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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

PONCIANO ALVAREZ-TINOCO,

Defendant and Appellant.

A134872

(Sonoma County  
Super. Ct. No. SCR606422)

Pursuant to a negotiated disposition, defendant entered a plea of no contest to four counts of lewd and lascivious acts on a child under the age of 14 years of age (Pen. Code, § 288, subd. (a)),<sup>1</sup> and to the enhancements of substantial sexual contact with a person under the age of 14 years of age (§ 1203.066, subd. (a)(8)). Subsequently, defendant moved to withdraw his no contest plea, and the trial court denied his motion. On appeal, defendant challenges the court's denial of his motion to withdraw his plea and claims that he had ineffective assistance of counsel and that his plea was not made knowingly and intelligently. We are not persuaded by his arguments and affirm the judgment.

**BACKGROUND**

On August 11, 2011, a felony complaint charged defendant in counts 1 through 4 and 10 with lewd and lascivious acts on a child under the age of 14 years of age. (§ 288,

<sup>1</sup> All further unspecified code sections refer to the Penal Code.

subd. (a).) The complaint further alleged substantial sexual contact with a child under the age of 14 years of age (§ 1203.066, subd. (a)(8)) as to counts 1 through 4. In counts 5 through 9, the complaint alleged oral copulation with a person under the age of 14 years. (§ 288, subd. (c)(1).)

We summarize the facts as they are set forth in the probation officer's report. Defendant had been dating the mother of the victim (mother) for about two years and had lived in the home with mother, the 11-year-old victim, and the victim's younger sister. On August 9, 2011, the victim's grandfather (grandfather) came to visit her. He waited for the victim in his car but, when she did not exit the house, he went to the kitchen window and looked inside. He saw defendant push the victim into a corner, kiss her face and neck, and rub both of his hands on her buttocks. The grandfather knocked on the door; mother, grandfather's daughter, answered. He told mother what he saw and the two of them confronted defendant.

Mother spoke to the victim and she told her that defendant had hugged her, kissed her, and touched her buttocks in the past. The police were called and the victim was interviewed by a forensic interview specialist. The victim disclosed that around June 2011, defendant began to touch her in a sexual manner. She reported that on approximately four occasions, he inserted his penis into her mouth. On approximately two or three occasions, he orally copulated her vagina. On approximately four occasions, he touched her vagina with his hands, and on approximately four occasions he inserted his penis in her vagina. She revealed that on approximately five occasions, he inserted his penis in her anus.

When questioned by police, defendant stated that he was dating mother and felt affection for the victim and her six-year-old sister. Defendant reported that he did not think his actions hurt the victim or " 'destroyed her life.' " He denied having sex with the victim, but admitted that she "was not untruthful." The deputy told defendant that the victim was at the hospital and it appeared that she was pregnant. Asked if he took responsibility, defendant said, " 'If it was like that yes; but it isn't like that; she's a little girl.' " He admitted that if she were pregnant, he was responsible. After initially denying

having sex with the victim, defendant acknowledged having sexual contact with her and inserting his penis into her mouth. He also admitted that he orally copulated her “ ‘about twice.’ ”

On August 26, 2011, the trial court held a hearing after being informed about a negotiated disposition. The court noted that defendant was pleading guilty to counts 1 through 4 in exchange for the dismissal of counts 5 through 10, and that the court would be imposing a sentence of 14 years. Defendant responded that he understood this. When asked whether he understood that he would have to register as a sex offender for the rest of his life, he answered that he understood that.

Defendant, the interpreter, and defendant’s attorney, had signed defendant’s guilty plea form, which is commonly referred to as a *Tahl* form (*In re Tahl* (1969) 1 Cal.3d 122 (*Tahl*)). The constitutional waivers on the form were written in Spanish. When discussing the signed *Tahl* form, the trial court specifically asked defendant whether his interpreter had gone over the form and read this form to him. Defendant confirmed that his interpreter had done that. Defendant also affirmatively confirmed that his attorney discussed these rights with him. When asked whether he had any questions about these rights, defendant responded, “No.” The court asked defendant whether he realized that these were rights he was giving up and he answered, “Yes.”

The trial court then stated: “Next to each one of these [constitutional] rights there is a box for you to place your initials. By placing your initials in this box, it means that these rights were read to you. You understood them, and you’re willing to give them up. Did you place your initials in each one of these boxes by these rights?” Defendant responded, “Yes” The court asked defendant whether he signed the last page of this four-paged form, and he said, “Yes.” The court asked defense counsel if she joined in the waiver of defendant’s constitutional rights, and she replied, “I do.”

The court found a factual basis for the plea. The court found the plea entered by defendant to be made freely, voluntarily, knowingly, and intelligently.

The modified probation presentence report dated September 15, 2011, indicated that the probation officer interviewed defendant while he was in jail. Defendant told the

probation officer that he had never been in jail before and that he had told his attorney that he was guilty but now he was thinking that his prison term is “ ‘a very long time.’ ” Defendant, according to the probation report, “said he has since considered the impact of his sentence and the effect on his family.” Defendant revealed that he had “felt the sentence was long, but [had] not want[ed] the judge to think he was ‘protesting.’ ” Defendant advised that he “ ‘maybe wasn’t thinking well’ ” when he signed the *Tahl* form. He added that “he was unsure if he was wrong to accept the plea agreement; he was confused by the process.” Defendant declared: “ ‘It’s a long time [in prison].’ ” Defendant asked “if there was any possibility the judge could change the sentence” as he “recently learned that his mother was sick and he was worried about her; he also had been thinking about his child.” Defendant said that he was “ ‘not protesting’ but asked that his thoughts be ‘taken in[to] consideration.’ ”

On September 23, 2011, Attorney Peter Duarte substituted in place of Judeann Conry as counsel for defendant. Subsequently, on December 2, 2011, Duarte filed on behalf of defendant a motion to withdraw his plea.

The trial court held a hearing on January 26, 2012. Defendant testified that Conry spoke to him only once about his case. He believed that Conry told him he would be serving 12 years; she did not show him the videotapes of the victim’s interviews. He claimed that his attorney told him he was facing 10 counts, then she told him there were four counts. He asked her what they could do about it and she, according to defendant, responded that he could not do anything and he should “just plead guilty.”

Defendant testified at the plea withdrawal hearing that he had pleaded guilty because he did not want “to contradict others like the victim or her family.” Defense counsel asked defendant whether he had informed the person from probation who had come to interview him while he was in jail that he was confused by the process, and defendant responded: “I don’t remember, but I don’t believe so, because as I told you before, I didn’t want to contradict anyone.” Defendant added, “But later on, I thought that the time that they were asking me to serve wasn’t fair.” He said that he did not agree

with the charges. When asked on redirect why he signed the *Tahl* form, defendant claimed that he “felt bad” and that he did not “know the consequences.”

Defense counsel stated that he wanted to ask defendant “again” the following: “You don’t recall telling the probation officer who interviewed you that you found that you were confused by the process? You don’t recall saying that?” Defendant answered, “I didn’t tell him that.”

When asked by the prosecutor whether he now did not want the 14-year sentence because of family members and family obligations, defendant said, “Yes.” Defendant recalled completing the *Tahl* waiver form and admitted that the Spanish interpreter and his attorney were with him when he completed it. The prosecutor asked defendant whether he wanted to enter his plea at the time he met with his counsel and defendant answered, “Yes.” The prosecutor asked: “And now, at this time, you regret making that decision; is that right?” Defendant replied, “Yes.” When questioned further by the court, defendant admitted that he told the police that he had committed sexual acts with the victim and he admitted that the Spanish interpreter read each of the *Tahl* rights.

The court asked defendant if he recalled the court informing him at the hearing on August 26, 2011, that his sentence would be 14 years; defendant admitted being told that. The court then stated: “When you . . . earlier testified that nobody told you how much time you would do, do you remember me telling you in court that you would do 14 years as part of the agreed-upon disposition?” Defendant answered, “Yes.” The court continued, “And your testimony today is you feel that this is not a fair sentence, the 14 years?” Defendant answered, “Yes.”

The court asked defendant whether he understood when he entered the plea to the four counts that the additional six counts would be dismissed. The court explained: “In other words, you would not have to serve any time for those additional six counts.” The court asked defendant whether he understood that and defendant replied, “Yes.”

Defendant’s public defender, Conry, also testified. Conry stated that she reviewed the police reports before meeting with defendant. She had her investigator speak to the grandfather. She explained that defendant’s admissions to the police “would be fairly

difficult to get out of in terms of looking from a defense perspective . . . .” Conry disclosed that her investigator read the entire police report to defendant. She believed she had two meetings with defendant and she recalled telling him the terms of the plea deal as compared to his maximum exposure. She remembered telling him that it was his decision about what to do; she also remembered advising him of his rights. She said that it appeared to her that defendant understood everything she discussed with him.

Conry clarified that this case was in early case resolution court (ECR court); she had requested a videotape of the victim’s statements and she believed she told defendant that she had not yet received a copy of it. She had begun the discovery process and had already requested the videotapes. She disclosed that she was worried about not having seen the videotape but the grandfather had corroborated defendant’s admissions. She said that the decision to accept the plea was made by defendant and that she never made this decision for her clients. Since the case was in ECR court and the offer came quickly, she had not had time to get the videotape of the victim’s interviews. She reported the offer to defendant when it came. Defendant asked that she try to get him less time, which she successfully accomplished. She brought the offer of less time to defendant and he accepted it.

The trial court took judicial notice of various documents and observed that defendant’s maximum exposure was 26 years and he received 14 under the plea.

At the end of the hearing, the trial court stated that it believed that defense counsel “acted appropriately under the circumstances, and she acted as effective counsel. She did review all the police reports. She reviewed the summaries of those police reports, including the interviews [with the victim]. . . . [¶] She shared those reports with the defendant, and used a Spanish-speaking investigator to have those reports read to the defendant. [¶] The police reports also summarized the defendant’s own statements. And those were read to the defendant. And the defendant during his interview admitted his culpability to Ms. Conry, and then, admitted that he had that conversation with Conry here. . . . [¶] There’s nothing before the court to indicate—there’s no evidence before

the court to indicate that there's any discrepancies between the police reports and the recorded interviews. There was never any evidence introduced in regards to that."

The trial court further explained its reason for denying defendant's request to withdraw his plea: "The court feels that Ms. Conry did properly evaluate the evidence. She secured a negotiated disposition in which six of the counts were dismissed. She took a 26-year exposure case and turned it into a 14-year plea. So therefore, she saved the defendant 12 years of exposure and possible additional commitment in state prison. [¶] The court, personally, spent time with the defendant going over his constitutional rights at the time of the plea. There was an interpreter present. And the court made sure that he understood that this was a negotiated disposition in which he would receive 14 years in state prison. [¶] So, for him to testify today that he did not know how much time hat he was facing, the court doesn't feel is believable under the circumstances. [¶] What I heard him testify to was that he felt the sentence was not fair. [¶] And it may be true that he thinks 14 years is a long time, but also the fact that he could have received 26 years is a long time, also. [¶] Just because he thinks the sentence isn't fair, does not rise to the level of allowing a negotiated disposition to be withdrawn. [¶] So, for those reasons, I'm respectfully denying his motion to withdraw the plea."

On February 21, 2012, the trial court sentenced defendant to 14 years in state prison.

Defendant filed a timely notice of appeal on March 7, 2012. On that same date, the trial court granted defendant's request for a certificate of probable cause.

## **DISCUSSION**

### ***I. Standard of Review***

Defendant claims that the trial court abused its discretion when it denied his motion to withdraw his no contest plea. He maintains that he established good cause to withdraw his plea based on ineffective assistance of counsel. He also argues that he should have been permitted to withdraw his plea because it was not made knowingly and intelligently.

Section 1018 provides that the trial court “[o]n application of the defendant at any time before judgment . . . may . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.” This provision further states that “[t]his section shall be liberally construed to effect these objects and to promote justice.” (§ 1018.) “Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea.” (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) “It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea.” (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.)

We review the trial court's ruling for abuse of discretion and adopt the court's factual findings if those findings are supported by substantial evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 585.) Abuse of discretion is found only if the trial court has exercised its discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

## **II. Claim of Ineffective Assistance of Counsel**

Defendant contends, as he did in the trial court, that Conry did not provide him with effective assistance of counsel with regard to his guilty plea because she failed to obtain and view the videotapes of the interviews of the victim and of his admissions to the police. Defendant argues that defendant was unable to make an informed decision regarding his possible defenses to the charges or to determine the reasonableness of the 14-year plea without this information.

“Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel.” (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) A claim of ineffective assistance of counsel requires the defendant show both that trial counsel's performance was deficient and as a result of that deficient performance defendant suffered prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668.) In the context of a guilty plea, in order to show ineffective assistance of counsel a defendant has the burden

to prove by a preponderance of the evidence: (1) his or her counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) he or she suffered prejudice from counsel's deficient performance in that "there is a reasonable probability that, but for counsel's errors, he [or she] would not have pleaded guilty and would have insisted on going to trial." (*Hill v. Lockhart* (1985) 474 U.S. 52, 59, fn. omitted; see also *In re Resendiz* (2001) 25 Cal.4th 230, 239, 248-254, abrogated on another ground in *Padilla v. Kentucky* (2010) 130 S.Ct. 1473, 1484.) " 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " (*Ledesma*, at p. 218, quoting *Strickland*, at pp. 693-694.)

" '[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed.' " (*In re Cox* (2003) 30 Cal.4th 974, 1019-1020.) In this case, it is clear that defendant has failed to demonstrate prejudice as a result of counsel's performance; accordingly, it is unnecessary to determine whether counsel's performance was deficient.

Nothing in this record establishes a reasonable probability that defendant would have refused the plea deal had Conry acquired the videotapes of the interviews with defendant and the interviews of the victim. Defendant told Cory that he wanted less time than his possible sentence of 26 years. Thus, Conry achieved what defendant requested when she was able to get the prosecutor to offer 14 years. The record showed that counsel actually and accurately communicated the offer to defendant, defendant understood that his sentence was 14 years, and defendant made the decision to accept the plea. (See *In re Resendiz, supra*, 25 Cal.4th at p. 253.)

Defendant contends that he would not have accepted the plea had Conry reviewed the videotapes with him. The record contains no reliable evidence supporting this claim. Conry's investigator read the police report to defendant in Spanish, and the police report summarized the admissions made by defendant to the police and the interviews with the

victim. As the trial court stressed, defendant presented no evidence indicating that any of the summaries were inaccurate or that they omitted significant information. Indeed, defendant knew what he said to the police and thus he would have told his counsel if he believed any of the information was incomplete or inconsistent. He also could have told his counsel if he believed coercion was involved or if he was unsure about what was asked of him. Furthermore, defendant told his attorney that he had committed the sexual offenses. With regard to the victim's videotapes, his assertion that the videotapes may have contained contrary information is mere speculation. Defendant must show prejudice as a demonstrable reality, not speculation as to the alleged error or omissions of counsel. (See, e.g., *People v. McPeters* (1992) 2 Cal.4th 1148, 1177, superseded by statute on another issue.)

The record showed that defendant wanted a reduced sentence. Defendant faced a possible sentence of 26 years, and the plea was for a sentence of 14 years. Thus, counsel achieved what defendant wanted. The record establishes that defendant understood that the sentence was for 14 years. The record also demonstrates that defendant admitted committing the sexual offenses; it also shows that counsel had an investigator interview the grandfather, and the grandfather corroborated the victim's statements. There is absolutely no evidence that the videotapes would have weakened the prosecutor's case or would have provided defendant with any viable defense that might have lead to acquittal on some charges and a lesser sentence than that provided in the negotiated disposition. Given defendant's admissions and the grandfather's testimony that he saw defendant molest the victim, defendant has failed to demonstrate that he would have rejected the plea and opted to face the risk of a much greater punishment had his counsel reviewed the videotapes.

Accordingly, we conclude that defendant has not demonstrated that there is a reasonable probability that he would have proceeded to trial had counsel conducted an investigation beyond a review of the police reports, an interview of the grandfather, and discussions with defendant. Defendant has not established prejudice.

### III. *Claim that the Plea was Not Given Knowingly and Intelligently*

Defendant claims that he demonstrated good cause for withdrawing his plea as he did not understand the nature of the sentence and did not understand the *Tahl* waivers. He claims that he was not thinking clearly and did not really understand what he was doing.

To be valid, the entry of a guilty plea must be intelligent and voluntary under the totality of the circumstances. (*People v. Howard* (1992) 1 Cal.4th 1132, 1177.) The United States Supreme Court held in *Boykin v. Alabama* (1969) 395 U.S. 238 that in accepting a guilty plea to an offense, the trial court should ensure that the record reflects on its face that the defendant voluntarily and knowingly waived his or her constitutional rights to a jury trial, to confrontation, and to remain silent. (*Id.* at pp. 242-243.) *Tahl* determined that *Boykin* required that the record reflect that a defendant in entering a plea of guilty “was aware, or made aware, of his [or her] right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea. Each must be enumerated and responses elicited from the person of the defendant.” (*Tahl, supra*, 1 Cal.3d at p. 132.)

Here, as defendant concedes, the record establishes that defendant signed the *Tahl* form, and he also acknowledges that he told the trial court that he understood each of the rights he was waiving. Defendant also told the court that his interpreter went over the *Tahl* form with him and his interpreter read to him each right that he was waiving.

Defendant now claims that that he did not understand the nature of the rights he was waiving and that he was confused. He also complains that the court merely referred to the waiver of rights form and failed to discuss the specific right defendant was giving up.

Defendant’s argument is not persuasive. The trial court did not have to read through each of the rights set forth in the *Tahl* form. The record must show that defendant knowingly and voluntarily waived his constitutional rights: “This does not require the recitation of a formula by rote or the spelling out of every detail by the trial court. It does mean that the record must contain *on its face* direct evidence that the

accused was aware, or made aware, of his right to confrontation, to a jury trial, and against self-incrimination, as well as the nature of the charge and the consequences of his plea.” (*Tahl, supra*, 1 Cal.3d at p. 132.)

Here, the trial court confirmed that the interpreter and defendant’s counsel went through each item on the *Tahl* form with defendant; defendant told the court that he understood each of the rights he was giving up. Conry testified that she explained to defendant the rights he was waiving and the plea offer and that she believed he understood them.

At the hearing to withdraw the plea, the trial court asked defendant whether he understood that he would receive a sentence of 14 years and that six counts would be dismissed as a result of the plea. Defendant admitted that he had understood that. Defendant initially denied being told the consequences of his plea but, after being questioned further by the court, defendant admitted that the court had told him that his guilty plea would result in a 14-year sentence. Indeed, defendant admitted in court that his reason for wanting to change his plea was not that he did not know the consequences of his pleas but that he now felt 14 years was not a fair sentence. When asked by the prosecutor whether he now did not want the 14-year sentence because of family members and family obligations, defendant said, “Yes.” The prosecutor asked defendant whether he wanted to enter his plea at the time he met with his counsel and defendant answered, “Yes.” The prosecutor asked: “And now, at this time, you regret making that decision; is that right?” Defendant replied, “Yes.” “A plea may not be withdrawn simply because a defendant has changed his mind.” (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.)

Here, the record established that defendant knowingly and intelligently waived his constitutional rights, that he realized he would receive a sentence of 14 years, that he knew he faced a possible sentence of 26 years, and that he understood six counts would be dismissed in exchange for his plea. The record also shows that defendant simply changed his mind and decided that the 14-year sentence was not fair. Accordingly, the trial court did not abuse its discretion in denying defendant’s motion to withdraw his plea based on his claim that his plea was not made knowingly and intelligently.

**DISPOSITION**

The judgment is affirmed.

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Lambden, J.

We concur:

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Kline, P.J.

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Haerle, J.