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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

SERGIO CABRALES,

Defendant and Appellant.

C068447

(Super. Ct. No.
06F06698)

Defendant Sergio Cabrales pleaded no contest to second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)--count one) and admitted that he personally used a handgun in the commission of the offense (Pen. Code, § 12022.53, subd. (b)). (Further statutory references are to the Penal Code unless otherwise indicated.) He also pleaded no contest to transportation of methamphetamine (Health & Saf. Code, § 11379--count three) with a Cruz waiver, which allows a trial court to withdraw its previous approval of a plea and sentence a defendant to a

greater term than had been bargained for if the defendant willfully fails to appear for sentencing. (*People v. Cruz* (1988) 44 Cal.3d 1247, 1254, fn. 5.)

Defendant was released on his own recognizance and ordered to return to court the following day. If he returned as directed, he was promised a state prison term of 12 years consisting of the low term of two years on count one plus 10 years for the enhancement. In addition, he would be permitted to then withdraw his plea to count three. If he did not return as ordered, he would receive a prison sentence of 16 years. Under the plea agreement, the court would dismiss two related counts (counts two & four) at sentencing and defendant would pay "a fine of up to \$10,000 plus the penalty assessment," a restitution fine of not less than \$200 and not more than \$10,000, and victim restitution in an amount to be determined.

Defendant returned to court as directed. The trial court orally imposed the stipulated 12-year term on count one and a concurrent midterm on count three. Defendant was awarded 27 days' custody credit and four days' conduct credit, ordered to make restitution to the victim, and ordered to pay fines and fees including a \$213.37 main jail booking fee and \$23.50 main jail classification fee. The remaining counts were dismissed in the interest of justice in light of the plea. The relevant 2010 amendment to section 2933 does not entitle defendant to additional conduct credit because he was committed for a serious felony. (Former § 2933, subd. (e)(3) [as amended by Stats. 2010, ch. 426, § 1, eff. Sept. 28, 2010].)

In February 2012, more than 120 days following the April 2011 commitment, the trial court attempted to strike count three in accordance with the plea agreement, but the attempt was statutorily ineffective. (§ 1170, subd. (d).)

Defendant contends, and the Attorney General concedes, he is entitled to specific performance of the plea bargain, which requires the striking of count three. Defendant further contends the trial court imposed the booking and classification fees without determining his ability to pay. We shall modify the judgment.

FACTS

Because the matter was resolved by plea and the facts are not at issue, our statement of facts is taken from the prosecutor's statement of factual basis for the plea.

"On July 29th, 2006, in the County of Sacramento, [defendant] did by means of force and fear take money from the immediate presence and possession of Victor [F.] while personally using a .38 caliber special firearm, which is not an element of the underlying [violation of section] 211."

DISCUSSION

I

Defendant contends, and the Attorney General concedes, he is entitled to specific performance of the plea bargain, which requires the striking of count three. We accept the Attorney General's concession.

"A negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles.

[Citations.] 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties. [Citation.] If contractual language is clear and explicit, it governs. [Citation.]'" (*People v. Shelton* (2006) 37 Cal.4th 759, 767.)

Where the state breaches the plea bargain, the remedy is either to require specific performance of the plea or to permit the defendant to withdraw the plea. (*People v. Mancheno* (1982) 32 Cal.3d 855, 860-861.) "Courts find withdrawal of the plea to be the appropriate remedy when specifically enforcing the bargain would have limited the judge's sentencing discretion in light of the development of additional information or changed circumstances between acceptance of the plea and sentencing. Specific enforcement is appropriate when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable under all the circumstances." (*Id.* at p. 861.)

In this case, the trial court's February 2012 order striking count three, although statutorily ineffective, makes plain that specific performance will not bind the court to a disposition it considers unsuitable under the circumstances. We agree with the parties that the facts and circumstances justify specific performance. Defendant appeared in court for remand to custody the day after the plea, as required, and he is entitled

to receive his bargained-for benefit. (See *People v. Collins* (1978) 21 Cal.3d 208, 216.)

Because defendant's contention seeks to enforce, rather than challenge, the plea, he was not required to obtain a certificate of probable cause. (*People v. Johnson* (2009) 47 Cal.4th 668, 679, fn. 5.)

In a separate argument, defendant contends his trial counsel rendered ineffective assistance at sentencing in that, although he successfully argued that the sentences on counts one and three should not run consecutive, he failed to remind the court that the plea agreement required dismissal of count three. The Attorney General counters that any deficient performance was not prejudicial because, pursuant to the previous argument, count three will be dismissed prior to expiration of the restraint (custody) on count one. Our agreement that the plea agreement entitles defendant to specific performance makes it unnecessary to consider the ineffective assistance argument at length.

II

Defendant contends the matter must be remanded for resentencing because the trial court imposed the booking and classification fees without finding that he had the ability to pay. (Citing *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1401.)

The Attorney General counters that defendant has forfeited this claim because his objection to the proposed \$2,000 restitution fine did not include an objection to the booking and

classification fees. The Attorney General notes that this court has long applied the forfeiture rule where a defendant does not object in the trial court. (E.g., *People v. Hodges* (1999) 70 Cal.App.4th 1348, 1357 [booking fee]; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468 [restitution fine].) The claim of forfeiture has no merit.

Defendant's trial counsel asked the trial court to "waive *all discretionary fines and fees* and impose a \$200 restitution fine instead of the [\$]2,000, which is recommended. The reason being, my client does have a toddler that he has been supporting these past several years that he's been out of custody with his job. Of course, he's losing his job. [¶] And I would ask that he not be burdened with the higher restitution fine, giving him the ability to try and help support his daughter while he's incarcerated." (Italics added.)

While defendant's objection did not identify the booking and classification fees by name, it did expressly include "all discretionary fines and fees." The Attorney General does not dispute that a determination of the ability to pay booking and classification fees entails an exercise of the trial court's discretion. We thus turn to the merits of defendant's contention.

Booking and classification fees may be imposed "[i]f the person has the ability to pay." (Gov. Code, § 29550.2, subd. (a).) At the time of sentencing, defendant was 22 years old. After committing the crime in July 2006, defendant worked to turn his life around. He graduated from high school in 2007.

He told the sentencing court that, after his first meeting with his public defender, he found and kept a job. Through hard work and saving, he had become independent enough to have two apartments (evidently seriatim) and eventually a house while also supporting his wife and daughter. This record supports an implied finding that, notwithstanding the loss of his job upon incarceration, he would be able to pay the classification and booking fees.

The Attorney General notes that, on the original abstract of judgment, the booking fee is incorrectly listed as \$213.27, not \$213.37. The trial court shall correct the amount when preparing the amended abstract.

DISPOSITION

The judgment is modified by striking defendant's conviction on count three. As so modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment, reflecting a booking fee of \$213.37, and to forward a certified copy to the Department of Corrections and Rehabilitation.

_____ HULL _____, Acting P. J.

We concur:

_____ MAURO _____, J.

_____ HOCH _____, J.