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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. JOSE MANUAL GARCIA VIDALES, Defendant and Appellant.	C062494 (Super. Ct. No. 09848)

A jury found defendant Jose Manual Garcia Vidales guilty of second degree robbery, conspiracy to commit a felony, criminal street gang activity, and exhibiting a deadly weapon other than a firearm, a misdemeanor. In connection with the felonies, the jury found that defendant personally used a deadly or dangerous weapon. The jury could not reach a verdict on gang enhancements. Instead of retrial on the gang enhancements, defendant entered a negotiated admission to the gang enhancement attached to the conspiracy count in exchange for both the

dismissal of the gang enhancement attached to the robbery and a stipulated sentence of 11 years. The court sentenced defendant accordingly.

Defendant appeals. He did not obtain a certificate of probable cause. He contends the agreed-upon 11-year sentence was unauthorized because Penal Code[1] section 654 applied; counsel rendered ineffective assistance in advising defendant to enter his admission in exchange for the stipulated sentence; he did not knowingly enter the agreement; and the agreement was based on a mutual mistake.

In our first opinion in this matter, this court followed *People v. Fulton* (2009) 179 Cal.App.4th 1230 and concluded that defendant's contentions were noncognizable on appeal because he was challenging the validity of his admission of the gang enhancement without a certificate of probable cause. This court also concluded that defendant was estopped from raising the section 654 issue because he stipulated to the sentence and did not preserve the section 654 issue. (*People v. Vidales* (Sept. 10, 2010, C062494) [nonpub. opn.].)

The California Supreme Court granted review. In *People v. Maultsby* (2012) 53 Cal.4th 296, the court disapproved *Fulton*,

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[1] All further section references are to the Penal Code.

concluding that a certificate of probable cause was not required to challenge his admission of the enhancement, and remanded this case for reconsideration in light of *Maultsby.* Based on *Maultsby*, defendant's contentions are cognizable on appeal. Although cognizable, we conclude that defendant is estopped from complaining about the sentence he received.

I

Section 654 Issue

All of defendant's contentions are based on his erroneous premise that his maximum exposure was 10 years. The jury found defendant guilty of all underlying offenses and all weapon enhancements. The jury was unable to reach a verdict on only the gang enhancements attached to the conspiracy and the robbery counts. Defendant entered a negotiated admission to the gang enhancement attached to the conspiracy conviction in exchange for both the dismissal of the gang enhancement attached to the robbery conviction and a stipulated sentence of 11 years in state prison for all his convictions and enhancements. In entering this plea agreement, defendant avoided a harsher penalty for his crimes.

The triad for second degree robbery is two, three, or five years. (§ 213, subd. (a)(2).) The weapon enhancement carries one year. (§ 12022, subd. (b)(1).) Because robbery is a violent felony (§ 667.5, subd. (c)(9)), the gang enhancement attached to the robbery count carried 10 years (§ 186.22, subd. (b)(1)(C)). Conspiracy to commit the robbery carried the same triad as the robbery (§ 182, subd. (a)(1)) and the weapon

enhancement added one year. But the gang enhancement attached to the conspiracy count carried a triad of only two, three, or four years. (§ 186.22, subd. (b)(1)(A).) Had both gang enhancements been retried and both found true, defendant would have faced a sentence of no less than 13 years and a maximum sentence of 16 years on the robbery conviction and enhancements. Defendant entered a negotiated admission to the gang enhancement attached to the conspiracy conviction rather than the gang enhancement attached to the robbery conviction in exchange for a stipulated sentence of 11 years, avoiding a potentially longer sentence.

That section 654 and case law generally makes punishment for both conspiracy and the underlying substantive offense impermissible (*In re Cruz* (1966) 64 Cal.2d 178, 180-181) is of no moment under the circumstances. California Rules of Court, rule 4.412 provides in relevant part: "(b) By agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654's prohibition of double punishment, *unless that claim is asserted at the time the agreement is recited on the record*." (Italics added.) Defendant and defense counsel both agreed to the stipulated sentence and did not raise a double punishment claim.

By stipulating to the sentence and failing to preserve the section 654 issue, defendant is estopped from raising it. (*People v. Hester* (2000) 22 Cal.4th 290, 294-295.)

The parties did not negotiate a plea for a *maximum* sentence but instead for a *stipulated* sentence. (See *People v. Buttram* (2003) 30 Cal.4th 773, 785.) Defendant received advantages and benefits and it was reasonable to abandon a section 654 claim. Defendant cannot show any prejudice due to counsel's performance -- he has not shown that it is reasonably probable that he would have received a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.)

II

Remaining Contentions

Defendant's remaining contentions are all based on the same erroneous premise that the maximum sentence that could legally be imposed was 10 years. Given this erroneous premise, all remaining contentions are likewise rejected.

"'Plea bargains are "'contractual in nature and must be measured by contract law standards.'" . . . The application of contract law to plea agreements is premised on "the notion that the negotiated guilty plea represents a bargained-for quid pro quo."' [Citation.]" (*People v. Gipson* (2004) 117 Cal.App.4th 1065, 1069.) The People and defendant negotiated a plea whereby both would benefit -- the People would forgo retrying the gang enhancements and defendant would receive a lesser potential

punishment. Defendant abandoned his section 654 claim and the People abandoned the greater punishment carried by the gang enhancement attached to the robbery count. The record does not reflect that defendant misunderstood the oral plea agreement. Nor does the record reflect a mutual mistake. Contrary to defendant's claim, there was no ambiguity in the plea agreement.

III

Custody Credits

The trial court awarded 148 actual days and 74 conduct days pursuant to section 4019 for a total of 222 days of presentence custody credit. Because defendant was convicted of robbery, a violent felony, his conduct credit was limited to 15 percent of his actual days. (§§ 667.5, subd. (c)(9), 2933.1.) Thus, he is entitled to 22 conduct days for a total of 170 days of presentence custody credit. An unauthorized sentence may be corrected at any time. We will modify the judgment accordingly. (*People v. Scott* (1994) 9 Cal.4th 331, 354-355; *People v. Guillen* (1994) 25 Cal.App.4th 756, 764.)[2]

DISPOSITION

The judgment is modified to provide for 22 conduct days for a total of 170 days of presentence custody credit. The trial court is directed to prepare an amended abstract of judgment accordingly and to forward a certified copy to the Department of

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[2] In the interests of judicial economy, we have corrected the error without requesting supplemental briefing. If either party is aggrieved by this procedure, he may petition for rehearing. (Gov. Code, § 68081.)

Corrections and Rehabilitation. As modified, the judgment is affirmed.

ROBIE, J.

We concur:

RAYE, P. J.

HULL, J.