

EVALUATING ISSUES IN THE CONTEXT OF PROCEDURAL DEFAULT Materials & Presentation by Brad Bristow, CCAP Staff Attorney

Whether an issue should appear in a brief is a function of:

- whether there was an error – both a practical and legal sense;
- effect of standards of review and standards of prejudice;
- effect of procedural defaults (failure to obtain certificate of probable cause, forfeiture; estoppel, etc.) and this factor is a large one in guilty plea appeals.

I. Waiver & Forfeiture

A. Waiver and forfeiture defined

1. Waiver is a knowing, intelligent and voluntary relinquishment of a right such as the express waiver of right to appeal in *People v. Nguyen* (1993) 13 Cal.App.4th 114, 119. The extent of the express waiver will be treated under principles of contract law, with the court examining the parties expressed intent and reasonable expectations. Thus if there is a “waiver of appeal” and an apparent agreement as to sentence, *Nguyen* seems to prevent an appeal of most sentencing issues except perhaps an unauthorized sentence. (*Ibid.*) But *Nguyen* would not likely prevent an appeal of a sentencing issue where it did not expressly say so and there was no agreement as to the sentence that would be imposed.

2. The principle of *People v. Scott* (1994) 9 Cal.4th 311, probably most accurately termed *forfeiture*, concerns loss of a right by failing to assert the right before a tribunal having jurisdiction to grant it. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.)

This generally happens as a failure to object when the issue, such as an error in making a discretionary sentencing choice, is one in which an objection would factually develop the error. (*People v. Scott, supra*, 9 Cal.4th at pp. 351-354.)

But a failure to object will not result in forfeiture if the error is jurisdictional or the

sentence imposed is unauthorized. (*People v. Williams* (1999) 21 Cal.4th 335, 341.)

Also the failure to bring the error to the court's attention will not be forfeited where factual development by the court is specifically mandated. (*People v. Butler* (2003) 31 Cal.4th 1119 [express probable cause finding required for some AIDS testing orders under Penal Code section 1202.1]. For example, awards of attorney's fees under Penal Code section 987.8, require notice to the defendant and a hearing, and presume inability to pay when the defendant has been sent to prison. A silent record will often require a remand by the appellate court even when the defendant does not object in the trial court. (*People v. Flores* (2003) 30 Cal.4th 1059.)

However, error resulting from the absence of evidence of the defendant's ability to pay other items such as probation costs, fines and restitution fines may be found forfeited when there has been no objection in the trial court. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066 [probation costs]; *People v. McMahon* (1992) 3 Cal.App.4th 740 [sexual offender fine]; *People v. Gibson* (1994) 27 Cal.App.4th 1466 [restitution fine].)

B. Appellate Arguments Against Forfeiture

1. Statutorily unauthorized sentences that are not the subject of a stipulation may be challenged at any time. (*People v. Smith* (2001) 24 Cal.4th 849, 854 .)

2. There is also an exception for constitutional issues not requiring factual development. (*Hale v. Morgan* (1978) 22 Cal.3d 388, 394; *People v. Partida* (2005) 37 Cal.4th 428, 436 [clearly defined due process issue reached when only an evidentiary objection was raised in trial court]; see also, *In re Sheena K.* (2007) 40 Cal.4th 875, 885-886, [challenges to unconstitutionally vague or overbroad probation conditions].)

3. Forfeiture applies to the parties and not to the reviewing court. (*People v. Williams* (1998) 17 Cal.4th 148, 161 [appellate court reached challenge to exercise of discretion

in setting aside a strike although prosecution neither objected nor appealed].)

4. It may be most effective to preserve a sentencing issue by alleging that appellant was deprived of effective assistance of trial counsel when trial counsel failed to raise the trial court's error in sentencing. (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1080.) These contentions often may be raised on appeal rather than by petition for writ of habeas corpus because there is less chance of the reviewing court finding a reasonable tactical reason not to object. One unpublished opinion from the Third District said, "What did counsel have to lose [by bringing the matter to the court's attention]?"

An allegation of ineffective assistance of counsel should be captioned or at least separately headed as an ineffective assistance contention. The concern here is to comply with the rule requiring separate statement of arguments. (Cal. Rules of Ct., rule 8.204(a)(1)(B).) This also helps to federalize the issue. (*Baldwin v. Reese* (2004) 541 U.S. 27.) Also, an allegation of ineffective assistance of counsel should not appear for the first time in the reply brief. (*People v. Dunn* (1995) 40 Cal.App.4th 1039.)

C. Estoppel Distinguished

Although *People v. Nguyen, supra*, 13 Cal.App.4th 114, held that an express waiver of appeal of sentencing issues may not bar an appeal challenging an unauthorized sentence, the doctrine of estoppel may act to prevent the party from challenging certain unauthorized sentences where the defendant received a benefit from the bargain and the unauthorized sentence is not wholly beyond the court's elemental jurisdiction. (*People v. Jones* (1989) 210 Cal.App.4th 124, 132-136; *People v. Nguyen, supra* 13 Cal.App.4th at p. 122; *People v. Ellis* (1987) 195 Cal.App.3d 334, 343, and *People v. Beebe* (1989) 216 Cal.App.3d 927, 932.) But note that in each of these cases the defendant received benefits. Question whether the doctrine would apply

where there is a “failure of consideration” – straight-up plea, no promises.

D. What if Certificate of Probable Cause Cannot Be Obtained?

Of course, the efforts to obtain the certificate should occur before submitting the brief. If there is a certificate problem that can arguably be resolved, it is probably better to address it, rather than having the appeal dismissed without any argument by the defendant.

Consider arguing that the issue is one of specific performance rather than withdrawal of plea. Waivers under *People v. Cruz* (1988) are almost always viewed as specific performance although the relief usually granted in the alternative may be to set aside the plea if the trial court will not specifically perform the plea bargain. (But see, *People v. Vargas* (2007) 148 Cal.App.4th 644). Arguments under *People v. Devaughn* (1977) 18 Cal.3d 889, seeking a remedy when the trial court has promised that an issue can be appealed which in fact cannot be preserved when there is a guilty plea have sometimes been held to require a certificate, but on others have sometimes been reached on appeal because specific performance is impossible.

Motions to withdraw a plea often require a certificate, but if the issue is seen more as a challenge to the way the court handled the motion to withdraw the plea than as a challenge to the plea itself, perhaps a certificate is not required. (*People v. Osorio* (1987) 194 Cal.App.3d 183; but see, contra, *People v. Emery* (2006) 140 Cal.App.4th 560.)