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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW ELTON PHILLIPS, Defendant and Appellant.	C067261 (Super. Ct. No. 10F4852)

After rejecting two plea offers, defendant Matthew Elton Phillips entered an open plea of no contest to first degree residential burglary (Pen. Code, § 459)[1] and admitted to four prior prison terms (§ 667.5, subd. (b)). Prior to sentencing, defendant moved to withdraw his plea, asserting that counsel and the trial court had misadvised him about being presumptively ineligible for probation when in fact he was absolutely ineligible. After the trial court rejected defendant's motion,

[1] Undesignated statutory references are to those sections of the Penal Code in effect at the time of defendant's January 21, 2011 sentencing.

defendant was sentenced to the maximum term of 10 years in state prison.

On appeal, defendant contends the trial court abused its discretion in denying his motion to withdraw his plea. Defendant argues the court should have granted the motion based on his counsel's ineffective assistance in advising him during the plea consideration process, an ineffectiveness that was buttressed by the prosecutor and by the trial court.

We conclude the trial court abused its discretion in denying defendant's motion to withdraw his plea. We are guided in this decision by two recent companion opinions from the United States Supreme Court that apply to defendant on his direct appeal here—*Missouri v. Frye* (2012) 566 U.S. ___ [182 L.Ed.2d 379] (*Frye*) and *Lafler v. Cooper* (2012) 566 U.S. ___ [182 L.Ed.2d 398] (*Cooper*). (See *Griffith v. Kentucky* (1987) 479 U.S. 314, 328 [93 L.Ed.2d 649, 661] [federal high court constitutional decisions apply that are issued while direct appeal pending]). The parties have filed supplemental briefing on these two decisions.

Frye and *Cooper* held that a defendant is entitled to effective assistance of counsel during plea negotiation and consideration, and applied the two-part *Strickland v. Washington* (1984) 466 U.S. 668 [80 L.Ed.2d 674] (*Strickland*) ineffective assistance test of deficient performance and prejudice to this realm. (*Cooper*, *supra*, 566 U.S. ___ [182 L.Ed.2d at p. 406];

see *Frye*, *supra*, 566 U.S. ___ [182 L.Ed.2d at pp. 386-387].) We shall reverse and remand in accord with these two decisions.

FACTUAL AND PROCEDURAL BACKGROUND

After overwhelming evidence attributed a July 5, 2010 residential burglary to defendant, defendant was charged with felony first degree residential burglary. (§ 459.)[2]

On July 20, 2010, the prosecution offered defendant a six-year prison term in exchange for pleading guilty.[3] As a result of defendant's waiving a preliminary hearing, that offer was to remain open for three weeks. On July 30, 2010, defense counsel informed defendant that he was presumptively ineligible for probation, but nevertheless probation was a possibility if defendant could overcome the presumptions. While defense counsel noted that probation was possible, he also stated that probation was unlikely and advised defendant to accept the six-year offer. On August 9, 2010, defendant rejected the prosecution's six-year offer based on the assumption, given to him by defense counsel, that probation, while unlikely, was possible.

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[2] Defendant also had four prior prison terms. (§ 667.5, subd. (b).) Due to these prior prison terms, he was statutorily ineligible for probation. (See § 1203, subd. (k).)

[3] It is important to note that six years is the minimum defendant could have received, calculated by the low term for the burglary, two years, plus four years for the four prior prison term enhancements. (§§ 461, subd. (a), 667.5, subd. (b).)

On November 12, 2010, the prosecution offered defendant an eight-year prison term in exchange for defendant's guilty plea. Again, defendant rejected this offer on the assumption that probation was possible.

On that same November day, defendant, believing probation was possible, entered an "open plea" with admissions to all charges and no promises by the prosecution.

During the trial court proceedings on the open plea, the following colloquy occurred:

"THE COURT: Maximum term of confinement is 10 years; is that correct?

"[THE PROSECUTOR]: That is true.

"THE COURT: All right. And eligibility for probation would be three years; is that correct?

"[DEFENSE COUNSEL]: He's presumptively ineligible for probation.

"THE COURT: Presumptively ineligible. Oh, I misspoke. I meant parole, would be three years maximum. [¶] . . . [¶] So, Mr. Phillips, do you understand that by entering this plea, you'll be ineligible for probation, presumptively ineligible, a[s] [defense counsel] just mentioned?

"DEFENDANT: Yes.

"[THE PROSECUTOR]: Just to be clear, Mr. Phillips, he has and [*sic*] uphill battle for probation. He's presumptively ineligible. Should there be extraordinary extenuating circumstances he'd technically be eligible for probation.

"DEFENDANT: Thank you."

As part of his open plea, defendant also filled out and signed a *Tahl*[4] form. This form, which was eventually reviewed and signed by both attorneys and the trial judge, stated defendant was presumptively ineligible for probation rather than statutorily ineligible.

While compiling the information for defendant's presentence probation report on this case, the probation officer discovered that defendant, while in presentence jail custody, had applied for and been accepted into Teen Challenge International, a drug rehabilitation program. Defendant had hoped he would be given probation and an opportunity to attend the program to get help for his drug addiction. Moreover, defendant stated to the probation officer, "'I am willing to enter a [*Johnson* waiver][5] on all of my current credits. I will serve an additional 365 days in jail, work in the kitchen as the head chef, and get my high school diploma. I then want to be released to Teen Challenge on a ten year, joint-suspended sentence. If I mess up, I will enter a [*Johnson* waiver] on my 365 days in jail, and go to prison for ten years.'"

At the conclusion of the investigation, the probation officer recommended defendant be sentenced to the maximum of 10

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[4] *In re Tahl* (1969) 1 Cal.3d 122.

[5] *People v. Johnson* (1978) 82 Cal.App.3d 183, 188 (stating a defendant can waive custody credits if done knowingly and intelligently).

years in state prison. The probation report was the first official notice that defendant was absolutely ineligible for probation rather than presumptively ineligible. Defense counsel was not aware of defendant's absolute ineligibility until the probation report was filed on December 20, 2010, and the trial court so confirmed on January 7, 2011.

Immediately following defense counsel's awareness of defendant's ineligibility for probation, a *Marsden* motion[6] was made and heard on January 19, 2011. The basis of the motion was that defendant had the desire to seek treatment and probation at the outset of the case; however, if defendant had known he was ineligible for probation he would have accepted the six-year offer he initially received. The trial court denied the *Marsden* motion. On the same day, defendant filed a similarly based motion to withdraw his plea, but the trial court denied that motion as well, stating it was not reasonable for defendant to have hoped for probation.

DISCUSSION

Defendant contends the trial court erred in denying his motion to withdraw his plea. We agree.

Section 1018 permits the withdrawal of a plea where a defendant shows good cause by clear and convincing evidence. (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1142.) Good cause can be established by "[m]istake, ignorance or any other factor

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

overcoming the exercise of free judgment." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) Moreover, where a defendant's plea is induced by fundamental misrepresentations, a judgment based upon the plea must be reversed. (*People v. Coleman* (1977) 72 Cal.App.3d 287, 292.) We review the denial of a motion to withdraw a plea for an abuse of discretion. (*People v. Ottenstror* (1954) 127 Cal.App.2d 104, 109.)

Defendant entered his open plea based on his counsel's misadvisement that he was presumptively ineligible for probation—i.e., he could receive probation upon a showing of unusual circumstances. However, it was actually legally impossible for defendant to receive probation, because he was statutorily ineligible. (See § 1203, subd. (k).) The prosecutor and the trial court did not help matters in perpetuating defense counsel's misadvisement. Defendant's actual prison exposure was a minimum of six years (probation was not an option) and a maximum of 10 years.[7]

Defendant's counsel misadvised defendant from the outset of his case. After defendant was offered six years in prison to plead guilty, defense counsel stated to defendant that he was eligible for probation upon a showing of unusual circumstances. (See § 1203, subd. (e).) This misadvisement was further

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[7] This range of six to 10 years is calculated as follows: the lower term of two years or the upper term of six years for the burglary charge, plus four additional years for defendant's four prior prison term enhancements. (§§ 461, subd. (a), 667.5, subd. (b).)

explicated to defendant in a letter. While the letter advised defendant to accept the prosecution's offer, the letter also noted that defendant could receive probation upon a showing of unusual circumstances, even though this was unlikely. Relying on defense counsel's misadvisement, defendant sought and was accepted into a program for his drug addiction. It was defendant's hope that he would be given probation and an opportunity to attend this program as illustrated in his interview with his probation officer.

Defense counsel's misadvisement of probation eligibility leads us to the recent *Frye* and *Cooper* decisions. *Frye*, in fact, is quite similar to the present matter. In *Frye*, defense counsel failed to inform his client of a plea offer; and after the offer lapsed, the client still pleaded guilty (in an open plea), but on more severe terms. (*Frye*, *supra*, 566 U.S. ___ [182 L.Ed.2d at pp. 386-387]; see *Cooper*, *supra*, 566 U.S. ___ [182 L.Ed.2d at p. 405].)

Frye and *Cooper*, as noted, held that a defendant is entitled to effective assistance of counsel during plea negotiation and consideration, and they applied the two-part *Strickland*, *supra*, 466 U.S. 668 [80 L.Ed.2d 674] ineffective assistance test of deficient performance and prejudice to this realm. (*Cooper*, *supra*, 566 U.S. ___ [182 L.Ed.2d at pp. 406-407]; see *Frye*, *supra*, 566 U.S. ___ [182 L.Ed.2d at pp. 386-387].) To show ineffective assistance of counsel, under the *Strickland* test, a defendant must show (1) that counsel's

performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's deficient performance, defendant would have obtained a more favorable outcome. (*Strickland*, *supra*, 466 U.S. at pp. 688, 694 [80 L.Ed.2d at pp. 693-694, 698].)

There can be little quibble that defense counsel's misadvisement here of probation eligibility fell below an objective standard of reasonableness. Defense counsel had to know that defendant was pinning his hopes on probation eligibility, slim as those hopes may have been. Defendant rejected two favorable plea offers (six years, and eight years) based solely on those hopes. Defense counsel was duty bound to correctly inform defendant about his probation eligibility under the law. Consequently, defendant has satisfied the first prong of the *Strickland* two-part test.[8]

As for the second prong of the *Strickland* test, as *Frye* states, "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because

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[8] At oral argument, the People maintained that defendant could not satisfy the first prong of *Strickland* because defendant failed to tell his counsel that he was on probation or parole at the time of his current offense, a fact which rendered defendant absolutely ineligible for probation. (See § 1203, subd. (k).) Not knowing this fact, the People argue, defense counsel did not perform ineffectively regarding his plea advice. Given that defendant was charged with multiple, recent convictions for which he had to be on probation or parole if not incarcerated, the record does not support the People's argument. (See also fn. 2, *ante*.)

of counsel's deficient performance, defendants must demonstrate [(1)] a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel, [and] . . . [(2)] a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." (*Frye*, *supra*, 566 U.S. ___ [182 L.Ed.2d at p. 392]; see *In re Alvernaz* (1992) 2 Cal.4th 924, 942-943 [the prosecution and the trial court have this discretion under California law].)

It is reasonably probable that defendant would have accepted the six-year offer if he had been properly advised. Defendant had a prison exposure of six to 10 years. The evidence against defendant was overwhelming, and six years was the minimum sentence he faced upon conviction. However, due to defense counsel's misadvisement concerning probation eligibility, defendant rejected the offer of this minimum sentence. If defendant had been properly advised that he was absolutely ineligible for probation, it is more than reasonably probable he would have accepted the six-year plea offer because that was the minimum sentence he could have received.

Defendant must now be given the opportunity, as *Frye* provides, to demonstrate a reasonable probability that the six-year plea offer (or, at the least, that the eight-year plea offer) would have been entered without the prosecution canceling it or the trial court refusing to accept it.

Should defendant make this showing, the correct remedy is for the trial court to order the People to reoffer the appropriate plea offer of six years (or eight years). (See *Cooper*, *supra*, 566 U.S. ___ [182 L.Ed.2d at p. 414]; see also *Frye*, *supra*, 566 U.S. ___ [182 L.Ed.2d at pp. 393-394].)

DISPOSITION

The judgment is reversed. We conclude the trial court abused its discretion in denying defendant's motion to withdraw his plea on the ground it was not reasonable for defendant to have hoped for probation. The matter is remanded to the trial court to allow defendant an opportunity to demonstrate a reasonable probability that the six-year plea offer (or, at the least, that the eight-year plea offer) would have been entered without the prosecution canceling it or the trial court refusing to accept it. Should defendant make this showing, the correct remedy then is for the trial court to order the People to reoffer the appropriate plea offer of six years (or eight years). (See *Cooper*, *supra*, 566 U.S. ___ [182 L.Ed.2d at p. 414]; see also *Frye*, *supra*, 566 U.S. ___ [182 L.Ed.2d at pp. 393-394].) Should defendant not make this showing, he is entitled to withdraw his plea because we have concluded the trial court erred in denying his motion to withdraw the plea;

and this matter will then proceed as if defendant’s open plea and the prior plea offers had not been made.

BUTZ, J.

We concur:

BLEASE, Acting P. J.

DUARTE, J.