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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID MCPETERS,

Defendant and Appellant.

A142795

(Solano County
Super. Ct. No. FCR296212)

Defendant David McPeters appeals from a judgment following a no contest plea to one count of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(4)).¹ Defendant raises a single issue on appeal: that the trial court’s imposition of the upper prison term of four years violated the terms of the negotiated disposition, which he contends provided for a three-year term. We agree with this contention, and order the judgment modified to three years.

DISCUSSION

The facts underlying defendant’s conviction are immaterial to the issue on appeal. We therefore do not recite them. What is material is the following:

On the date set for jury trial, December 12, 2012, defendant completed a waiver of rights and felony change of plea form. Defendant stated he wished to enter a plea of no contest to count 1 of the information charging a violation of section 245, subdivision (a)(4). Item No. 7 of the form stated as follows: “The maximum punishment which the

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

court may impose upon this plea is ‘3 yrs SP (4yr Max for 245)’.” The text within single quotes was handwritten in by defense counsel.

When the matter was called on December 12, the trial court stated it had been provided with the waiver of rights form and then raised a question as to the negotiated sentence. The following exchange occurred:

“The Court: Mr. McPeters, according to the waiver form that I’ve received, you’re going to be—counsel, why does the maximum punishment here read three years State Prison?”

“[Defense counsel]: Because you’re suspending three years, Judge. I put four years maximum as the charge.”

“The Court: Okay. According to this waiver form, you’re going to be entering a plea of no contest to Count 1, a violation of Penal code Section 245(a)(4), which is assault by means likely to produce great bodily injury. You’re doing this with the understanding that the Court is going to order that you *serve the mid-term, which is three years, um, but I’m going to **suspend the execution** of that sentence.* I’ll place you on probation, and I’m going to initially give you credit here for time served; is that your understanding of what’s happening here?”

“The Defendant: Yes, sir.” (Italics and boldface added.)

After completing its admonishments and advisements, the court accepted defendant’s no contest plea, set the matter for sentencing on February 8, 2013, and released defendant on his own recognizance. The matter was continued to March 1. On March 1, defendant left the courtroom before his case was called. The court issued a bench warrant.

Defendant was apprehended within two weeks, and the case was called again for sentencing on May 20, 2013. In the meantime, defense counsel filed a motion asserting there had been no valid “*Cruz*” waiver² and therefore, if the court departed from the agreed-to sentence because defendant had failed to appear, he was entitled to withdraw his no contest plea. In the notice of motion, defense counsel wrote: “Mr. McPeters will move to withdraw this plea in the event that this court deviates from the plea agreement,

² *People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*).

which limited his exposure to 4 years in prison, on the grounds that there was no valid waiver”

The trial court agreed the current version of the felony change of plea form differed from the form defendant had completed, and therefore granted the motion, stating it would “follow the indicated sentence.” It then sentenced defendant as follows: “In the new matter . . . pursuant to the initial indicated sentence in this matter, imposition of judgment and sentence is going to be suspended and the defendant will be placed on three years formal probation subject to the following terms and conditions” This was indicated in the court’s minutes by a checked box stating “**Imposition of sentence is suspended** and the defendant placed on . . . **Formal** . . . probation for a period of 3 years . . . , on terms and conditions indicated below” These included that he serve 300 days, with actual and section 4019 credits totaling 300 days. Defendant was then duly released from custody.

Defendant was subsequently found to be in violation of the terms and conditions of his probation on several occasions. After the second time, the prosecution asked that probation be terminated and the court impose “the high-term . . . based on the underlying facts” of the case. Defendant filed a statement in mitigation asking the court to reinstate probation. The court terminated probation, noting the probation department had opposed placing defendant on probation in the first place, given his prior criminal history and prior probation failures. Identifying numerous factors in aggravation, the court imposed the “upper term of four years” and awarded 660 days of actual and section 4019 credits. The clerk’s minutes thus stated: “Count 1 245(a)(4) PC H.T. 4 years.” The abstract of judgment likewise specifies the “Time imposed” as “4 yrs. 0 mos.”

Neither defendant nor his attorney raised any objection to the length of the prison term. However, defendant, speaking for himself, complained his representation had “been changed” several times and he thought it was “unfair,” and he wanted to “withdraw” the “deal.” He also claimed he had had a “dispute” with his lawyer and had

asked to make a *Marsden* motion.³ Counsel represented he had met with defendant and defendant had raised the issue, but after further conversation defendant had not pursued it. Because defendant had never given the slightest indication he wanted to make a *Marsden* motion until after sentence was pronounced, the court denied his request as untimely.

Defendant filed a notice of appeal and request for a certificate of probable cause on two grounds. The first was that he was not guilty and only accepted the plea deal because he was “forced” to do so by his lawyer. The second was an objection to the additional year of state prison: “I am filing this appeal against the estended [*sic*] sentencing of the 1 year prison prior which was not provided to my understanding by a lawyer. Instead of 3 years sentent [*sic*] I received 4 years which was not the deal I signed for.” The court denied the request.

The Attorney General contends defendant is simply challenging the terms and conditions of the negotiated disposition without having obtained a certificate of probable cause, either from the trial court or by way of a writ of mandate successfully challenging the court’s denial of his request for a certificate. The premise of this contention, however, is that the plea deal embraced a sentencing “range,” which included a four-year term. In support of this view, the Attorney General points to (a) the handwritten notation defense counsel added to change plea form, stating “3 yrs SP (4yr Max for 245)” and (b) the line in defendant’s *Cruz* notice of motion referring to “the plea agreement, which limited his exposure to 4 years in prison.” The Attorney General also asserts the trial court suspended *imposition of sentence* when initially imposing the three-year probationary term, leaving it to the court to thereafter impose a different term within the purported four-year range when actually sentencing defendant.

We disagree with this view of the record in light of what seems to us a very clear recital by the trial court of the negotiated disposition. To begin with, the court asked defense counsel about the handwritten addition on the plea form of “(4 yr Max for 245).”

³ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

Counsel's response gave no indication this indicated a sentencing "range" within which the court could exercise its discretion. Rather, it appears counsel was simply advising the court as to the maximum prison term for a section 245 conviction.

This appears to have been the trial court's understanding since it then turned to defendant and stated unequivocally: "You're doing this with the understanding that the Court is going to order that you serve the mid-term, which is three years, um, but I'm going to suspend[] the execution of that sentence. I'll place you on probation, and I'm going to initially give you credit here for time served; is that your understanding of what's happening here?" Not only is it clear the trial court told defendant he was going to serve the "mid-term" of "three years," but it also stated it was going to suspend "execution of" (not imposition of) that sentence. Thus, we conclude the plea deal, as articulated by the trial court and as understood by defendant, was that he was being sentenced to three years, with execution suspended and placement on formal probation. That defense counsel erroneously stated in the *Cruz* motion that the plea agreement limited defendant's exposure to four years, does not change the trial court's original colloquy with defendant or its original sentencing determination (which correctly imposed the three years, but erroneously suspended imposition of, rather than execution of, sentence).

Given the clarity of the record here, we further conclude the appropriate disposition is specific enforcement of the plea agreement. (See *In re Williams* (2000) 83 Cal.App.4th 936, 944.)

DISPOSITION

The judgment is modified to specify the prison term is three years, and as modified is affirmed. A corrected "Felony Abstract of Judgment" is ordered filed that likewise specifies the time imposed is three years zero months.

Banke, J.

We concur:

Humes, P. J.

Dondero, J.