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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS MANUEL CRUZ,

Defendant and Appellant.

B230284

(Los Angeles County
Super. Ct. No. BA364548)

APPEAL from the judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed as modified.

Jessica C. Butterick, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II and Sonya Roth, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Luis Manuel Cruz was charged with various drug and firearm offenses with related enhancements. He agreed to plead no contest to all counts and special allegations with a resulting disposition of nine years in state prison. Prior to sentencing, he moved to withdraw his plea, based on ineffective assistance of counsel. The trial court denied the motion and sentenced defendant to an aggregate term of nine years in state prison. On appeal, defendant contends the trial court sentenced him in violation of his negotiated plea. We agree and modify the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

A. Defendant's No Contest Plea

Defendant was charged by amended information in January 2010 with one count of transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a); count 1), possession for sale of methamphetamine (*id.*, § 11378; count 2), possession of methamphetamine while armed (*id.*, § 11370.1, subd. (a); count 3), having a concealed firearm in a vehicle (Pen. Code, § 12025, subd. (a)(1); count 4), and possession of a firearm by a felon (*id.*, § 12021, subd. (a)(1); count 6).¹ As to counts 1 and 2, the information specially alleged that defendant was personally armed with a firearm (Pen. Code, § 12022, subd. (c)). As to counts 1, 2, 3 and 4, it was specially alleged that defendant previously suffered a conviction for possession for sale of a controlled substance (Health & Saf. Code, § 11370.2, subd. (a)).

On May 17, 2010, defendant, represented by counsel, agreed to a negotiated plea, the terms of which were confirmed by the prosecutor, before defendant entered his plea.

¹ The amended information did not charge a count 5.

“[Prosecutor:] You will plead guilty to all of the counts with which you are charged and you will admit your probation violation. Our understanding is that you’ll be sentenced to nine years in state prison. Because this is a multiple defendant case, you have to waive time for sentencing until the co-defendants’ cases are resolved. At all times you will retain your Fifth Amendment privilege against self-incrimination. If you are called as a witness by any party and if you choose to testify, you agree to give truthful testimony. The truthfulness of your testimony will be determined by the court by preponderance of the evidence. If your testimony is deemed truthful, you keep your nine-year deal. If deemed to be untruthful, you will be sentenced to the maximum of 14 years and eight months in state prison. Do you understand and agree to that?”

“[Defendant]: Yes.”

“[Prosecutor]: And if everything goes as expected, when you are ultimately sentenced to nine years in state prison, you will be sentenced on Count 1 along with the allegation that you were personally armed with a firearm. At that time the remaining counts and allegations will be dismissed. Do you understand?”

“[Defendant]: Yes.”

The record of the plea hearing establishes defendant was then advised of and waived his constitutional rights and was advised of, and acknowledged he understood, the consequences of his plea. Defendant further acknowledged that he believed it was in his best interest to accept the negotiated plea.

In accordance with the plea agreement, defendant pleaded no contest to all counts and admitted the special allegations.² Defense counsel stipulated to a factual basis for the plea based on the police report. The trial court found the plea was knowingly, intelligently and voluntarily entered, and there was a factual basis for the plea.³

² Defendant also admitted an alleged probation violation in Los Angeles Superior Court case No. BA364548.

³ Defendant waived statutory time for sentencing until his codefendants’ cases were resolved.

B. Defendant's Motion to Withdraw His Plea and Sentencing

On July 20, 2010, defendant moved to withdraw his plea due to ineffective assistance of counsel, which was heard and denied on November 19, 2010.

At the sentencing hearing on January 3, 2011, defendant was sentenced on all counts to an aggregate nine-year state prison term, consisting of the middle term of three years for transportation of methamphetamine, plus three years for the firearm enhancement, plus three years for the prior drug-related conviction. The trial court sentenced defendant to concurrent middle terms on the remaining counts (counts 2, 3, 4 and 6) and the lower term for the remaining firearm enhancement.⁴ As part of defendant's sentence, the trial court imposed a \$40 court security fee for each of counts 1, 2, 3, 4 and 6.

Defendant filed a timely appeal and obtained a certificate of probable cause.

DISCUSSION

Defendant contends his due process rights were violated because he was not sentenced in accordance with his plea agreement.

“When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon. [¶] “[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” (*Santobello v. New York* [(1971)] 404 U.S. [257,] 262 [92 S.Ct. 495, 30 L.Ed.2d 427].) [¶] The Supreme Court has thus recognized that due process applies not only to the procedure of accepting the plea [citation], but that the requirements of due process attach also to implementation of

⁴ The court also imposed a concurrent term of five years for violating probation in Los Angeles Superior Court case No. BA364548.

the bargain itself. It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy.’ (*People v. Mancheno* [(1982)] 32 Cal.3d 855, 860; see also *People v. Glennon* [(1990)] 225 Cal.App.3d [101,] 104.)” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024; accord, *People v. Crandell* (2007) 40 Cal.4th 1301, 1307.)

“A violation of a plea bargain is not subject to harmless error analysis. A court may not impose punishment significantly greater than that bargained for by finding the defendant would have agreed to the greater punishment had it been made a part of the plea offer. ‘Because a court can only speculate why a defendant would negotiate for a particular term of a bargain, implementation should not be contingent on others’ assessment of the value of the term to defendant. [¶] . . . [¶] Moreover, the concept of harmless error only addresses whether the defendant is prejudiced by the error. However, in the context of a broken plea agreement, there is more at stake than the liberty of the defendant or the length of his term. “At stake is the honor of the government[,] public confidence in the fair administration of justice, and the efficient administration of justice” (*People v. Mancheno, supra*, 32 Cal.3d at pp. 865-866, quoting *United States v. Carter* (4th Cir. 1972) 454 F.2d 426, 428 (in bank).)” (*People v. Walker, supra*, 54 Cal.3d at p. 1026.)

“““A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound.”” (*People v. Armendariz* (1993) 16 Cal.App.4th 906, 911) ‘When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement.’ (*People v. Walker* [, *supra*,] 54 Cal.3d 1013, 1024)” (*People v. Vargas* (2001) 91 Cal.App.4th 506, 533; accord, *People v. Segura* (2008) 44 Cal.4th 921, 930-931.)

By pleading no contest to all counts and by admitting all special allegations, defendant’s total exposure was 14 years eight months in state prison. Construing the plea agreement as a whole, it is clear defendant entered his plea on condition that he would be thereafter sentenced to an aggregate nine-year term on only count 1 (transportation of

methamphetamine) and the attendant firearm enhancement.⁵ Accordingly, defendant's plea agreement rested, to a significant degree, on the reduced prison term and the dismissal of all but one of the counts and special allegations and not, as the People argue, on the reduced prison term alone. On this record, it appears defendant was improperly deprived of the benefits of his negotiated plea when he was sentenced on counts and special allegations the prosecutor had agreed to dismiss. This breach of the plea agreement was a denial of due process.

When an error of this type is established on appeal, the remedy is either to require specific performance of the plea agreement or to permit defendant to withdraw the plea. (*People v. Mancheno, supra*, 32 Cal.3d at pp. 860-861.) The appropriate remedy will vary depending on the circumstances of each case and will turn on such factors as which party breached the agreement, whether the breach was intentional or inadvertent, whether circumstances changed between the entry of the plea and the sentencing and whether additional information would constrain the court to a disposition it considers inappropriate. (*Id.* at p. 861.)

In determining what relief is appropriate, the goal is to “redress the harm caused by the violation without prejudicing either party or curtailing the normal sentencing discretion of the trial judge.” (*People v. Olea* (1997) 59 Cal.App.4th 1289, 1298, quoting *People v. Mancheno, supra*, 32 Cal.3d at p. 860.) Withdrawal of the plea is more appropriate where specifically enforcing the bargain would curtail the trial court's sentencing discretion, whereas specific performance is the appropriate remedy if it will implement the reasonable expectations of the parties without binding the trial judge to a

⁵ While the plea agreement called for defendant to receive these benefits only if he were found to have testified truthfully against his codefendants at trial, the record fails to show whether (1) his codefendants' cases were resolved short of trial, or (2) defendant testified against them at trial and did so truthfully, or (3) the prosecutor decided to forgo this condition of the negotiated plea. In any event, this condition of defendant's negotiated plea is deemed to have been waived or forfeited by the People at sentencing.

disposition the judge finds unsuitable under the circumstances. (*Mancheno, supra*, at p. 861.)

Under the circumstances, we conclude that specific performance of the plea agreement is the appropriate remedy. The record reflects the breach of the plea agreement was inadvertent, occasioned by the lapse of more than six months between the plea and sentencing hearings. After some initial confusion at the outset of the sentencing hearing, the bench officer, who had presided over the plea hearing, pronounced what he and counsel understood as “the agreed-upon disposition in this matter.” While specific performance of the plea agreement is generally limited to ““very special circumstances,”” we nonetheless conclude the facts and considerations of fairness justify its application here. (See *People v. Calloway* (1981) 29 Cal.3d 666, 672.) Specific enforcement of the terms accepted by the People and defendant would “completely repair the harm caused by the breach.” (*People v. Toscano* (2004) 124 Cal.App.4th 340, 345, citing *People v. Kaanehe* (1977) 19 Cal.3d 1, 14.)

DISPOSITION

The judgment is ordered modified as follows: Defendant is sentenced to an aggregate state prison term of nine years, consisting of the four-year upper term for transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a); count 1), plus the five-year upper term for the attendant arming enhancement (Pen. Code, § 12022, subd. (c)). As to count 1, the special allegation of a prior drug-related conviction (Health & Saf. Code, § 11370.2, subd. (a)) shall be stricken. Counts 2, 3, 4 and 6 shall be dismissed. As modified, the judgment is affirmed. The superior court is ordered to prepare a corrected minute order and to prepare and file with the Department of Corrections and Rehabilitation an amended abstract of judgment reflecting these changes.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.