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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

FRAISURE SMITH,

Defendant and Appellant.

A106401

**(Solano County
Super. Ct. No. 208822)**

After Fraisure Smith pled no contest to sexual battery, he filed a motion to withdraw his plea. The trial court denied the motion. Smith now argues that he received ineffective assistance of counsel because his attorney failed to raise the potentially meritorious argument that there was no factual basis for Smith's plea. We reverse and remand for a hearing on a renewed motion that challenges the factual basis for the plea.

FACTUAL & PROCEDURAL BACKGROUND

The following factual summary is taken from the preliminary hearing transcript. Smith accosted the 17-year-old victim as she was walking to the library. The victim talked with Smith for about 20 minutes and then entered the building and walked upstairs. Smith followed her. As the victim exited the stairwell, Smith asked her whether they could see each other again and she said they could not. He then grabbed her by the hand and pulled her back into the stairwell. He pushed her up against the wall and held

both of her hands down by her sides. He pressed his head against her forehead and tried to kiss her; he grabbed her buttocks through her clothing; and he pushed his pelvic area against hers through her clothing. Smith then “place[d] one of his hands under her shirt and began rubbing her from[] what she described as her bra line down to her waist.” When Smith let go of her hand so he could reach under her shirt, she was able to get away.

Smith was charged with sexual battery by restraint (Pen. Code, § 243.4, subd. (a)¹; count I); false imprisonment by violence (§ 236; count II); and annoying or molesting a child (§ 647.6, subd. (a); count III). The court granted Smith’s *Faretta*² motion and permitted him to represent himself at the preliminary hearing and trial. On the second day of trial, Smith pled no contest to the sexual battery charge in exchange for a stipulated seven-year state prison sentence. The other counts were dismissed. At sentencing, Smith moved to withdraw his plea based on prosecutorial misconduct and omissions from the plea colloquy. Smith’s later-appointed counsel argued that Smith did not knowingly and voluntarily waive his right to counsel. The court denied the motion and sentenced Smith to seven years pursuant to the plea agreement.

On April 23, 2004, Smith’s attorney filed a notice of appeal on his behalf. On May 4, 2004, Smith applied in propria persona for a certificate of probable cause, listing numerous grounds to challenge the validity of his plea. The court summarily denied the certificate.

DISCUSSION

Smith argues that he received ineffective assistance of counsel because the attorney who filed his motion to withdraw the plea failed to raise the potentially meritorious argument that there was no factual basis in the record for the plea.

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

² *Faretta v. California* (1975) 422 U.S. 806.

I. *Preliminary Issues*

First, Smith did not waive his right to raise his ineffective assistance claim when he made a general waiver of his right to appeal while entering his plea, because a general waiver of the right to appeal does not apply to errors occurring subsequent to the plea. (*People v. Sherrick* (1993) 19 Cal.App.4th 657, 659; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1661-1663.)

Second, Smith was not required to obtain a certificate of probable cause in order to perfect his appeal because the appeal does not in substance challenge the validity of his plea. (§ 1237.5; Cal. Rules of Court, rule 30(b); *People v. Buttram* (2003) 30 Cal.4th 773, 776.) Smith challenges the constitutional adequacy of his legal representation following the entry of his plea. In such cases, section 1237.5 and California Rules of Court, rule 30(b) are not implicated. (*People v. Osorio* (1987) 194 Cal.App.3d 183, 187.) In *Osorio*, for example, the defendant argued that he received ineffective assistance of counsel because his attorney refused to file a motion to withdraw his plea. (*Id.* at p. 186.) The court held that no probable cause certificate was required because the appeal “attacks the failure of counsel to file the motion in the first instance. The relief requested does not require that we pass upon the validity of the guilty plea.” (*Id.* at p. 187; see also *People v. Makabali* (1993) 14 Cal.App.4th 847, 851.) Similarly, *People v. Vera* (2004) 122 Cal.App.4th 970 held that section 1237.5 did not apply to an appeal of the denial of a post-plea *Marsden* motion because a “determination that defendant is entitled to substitute counsel has no necessary implication for [the defendant’s] no contest plea, which plea stands until a motion to withdraw is made and granted.” (*Vera*, at p. 978.) Smith’s appeal merely requires us to decide whether the attorney who represented him on his motion to withdraw the plea provided constitutionally adequate representation. We need not decide whether the motion should have been granted or whether Smith’s plea was invalid. A certificate of probable cause was not required.

II. *Ineffectiveness of Counsel*

Defendants are entitled to effective assistance of counsel when they seek to withdraw a plea. (*Osorio, supra*, 194 Cal.App.3d at pp. 187-189.) Under both California and federal law, a defendant receives ineffective assistance if counsel's performance falls below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been more favorable to the defendant. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218, citing *Strickland v. Washington* (1984) 466 U.S. 668.) There is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance and courts must accord great deference to counsel's tactical decisions. (*Strickland*, at p. 689.) The defendant bears the burden of proving ineffective assistance of counsel by a preponderance of the evidence. (*Ledesma*, at p. 218.) When an ineffective assistance claim is raised on direct appeal, the reviewing court will reverse the conviction only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his conduct. (*People v. Frye* (1998) 18 Cal.4th 894, 979-980.)

Smith's attorney provided ineffective representation because he did not raise the potentially meritorious argument that the trial court did not verify that there was a factual basis for Smith's plea. Under section 1192.5, a trial court must confirm that there is a factual basis for a defendant's plea before accepting a conditional plea of guilty or no contest. This statutory requirement, while not compelled by the federal Constitution, helps ensure that federal constitutional standards of voluntariness and intelligence are met. (*People v. Holmes* (2004) 32 Cal.4th 432, 438.) The purpose of the factual basis requirement "is to protect against the situation where the defendant, although he realizes what he has done, is not sufficiently skilled in law to recognize that his acts do not constitute the offense with which he is charged." (*People v. Watts* (1977) 67 Cal.App.3d 173, 178, cited with approval in *Holmes*, at pp. 436, 439-440.) "Inquiry into the factual

basis for the plea ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead.” (*Watts*, at p. 178.)

A bare statement by a trial court that a factual basis exists is inadequate; the trial court must garner information from either the defendant or defense counsel to verify the factual basis for the plea. (*Holmes, supra*, 32 Cal.4th at p. 436.) “If the trial court inquires of the defendant regarding the factual basis, the court may develop the factual basis for the plea on the record through its own examination by having the defendant describe the conduct that gave rise to the charge [citation], or question the defendant regarding the factual basis described in the complaint or written plea agreement. [Citations] If the trial court inquires of defense counsel regarding the factual basis, it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a . . . preliminary hearing transcript . . . [Citation]” (*Ibid.*) The court need only establish a prima facie factual basis for the charges; it need not interrogate the defendant about each element of the crime and possible defenses, it need not resolve factual disputes, and it need not convince itself that the defendant is guilty. (*Id.* at pp. 441-442.) The court has wide discretion to determine whether a factual basis exists. (*Id.* at p. 443.)

Smith stipulated during the plea colloquy that the preliminary hearing transcript established a factual basis for his plea, and the court later made a finding that a factual basis existed. The transcript, however, does not clearly establish that Smith committed an essential element of the crime of sexual battery. Sexual battery occurs when a person “touches an intimate part of another person while that person is unlawfully restrained by the accused or an accomplice, and . . . the touching is against the will of the person touched and is for the purpose of sexual arousal, sexual gratification, or sexual abuse.” (§ 243.4, subd. (a).) “Touching” means “physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense.” (§ 243.4, subd. (f).) “Intimate part” means “the sexual organ, anus, groin, or

buttocks of any person, and the breast of a female.” (§ 243.4, subd. (g)(1).) Thus, sexual battery is committed only if the perpetrator contacts the skin of an intimate part of the victim. (*In re Keith T.* (1984) 156 Cal.App.3d 983, 986; *People v. Elam* (2001) 91 Cal.App.4th 298, 310.)

At the preliminary hearing, the testifying officer reported that the victim told him that Smith touched her buttocks and pelvic area through her clothes. Those acts were clearly insufficient to establish sexual battery. He also testified that Smith “place[d] one of his hands under her shirt and began rubbing her from, what she described as her bra line down to her waist.” This evidence does not support an inference that Smith touched the skin of the victim’s breast. In contrast, the evidence reviewed in *In re Gustavo M.* (1989) 214 Cal.App.3d 1485 did support an inference that the defendant touched the skin of the victim’s breast. The victim in *Gustavo M.* testified that the defendant pulled down her leotard and her bra strap and “[h]e touched my breast” at that time. (*Id.* at p. 1498.) Although she never expressly stated that the defendant touched the skin of her breast, the appellate court noted that the judge had benefit of observing the witness while she testified and saw her indicate where her bra strap came down, which is not clearly reflected in the reporter’s transcript. (*Id.* at p. 1499.) Here, it would be much more attenuated to infer from the preliminary hearing testimony that Smith touched the skin of the victim’s breast. In addition, we cannot infer that the magistrate hearing the evidence and seeing the witnesses at the preliminary hearing had further evidence because the judge who took the plea did not preside over the preliminary hearing.

The parties have not identified any evidence in the preliminary hearing transcript or the trial record that would establish a factual basis for the disputed element of the crime. (See *Holmes, supra*, 32 Cal.4th at p. 443 [inadequate factual basis inquiry is harmless if trial record supports a factual basis for the plea].) The presentencing report, for example, indicates that Smith pressed his body against the victim, grabbed her buttocks over her clothes, and put his hands under her shirt and felt “around her stomach,

below her bra line.” The victim testified at trial, but before she was asked to describe the extent of Smith’s touching, the trial was interrupted and Smith pled. We have no basis to infer that Smith would have admitted touching the skin of the victim’s breast had the trial court requested such an admission. Nor can we speculate as to what additional evidence might have been offered had this ground been raised. In sum, it appears that a motion to withdraw the plea based on the absence of a factual basis for the plea may have been meritorious.

By failing to present the potentially meritorious argument that the trial court failed to verify a factual basis for Smith’s plea, Smith’s attorney performed below an objective standard of reasonableness. (Cf. *People v. Nation* (1980) 26 Cal.3d 169, 178-179 [failure to raise potentially meritorious defense amounted to ineffective assistance of counsel].) We perceive no conceivable tactical reason for failing to make the argument. (Cf. *id.* at p. 179.)

The attorney’s ineffective performance caused Smith prejudice. When a defendant who was not represented by counsel at the time he entered a plea establishes by clear and convincing evidence good cause to withdraw the plea, the trial court must grant the defendant’s motion to withdraw the plea. (§ 1018; *People v. Cruz* (1974) 12 Cal.3d 562, 566.) The absence of a factual basis for a plea is good cause for allowing the defendant to withdraw the plea. (See *Watts, supra*, 67 Cal.App.3d at p. 182; *People v. Tigner* (1982) 133 Cal.App.3d 430, 435.) Had Smith’s counsel raised this ground in a motion to withdraw the plea, there is a reasonable probability that he would have prevailed. It is not at all clear to us that the prosecution would have been able to prove the sexual battery charge beyond a reasonable doubt. The remaining charges against Smith were false imprisonment by violence, which carried a maximum sentence of three years rather than the four-year maximum for sexual battery, and annoying or molesting a child, a misdemeanor. (§§ 18, 236, 237, 243.4, subd. (a), 647.6, subd. (a).)

DISPOSITION

We reverse and remand for appointment of counsel and for further proceedings on the motion to withdraw the plea on the ground that a factual basis for the plea was lacking.³ If no motion is made or if the motion is denied, judgment should be reinstated by the trial court.

GEMELLO, J.

We concur.

JONES, P.J.

SIMONS, J.

³ In a separate petition for a writ of habeas corpus, case No. A110336, Smith has raised a claim that he received ineffective assistance of counsel and that the trial court acted in excess of jurisdiction. In a separate order filed this date, the petition is denied.