Filed 11/8/01

COURT OF APPEAL, FOURTH DISTRICT

DIVISION TWO

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. HENRY JAMES HOLMES, Defendant and Appellant.	E027589 (Super.Ct.No. RIF091270) **OPINION**

APPEAL from the Superior Court of Riverside County. Becky L. Dugan, Judge. Affirmed.

James R. Mc Grath, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, David P. Druliner, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Laura Whitcomb Halgren and Robert M. Foster, Supervising Deputy Attorneys General, for Plaintiff and Respondent.

Defendant pleaded guilty to assault with the intent to commit rape (Pen. Code, § 220[1]) in exchange for a term of two years in state prison and dismissal of the remaining count. Defendant then waived referral to probation and was immediately sentenced to the agreed-upon term. On appeal, defendant contends (1) he must be allowed to withdraw his guilty plea because the trial court failed to establish a sufficient factual basis for the plea as required by section 1192.5, and (2) he must be permitted to withdraw his plea because he was misadvised by his counsel concerning the credits he would receive in state prison. We reject defendant's contentions and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

There was no preliminary hearing, and a probation report was waived, so the factual circumstances against defendant were never established in court.

In a felony complaint filed by the Riverside County District Attorney's office on April 18, 2000, defendant was charged with assault with the intent to commit rape (§ 220) (count 1) and sexual battery (§ 243.4, subd. (d)) (count 2).

On June 1, 2000, defendant pleaded guilty to count 1 in exchange for a term of two years in state prison and dismissal of count 2.[2] Thereafter, defendant waived his

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The record also shows that, as part of the plea agreement, defendant also pleaded guilty to two infraction charges (operating a taxi without a license and failure to appear in court) arising from two unrelated cases (Case Nos. 395370 and 263971, respectively).

right to a presentence probation report and wished to immediately be sentenced. Defendant was sentenced to the agreed-upon term of two years.

On June 15, 2000, defendant wrote a letter to the trial court requesting to withdraw his plea based on his counsel's misadvisement concerning credit for time served. On July 24, 2000, defendant's counsel, Donna Johnson, declared a conflict of interest and asked to be relieved as counsel for defendant. The trial court relieved Johnson and appointed special counsel, A. Sandquist, for purposes of the motion to withdraw the plea. At that time, the trial court also set August 14, 2000, as the hearing date for the motion to withdraw the guilty plea.

On August 14, 2000, Sandquist withdrew defendant's motion to withdraw the plea because, as Sandquist acknowledged, the trial court lost its jurisdiction to address the motion since defendant had already been sentenced, pursuant to *Cano v. Superior Court* (1999) 72 Cal.App.4th 1310, 1315-1316 and section 1018.

On July 17, 2000, defendant filed his notice of appeal and request for certificate of probable cause. On July 28, 2000, defendant filed his amended notice of appeal; on that same day, defendant's request for a certificate of probable cause was granted.

II

DISCUSSION

A. *Factual Basis For Plea*

Defendant contends the trial court failed to establish a sufficient factual basis for his conditional guilty plea and performed no independent inquiry as required by section 1192.5; therefore, the guilty plea must be vacated.

Section 1192.5 requires the trial court, before accepting a conditional plea of guilty to a felony, to satisfy itself that a factual basis for the plea exists.[3] (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1181.) The purpose of the factual-basis requirement is to prevent a defendant, ignorant of legal niceties and distinctions, from failing to realize that his acts do not constitute the crime with which he is charged. (*People v. Watts* (1977) 67 Cal.App.3d 173, 178.) For this reason, the trial court is required to satisfy itself independently that there is some reasonable cause to believe that defendant committed the crime. (*Id.*, at p. 180.) However, the law "does not require the trial court to interrogate a defendant personally in an element by element manner about the factual basis for his guilty plea. . . . He may, in fact, enter a plea of guilty even though he protests his innocence. [Citation.]" (*Ibid.*) "'[T]he court may satisfy itself by statements and admissions made by the defendant, his counsel, and the prosecutor . . .'" (*ibid.*), as well as a preliminary hearing transcript, grand jury transcript, or presentence probation report. (See also *People v. McGuire* (1991) 1 Cal.App.4th 281, 283; *People v. Calderon* (1991) 232 Cal.App.3d 930, 935; *People v. Tigner* (1982) 133 Cal.App.3d 430, 434.)

We agree that the court had an investigative duty under section 1192.5 but find the duty was fulfilled by the court's inquiry of defendant. (See, e.g., *People v. Calderon*, *supra*, 232 Cal.App.3d at p. 935 [court's inquiry of the defendant at plea hearing of whether he tried to kill the victim and the defendant's statement that he did constituted an

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[3] Section 1192.5 provides, in pertinent part, that, upon a plea of guilty which is a part of a plea bargain, the "court shall also cause an inquiry to be made of the

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adequate factual basis for attempted murder]; *People v. McGuire*, *supra*, 1 Cal.App.4th at p. 283 [mere stipulation by the parties constitutes a sufficient factual basis]; but see *People v. Tigner*, *supra*, 133 Cal.App.3d at p. 435 [reviewing court held that a "mere recitation by the court concluding 'There's a factual basis' without developing the factual basis *on the record* is not sufficient to meet the requirements of Penal Code section 1192.5" and that the presentence report was insufficient to render the error harmless].) In the present matter, since there was no preliminary hearing transcript, grand jury transcript, or presentence probation report at the time of the entry of the guilty plea, the court inquired of defendant regarding the voluntariness and the factual basis of the plea. Defendant informed the court that he had committed the acts alleged in count 1 of the complaint. Further, defendant specifically stated in his change of plea form that there was a factual basis for his plea. This should be sufficient to satisfy the requirements of section 1192.5.

B. *Ineffective Assistance of Counsel*

Defendant next contends that he must be permitted to withdraw his plea because he was misadvised by his counsel concerning the credits he would receive while in state prison. We find this issue is not properly before this court because the trial court never heard defendant's motion to withdraw his guilty plea.

As defendant concedes, his counsel, Sandquist, withdrew the motion pursuant to section 1018 because the trial court lost jurisdiction to address the motion, since

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defendant to satisfy itself that the plea is freely and voluntarily made, and *that there is a*
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defendant had already commenced serving his sentence. Further, Sandquist never requested that the motion be construed as a motion to vacate or filed petitions in the nature of coram nobis or habeas corpus. Therefore, this issue is not properly before this court.

Even if it were, it is not possible to assess defendant's claim on an appellate record which does not reflect the reasons for the actions which defendant now claims fell below constitutional standards of competence. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267; *People v. Wilson* (1992) 3 Cal.4th 926, 936.) To demonstrate that he received ineffective assistance of counsel, defendant must establish both: (1) that his counsel's performance was deficient under an objective standard of professional competency; and (2) that there is a reasonable probability that but for counsel's errors, a more favorable determination would have resulted. (*People v. Holt* (1997) 15 Cal.4th 619, 703; *People v. Williams* (1997) 16 Cal.4th 153, 214-215; *In re Avena* (1996) 12 Cal.4th 694, 721; *People v. Davis* (1995) 10 Cal.4th 463, 503; *People v. Babbitt* (1988) 45 Cal.3d 660, 707; *Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) "We have repeatedly stressed 'that "[if] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," the claim on appeal must be rejected.' [Citations.] A claim of ineffective assistance in such a case is

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factual basis for the plea." (Italics added.)

more appropriately decided in a habeas corpus proceeding. [Citations.]"[4] (*People v. Mendoza Tello*, *supra*, 15 Cal.4th at pp. 266-267, quoting *People v. Wilson*, *supra*, 3 Cal.4th at p. 936, quoting *People v. Pope* (1979) 23 Cal.3d 412, 426.) Therefore, the decision must be affirmed on appeal.

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[4] We note that, although "[i]n California the appellate courts as well as the superior courts exercise original habeas corpus jurisdiction[,]" "appellate courts are not equipped to have prisoners brought before them and to conduct testimonial hearings on disputed issues of fact." (*In re Hochberg* (1970) 2 Cal.3d 870, 873-874, fn. 2, rejected on another ground in *In re Fields* (1990) 51 Cal.3d 1063, 1070, fn. 3.) Therefore, if defendant files a petition for writ of habeas corpus, we recommend that he file it in the superior court.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED

RICHLI
J.

We concur:

RAMIREZ
P.J.

McKINSTER
J.