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GEORGE DEUKMEJIAN
Attorney General

OPINION	:	No. 80-101
	:	
of	:	<u>May 9, 1980</u>
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GEORGE DEUKMEJIAN	:	
Attorney General	:	
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Paul H. Dobson	:	
Deputy Attorney General	:	
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SUBJECT: SEARCH AND SEIZURE ISSUE—A criminal defendant pursuant to a plea bargain may expressly waive the statutory right to seek appellate review of a search and seizure issue under Penal Code section 1538.5, subdivision (m).

The Honorable Cecil Hicks, District Attorney, County of Orange, has requested an opinion on a question which we have rephrased as follows:

May a criminal defendant pursuant to a plea bargain expressly waive the statutory right to seek appellate review of a search and seizure issue under Penal Code section 1538.5, subdivision (m)?

CONCLUSION

A criminal defendant pursuant to a plea bargain may expressly waive the statutory right to seek appellate review of a search and seizure issue under Penal Code section 1538.5, subdivision (m).

ANALYSIS

Penal Code section 1538.5¹ was enacted in 1967 to remedy deficiencies in the existing law concerning the procedure for suppression of evidence which was obtained as a result of an illegal search or seizure. (*In re David G.* (1979) 9 Cal. App. 3d 247, 254.) In *People v. Gephart* (1979) 93 Cal. App. 3d 989, 995–996 the court reviewed the procedures available to the defendant in a felony case with respect to raising a claim of illegal search and seizure:

“A brief review of statutory procedure will place section 1538.5 in perspective. Under the statutory scheme of Penal Code sections 995, 999a, and 1538.5, an accused may have up to seven opportunities to challenge the validity of a temporary detention, arrest, or search and seizure: (1) The accused can move to suppress the evidence obtained at the preliminary hearing. (Pen. Code, § 1538.5, subd. (f)); (2) If the motion is denied and the accused is held to answer, a motion may be made in the superior court to set aside the information for lack of probable cause on the ground that the evidence is the product of an illegal search (Pen. Code, § 995); (3) Upon the denial of a motion under Penal Code section 995, a defendant may file a petition for a writ of prohibition to stay the trial on the ground that the evidence is the product of an illegal search (Pen. Code, § 999a); (4) A special hearing de novo in the superior court on the validity of the search is proper (Pen. Code, § 1538.5, subd. (i)); (5) An adverse determination may be reviewed by means of a petition for a writ of prohibition or mandate in the appellate court (Pen. Code, § 1538.5, subd. (i)) (6) If prior to trial the opportunity for a section 1538.5 motion did not exist or the accused was not aware of the grounds for the motion, the issue may be raised at trial. (Pen. Code, §§ 1538.5, subds. (h) and (m); and (7) Finally, the matter may be considered on appeal after the denial of the motion under Penal Code section 1538.5, even though the accused enters a plea of guilty after the denial (Pen. Code, § 1538.5, subd. (m)).”

In a misdemeanor prosecution, the accused has a right to make a motion in the municipal or justice court before trial. (§ 1538.5, subd. (g).) If the motion is denied the defendant may make a pretrial appeal to the superior court for review of that denial. (§ 1538.5, subds. (j) and (m).)

¹ Hereinafter, all section references are to the Penal Code unless otherwise indicated.

Section 1538.5, subdivision (m) provides in pertinent part:

“A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Such review on appeal may be obtained by the defendant providing that at some stage of the proceedings prior to conviction he has moved for the return of property or the suppression of the evidence.”

In the instant opinion we address the issue of whether or not an accused may waive the statutory right of appellate review after a guilty plea as part of a plea bargain. In analyzing this issue we will first address the exact nature of the statutory right provided for in subdivision (m) of section 1538.5. Next we will consider the nature of a plea bargain. Finally, we will consider whether or not the plea bargain contained in a waiver of the statutory right to appeal pursuant to section 1538.5 would be valid and enforceable.

There is no constitutional right to seek review of a search and seizure issue on appeal after a guilty plea. When a defendant pleads guilty, he waives a number of constitutional rights—the privilege against self-incrimination, the right to jury trial and the right to confront accusing witnesses. (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal. 3d 122.) Additionally, as a general rule, the plea of guilty waives all constitutional challenges to pretrial proceedings. (*Lefkowitz v. Newsome* (1975) 420 U.S. 283, 288; *Tollert v. Henderson* (1973) 411 U.S. 258, 267; *People v. DeV Vaughn* (1977) 18 Cal. 3d 889, 895–896.) Section 1538.5, subdivision (m) constitutes the exception to the rule that all errors arising prior to the entry of the guilty plea are waived except those which question the jurisdiction or legality of the proceedings. (*People v. Lilienthal* (1978) 22 Cal. 3d 891, 897; *People v. Kaanehe* (1977) 19 Cal. 3d 1, 9.) Prior to the enactment of section 1538.5, a defendant could not appeal a search and seizure issue following a plea of guilty. (*In re David G.*, *supra*, 93 Cal. App. 3d at p. 253.)

In *In re David G.*, *supra*, a minor moved to suppress evidence against him in a wardship proceeding commenced in the juvenile court pursuant to Welfare and Institutions Code section 602. The motion was denied and the minor admitted the allegations in the wardship petition. Thereafter he appealed and attempted to raise the search and seizure issue citing section 1538.5, subdivision (m). The appellate court rejected his contention that the constitutional right of equal protection of laws required the provisions of subdivision (m) to apply equally to minors as well as to adults. In this regard the court stated:

“Only by the enactment of section 1538.5, subdivision (m) did the Legislature give an adult the right to appeal the denial of a suppression

motion following a plea of guilty. Thus, a minor charged in a wardship petition is in the same position as an adult prior to the enactment of section 1538.5—he can preserve his appellate right as to the search and seizure issue by denying the petition and appealing from the dispositional order if the jurisdictional allegations are found to be true. (Welf. & Inst. Code, § 800; see *In re Melvin S.* (1976) 59 Cal. App. 3d 898, 900–901; see also Walker, Cal. Juvenile Court Practice (Cont. Ed. Bar Supp. 1977) § 157, p. 61.) (4) Therefore, *the right at stake here is not the fundamental right to be free from unreasonable searches and seizures, but a much narrower right-to appeal from an adverse ruling on a suppression motion without first denying the charges of the wardship petition.*

“Since *the statute does not directly affect a fundamental right* or create a ‘suspect’ classification, we need only ask whether there is a rational legislative basis for affording adults the right to appellate review of the denial of a suppression motion following a guilty plea without affording a similar right to minors. We conclude that the legislative classification is rationally related to the purpose of the statute.” (Fn. omitted; emphasis added; 93 Cal. App. 3d at p. 254.)

Thus, it may be seen that the proposed waiver, which is the subject of this opinion, does not concern a waiver of a constitutional right or any other fundamental right.

It is well recognized that the exclusionary rule serves a two-fold public purpose: To deter the police from engaging in unconstitutional searches and seizures and to relieve the courts from being compelled to participate in illegal conduct. (*People v. Blair* (1979) 25 Cal. 3d 640, 655.) Here, we do not deal with a waiver of a right to be free from illegal searches or seizures or the waiver of the right to suppress illegally seized evidence. We merely deal with a limited statutory right which permits a defendant to raise on appeal the admissibility of the evidence seized by the police without contesting his guilt in the trial court. (Cf. *In re David G.*, *supra*, 93 Cal. App. 3d at pp. 254–255.)

Having considered the nature of the statutory right of appellate review under subdivision (m), we now examine the nature of the plea bargain. Plea bargaining has become an accepted practice of criminal procedure in American courts, including California courts. (*People v. West* (1970) 3 Cal. 3d 595, 604.) As the Supreme Court stated in *People v. West*, *supra*, at page 604:

“Both the state and the defendant may profit from a plea bargain. The benefit to the defendant from the lessened punishment does not need elaboration; the benefit to the state lies in the savings and costs of trial, the

increased efficiency of the procedure, and the further flexibility of the criminal process.”

There are several statutory provisions relating to plea bargains. (§§ 1192.1, 1192.2, 1192.4, 1192.5.) However, a plea bargain need not be limited to the specific provisions of those sections. (See *People v. West*, *supra*, 3 Cal. 3d at p. 806.)

What is essential to plea bargain is first, an agreement between the People, represented by the prosecutor, and the defendant, usually represented by counsel; and second, judicial approval of the bargain. (*People v. Orin* (1975) 13 Cal. 3d 937, 942–943.) Thus, counsel for both parties must disclose fully to the court the terms of that agreement and they should become part of the record of the cause. (*People v. West*, *supra*, 3 Cal. 3d at p. 608.)

As the court in *People v. Collins* (1978) 21 Cal. 3d 208, 214 noted: “Critical to plea bargain is the concept of reciprocal benefits.” Traditionally, the benefit to the state in entering a plea bargain is the certainty of an ultimate result, namely, “the defendant’s vulnerability to a term of punishment.” (*People v. Collins*, *supra*, at p. 215.) The benefit to the defendant normally is that he limits his vulnerability to a less severe term of punishment than could have resulted had he been convicted of the offense or offenses as charged. (*People v. Collins*, *supra*, at pp. 214–215.)

The express waiver of statutory right to appellate review which we consider herein adds a new twist to the plea bargaining process. In exchange for a promise of a less severe punishment or some other more favorable disposition of the case, a defendant promises to waive his right to appeal the denial of his pretrial suppression motion after his plea of guilty. It is clear that the defendant may always waive his right to appeal by simply *abandoning his request for appeal: however, such a waiver must be an informed one.* (*People v. Bailey* (1969) 1 Cal. 3d 180, 186.) The question presented here is whether or not such a waiver may be part of a plea bargain.

We are aware of no California case which specifically addresses this issue. In *People v. Williams* (1975) 36 N.Y.2d 829 [331 N.E.2d 684] cert. den., 423 U.S. 873 the Court of Appeals of New York considered the validity of the waiver by a defendant of his right to appeal on a suppression issue as part of a plea bargain. On appeal, the defendant contended that as a matter of law there could be no waiver of his statutory right to appeal from a preconviction denial of the motion to suppress. The court rejected the contention holding that where a plea on a condition was voluntarily entered with full comprehension on the defendant’s part of both the plea and the associated conditions, the defendant may properly be held to the waiver of his right to appeal the denial of a suppression motion.

In *Staton v. Warden* (1978) 175 Conn. 328 [398 A.2d 1176] the court indicated that a plea bargain containing an intelligent waiver of the right to appeal would be valid, but in that case found the waiver not to have been intelligently made. In *State v. Crosby* (La. 1976) 338 S.2d 584, 589 the court in dictum cited *People v. Williams* with apparent approval. See also *United States (Amuso) v. LaVallee* (E.D.N.Y, 1968) 291 F. Supp. 383, aff'd. (2d Cir. 1970) 427 F.2d 328.

In *People v. Butler* (1972) 43 Mich. App. 270 [204 N.W.2d 325] an appellate court held that to permit a prosecution to induce a defendant to waive his right to appeal violated the absolute right to appeal guaranteed by the Michigan State Constitution. In so holding the court noted:

“If such bartering were to be permitted the prosecution would indeed be able to insulate, and in many cases, guilty pleas accepted in contravention of standards which have been developed with painstaking care to afford defendants their basic rights.” (204 N.W.2d at p. 330.)

The Supreme Court of Arizona in *State v. Etlington* (1979) 121 Ariz. 572 [592 P.2d 768] held that the right to appeal is not negotiable in plea bargaining because such a waiver would be against public policy. The court cited the above quoted sentence from *People v. Butler, supra*, 43 Mich. App. 270 and the case of *State v. Gibson* (1975) 68 N.J. 499 [348 A.2d 769].

In *Gibson, supra*, the Supreme Court of New Jersey considered the validity of a plea agreement wherein a defendant pleaded guilty to certain charges in return for the dismissal of a more serious charge and certain sentence concessions. The plea was conditioned on defendant waiving his right to appeal from another conviction entered against him after a trial. The court in considering the issue cited *People v. Butler, supra*, 43 Mich. App. 270 as a “minority viewpoint” and stated that it was unpersuaded by the rationale of *Butler* that tendering concessions to a defendant in return for his agreement not to appeal a conviction is necessarily an unconstitutional chilling and therefore deprivation of his right of appeal. The court in *Gibson* pointed out that a defendant upon a guilty plea surrenders other constitutional rights, such as his rights to be tried by a jury and to be confronted by witnesses against him. Yet if the record shows that a defendant has intelligently and voluntarily pleaded guilty, he cannot complain that he was impermissibly coerced into waiving these rights. The court further stated:

“It is obvious that a pronouncement by this court of the flat illegality under any circumstances of an agreement by a defendant to waive an appeal would operate substantially to cut down the incentive of prosecutors in many cases to offer what particular defendants and their attorneys might regard as

worthwhile inducements to forego that right. Discouragement of plea negotiations to that extent does not appear to us consistent with sound judicial policy.” (384 A.2d at p. 775.)

Despite the pronouncements of the court in *Gibson* rejecting the proposition that public policy would prevent a waiver of the right of appeal as a condition to plea bargain, the New Jersey Supreme Court did not accept the approach taken by the New York Court of Appeal in *People v. Williams*, *supra*, 36 N.Y.2d 829. The court in *Gibson*, *supra*, 348 A.2d at p. 775 stated:

“Notwithstanding we have found no impairment of public policy in the incorporation of appeal—waivers or conditions against appeal in an otherwise uncoerced and voluntary plea agreement, we think it salutary to permit a defendant to file an appeal from a conviction if he does so timely, notwithstanding the unexceptional agreement not to. Of course, a defendant who has obtained sentence or charge concessions in consideration of the appeal-waiver would be subject to their revocation, at the option of the state, immediately upon the filing of the appeal.”

The court reasoned that to allow a defendant to disregard an agreement not to appeal, arrived at fairly in a plea negotiation, would not discourage plea bargaining in general. Such an agreement would encourage a defendant not to appeal and thus secure the benefits of the bargain. The court, noting that in that state an appeal must be brought within 45 days of conviction, held that it was not likely that the state would suffer any prejudice if it were required to try the once dismissed charges since the revocation of the plea bargain would be made known to it within 45 days after the conviction.²

Our review of the cases of other jurisdictions which have considered the issue of the waiver of the right to appeal persuades us that an accused, as part of a plea bargain, may waive his statutory right to appeal under section 1538.5, subdivision (m). We have already noted that the right to seek appellate review provided by subdivision (m) is not a constitutional right or even a fundamental right. Moreover, as we have already noted and as was noted by the New Jersey Supreme Court in *State v. Gibson*, *supra*, 68 N.J. 499, when the defendant pleads guilty he waives a number of constitutional rights. Thus, we are unpersuaded by the rationale of *People v. Butler*, *supra*, 43 Mich. App. 270 and *State v. Ethington*, *supra*, 121 Ariz. 572.

² In the case of the particular defendant in *State v. Gibson*, *supra*, 68 N.J. 499, the court found that his surrender of his right to appeal was invalid, and because he did not file a timely appeal, he was not entitled to post-conviction relief.

We note in this regard that the *Standards Relating to Criminal Appeals* (1974) published by the American Bar Association Project on Standards for Criminal Justice provides in regard to a defendant's trial counsel's duties with respect to appeal that "[o]ne alternative to be considered is whether it is in his client's interest to seek mitigation in the grade of the offense or the severity of the sentence in exchange for a decision to forego appeal." (*Id.*, § 2.2, p. 436.)

As we have already pointed out, the Supreme Court in *People v. West*, *supra*, 3 Cal. 3d at page 604 has held that plea bargaining is an accepted and encouraged practice which benefits both the defendant and the state. One of the key advantages to both sides in plea bargaining is that it provides to each a certainty as to the disposition of the case. We view the waiver of the right to appeal as provided for in subdivision (m) of section 1538.5 a condition which relates to this goal of plea bargaining.

There is a maxim of jurisprudence:

"Anyone may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement." (Civ. Code, § 3513.)

Accordingly, it has been held that a defendant in a criminal case may waive a right which exists for his own benefit, but not one which exists for the public benefit. (*People v. Dominguez* (1967) 256 Cal. App. 2d 623, 629.)

We do not view the waiver of the right to appeal pursuant to section 1538.5, subdivision (m) as contravening any public policy. As we have already noted, the particular right which would be waived is merely a statutory procedural right which permits a defendant to seek appellate review of a search and seizure issue without first having to contest the charges at a trial. The public policy or public benefit underlying this right is the elimination of the need for a trial where the only issue which the defendant wants to contest is the lawfulness of a search or seizure. The waiver of appellate review pursuant to section 1538.5, subdivision (m) would not be contrary to this public policy of expediting appellate review since by entering the bargain the defendant has evidenced his willingness to forego appellate review on the search and seizure grounds.

Nor would the waiver contravene the public policy underlying the exclusionary rule. Certainly such a waiver would not undermine the purpose of the exclusionary rule to deter illegal police conduct. The availability of the motion to suppress is the deterrent. Whether or not the defendant avails himself of the rule is another matter. The other purpose of the exclusionary rule, relieving the courts from being compelled to participate in illegal conduct, is likewise not affected by the waiver. There is no requirement that the defendant

assert the exclusionary rule at any stage of the proceedings. Moreover, in the case where the issue of waiver of the right to appellate review would arise, the lower court already would have upheld the lawfulness of the search and/or seizure and would have denied the motion to suppress. Under these circumstances, there is no question of the court participating in illegal conduct.

Thus, we find no impropriety in including in a plea bargain a condition that the defendant waive his right to appellate review of a search and seizure issue pursuant to section 1538.5, subdivision (m).

Having concluded that there is no public policy reason which would prevent the inclusion of a waiver of the right to appeal pursuant to subdivision (m) in a plea bargain, we still must consider whether or not such an agreement could be enforced. If the agreement is unenforceable, there can be no valid plea bargain.

Our first concern in this respect is the fact that a plea bargain contemplates the prosecution and the defense coming to an agreement which is approved and enforced by the court. (*People v. Orin, supra*, 13 Cal. 3d at pp. 942–943.) In *Way v. Superior Court* (1977) 74 Cal. App. 3d 165, 180 the court characterized a plea bargain as follows:

“The ‘plea bargain’ between the prosecutor and the defendant is merely an agreement between them as to a disposition which will be submitted to the judge for his adoption, if he so chooses. It vests no rights other than those which relate to the immediate disposition of the case.

Both the defendant and the People are entitled to the benefits of the plea bargain. (*People v. Collins, supra*, 21 Cal. 3d at pp. 214–215.) In the case of a waiver of the right to appeal under section 1538.5, subdivision (m) the trial court would approve the bargain but it would be the appellate court which would be required to enforce it. Subdivision (m) provides for a right to appeal. Rule 31, subdivision (d) of the California Rules of Court provides that after a judgment of conviction entered upon the basis of a guilty plea, a defendant may file a notice of appeal stating that it is based upon the grounds “involving a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code.” In such a case the defendant need not comply with the provisions of Penal Code section 1237.5 requiring a certificate of probable cause to appeal by the trial court.³

When notice of appeal is filed, jurisdiction in the case is transferred from the trial court to the appellate court. (*Wagner v. Shapona* (1954) 123 Cal. App. 2d 451, 464;

³ In the case of a misdemeanor, rule 182, California Rules of Court merely provides for the filing of a notice of appeal without reference to Penal Code section 1538.5 or section 1237.5.

Associated Lumber and Box Co. v. Superior Court of Calaveras County (1947) 79 Cal. App. 2d 577; *In re Shafter-Wasco Irrigation Dist.* (1942) 55 Cal. App. 2d 484, 486.) Pursuant to rule 31 it would appear that the filing of the notice of appeal by the clerk would merely be a ministerial act and that upon the filing the trial court which approved the plea bargain would be without jurisdiction at that point to enforce the waiver condition.

Thus, the waiver condition of the plea bargain, if at all enforceable, would have to be enforced by the appellate court. We conclude that such a waiver would be enforceable in the appellate court. The waiver would not preclude appeal, but would preclude defendant from raising the issue on appeal.

In *People v. Peters* (1970) 7 Cal. App. 3d 154, 159–160, the court held that a defendant who withdrew his motion under section 1538.5 and stipulated to the admissibility of evidence could not raise the issue on appeal. We believe the waiver of the right to seek appellate review is analogous to a withdrawal of the motion to suppress. Thus, in our view, a defendant who waives his right to appellate review would not be precluded from perfecting the appeal, but he would be precluded from raising the issue of the legality of the search or seizure by virtue of the waiver.

We also note that in *People v. Rogers* (1978) 21 Cal. 3d 542, the Supreme Court held that the Court of Appeal erred in considering a search and seizure issue where the defendant had waived the issue by failing to make the appropriate objection at the trial level. We believe the same rule would pertain to the case of the defendant who pursuant to a plea bargain waived his right to seek appellate review of a search and seizure issue. The appellate court would be precluded from considering the issue because of the waiver.

We do not believe that a California court would adopt the “remedy” adopted by the New Jersey Supreme Court in *State v. Gibson, supra*, 68 N.J. 499. The prosecution is entitled to the benefits for which it has bargained. (*People v. Collins, supra*, 21 Cal. 3d at p. 214.) The benefit for which the prosecution would have bargained in the case of a waiver by the defendant of the right to appeal pursuant to section 15381, subdivision (m) would be the insulation of the judgment from possible reversal on appeal on search and seizure grounds. Thus, if defendant were permitted to raise the issue on appeal, the benefit contemplated by the prosecution would be illusory. For this reason, it is our opinion that such a plea bargain could be enforced as a waiver of the right to raise the issue on appeal. (Accord *People v. Williams, supra*, 36 N.Y.2d 829.)

It is our conclusion, therefore, that a criminal defendant pursuant to plea bargain may expressly waive the statutory right to seek appellate review of a search and seizure issue under section 1538.5, subdivision (m).
