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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FIVE

THE PEOPLE, Plaintiff and Respondent, v. JAVIER RODRIGUEZ, Defendant and Appellant.	B278975 (Los Angeles County Super. Ct. No. PA086950)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel B. Feldstern, Judge. Conditionally reversed and remanded.

William J. Capriola, under appointment by the Court of Appeal for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, Tita Nguyen, Deputy Attorney General, for Plaintiff and Respondent.

Defendant and appellant Javier Rodriguez (defendant) twice stole over $500 worth of merchandise from two sporting goods stores. The Los Angeles County District Attorney charged him with two counts of shoplifting and one count of grand theft. Defendant filed a Penal Code[1] section 995 motion seeking dismissal of the grand theft charge, arguing it was improperly based on the aggregate value of the goods stolen from both stores, and the trial court denied the motion. Immediately thereafter, defendant entered a no contest plea to the grand theft charge pursuant to an agreement with the prosecution, and the trial court imposed a probationary sentence. We are asked to decide whether defendant is entitled to an opportunity to withdraw his plea because it was induced by a statement that he could appeal the section 995 ruling when that ruling in fact is not appealable. In the same vein, defendant also asks us to decide whether his trial attorney was constitutionally ineffective by advising him the denial of his section 995 motion was appealable notwithstanding his no contest plea.

I. BACKGROUND

A. The Offense Conduct

In June 2016, off-duty Los Angeles Police Department Sergeant Kevin Royce saw defendant running from a Sports Chalet store in Stevenson Ranch while carrying a handful of clothes and shoes. A person apparently working as store security was giving chase. Defendant ran to a car, he got in the passenger-side door, and the car then drove away. Sergeant

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[1] Undesignated statutory references that follow are to the Penal Code.

Royce followed the vehicle and called 911 to report the incident. Sergeant Royce continued to follow the car, which eventually came to a stop near a strip mall. When defendant exited the car, Sergeant Royce apprehended defendant at gunpoint until on-duty police officers arrived to take custody of defendant.

The responding officers recovered the merchandise stolen by defendant from the car that served as defendant's getaway vehicle. In a Mirandized interview, defendant admitted he stole some of the merchandise from the Sports Chalet store in Stevenson Ranch. Defendant also admitted he stole the remainder of the merchandise from a second Sports Chalet store in Porter Ranch earlier that same day. The total value of the merchandise taken was $1092.27: $505.46 from the Stevenson Ranch store and $586.81 from the Porter Ranch Store.

B. The 995 Motion and Defendant's No Contest Plea

Defendant was subsequently charged with two counts of misdemeanor shoplifting, in violation of section 459.5, and one count of grand theft, in violation of section 487, subdivision (a). Defendant was arraigned and pled not guilty to the charges.

Defendant later filed a section 995 motion, arguing the grand theft charge should be dismissed because the two acts of shoplifting were improperly aggregated to support a felony grand theft charge. Defendant argued aggregation was contrary to the intent of Proposition 47 (The Safe Neighborhoods and Schools Act) to prevent low level thefts from being treated as felonies, and defendant further maintained dismissal of the grand theft charge was required because the two thefts from the two Sports Chalet stores did not arise from a single impulse and were separate and distinct offenses.

The trial court convened a hearing to decide the issues raised by defendant's section 995 motion. The court engaged counsel for both sides in a discussion of post-Proposition 47 case law and concluded that while there was authority for the proposition that multiple forgeries could not be aggregated for purposes of supporting a felony charge that requires proof of value in excess of $950 (see, e.g., *People v. Salmorin* (2016) 1 Cal.App.5th 738, 745, 748-751), there was no similar bar on aggregation of multiple theft offenses. The court therefore announced it would deny defendant's section 995 motion, and counsel for defendant stated: "I think what I would like to do on [this] case is I'm going to be consulting with my appellate department and I want to set maybe a short date and we can see what our options are."

A discussion of potential trial dates ensued, at the end of which defense counsel again noted she "[p]robably will contact my appellate department and see if they want to take a writ on the denial of the [section] 995 in which case we can figure [it] out from there." The court then asked the prosecution whether, despite prevailing on the section 995 motion, there was any way "to find a solution to the case that does bring it down into the misdemeanor." The prosecution stated it viewed defendant's behavior as felonious but noted a "Caltrans offer" had been extended. The trial court set a trial date, but then recessed the proceedings.

When the proceedings reconvened on the record,[2] it was apparent the prosecution and defendant had agreed to resolve the case. The trial court acknowledged it had received a plea waiver form from defendant, and when the court asked the prosecution to put on the record what "the plea agreement is," the following exchange ensued:

> [The prosecutor]: Yes. The defendant is going to be pleading to the felony Count 3 grand theft over $950 and he will be sentenced to three years formal felony probation and I believe he has like 120 days at this point in time. He would be sentenced to that time in custody. Ordered to obey all laws, search and seizure conditions since items were recovered and will be no restitution necessary.
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> [Defense counsel]: We are going to be requesting a certificate of probable cause identifying notice of appeal as to the denial of [the] 995 motion.
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> The Court: Okay. All right. Mr. Rodriguez you are charged in Count 3 of the information with grand theft of personal property a value exceeding $950 from Sports Chalet. It's a violation of 487 of the Penal Code[, a] felony. Do you understand what you are charged with?
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> [Defendant]: Yes.

After confirming defendant understood the nature of the charge to which he would enter a plea, the court continued to

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[2] According to trial court minute orders, the hearing on the section 995 motion was heard at 8:30 a.m. and the proceedings reconvened at 11:30 a.m. after the court took the recess.

inquire of defendant to ensure he understood the constitutional rights he would be waiving and the consequences of changing his plea. Defendant confirmed no promises had been made to him "[o]ther than the plea agreement," and the only non-standardized notation on the plea waiver form that reflected the terms of the plea agreement was a reference that appears to reflect the agreed-upon three-year term of formal probation. When asked by the court how he pled to the grand theft charge, defendant entered a plea of no contest. The trial court accepted the plea and sentenced defendant to time served with a three-year probationary term. The prosecution dismissed the remaining shoplifting counts against defendant "based on the continued validity of the plea sentence."

The same day defendant entered his no contest plea, he filed a notice of appeal from the denial of the section 995 motion "on the issue of whether [section] 459.5 misdemeanor shoplifting can be aggregated into a felony [section] 487 post Prop 47." The notice of appeal stated defendant had requested a certificate of probable cause. The next day, the trial court granted defendant's request for a certificate of probable cause.

II. DISCUSSION

Defendant argues he should be afforded an opportunity to withdraw his no contest plea because it was conditioned on the mistaken understanding that an appeal would properly lie from the trial court's denial of his section 995 motion. The transcript of the plea hearing, in our view, does indicate defendant would have understood the plea agreement to preserve his ability to appeal the denial of his section 995 motion. The denial of a section 995 motion, however, is not appealable after a defendant

enters a no contest plea, and the appealability condition defendant reasonably understood his plea to incorporate is therefore unenforceable. Under these circumstances, defendant must be given the opportunity to reevaluate his no contest plea and proceed to trial if he so wishes.

"[W]hen a defendant pleads guilty or no contest and is convicted without a trial, only limited issues are cognizable on appeal. A guilty plea admits every element of the charged offense and constitutes a conviction [citations], and consequently issues that concern the determination of guilt or innocence are not cognizable. [Citations.] Instead, appellate review is limited to issues that concern the 'jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea.' [Citations]." (*In re Chavez* (2003) 30 Cal.4th 643, 649, fn. omitted.) As specifically relevant here, precedent holds the denial of a section 995 motion arguing a defendant was committed without reasonable cause is not appealable following the entry of a no contest or guilty plea. (*People v. Truman* (1992) 6 Cal.App.4th 1816, 1820-1821 [guilty plea precluded review of denial of section 995 motion "notwithstanding the trial court's promise to the contrary"] (*Truman*); *People v. Padfield* (1982) 136 Cal.App.3d 218, 227 [defendant whose section 995 motion was denied cannot admit sufficiency of the evidence in a plea and then challenge the evidence on appeal].) Further, the issuance of a certificate of probable cause does not make cognizable on appeal an issue waived by the entry of a no contest or guilty plea. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 9.)

The record of the plea hearing sufficiently demonstrates defendant would have reasonably understood the plea agreement to preserve his ability to challenge the trial court's ruling—made

just hours earlier that day—that aggregation of the two Sports Chalet thefts for purposes of bringing a felony grand theft charge was permissible. Defense counsel stated on the record her interest in exploring grounds for appeal of the section 995 ruling, and after a recess and in direct response to the court's request that the terms of the plea agreement be stated on the record, defense counsel stated defendant would be appealing the section 995 ruling. The trial court's response ("Okay. All right.") before proceeding with the plea colloquy, and the absence of any prosecution objection to defense counsel's statement, confirms the ability to appeal the ruling was part of the plea agreement—or, at a minimum, so defendant could have reasonably thought. Although the statements by the parties and the trial court thus intimated appellate review of the section 995 ruling "remained available despite the change of plea" (*People v. Hollins* (1993) 15 Cal.App.4th 567, 573 (*Hollins*)), the cases we have already cited establish such review is not permitted once defendant entered his no contest plea. (See, e.g., *Truman*, *supra*, 6 Cal.App.4th at pp. 1820-1821.)

A plea induced by statements "purporting to preserve for appeal issues waived by such plea . . . may be attacked on appeal as invalid." (*People v. Bowie* (1992) 11 Cal.App.4th 1263, 1266; accord, *Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 792 [where guilty plea has been "improperly induced by unenforceable promises that issues have been preserved for appeal[,] the defendant . . . is entitled to an opportunity to withdraw the plea"]; *Hollins*, *supra*, 15 Cal.App.4th at p. 573 [withdrawal of plea permitted where trial court made express statements the "clear import" of which was "that review [of the denial of a section 995 motion] by a higher court . . . remained

available despite the change of plea"]; *Truman*, *supra*, 6 Cal.App.4th at pp. 1820-1821 [withdrawal of plea permitted where trial court informed defendant he had "a statutory right to appeal" denial of section 995 motion and the court "would issue a certificate of probable cause to . . . litigate that issue"]; see also *People v. Superior Court (Sanchez)* (2014) 223 Cal.App.4th 567, 573 [plea agreements, being contractual in nature, are "'interpreted according to general contract principles'" and where the agreement was entered "subject to a mistake of law," a party to the agreement is entitled to rescind the agreement].) The principle espoused in these cases applies here. The plea agreement recited on the record purported to preserve defendant's ability to appeal the denial of his section 995 motion, that ability was dashed by his no contest plea, and defendant is accordingly entitled to an "'opportunity to reevaluate his guilty plea and withdraw that plea and proceed to trial if he so desires.'"[3] (*Truman*, *supra*, 6 Cal.App.4th at p. 1821.)

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[3] The Attorney General argues *Truman* is inapplicable because the statements made on the record here were less explicit concerning the availability of an appeal than those in *Truman*. The Attorney General is right, up to a point. In *Truman*, the trial court did state its "'understanding is that [the defendant] has a statutory right to appeal from the denial of the 995'" and added, "'I would further represent if it becomes an issue, I would issue a certificate of probable cause to allow you to litigate that issue on appeal.'" (*Truman*, *supra*, 6 Cal.App.4th at p. 1820.) But to say that the case for relief was even clearer in *Truman* is not to say that there is no clear case for relief here. In this case, the trial court's "okay" and "all right" responses are reasonably understood to adopt (whether intentionally or not) the terms of the plea agreement recited by the prosecution and the

Because we hold defendant must be given the opportunity to withdraw his plea, we need not reach the issue of whether defendant's trial attorney provided ineffective assistance of counsel.

DISPOSITION

The judgment is conditionally reversed, and the matter is remanded to afford defendant an opportunity to withdraw his no contest plea. If defendant fails to withdraw his no contest plea

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defense on the record—including the defense's statement that it would be "requesting a certificate of probable cause identifying notice of appeal as to the denial of [the] 995 motion." Moreover, and somewhat akin to the trial court's representation in *Truman*, when defendant followed up by submitting a request for a certificate of probable cause, the trial court granted it. To be sure, granting the certificate does not make a non-appealable issue appealable, but it does provide further confirmation that the parties and the court understood the plea agreement to contemplate the right to appeal the section 995 ruling.

within 30 days of the issuance of the remittitur, the judgment of conviction is reinstated.

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BAKER, J.

We concur:

KRIEGLER, Acting P.J.

LANDIN, 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.

Kriegler, Acting P.J., concurring

I concur fully in the court's opinion. It is troubling that the professionals involved in this case—not defense counsel, the prosecutor, or trial court—were aware that it has long been the law that rulings challenging the sufficiency of the evidence under Penal Code section 995 do not survive a guilty plea, even with the issuance of a certificate of probable cause. (*People v. Lilienthal* (1978) 22 Cal.3d 891, 897; *People v. Woodford* (1986) 176 Cal.App.3d 944, 948; *People v. Roper* (1983) 144 Cal.App.3d 1033, 1039; *People v. Padfield* (1982) 136 Cal.App.3d 218, 227.)

The issue raised by defendant on appeal could have easily been preserved for appellate review by either a bench trial or a submission of the issue of guilt on the preliminary hearing transcript. "Whenever a defendant waives trial and submits his guilt or innocence on the transcript of a preliminary hearing the trial court must weigh the evidence contained in the transcript and convict only if, in view of all matters properly contained therein, it is persuaded beyond a reasonable doubt of the defendant's guilt. In view of the foregoing it is clear that [the appellant], by submitting the question of his guilt on the transcripts of the preliminary hearing, cannot be held to have waived his right to challenge the sufficiency of the evidence on appeal." (*People v. Martin* (1973) 9 Cal.3d 687, 695.)

The only issue in this case is whether defendant's conduct amounts to a felony or a misdemeanor. The amount of additional resources that will be expended on the required remand to the

trial court (and the potential for a second appeal) is regrettable, and could have been avoided by a more considered resolution of the case in the first instance.

KRIEGLER, Acting P.J.