

Notice to Construe NOA to include required sec. 1237.5 language

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

F0 _____

v.

_____ County
Superior Court

APPELLANT'S NAME,

No. _____

Defendant and Appellant.

APPLICATION TO CONSTRUE THE NOTICE OF APPEAL

TO THE HONORABLE JAMES A. ARDAIZ, PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT:

Appellant, [APPELLANT], applies through his counsel to construe the notice of appeal filed on _____, to include the following language: "The grounds for appeal are sentencing issues, after admission of a probation violation, which do not challenge the validity of the plea or admission." A copy of the notice of appeal as filed is attached as Exhibit A. This application is based upon the record filed herein, the attached memorandum of points and authorities, and the declarations of appellant and appellate counsel.

Dated:

Respectfully submitted,

[ATTORNEY NAME]
Attorney for Appellant
State Bar No. _____
[ADDRESS]
[PHONE NO.]

MEMORANDUM OF POINTS AND AUTHORITIES

Statement of Procedural History [sample]

On August 29, 1991, after pleading guilty to two counts of burglary (Pen. Code, sec. 459), appellant was granted probation. (CT 5.)¹ Thereafter on October 17, 1994, a petition to violate appellant's probation was filed. (CT 89.) Appellant admitted the probation violation on November 8, 1994. (CT 95.)

The trial court took evidence on the issue of sentence choice pursuant to Penal Code section 1204 on December 30, 1994. (CT 109.) The court denied appellant's request for reinstatement of probation and sentenced him to prison for five months and four years for the two burglary charges. (CT 110.)

On [DATE], a notice of appeal was signed and filed by appointed counsel on appellant's behalf. This notice of appeal states that appellant appeals "from that particular part of the judgment . . . entered in this matter on 12/30/94: to wit: Case #____: 4 years State Prison, mid-term. Case #____: 16 mo. consecutive for 5 yrs. 4 mo. aggregate sentence. Sentencing error & abuse of discretion in failing to reinstate probation." (CT 123.)²

1 "CT" refers to the clerk's transcript on appeal.

2 The information sheet filed in this court by the _____ County Clerk also contains an error. That document states that "the Notice of Appeal states that the appeal is based solely on grounds involving a search and seizure, the validity of which was contested pursuant to P.C. sec. 1538.5."

At all stages of the trial court proceedings appellant was represented by [TRIAL ATTORNEY'S NAME], Attorney at Law. Counsel has also been appointed to represent appellant on appeal. Appellant has indicated his desire for appellate review of the sentence choice.

Applicable Law

The litigated issue presented by the record on file in this appeal concerns the sentencing choice by the trial court, which is appealable. (Pen. Code, sec. 1237.5; Rules of Court, rule 8.304(b)(4)(B); *People v. Tijerena* (1969) 1 Cal.3d 41, 48; *People v. Robinson* (1954) 43 Cal.2d 143, 145; *People v. Cotton* (1991) 230 Cal.App.3d 1072, 1079, 1080-1083; *People v. Jones* (1990) 224 Cal.App.3d 1309, 1315; *People v. Jackson* (1987) 196 Cal.App.3d 380, 386-387; *People v. Pennington* (1989) 213 Cal.App.3d 173, 175-177; *People v. Gilchrist* (1982) 133 Cal.App.3d 38, 42.)

However, the notice of appeal filed by trial counsel does not comply with the specific requirements of California Rules of Court, rule 8.304(b), with respect to appeals after pleas of guilty or nolo contendere in that it does not explicitly state that it is on grounds occurring after the plea, sentencing in this case.

The Legislature has clearly specified that it is the obligation of counsel for an indigent defendant to prepare and file a notice of appeal on his behalf when requested to do so or when it appears to counsel that arguably meritorious grounds to appeal exist. (Pen. Code, sec. 1240.1.) This duty necessarily encompasses the obligation to file a

(CT 126.) Appellate counsel is not aware of any search and seizure issues in this case, and apparently no Penal Code section 1538.5 motion was filed in the trial Court at any stage of the proceedings.

notice of appeal in a legally sufficient form. (Cf., *People v. Ribero* (1971) 4 Cal.3d 55, 66.)

The principles in favor of hearing an appeal on its merits should be followed here. (*People v. Chapman* (1971) 5 Cal.3d 218, 225 [“It is the policy of appellate courts to hear appeals on the merits, and avoid, wherever possible, forfeitures of substantial rights on technical grounds.”]; *People v. Casillas* (1964) 61 Cal.2d 344, 346; *In re Martin* (1962) 58 Cal.2d 133, 139.)

Therefore, appellant respectfully requests that this court construe the notice of appeal filed on [DATE], as including the following language: “The grounds for appeal are sentencing issues, after admission of a probation violation, which do not challenge the validity of the plea or admission.” Or in the alternative, appellant requests that this court deem this motion to be a petition for writ of habeas corpus. (*People v. Mendez* (1999) 19 Cal.4th 1084.)

Dated:

Respectfully submitted,

[ATTORNEY NAME]
Attorney for Appellant
State Bar No. _____
[ADDRESS]
[PHONE NO.]