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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

IRENE ROSE HERNANDEZ,

Defendant and Appellant.

2d Crim. No. B235114
(Super. Ct. No. 1359683)
(Santa Barbara County)

Irene Rose Hernandez appeals an order of probation granted after she waived her constitutional rights and pleaded nolo contendere to grand theft. (Pen. Code, § 487.)¹ The trial court granted a certificate of probable cause for this appeal.

We appointed counsel to represent Hernandez in this appeal. After examination of the record, counsel filed an opening brief raising no issues. (*People v. Wende* (1979) 25 Cal.3d 436, 441.) On January 30, 2012, we advised Hernandez that she had 30 days within which to personally submit any contentions or issues that she wished to raise on appeal. On February 7, 2012, we received a response from her contending that the trial court erred by denying her motion to withdraw her nolo contendere plea because she is innocent of the crime and was misidentified as the thief depicted in a bank security videotape. Pursuant to *People v. Kelly* (2006) 40 Cal.4th 106, 123-124, we

¹ All further statutory references are to the Penal Code.

present a factual and procedural summary of the case and a brief discussion of Hernandez's contentions.

FACTS AND PROCEDURAL HISTORY

On December 22, 2010, the Santa Barbara County prosecutor charged Hernandez by felony complaint with one count of second degree commercial burglary. (§ 459.) The crime arose from the unlawful use of an electronic debit card belonging to Ernest Guevara. On February 3, 2011, the prosecutor amended the felony complaint to allege a count of grand theft. (§ 487.) As part of a plea agreement, Hernandez then waived her right to a preliminary hearing, waived her constitutional rights, and entered a plea of nolo contendere to grand theft.

Prior to sentencing, Hernandez requested that the trial court appoint different counsel. The trial court granted her motion. Hernandez's newly appointed counsel then moved to withdraw her plea on the ground that she had not reviewed the evidence against her prior to entering her plea.

Following a hearing, the trial court denied the motion. The court noted that Hernandez did not support her motion with a factual declaration and that the written statement of counsel alone was inadequate.

The trial court then suspended imposition of sentence and placed Hernandez on formal probation for three years, with various terms and conditions including 90 days of confinement in county jail. The court awarded Hernandez 90 days of presentence custody and conduct credit.

DISCUSSION

A defendant who seeks to withdraw his guilty or nolo contendere plea may do so prior to judgment by showing good cause. (*People v. Sandoval* (2006) 140 Cal.App.4th 111, 123.) Section 1018 provides: "On application of the defendant at any time before judgment . . . [the trial] court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." Mistake, ignorance, or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. (*People v. Johnson* (2009) 47 Cal.4th 668, 679.)

Where a defendant is represented by counsel, the grant or denial of a motion to withdraw a plea is within the trial court's discretion. (*People v. Sandoval, supra*, 140 Cal.App.4th 111, 123.) On appeal, the reviewing court must affirm the trial court's decision absent a showing of abuse of discretion. (*Ibid.*) Defendant bears the burden of establishing that the court abused its discretion by denying a motion to withdraw his plea. (*Ibid.*)

Here Hernandez provided no factual showing to the trial court regarding mistake or ignorance overcoming her free judgment. (*People v. Johnson, supra*, 47 Cal.4th 668, 679 [statement of general rule].) Accordingly, the trial court did not abuse its discretion by denying her motion.

The judgment is affirmed.

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GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Rodney S. Melville, Judge
Superior Court County of Santa Barbara

Richard B. Lennon, under appointment by the Court of Appeal, for
Defendant and Appellant.

No appearance for Plaintiff and Respondent.