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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY JOHNSON,

Defendant and Appellant.

H031095

(Santa Clara County

Super. Ct. No. CC619063)

Defendant Timothy Johnson appeals a judgment following his plea of nolo contendere to three felony counts. Defendant filed a notice of appeal and a request for certificate of probable cause from the trial court. The trial court declined to provide the defendant a certificate of probable cause. Defendant asserts on appeal that he was deprived of adequate counsel while attempting to withdraw his plea.

**STATEMENT OF THE CASE AND FACTS**

Defendant was charged with the eight felony counts on February 1, 2006. Defendant had initially been represented by retained counsel, Nan Bucknell. However, on July 24, 2006, Ms. Bucknell told the trial court that her client was indigent and could no longer afford her services. As such, she could not continue to represent him. Defendant then requested appointment of counsel, and on July 27, 2006, the court appointed Roderick O'Connor as defendant's counsel.

Mr. O'Connor made his first appearance at a brief hearing on August 4, 2006, and the case was continued to August 11. Defendant and Mr. O'Connor first met at the hearing on the August 11. Mr. O'Connor said that he reviewed the evidence turned over by the prosecution, including the police reports and the interviews and recordings of the complaining witnesses. The preliminary hearing was scheduled for September 13. On this day Mr. O'Connor recommended to the defendant that he waive his right to a preliminary hearing and accept the plea offer to reduce the likelihood that defendant would be facing greater jail time should he not accept the plea. He waived his right to a preliminary hearing and pled guilty to three counts through a plea bargaining agreement with the prosecutor in exchange for 19 years imprisonment. He pled guilty to two counts of forcible oral copulation (Pen. Code, § 228a, subd. (c)(2)) and one count of lewd conduct upon a child under the age of 14 (Pen. Code, § 288, subd. (a)). The court sentenced him to 19 years in prison.

The immediate controversy stems from a hearing to determine if the trial court should appoint substitute counsel for purposes of investigating whether Mr. O'Connor had provided adequate representation. The trial court heard and denied this motion on October 12, 2006. At this hearing, defendant said he was scared into taking the plea bargain, that he was not guilty, and that he wished to withdraw his plea. The court then questioned defendant and the prosecutor regarding the case. Mr. O'Connor did not participate in the motion to withdraw defendant's plea. The court denied the motion to withdraw the plea and defendant appealed the trial court's decision to deny his motion. His appeal comes to us without a certificate of probable cause from the trial court.

#### **DISCUSSION**

We have long held that defendants are entitled to representation in all aspects of a court proceeding. *People v. Brown* (1986) 179 Cal.App.3d 207 (*Brown*), decided by another panel of this court, held that "it was improper to permit defendant to bring his motion in pro per while he was still represented by counsel and he had not waived his

right to counsel.” (*Id.* at pp. 214-215.) The defendant’s attorney in *Brown* refused to submit a motion to withdraw defendant’s plea and so the defendant was forced to do it himself. Here, there is little doubt that defendant presented his motion to withdraw his plea without the assistance of his court appointed counsel. The court transcript shows that the court put it’s questions to defendant directly. Defendant then argued his motion in pro per. This fact does not excuse defendant’s counsel from his duties of representation.

However, Penal Code section 1237.5 places two requirements on defendants seeking to appeal a conviction from a plea of guilty. First, the defendant must file “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” (Pen. Code, § 1237.5 subd. (a)). Next, the trial court must execute and file “a certificate of probable cause for such appeal with the clerk of the court” (Pen. Code, § 1237.5 subd. (b)). Here, defendant applied for a certificate of probable cause, but no such certificate has been filed with this court. Indeed, the trial court declined to issue it.

Defendant argues that a certificate of probable cause is not necessary given the circumstance of the motion. After *Brown*, the Supreme Court of California held that “[n]otwithstanding the broad language of [Penal Code] section 1237.5, it is settled that two types of issues may be raised in a guilty or nolo contendere plea appeal without issuance of a certificate: (1) search and seizure issues for which an appeal is provided under [Penal Code] section 1538.5, subdivision (m); and (2) issues regarding proceedings held subsequent to the plea for the purpose of determining the degree of the crime and the penalty to be imposed.” (*People v. Panizzon* (1996) 13 Cal.4th 68, 74 (*Panizzon*)). Thus, if not a listed issue, Penal Code section 1237.5 requires a certificate of probable cause. Defendant’s argument calls for a reevaluation of the trial court’s decision to dismiss his motion to withdraw his guilty plea, an issue that *Panizzon* failed to exempt, and therefore we must require a certificate in this case.

Defendant relies heavily on *People v. Osorio* (1987) 194 Cal.App.3d 183 (*Osorio*) in his attempt to argue that a certificate of probable cause is not required even if the defendant is challenging a plea. In *Osorio*, the probation officer reported the “sales transaction and alleged that Osorio was the principal seller” to the trial court. (*Id.* at p. 185.) Defendant disapproved of this terminology and wished to withdraw his plea, stating that the charges should be for “transporting and furnishing, but not sale.” (*Ibid.*, fn. 1.) The defendant’s counsel failed to make a motion to withdraw defendant’s plea and the Court of Appeal remanded for the motion to be heard. Two arguments preserve *Osorio* in light of *Panizzon*. First, no motion to withdraw the plea was made during trial in *Osorio*. The failure of Osorio’s attorney to present the motion was a failure of representation, and so it was appropriately remanded for consideration. Second, it is not unreasonable to place *Osorio* within the second exception found in *Panizzon, supra*, 13 Cal.App.4th 68. The defendant in *Osorio* challenged the term “selling” rather than “transporting and furnishing.” We do not contemplate if this would affect *Osorio*, but it is easy to foresee that pleading guilty to different crimes could have different ramifications, and his objection could be said to challenge the degree of crime. However, despite the preservation of *Osorio*, is it not applicable in the present case. Defendant both made the motion to withdraw his plea and was not challenging the degree of crime or the penalty, both of which were in conformity with the plea bargain.

As both defendant and respondent say in their briefs, the Court of Appeal of California, Third Appellate District approached this issue more recently in *People v. Emery* (2006) 140 Cal.App.4th 560 (*Emery*). In *Emery*, the defendant made a motion to continue the trial in order to evaluate the merits of withdrawing his plea. The trial court denied his motion and the Third Appellate District found that such a request was tantamount to challenging the plea itself, looked to the Supreme Court’s ruling in *Panizzon* for resolution of the matter, and required a certificate of probable cause to make the appeal cognizable. We view defendant’s motion to withdraw his plea as a direct

challenge to the validity of plea in the first instance. A certificate of probable cause is required.

**DISPOSITION**

The appeal is dismissed.

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RUSHING, P.J.

WE CONCUR:

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PREMO, J.

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MIHARA, J.