

NOT TO BE PUBLISHED

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

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUIS RICO, Defendant and Appellant.	C068691 (Super. Ct. No. SF116304A)
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The trial court sentenced defendant Jose Luis Rico to 16 months in prison for possession of a controlled substance. The prison term was contrary to defendant's on-the-record plea agreement to a sentence of probation and enrollment in a rehabilitation program in exchange for his guilty plea. On appeal, defendant seeks to enforce his statutory and due process right to withdraw his plea in light of the harsher sentence. We reverse and remand to afford him that right.

FACTUAL AND PROCEDURAL BACKGROUND

On March 11, 2011, defendant pled guilty to possession of a controlled substance in exchange for a promise of five years'

formal probation on the condition that he complete a treatment program at the Salvation Army with a six-month residential component. During the plea proceeding, the terms of the plea agreement were stated on the record, defendant waived his rights, and he was advised of other consequences of the plea agreement.

On June 6, 2011, the trial court, without any explanation on the record, instead sentenced defendant to 16 months in prison. Defendant received stipulated credits of 244 days of actual time served and 244 days of good time/work time, for a total credit of 488 days. As a result, the trial court stated he had a "paper parole" and would likely be released to immigration authorities.

At the sentencing hearing, before the trial court pronounced the sentence, defense counsel stated: "I've had discussions with [defendant] and with family, and I think they all understand that what we discussed at bench is the best resolution he can hope for." Defendant did not speak at sentencing.

On June 9, 2011, defendant filed a notice of appeal and request for certificate of probable cause, which was granted on July 8, 2011. Defendant stated in his notice of appeal: "[t]he D.A. offert [sic] me 364 days and 6 months on a living rehabilitation [sic] drug program. I took the offer. I was waiting [for] the bed for the living program. But on my last court day on 6-6-2011 the D.A. and my attorney violated my rights because they change [sic] the deal to 16 months with out

[sic] my knowledge on 6-6-2011 was the firts [sic] time my attorney told me about the 16 months, I almost got [i]n shock."

DISCUSSION

Defendant seeks reversal of his conviction to allow him to withdraw his guilty plea because the 16-month prison sentence was not in accord with his plea agreement and thus violated Penal Code¹ section 1192.5 and his federal right to due process. We agree and reverse.

I

The Governing Law

Section 1192.5 provides that in certain felony cases "a plea of guilty or nolo contendere . . . may specify the punishment [¶] Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea. [¶] If the court approves of the plea, it shall inform the defendant prior to making the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in

¹ Further undesignated section references are to the Penal Code.

that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so."

A plea agreement is interpreted in accordance with the rules of contract. (*People v. Toscano* (2004) 124 Cal.App.4th 340, 344.) Both parties must abide by the terms of the agreement. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.) "Thereafter, material terms of the agreement cannot be modified without the parties' consent." (*People v. Martin* (2010) 51 Cal.4th 75, 80, citing *People v. Segura* (2008) 44 Cal.4th 921, 935.) Likewise, under the due process clause, "when 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 [30 L.Ed.2d 427, 433].)

If the agreement is breached, the defendant is entitled to some remedy, which generally involves allowing the defendant to withdraw his or her plea. (§ 1192.5; *People v. Walker, supra*, 54 Cal.3d at pp. 1025-1027; *People v. Calloway* (1981) 29 Cal.3d 666, 673; *People v. Johnson* (1974) 10 Cal.3d 868, 871.) The statutory right under section 1192.5 does not recognize exceptions and "applies with equal force to all defendants who attempt to bargain away their constitutional rights in the hope of receiving leniency." (*Johnson*, at pp. 686, 873 [right to withdraw plea applied even where defendant intentionally misled the trial court about his true name and past criminal record in his effort to negotiate a more lenient plea agreement].) Deviation from the plea agreement does not constitute a

constitutional violation entitling the defendant to withdraw his plea unless the deviation is significant in the context of the plea agreement as a whole. (*Walker*, at p. 1024.)

II

The Remedy For Violation Of The Plea Agreement

Defendant agreed to plead guilty to possession of a controlled substance in exchange for being placed on five years' probation, conditioned on his completing a Salvation Army treatment program. Three months later, without explanation on the record, the trial court instead sentenced defendant to 16 months in prison, with custody and conduct credits of 488 days. Although defendant in essence received a time-served sentence, a 16-month prison sentence was nonetheless a significantly more severe punishment than a probationary term and assignment to a treatment program. Defendant correctly asserts that under section 1192.5, when the trial court failed to sentence him in accordance with the plea agreement, the court was required to allow him to withdraw his plea. Defendant further correctly asserts that the judgment therefore should be reversed and he should be allowed to withdraw his plea.²

The People do not dispute that the trial court failed to sentence defendant in accord with the plea agreement and concede

² Defendant's silence at sentencing did not constitute a waiver of his right to withdraw his plea. (*People v. Mancheno* (1982) 32 Cal.3d 855, 864.) Although silent there, defendant was not silent three days later when he filed his notice of appeal, wherein he wrote that his plea was changed "without my knowledge" and that it almost caused him to go into "shock."

"the appropriate remedy is to remand the matter to the trial court." The People, however, believe the remedy should include the opportunity for the trial court to determine whether the parties stipulated to a change in the plea agreement allowing the 16-month prison sentence. According to the People, only if such stipulation cannot be shown should defendant be allowed to withdraw his plea.

In support, the People contend "the record suggests that the parties may well have altered the terms of the plea agreement to allow for the 16-month prison term to be imposed. Indeed, defense counsel indicated at the outset of the sentencing hearing that he had engaged in discussions with defendant and his family and that 'they all understand that what we discussed at bench is the best resolution he can hope for.'"

A trial court may exercise its discretion and deviate from the agreed-upon terms of a plea agreement "so long as it offer[s] defendant an opportunity to withdraw his plea." (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1362.) Here, the record shows the trial court failed to make such an offer to defendant upon imposing the more severe 16-month prison sentence. When this type of error is established on appeal, relief may take one of three forms: (1) a remand to give defendant his "neglected opportunity" to withdraw the plea, (2) specific performance of the agreement as it was made between the parties, or (3) "'substantial specific performance'" consisting of a judgment that may deviate somewhat from the plea agreement but does not impose a "punishment significantly

greater than that bargained for.'" (*Ibid.*, citing *People v. Walker, supra*, 54 Cal.3d at p. 1027.)

We have no basis in the law for granting the relief the People request, which would involve fashioning a fourth type of remedy conditioning defendant's statutory and due process right to withdraw his plea on the reconstruction of an alleged and long-ago, off-the-record conversation at the trial bench. It is possible the parties agreed to modify the plea agreement before sentencing, but as the People accurately state, "Unfortunately, any agreement by the parties to alter the terms of the plea agreement was not made a part of the record."

As discussed earlier, a negotiated plea agreement, once accepted by the trial court, is binding on the parties and the court. (*People v. Martin, supra*, 51 Cal.4th at p. 80.)

"Thereafter, material terms of the agreement cannot be modified without the parties' consent." (*Ibid.*) Here, a material term of the plea -- the punishment -- was changed at sentencing by the trial court without explanation. The People argue that the parties "may well have altered the terms of the plea agreement," basing the theory on defense counsel's one-sentence statement in the record that defendant and his family "all understand that what we discussed at bench is the best resolution he can hope for." Perhaps that statement referred to the parties' consent to the changed 16-month prison sentence. Perhaps it did not. We have no way of knowing from the otherwise silent record before us.

Our Supreme Court has established that all accepted plea agreements must become part of the record. (*People v. West* (1970) 3 Cal.3d 595, 610.) “[T]he basis of the bargain should be disclosed to the court and incorporated in the record. We should exhume the process from stale obscurantism and let the fresh light of open analysis expose both the prior discussions and agreements of the parties, as well as the court’s reasons for its resolution of the matter.” (*Id.* at p. 609.) The court in *West* explained a key reason why plea agreements must be on the record: “The recordation of the plea bargain will afford to the appellate court, if such bargain is later collaterally or directly questioned, a complete account of the proceedings.” (*Id.* at p. 610.) Such accounts are desirable because they “‘are not readily impeached and constitute firm evidence long after the recollections of all parties involved in a case have dimmed.’ (Thompson, *The Judge’s Responsibility on a Plea of Guilty* (1960) 62 W.Va.L.Rev. 213, 222.)” (*West*, at p. 611.)

The Legislature codified the requirement that plea agreements for felonies be disclosed on the record in 1981 with the enactment of section 1192.6. (*People v. Cardoza* (1984) 161 Cal.App.3d 40, 44.) Among the statute’s provisions is the requirement that, upon a plea of guilty or nolo contendere, a prosecutor recommending a punishment for the court to impose “shall state the specific reasons for the recommendation in open court, on the record.” (§ 1192.6, subd. (c).) The requirement that plea agreements be a matter of record provides the opportunity for the public to scrutinize the conduct of

prosecutors and for the court to make informed decisions in approving or rejecting proposed plea agreements. (*Cardoza*, at pp. 44-45.)

Thus, under both statute and case law, plea agreements such as the one at issue here must be on the record. Indeed, the original agreement was. It follows, then, that for a materially modified plea agreement to replace an agreed-upon plea agreement already in the record, the terms of the modified agreement and the court's reasons for accepting it also must be disclosed in the "fresh light of open analysis" required under *West*. (*People v. West*, *supra*, 3 Cal.3d 595, 609.) Accordingly, if the parties here agreed to a modified plea agreement in an unrecorded discussion, the trial court should have memorialized it on the record, including the defendant's assent. The trial court inexplicably failed to do this. In the absence of a record, we decline to condition defendant's right to withdraw his plea on an after-the-fact inquiry as to what might have been said. We abide by the record before us.³

DISPOSITION

The judgment is reversed and the matter remanded to the trial court to allow defendant to withdraw his guilty plea. If defendant moves to withdraw his plea, the trial court must grant

³ Defendant contends trial counsel's failure to inform him of his right to withdraw his plea and to make a motion to that end constituted ineffective assistance of counsel without a tactical purpose. Because we resolve the matter on the basis of the trial court's error, we decline to address this claim.

his motion. If defendant does not move to withdraw his plea within 60 days of the filing of the remittitur in the trial court, the trial court shall reinstate the judgment.

ROBIE, J.

We concur:

NICHOLSON, Acting P. J.

HOCH, J.