to whether a person has an account or accounts at that office or branch and, if so, any identifying numbers of the account or accounts." (Gov. Code, § 7480, subd. (e)(1).) Likewise, financial institutions have the discretion to initiate contact with, and

thereafter communicate with and disclose customer financial records to, "appropriate state or local agencies concerning suspected violation of any law." (Gov. Code, § 7471, subd. (c); see also Gov. Code, § 7470, subd. (d); Pen. Code, § 14164, subd. (b).) In addition, the act expressly excludes title insurers, title companies, and escrow companies from its definition of "financial institution." (Gov. Code, § 7465, subd. (a).) Under these exceptions, there can be no reasonable expectation of privacy in the mere existence or ownership of one's financial records; records held by title insurers, title companies, and escrow companies; or in records held by a financial institution that has reason to suspect it was victimized.

These exceptions cover the conduct testified to at the preliminary and suppression hearings. Investigator Peter Parsons from the district attorney's office testified that he obtained a loan file containing defendant's information from a bank that believed defendant (and his brother) caused it over $500,000 in damages, and information about forged checks from another victimized bank. He also obtained information from title companies, and information about the number of accounts defendant's business held at a bank. Neither defendant's statutory nor his Fourth Amendment rights were violated by these activities.

Defendant contends for the first time in his supplemental brief that section 530.5, which prevents the unauthorized use of another person's personal identifying information, compels a different result. We reject this contention. Section 530.5 criminalizes identity theft; it provides that "[e]very person who willfully obtains personal identifying information, as defined in subdivision (b) of Section 530.55, of another person, and uses that

information for any unlawful purpose, including to obtain, or attempt to obtain, credit, goods, services, real property, or medical information without the consent of that person, is guilty of a public offense. . . ." There is no evidence that any of the financial institutions or title and escrow businesses that disclosed information to law enforcement did so for an unlawful purpose, or that the law enforcement agencies used the information they received for an unlawful purpose. The inclusion of "public entity" in the statutory definition of "person" does not compel a contrary conclusion. (See § 530.55, subd. (a).)

III. Request to Remand

Defendant requests that we remand the case to "develop facts" demonstrating prosecutorial misconduct as well as his actual innocence given that the allegedly fraudulent transactions "involved 'Normal lending practices.'" This is not a cognizable appellate claim. Defendant alleged prosecutorial misconduct in his motion to withdraw his plea, which is not properly before this court on appeal. Moreover, defendant had ample opportunity to "develop facts" before the trial court. We decline to remand the case for further proceedings.

IV. Defendant Received Effective Appellate Representation

Defendant asserts that the exhibits he attached to his briefs—most of which are not in the appellate record—"establish the petitioner must be appointed new counsel, and be allowed to fully brief his claims." We disagree.

The exhibits defendant provided consist of the pro. per. reply he filed in support of his motion to withdraw his plea and its accompanying exhibits (which are in the record); several "internet postings" concerning bankruptcy filings by some of the

financial institutions defendant allegedly defrauded; a press release from former Attorney General Kamala Harris regarding a settlement with HSBC "over its faulty mortgage servicing practices"; and several civil complaints against various lending institutions. None of these documents, individually or collectively, establishes that appellate counsel rendered ineffective assistance.

We have reviewed the record in accordance with our obligations under *Wende*. We are satisfied that defendant's counsel fully complied with her responsibilities, that defendant received adequate and effective appellate review of the judgment in this action, and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109-110; *Wende*, *supra*, 25 Cal.3d at p. 443.)

DISPOSITION

The judgment is affirmed.

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COLLINS, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.