



People v. O'Bannon

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California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

Defendant and appellant Pierre O'Bannon appeals from the judgment, sentence and denial of a motion to withdraw a no contest plea to first degree burglary. The trial court sua sponte found probable cause for the appeal to be taken, despite the absence of a certificate or a request for a certificate of probable cause required under Penal Code¹ section 1237.5 and California Rules of Court,² rule 30(b).³ On our own motion, we requested the parties to submit supplemental briefs addressing whether the appeal should be dismissed for failure to comply with the certificate requirement. After review, we conclude that we are bound by the Supreme Court's holding in *People v. Mendez* (1999) 19 Cal.4th 1084, 1099 (*Mendez*), that a defendant may not obtain review of certificate issues unless he has complied with section 1237.5 and rule 30(b) fully, specifically and in a timely fashion. Accordingly, the appeal is inoperative and we dismiss.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

O'Bannon pleaded no contest to four counts of first degree residential burglary (§ 459), and admitted to one prior felony strike conviction (§§ 1170.12, subds. (a)-(d)) and three prior felony convictions (§§ 667, subd. (a)(1), 667.5, subd. (d)). In exchange, he elected to receive a determinate sentence of 35 years.

Later, O'Bannon moved to withdraw his plea on the ground it was not voluntary. The court denied the motion.

O'Bannon filed a notice of appeal and a request for appointment of counsel on appeal with the superior court, but he did not file a request for a certificate of probable cause. The trial court sua sponte held a hearing on certificate of probable cause without the parties. The minute order set forth: "The court finds probable cause, despite the absence of a certificate or a request for a certificate." On the notice of appeal, the court inscribed and initialed the following notation: "Ct finds probable cause for appeal." It did not issue a certificate of probable cause.

O'Bannon timely appealed from the judgment, sentence and denial to withdraw his no contest plea. On our own motion, we requested the parties to submit supplemental briefs addressing whether the



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appeal should be dismissed for failure to comply with the certificate requirement.⁴

DISCUSSION

THE APPEAL IS INOPERATIVE FOR FAILURE TO COMPLY WITH SECTION 1237.5 AND RULE 30(B)

O'Bannon's notice of appeal set forth that: 1) his plea was not made "voluntarily, knowingly and intelligently;" 2) it was "coercive and unfair to tie" his plea bargain to that of his co-defendants; 3) his 35- year prison sentence was "cruel and unusual punishment" in light of co- defendants' six-year sentences; and 4) he was not given effective assistance of counsel. In his opening brief, O'Bannon has raised grounds only of the voluntariness of his plea.

"A defendant who has pleaded guilty or nolo contendere to a charge in the superior court, and who seeks to take an appeal from a judgment of conviction entered thereon, may not obtain review of so-called 'certificate' issues, that is, questions going to the legality of the proceedings, including the validity of his plea, unless he has complied with section 1237.5^[5]] . . . and [rule 30(b)⁶] . . . -which require him to file in the superior court a statement of certificate grounds as an intended notice of appeal within 60 days after rendition of judgment, and to obtain from the superior court a certificate of probable cause for the appeal within 20 days after filing of the statement and, hence, within a maximum of 80 days after rendition of judgment." (Mendez, supra, 19 Cal.4th at p. 1088.)

"Section 1237.5 has as its purpose 'to promote judicial economy' [citation] 'by screening out wholly frivolous guilty [and nolo contendere] plea appeals before time and money are spent' on such matters as the preparation of the record on appeal [citation], the appointment of appellate counsel [citation], and, of course, consideration and decision of the appeal itself." (Mendez, supra, 19 Cal.4th at p. 1095.)

"It has long been established that issues going to the validity of a plea require compliance with section 1237.5. [Citation.] Thus, for example, a certificate must be obtained when a defendant claims that a plea was induced by misrepresentations of a fundamental nature [citation] or that the plea was entered at a time when the defendant was mentally incompetent [citation]. Similarly, a certificate is required when a defendant claims that warnings regarding the effect of a guilty plea on the right to appeal were inadequate. [Citation.] [Citation.]" (People v. Buttram (2003) 30 Cal.4th 773, 781.)

In Mendez, the defendant was four months late in filing a statement of certificate grounds and failed to preserve the issue of his sentence miscalculation. (Mendez, supra, 19 Cal.4th at pp. 1091-1092.) The Supreme Court affirmed dismissal of the appeal, holding the defendant must comply with section 1237.5 and rule 30(b) "fully, and specifically, in a timely fashion" to obtain review of certificate issues. (Id. at p. 1089.) In reaching its conclusion, the Court in Mendez expressly adopted the "strict manner"⁷ and rejected the "relaxed manner" of applying section 1237.5 and rule 30(b). (Id. at pp. 1097-1098 and fns. 5, 7.) The court reasoned: "Even if we did not believe that section 1237.5 and rule [30(b)] should be applied in a strict manner, we would have to conclude that they should not be applied in a relaxed



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one. History has demonstrated that the search for 'judicial economy' in the expedient disposition of the individual appeal and its peculiar issues has been costly indeed, as fact-specific questions have arisen, time and again, demanding legally indeterminate answers."⁸ (Id. at p. 1098 and fn. 9.) As a result, the Court in Mendez determined that relaxing the certificate requirement in search of "'judicial economy'" has been a "futile" exercise that "must be abandoned." (Id. at p. 1098.)

The Supreme Court in Mendez effectively overruled O'Bannon's authorities on the relaxed treatment of section 1237.5 and rule 30(b): People v. Holland, supra, 23 Cal.3d 77; and People v. Martinez, supra, 46 Cal.App.3d 736. (Mendez, supra, 19 Cal.4th at pp. 1098-1099, fns. 7 & 9.) O'Bannon's other authorities also relied on People v. Holland, which the Court found objectionable: People v. Padfield (1982) 136 Cal.App.3d 218, 224, footnote 5; People v. Flores (1987) 196 Cal.App.3d 475, 481-482.⁹ (Mendez, supra, 19 Cal.4th at pp. 1097, fn. 7.) O'Bannon has not cited to nor can we find any California authority subsequent to Mendez that applied a relaxed treatment of the certificate requirement.

Here, O'Bannon failed to file his "written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings" pursuant to subdivision (a) of section 1237.5. The only declaration he filed was in support of a request for appointment of appellate counsel. By its own admission, the trial court also did not execute and file a certificate of probable cause pursuant to subdivision (b) of section 1237.5. Although O'Bannon's notice of appeal alleged the noncertificate issue of ineffective assistance of counsel, he did not argue this point in his opening brief.¹⁰ Instead, he addressed only the validity of his plea, a certificate issue. Thus, no exception applies under rule 30(b).

Under these circumstances, we cannot proceed to the merits of the appeal and must order dismissal. (Mendez, supra, 19 Cal.4th at p. 1096.)

DISPOSITION

The appeal is dismissed.

We concur: PERLUSS, P. J., JOHNSON, J.

1. All further statutory references are to the Penal Code unless otherwise indicated.
2. All further rule references are to the California Rules of Court unless otherwise indicated.
3. When we refer to rule 30(b), we also encompass references to its predecessor, rule 31(d).
4. Only O'Bannon filed the requested supplemental brief. The People do not challenge O'Bannon's right to file this appeal. However, "[t]he fact that the People have made no formal motion to dismiss this appeal does not make dismissal



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any less appropriate. The People cannot waive the requirements of rule [30(b)] by silence, or even by affirmative consent to the appeal proceeding in spite of noncompliance with this rule. [Citation.]" (People v. Ballard (1985) 174 Cal.App.3d 982, 985.)

5. 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, or a revocation of probation following an admission of violation, 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."

6. Rule 30(b) (former rule 31(d)) sets forth both the section 1237.5 provision and its exceptions: "Appeal after plea of guilty or nolo contendere or after admission of probation violation [¶] (1) Except as provided in (4), to appeal from a superior court judgment after a plea of guilty or nolo contendere or after an admission of probation violation, the defendant must file in that superior court - - in addition to the notice of appeal required by (a) - - the statement required by Penal Code section 1237.5 for issuance of a certificate of probable cause. [¶] (2) Within 20 days after the defendant files a statement under (1), the superior court must sign and file either a certificate of probable cause or an order denying the certificate. [¶] (3) If the defendant does not file the statement required by (1) or if the superior court denies a certificate of probable cause, the superior court clerk must mark the notice of appeal 'Inoperative,' notify the defendant, and send a copy of the marked notice of appeal to the district appellate project. [¶] (4) The defendant need not comply with (1) if the notice of appeal states that the appeal is based on: [¶] (A) the denial of a motion to suppress evidence under Penal Code section 1538.5, or [¶] (B) grounds that arose after entry of the plea and do not affect the plea's validity. [¶] (5) If the defendant's notice of appeal contains a statement under (4), the reviewing court will not consider any issue affecting the validity of the plea unless the defendant also complies with (1)."

7. The Supreme Court cited with approval the following cases, which applied section 1237.5 and rule 30(b) in a "strict manner": People v. Panizzon (1996) 13 Cal.4th 68, 89, footnote 15; People v. Hoffard (1995) 10 Cal.4th 1170, 1180 and footnote 8 (dictum); People v. Enlow (1998) 64 Cal.App.4th 850, 853- 854; People v. Stubbs (1998) 61 Cal.App.4th 243, 244- 245; People v. Jones (1995) 33 Cal.App.4th 1087, 1093- 1094; People v. Manriquez (1993) 18 Cal.App.4th 1167, 1170- 1171; People v. Breckenridge (1992) 5 Cal.App.4th 1096, 1098- 1101; People v. Ballard (1985) 174 Cal.App.3d 982, 984- 989; People v. Patterson (1984) 151 Cal.App.3d 252, 255- 257; People v. Pinon (1979) 96 Cal.App.3d 904, 908- 909. (Mendez, supra, 19 Cal.4th at p. 1097, fn. 5.)

8. The Supreme Court singled out the following cases as having relaxed the application of section 1237.5 and rule 30(b) for judicial economy: People v. Everett (1986) 186 Cal.App.3d 274, 280, footnote 2; see also, e.g., People v. Holland (1978) 23 Cal.3d 77, 84- 85; People v. Flores (1971) 6 Cal.3d 305, 308 and footnote 2; People v. Herrera (1967) 66 Cal.2d 664, 665; People v. Cortez (1997) 55 Cal.App.4th 426, 429; People v. Cepeda (1996) 49 Cal.App.4th 1235, 1237; People v. Young (1991) 228 Cal.App.3d 171, 178- 179; People v. Grey (1990) 225 Cal.App.3d 1336, 1338- 1340, disapproved on a point not pertinent here, In re Jordan (1992) 4 Cal.4th 116, 130, footnote 8; People v. Forrest (1990) 221 Cal.App.3d 675, 677- 678, footnote 2; People v. Vento (1989) 208 Cal.App.3d 876, 878, footnote 1; People v. Smith (1985) 171 Cal.App.3d 997, 1000- 1001; People v. Arwood (1985) 165 Cal.App.3d 167, 171- 173 (per Panelli, P. J.); People v. Jerome (1984) 160 Cal.App.3d 1087, 1094- 1095; People v. Tirado (1984) 151 Cal.App.3d 341, 348; People v. Chavez (1981) 124 Cal.App.3d 215, 218- 221; People v. Santos



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(1976) 60 Cal.App.3d 372, 376- 379; People v. Martinez (1975) 46 Cal.App.3d 736, 743; People v. Dena (1972) 25 Cal.App.3d 1001, 1004- 1005; People v. Coley (1968) 257 Cal.App.2d 787, 793. (Mendez, supra, 19 Cal.4th at p. 1099, fn. 9.)

9. Indeed, the Attorney General also cited to some of the same disapproved authorities in the respondent's brief.

10. If the claim of error is ineffective assistance of counsel based on the erroneous advice of counsel, the proper remedy is a petition for writ of habeas corpus. (People v. Goodrum (1991) 228 Cal.App.3d 397, 400, fn. 4.)

