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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

TOU YEE XIONG,

Defendant and Appellant.

C069002

(Super. Ct. No. CM034007)

Over a period of several months, the Butte County Sheriff's Department investigated a series of residential burglaries. Several victims saw young Asian males running away from the crime scenes. After executing a search warrant at defendant Tou Yee Xiong's home, officers found a revolver. A felony complaint charged defendant with receiving stolen property. (Pen. Code, § 496, subd. (a).)¹

¹ All further statutory references are to the Penal Code unless otherwise designated.

Defendant entered a plea of no contest. The trial court sentenced him to three years in state prison. Defendant appeals, arguing the sentence violates his right to due process, since defense counsel failed to execute the promise that induced defendant to enter his plea. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Sheriff's deputies investigated a series of residential burglaries between September 2010 and December 2010. Several victims observed young Asian males fleeing the area. A search of defendant's home unearthed a .357 caliber Taurus revolver, later determined to be stolen. While ensconced in the back of a patrol car, defendant made several incriminating statements.

An amended felony complaint charged defendant with receiving stolen property: the Taurus revolver. (§ 496, subd. (a).) Defendant entered a plea of no contest. The trial court denied probation and sentenced defendant to three years in state prison. Defendant filed a timely notice of appeal.

DISCUSSION

Defendant argues he was denied his due process rights when defense counsel failed to execute the promise that induced defendant to change his plea. According to defendant, he agreed to enter his plea because counsel agreed to request that the court reduce the charge to a misdemeanor. However, defense counsel failed to make such a request. This failure, defendant contends, amounts to reversible error.

Background

Defendant entered a plea of no contest under the condition that at sentencing, defense counsel would request that the court reduce the felony to a misdemeanor under section 17, subdivision (b) (hereafter § 17(b)). On the plea agreement form, a check mark appears next to the following statement: "I have not been induced to enter the above plea(s) [and admission(s)] by any promise or representation of any kind, except (briefly state any negotiated settlement with the District Attorney)." A handwritten

notation follows: “Attorney to make application for reduction under PC § 17(b) at time of sentencing.”

The agreement is signed by defendant, defense counsel, the prosecutor, and the trial court. When defendant entered his plea, defense counsel stated “there will be, at time of sentencing, a 17(b). . . . I would ask the court to exercise its discretion at time of sentencing to reduce this, but we need the full context in terms of that background information.”

Defendant’s probation report recommended that the court deny defendant probation and sentence him to the upper term of three years.² A supplemental report echoed this recommendation.

At sentencing, the trial court stated it intended to deny probation, but requested argument on the appropriate sentence. The prosecution endorsed the probation department’s recommendation of the upper term. The prosecution noted defendant had been on probation since the age of 11 and had “sustained his now tenth theft-related charge.” Defendant had violated his probation in each of the preceding two years. In

² The probation report states, in part: “Although the defendant denies being a member of the Hmong Nation Society (HNS), he has been observed on numerous occasions associating with known HNS members, and wearing their gang-related colors. In addition to the defendant’s continued victimization of this community, he has been observed holding a handgun. . . . [H]e made statements indicating his knowledge of the crimes. The defendant has been on probation since the age of 11, and has failed to make any positive adjustments in his life or complete probation satisfactorily. . . . Since the defendant has been on probation since the age of 11, it would appear he is either unwilling or incapable of complying with a grant of probation. The defendant has shown no remorse, nor has he taken any responsibility for his actions. It is felt, based on the defendant’s history of victimization, gang association, possession of weapons, and threats as recorded during his conversation with his brother, that the defendant would be a threat to the community as he has not demonstrated a desire to rehabilitate himself. His progress on probation, as evidenced by his continued associations, escalation of offenses and school progress is minimal at best.”

addition, the prosecution alleged that defendant had been seen affiliating with gang members and sporting gang colors.

Defense counsel pointed out defendant's significant disability, a hearing loss of over 50 percent. This disability, counsel conceded, did not excuse defendant's actions, but explained some of his bad behavior as an effort to fit in. Defense counsel also stressed defendant's supportive family.

Prior to sentencing defendant, the court considered various factors under the California Rules of Court. The court noted with concern defendant's youth: he was 18 years old at the time of his plea. However, the court also reviewed defendant's prior unsatisfactory performance on probation and the continuing, escalating nature of the burglaries and thefts. The court concluded it was "very concerned with [defendant's] fascination with firearms. [¶] And it is quite clear to the Court, after reviewing the reports and the information contained therein, that the defendant has an inability to speak the truth. He is not trustworthy." Accordingly, the court sentenced defendant to the upper term of three years.

Analysis

Defendant argues defense counsel's failure to ask the court to reduce his conviction to a misdemeanor denied him the benefit of his plea bargain and violated his right to due process. According to defendant, counsel's failure to make this argument amounts to reversible error.

A plea bargain is a negotiated agreement between the prosecution and a defendant by which the defendant agrees to plead guilty or no contest to one or more charges in return for dismissal of one or more of the other charges. The trial court must approve the plea bargain. Because a negotiated plea agreement is in the nature of a contract, it is interpreted according to general contract principles. The court's approval of the agreement binds the court to the terms of the plea bargain, and the defendant's sentence must be within the negotiated terms. (*People v. Martin* (2010) 51 Cal.4th 75, 79.)

Here, defendant's plea bargain contained a requirement that at the time of sentencing defense counsel, pursuant to section 17(b), "make application for reduction." At the plea hearing, defense counsel stated: "Your Honor, there will be, at time of sentencing, a 17 (b). There is a Harvey waiver. I believe that he has a juvenile record that will probably be referenced as far as a probation report. My evaluation is such that I believe -- *I would ask the court to exercise its discretion at time of sentencing to reduce this*, but we need the full context in terms of that background information." (Italics added.) Defense counsel asked the court to exercise its discretion at time of sentence to reduce defendant's conviction pursuant to section 17(b) as required by the plea bargain defendant and the prosecution entered into.

Defendant disputes this reading of the record. According to defendant, defense counsel's statement "was an obvious use of the subjunctive mood: counsel was not *asking* the court, but imagining that he would be asking if at that time all the facts were known, which they were not. In any case, the agreement, the explicit agreement, was that [defendant's] counsel would make this plea for reduced sentencing 'at time of sentencing.' [Citation.] There is no doubt, and [the Attorney General] does not dispute, that this did not happen."

Despite defendant's rigid reading of the record, he did receive the benefit he bargained for. Defense counsel asked the court to exercise its discretion under section 17(b) at time of sentencing to reduce defendant's conviction. Neither the use of the subjunctive, nor defense counsel's reference to the necessity for the full context of background information, negates defense counsel's request to the trial court. Since defense counsel requested the court reduce defendant's sentence under section 17(b) at time of sentencing, we find no violation of defendant's right to due process in the implementation of the plea agreement.

We also agree with the Attorney General that the trial court, had it been provided with another opportunity to reduce defendant's conviction to a misdemeanor, would have

declined. It is fanciful to believe otherwise given the concerns expressed by the court regarding defendant's prior unsatisfactory performance on probation, his escalating criminality, and his dishonesty.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

HULL, J.

DUARTE, J.