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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK DEON HOUSTON,

Defendant and Appellant.

B225329

(Los Angeles County
Super. Ct. No. NA081499)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Charles D. Sheldon, Judge. Affirmed.

Mark Yanis, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Lance E. Winters, Senior Assistant Attorney General, Mary Sanchez and
Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Derrick Deon Houston appeals from a final judgment following his plea of nolo contendere, arguing that his plea was not voluntary and intelligent and that the trial court abused its discretion in denying his motion to withdraw his plea.¹ We affirm.

BACKGROUND

A first amended information filed October 21, 2009 charged Houston with two second degree robberies, in violation of Penal Code² section 211, and alleged that both robberies were committed for a gang purpose pursuant to section 186.22, subdivision (b)(1)(C). The information further alleged that Houston had three prior serious or violent felony convictions or juvenile adjudications pursuant to sections 1170.12, subdivisions (a)–(d), and 667, subdivisions (b)–(i), as well as five prior serious felony convictions under section 667, subdivision (a)(1), and three prior prison terms under section 667.5, subdivision (b).

On August 6, 2009, the court heard Houston’s motion under *People v. Marsden* (1970) 2 Cal.3d 118. Houston argued that trial counsel Randy Na wasn’t “representing [him] right” because he had not obtained crime scene videotapes; Na explained he had requested the tapes and was waiting for them. The court denied the motion.

At a preliminary hearing on September 23, 2009, a Long Beach police officer testified that he responded to a liquor store shortly after 10:00 p.m. on February 27, 2009. The officer spoke to the two victims separately and then interviewed them together. The victims told the officer that Houston³ was outside the liquor store. One of the victims heard Houston say: “This is West Coast Crip hood. Where you all from?” They told Houston they were not in a gang and entered the store. Houston entered the store, and said “he wished he had a burner on him.” The victims understood a “burner” to be a gun. Houston reached into his front waistband.

¹ Houston obtained a certificate of probable cause. (Penal Code, § 1237.5, subd. (a); *People v. Johnson* (2009) 47 Cal.4th 668.)

² All further statutory references are to the Penal Code.

³ The victims identified Houston in photographic lineups.

After buying some items, the two victims left the store, where they saw Houston outside on a bicycle, putting on gloves. The two victims got into a car and started it, and Houston rode up to the driver's side door, placing his bicycle between the door and the car so that the car door could not be closed. Houston told the men he was going to rob them, and that he had a gun, placing his hand towards his waistband. Houston then told the driver to turn off the car. The passenger gave Houston his only dollar. Houston grabbed the driver's chain and pendant and took it off his neck. The driver put the car into reverse and accelerated.

A detective on the gang enforcement unit testified that in his opinion Houston was a West Coast Crips gang member, based on Houston's tattoos, information received from other officers, and crime reports. The liquor store was a half-block outside the gang's territory. Based on criminal records of other West Coast Crips members, and given hypothetical facts identical to this case, the officer opined that Houston robbed the two victims for the benefit of the gang.

Houston pleaded not guilty and denied all the allegations on October 7, 2009. Na moved to set aside the information, arguing that there was insufficient evidence at the preliminary hearing to support the gang allegation. At a hearing on November 16, 2009, Na argued that the prosecution had failed to support the gang allegation with some evidence of specific intent to benefit the gang. The court denied the motion.

On March 1, 2010, at a change of plea hearing, the judge stated that the prosecution's offer was 30 years, "even though this is a third strike case, if they can prove it. And even though he has a whole bunch of five-year priors" A conviction as a three strikes case would mean 25 years to life, with a minimum of 15 years on three priors. The court stated that Houston had "an absolutely terrible, terrible record" and "the D.A.'s offer is generous." "We are either going to settle the case or go to trial today."

Na then stated that the offer was 30 years (with a concurrent sentence on the second count), and "[m]y client has indicated he wants to resolve the case." The court stated: "Mr. Houston, listen carefully. Your lawyer is here. Good lawyer. And we'll

just stop if there is anything you don't understand. Answer the questions. If it's free and voluntary, I will accept it." The court agreed to postpone sentencing for three weeks.

The prosecutor then described the charges, the priors, and the gang allegation, and asked Houston, "Do you understand all of the charges and allegations against you?" Houston conferred with Na privately, and then stated he was ready to continue. The following colloquy occurred: "Do you understand all of the charges and allegations against you?" Houston responded: "Some of them." The prosecutor asked: "Would you like some of them explained to you further?" and "Do you want further time to speak to your attorney regarding the charges?" Houston responded, "No" to each question. The trial court explained: "We just want to be sure you understand everything, sir, so we'll take our time. Are you okay to go forward?" and Houston answered, "Yes." The court stated, "Go ahead," and the prosecutor asked: "Have you had a chance to speak to your attorney about the charges against you, including any defenses you may have?" Houston answered, "Yes." Houston was advised of his constitutional rights and the consequences of his plea, and stated that he understood them. Houston answered, "no" when asked whether anyone had made any promises or threatened him to get him to plead, and then answered, "yeah" when asked: "Are you pleading voluntarily because you believe it's in your best interest to do so?"

Houston then pleaded no contest to the two robbery counts and admitted that the gang enhancement was true. He also admitted the three prior convictions after the prosecutor explained that "[t]hey won't be used to give you a life sentence, but they will be used to calculate the total sentence that we got." Na joined in the waivers and the plea and stipulated to a factual basis for the plea. The trial court concluded, "Mr. Houston does understand his constitutional rights. He understands the consequences of his plea. I also found that he has done it freely and voluntarily in open court with his attorney right here to assist him, and we stopped one time so that he could be sure he understood everything. So it's a valid plea."

At the sentencing hearing on March 23, 2010, Houston addressed the court outside of the presence of the prosecutor. He stated that at the change of plea hearing, "I wanted

to hurry up and get the case resolved. But I was wrongly informed by counsel. He said that he could not file motions for me” and “refused” to do things for Houston, including an appeal of the denial of the motion to dismiss the case and a motion to dismiss the strike priors. Houston continued: “I asked you several times if you could give me a different counsel.” “I asked him could he please relieve himself of my case and everything. And he is still here. And I took the deal.” Asked if he had anything else to say, Houston stated: “Yes, I would like to withdraw my plea.” The trial court denied the request. Na stated that because Houston alleged that “I misinformed him or did something” about the plea, Houston had “the right to have another counsel explore whether or not he entered into the plea knowingly and intelligently.” The court appointed the alternate public defender as new counsel.

On May 5, 2010, the alternate public defender (new counsel) filed a motion to withdraw the plea under section 1018, stating that Houston accepted the plea out of fear, without understanding the progress of his case or the state of the evidence: “[C]onfronted with risking trial with counsel who has not communicated strategy, answered questions, or allowed defendant to review the evidence . . . Mr. Houston was denied the opportunity to assist in his own defense.” The motion stated that the “plea was not free and voluntary due to counsel’s lack of communication with Mr. Houston, failure to fully investigate the case.”

At a hearing on May 7, 2010, Houston’s new counsel stated, “I’ve explained to Mr. Houston, at least according to my calculations, his exposure is 94 years to two life terms.” New counsel had also explained that if the court granted the motion to withdraw the plea, Houston would go to trial, and the prosecutor would not make further offers. The court asked: “So you’ve thought about this potential for things going badly for you and worse for you were this motion to be granted?” Houston responded that he still wanted to proceed with the motion.

Na appeared, represented by the public defender. Houston testified that he asked Na to file motions and to conduct investigations,⁴ and the two would end up arguing when Na brushed him off. Houston also wanted Na to get a videotape recording of a police interview in which he purportedly admitted gang membership, and Na refused. Na also refused to retain a gang expert. Na also did not come up with any defenses and was unprepared for trial, because he was too preoccupied with Houston's prior strikes, and told Houston that if he went to trial he would be found guilty and get life imprisonment.

Houston told the court that he pleaded guilty because "[he] had no appropriate counsel, and [he] figured [he]'d rather get it over." He was "stressed out" by being in jail and "was tired of dealing with Mr. Na." Houston wanted to help in his defense, but Na would not listen. Na had shown him the videotape through a videoconference, but despite Houston's requests Na did not show the videotape to Houston in person so Houston could walk Na through it and explain what happened.

On cross-examination, Houston stated he spoke to Na 10 times. Na went over a victims' statement obtained by Na's investigator and talked to Houston about getting information about the victims from MySpace and Facebook. On redirect, Houston explained that he asked Na to verify whether his nine strikes were legitimate, and Houston still did not know whether they were.

Na testified that he had advised Houston that Na issued subpoenas to MySpace and Facebook for both victims to see if any information on the sites about the victims' background could help in Houston's defense. Na had only been able to get information on one victim, which he showed to Houston. He had also requested 911 recordings. Na had obtained digital photos of Houston in group shots and gang field identification cards, which were being used to establish Houston's gang membership, and had shown them to Houston. In Na's professional opinion, he had done everything reasonable to evaluate the likelihood of a successful defense at trial, and based on that professional assessment,

⁴ Houston wanted Na to contact the people in the store (including the clerk, the people in the parking lot and across the street) and talk to the victims.

he concurred in the plea. Na had spoken to Houston at least 12 times, and had gone over the elements of the offenses and special allegations and the consequences of Houston's strikes. Na answered Houston's questions. Na's investigator spoke to the victims, and went to the liquor store two times to talk to the clerk, but was unable to find the clerk. Na did not know the name of the store clerk and did not know whether the investigator inquired about the clerk's hours.

When Houston's trial date came up, Na's investigator was still trying to get the clerk's statement, and the Facebook investigation was pending. In conversations with Houston, Na had gone over the elements of the charged offenses and the special allegations, as well as the strikes and what they meant. Houston told Na he would accept an offer of 21 years, and otherwise Na would move for a continuance, which the court would have to grant. The prosecutor's offer was 30 years, and the judge did not make a better offer. Na went over Houston's constitutional rights, explained the number of years and how much time he would actually serve, and believed Houston was fully advised about the plea and its consequences.

During the plea, Houston was hesitant about the gang allegation, and took some time to talk it over with Na. Houston muttered to himself: "Don't trip. Don't trip." And then said: "Okay. Let's just go ahead and do this." Na thought "don't trip" meant "forget it," or "what am I going to do about it," as if Houston was accepting that the offer came with the gang allegation.

Houston's new counsel argued that there had been a breakdown in communication and Houston had not been able to assist in his own defense. Na had failed to get the store clerk's name and hours, and Houston pleaded because he was "between a rock and a hard place. It was sort of a Catch 22. Does he risk going to trial with an attorney, a representative, whom he doesn't have any confidence in, he doesn't really know the state of the evidence, there's multiple disagreements." Na had advised Houston that he was exposed to 94 years and two life terms, or he could take 30 years; any reasonable person who did not trust their lawyer would accept the 30 years. Houston had balked at the gang allegation and had repeatedly requested an investigation. When Houston said, "[d]on't

trip[,] [d]on't trip,'" he was trying to talk himself into the deal. Houston had taken "the lesser of two evils."

The prosecutor argued: "What we have here is a case of buyer's remorse. It's 30 years. It's a big deal. But there's no reason why the proceedings that brought about this result are in any way suspect or otherwise improper." There had been no request for a *Marsden* hearing on the day of the plea to discuss any issues Houston had with counsel. Na had reviewed the videotape with Houston, and Na had gone "above and beyond the normal means of discovery," including subpoenaing social networking sites, and the disposition was reasonable given the time Houston was facing.

Houston's new counsel agreed that Na did a lot of discovery, but the results were not shared with Houston, who therefore felt he had no choice but to plead guilty. Houston had challenged Na in the August 6 *Marsden* hearing.⁵ While Na was "a great lawyer," Houston's issues with Na had an effect on his decision and meant his plea was not free and voluntary: "Again, he was between a rock and a hard place."

The trial court understood that "many defendants are placed between a rock and a hard place" because of high potential sentences. Nevertheless, the court concluded that Na did a good job, stating: "I just cannot see that I should make a finding different than that it was a valid plea, free and voluntary, and the defendant understood his rights." The court denied Houston's motion to set aside his no contest plea.

On June 1, 2010, Houston was sentenced to thirty years. Houston obtained a certificate of probable cause and filed this timely appeal.

⁵ Counsel stated, "it's my understanding that he also requested a *Marsden* here." We see no indication in the record that Houston requested a second *Marsden* hearing. On March 23, 2010, Houston expressed his unhappiness with counsel and his desire to withdraw his plea; his counsel, Na, suggested that new counsel be appointed to represent Houston. Houston subsequently received new counsel.

DISCUSSION

Houston argues that the trial court violated his due process rights by accepting his no contest plea,⁶ which was not made knowingly and intelligently, and by refusing his request to withdraw his plea.

A defendant must enter into a plea agreement voluntarily, with an understanding of the charges and the direct consequences of the plea. (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, 183.) A “guilty plea would indeed be invalid if [the defendant] had not been aware of the nature of the charges against him.” (*Id.* at pp. 182–183.) “Where a defendant is represented by competent counsel, the court usually may rely on that counsel’s assurance that the defendant has been properly informed of the nature and elements of the charge to which he is pleading guilty.” (*Id.* at p. 183.)

Houston points out that at the change of plea hearing, when asked if he understood the charges against him, he answered, “Some of them,” and he argues that this response alone affirmatively shows that he lacked an understanding of the charges. The colloquy continued, however. Houston twice answered, “no” when the prosecutor then asked him whether he wanted some of the charges further explained, and if he wanted more time to talk to his attorney, and he answered, “yes” when the court asked him: “We just want to be sure you understand everything, sir, so we’ll take our time. Are you okay to go forward?”

On this record, we cannot conclude that Houston did not understand the charges against him. Na testified that he had advised Houston of the elements of the charged offenses. Houston’s initial response that he understood some of the charges was met with questions, by the prosecutor and by the court, whether he wanted some of the charges further explained, wanted more time with his attorney, or understood everything. To these further questions, Houston indicated that he wanted no further explanations or additional time with his attorney, and he wanted to go forward and enter his plea. Merely

⁶ A plea of no contest is treated the same as a plea of guilty for the purposes of determining whether the plea was voluntary or whether the court should have granted a motion to withdraw the plea. (§§ 1016, 1018.)

stating that he understood “some” of the charges does not establish that the plea was not voluntary and intelligent; Houston then refused the prosecution’s offers to explain “some” of the charges and to allow further time with his attorney, telling the court that he wanted to go forward and enter the plea.

Houston also argues that he should have been allowed to withdraw his no contest plea. Section 1018 provides: “On application of the defendant at any time before judgment . . . , the court may . . . for good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice.” The defendant must establish by clear and convincing evidence valid grounds for withdrawing a guilty plea, and “[t]he provisions of section 1018 . . . should only be utilized upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes.” (*People v. Palmer* (1942) 49 Cal.App.2d 567, 572.) Even after a showing of good cause, the decision whether to grant a request for withdrawal of a guilty plea is discretionary where the defendant has been represented by counsel. (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) We therefore review for an abuse of discretion the decision not to grant withdrawal of a plea. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) “Further, ‘appellant must show that trial counsel failed to act in a manner to be expected of reasonably competent attorneys acting as diligent advocates. In addition, appellant must establish that counsel’s acts or omissions resulted in the withdrawal of a potentially meritorious defense.’ [Citation.]” (*People v. Hernandez* (1979) 96 Cal.App.3d 856, 864.)

No abuse of discretion appears here. Houston was represented by new counsel, appointed by the court at the suggestion of Houston’s original counsel, Na. Houston’s motion did not argue that his plea was not made intelligently and voluntarily because Houston understood only some of the charges (a contention Houston makes on appeal and which we rejected above). The motion argued instead that Na did not communicate with Houston and failed to make a thorough investigation, causing Houston to lose confidence in Na. The trial court made a factual finding, however, that Na had done a good job in his representation of Houston, and nothing in the record provides clear and

convincing evidence to the contrary. Certainly, Houston has not demonstrated that Na's actions resulted in his loss of a potentially meritorious defense. The court did not abuse its discretion in denying Houston's motion to withdraw his no contest plea.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

MALLANO, P. J.

CHANEY, J.