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

THE PEOPLE,  
  
Plaintiff and Appellant,  
  
v.  
  
STEVEN JAMES SEBENI,  
  
Defendant and Respondent.

C069300  
  
(Super. Ct. No.  
SF113481A)

Defendant Steven James Sebeni pled no contest to diversion of funds (Pen. Code, § 484b)<sup>1</sup> and contracting without a license, a misdemeanor (Bus. & Prof. Code, § 7028). The trial court reduced the diversion of funds count to a misdemeanor (§ 17) and placed defendant on three years' informal probation with a condition that he serve 60 days in county jail.

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<sup>1</sup> Undesignated statutory references to follow are to the Penal Code.

The People appeal, contending the trial court violated the plea agreement and improperly reduced the victim restitution award to zero. We vacate the sentence and remand for resentencing.

#### BACKGROUND

The facts of defendant's crimes, as ascertained from the factual basis of his plea, are as follows: On January 25, 2006, Ricardo Unzueta entered into a written contract with defendant to remodel Unzueta's home. Unzueta paid defendant \$25,000 but defendant did not do the work and diverted the money for some other use. Defendant was not a licensed contractor.

The terms of defendant's plea agreement were announced at the plea colloquy on November 17, 2010. Defense counsel stated: "It's my understanding that [defendant] would be pleading guilty to Count I, which is a 484[b], as a felony, and Count IV, which is a misdemeanor, [Business and Professions] Code Section 7028. And then there's a -- essentially a graduated payment schedule. And with that, various levels of incarceration."

The trial court explained the terms of the agreement to defendant: "And the bottom line will be we'll continue your matter for three separate occasions for a sentencing to give you an opportunity to try to make restitution. [¶] If you pay no restitution, it will be a felony local 180 days. [¶] If you pay \$5,000, it will be 120 days. [¶] Fifteen, though, will be 60 days. [¶] And the total, \$25,000, will be a misdemeanor, 60 days." In addition, defendant would be placed on probation and could serve the jail time in an alternative program.

The court continued sentencing until May 18, 2012, with two interim dates before then. If defendant failed to pay on either of the interim dates, then the trial court could sentence him at that time, but if defendant continued to pay restitution, then the court would delay sentencing until May 18. The trial court set the two interim dates as January 21, 2011, and September 22, 2011.

Defense counsel asked to address one more matter, "the form of the payment." Counsel said: "we had mentioned this recently. But it's my understanding that it should be in the form of a cashier's check, written out to the victim's name.

[¶] Is that correct, . . . , that he bring this to court that day?" [¶] And then I understood that [the prosecutor] may have the -- the victim here in court that day so it could be handed directly to him, because the DA's office doesn't want to be involved in -- in holding onto that money." The prosecutor said "[w]ell, that -- that's right, yeah[,] and "[t]hat's what we try to do." The prosecutor then dismissed the charges and the hearing concluded.

On July 20, 2011, defendant filed a motion to withdraw the plea on the grounds that the victim was unavailable to receive the restitution payments. The motion asserted the victim was not present for the receipt of the first installment payment, January 21, 2011, "allegedly because the People forgot to notify him that he was to be present." Defendant brought cash that day which was placed in defense counsel's trust account. On February 18, 2011, the People informed defense counsel that they

could not find the victim. The People were given until March 4, 2011, to find the victim, which was later extended to March 30 and then June 28. The matter was set for this motion once it became clear that the People could not find the victim.

The People's reply asserted the victim's unavailability was not anticipated by either party at the time of the plea. According to the People, defendant had only \$1,600 of \$5,000 he agreed to have on the day for the first payment. The People tried to contact the victim on multiple occasions, but to no avail. The victim had been in contact with law enforcement officials from the time of his initial complaint in late 2006 or early 2007 until the date for defendant's first installment payment in January 2011. The People argued that defendant had not established good cause for withdrawal of his plea and asserted the bargain should be "fairly enforce[d]" by requiring defendant to pay restitution to San Joaquin County Revenue and Recovery, the California Victim's Compensation Fund, the San Joaquin County Courts, the San Joaquin County District Attorney's Office, or to charity.

At the August 30, 2011, hearing on defendant's motion, defense counsel objected to the factual assertions in the reply as they were not made under penalty of perjury. Counsel told the court "the entire plea bargain surrounded this issue of restitution[.]" Since the district attorney's office had problems with taking restitution into their office, counsel understood that the victim would be brought into court on the first day to receive the first installment in person because the

prosecutor "literally didn't want to touch the money[.]"

Defendant brought \$1,600 in cash on January 21, 2011, which was held in counsel's trust account because the victim did not appear. Defendant subsequently presented a \$3,000 cashier's check in the victim's name, which was in counsel's office.

The prosecutor told the court that the People had no knowledge of the victim's unavailability when the plea was taken. They did not know he was unavailable until after trying to contact him several times since the January 21, 2011, hearing. To the extent the statements in the People's reply brief were not made under penalty of perjury, the prosecutor affirmed to the court that the People were unaware that the victim was unavailable.

The trial court indicated it was inclined to grant defendant's motion, but if defendant let the plea stand, then the court would sentence him as if he paid the entire \$25,000 in restitution. Defendant accepted the trial court's offer and let the plea stand.

The People objected to the trial court's proposal. The trial court replied that the People's inability to produce the victim established good cause for its ruling. When asked by the court if the probation department could contact the victim to determine restitution, the prosecutor replied "I don't know." The trial court reduced the diversion of funds count to a misdemeanor, placed defendant on probation with 60 days in jail, entered a finding of "no restitution[,]" and gave the People the option of challenging the finding at a restitution hearing.

## DISCUSSION

### I

The People assert the trial court violated the plea agreement by modifying the plea without their consent. According to the People, withdrawal of the plea would have been improper because defendant failed to establish good cause for withdrawal. They ask for specific performance of the plea, namely reinstating defendant's obligation to pay restitution under the terms of the plea. If the victim is still unavailable on remand, the People ask that defendant should pay restitution to the State's Victim Compensation and Government Claims Board to hold in trust for the victim.

Defendant counters by claiming that a material mistake of fact, the People's inability to locate the victim, prevented the plea agreement from being executed. He contends this was not "an unexpected tsunami[,] " but the result of the prosecution's lack of diligence. According to defendant, the trial court's remedy was not an abuse of discretion.

"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.] On the other hand, "[i]f the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it."

[Citations.]' [Citation.] 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties.

[Citations.]' [Citations.]" (*People v. Shelton* (2006) 37 Cal.4th 759, 767.)

Not every term in a plea agreement is equally important. While the People and the courts are bound to uphold the terms of a plea agreement (*People v. Walker* (1991) 54 Cal.3d 1013, 1024; *Santobello v. New York* (1971) 404 U.S. 257, 262 [30 L.Ed.2d 427, 433]), this rule applies only to material terms of the plea. "This does not mean that any deviation from the terms of the agreement is constitutionally impermissible." (*People v. Walker, supra*, at p. 1024.) "[W]hen 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, supra*, at p. 262 [30 L.Ed.2d at p. 433].) Accordingly, a punishment or condition "that is insignificant relative to the whole" may be imposed whether or not it was part of the plea negotiations. (*People v. Walker, supra*, at p. 1024.)

A similar approach applies when a condition of a plea cannot be performed due to subsequent events. The contract of

impossibility law defense applies to plea agreements. "If for any reason the court cannot effectuate the terms of a plea bargain, it must permit the defendant to withdraw his guilty plea. [Citation.]" (*People v. Jackson* (1981) 121 Cal.App.3d 862, 869.) However, this rule does not apply to terms which are not material to the agreement.

*People v. McIntosh* (2009) 177 Cal.App.4th 534 (*McIntosh*) is an example of how the impossibility rule applies only to a material term of the plea. Every plea agreement contains an implied term that the defendant will be sentenced by the judge who took the plea. (*Id.* at p. 540; *People v. Arbuckle* (1978) 22 Cal.3d 749, 756-757.) In *McIntosh*, the defendant and the People anticipated the judge who took defendant's no contest plea would be available for sentencing. (*McIntosh, supra*, at p. 543.) The judge, a retired visiting judge on assignment, became unavailable for personal reasons and would not be able to handle the case. (*Id.* at pp. 538-539.) Defendant moved to withdraw his plea based on *Arbuckle*; the newly assigned judge denied the motion and sentenced defendant in accordance with the plea. (*Id.* at p. 539.)

The Court of Appeal affirmed. (*McIntosh, supra*, 177 Cal.App.4th at p. 537.) The question before the court was whether sentencing before the judge who took the plea was "'significant deviation from the terms of the plea bargain,' permitting a defendant to withdraw the plea. [Citation.]" (*Id.* at p. 543.) Citing *Walker*, the *McIntosh* court noted that deviations from the plea agreement were impermissible only if

the variance is ““significant” in the context of the plea bargain as a whole[.]’” (*Id.* at p. 544.) The court concluded: “Certainly where the judge who accepts a plea is otherwise available, there is a reasonable expectation that he or she will impose sentence, but should that become impossible through no fault of the court or the prosecution, rescission of the plea agreement should require an affirmative showing by the defendant that a material term of the agreement has been violated as a result, or that there has been a ‘significant deviation’ from the terms of the plea agreement.” (*Id.* at p. 545.)

This rule applies to other unanticipated obstacles in executing a plea agreement. In contract law, partial impossibility of performance by one party does not excuse the other party from performing unless the term which cannot be performed is material to the agreement. (Rest.2d Contracts, §§ 237, 267; 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts § 852, pp. 938-940 and cases cited therein.) Likewise, a plea agreement is impossible to perform only if a material element of the plea cannot be performed.

The trial court’s ruling is derived from its finding that defendant could not perform part of the plea because the victim was not available to receive restitution. Based on this finding, it altered the terms of the plea agreement to defendant’s advantage.

The fatal problem with the court’s chain of reasoning is its implied finding that the method of payment was a material term of the plea agreement. How defendant was to pay

restitution was not part of the plea agreement as set forth in the plea colloquy. The terms of the plea were that in exchange for defendant's no contest plea to diversion of funds and contracting without a license he would be given probation, with jail time and \$25,000 in victim restitution paid over three installments. The amount of restitution paid by defendant determined the amount of jail time and whether the diversion of funds count would be treated as a misdemeanor or a felony.

The requirement that defendant was to pay the victim in person rather than by other means was not mentioned until after defendant's plea was accepted. The plea agreement centered on defendant *paying* restitution; *how* defendant paid was not material to the agreement. That term was added after the initial agreement<sup>2</sup> and benefitted the People, who evidently did not want restitution funds going through the district attorney's office.

The term specifying that defendant was to pay restitution to the victim in person was not a material element of the plea agreement. Since it was for the sole benefit of the People, the term could be waived by them without impairing defendant's obligation to perform. (See Rest.2d Contracts § 84 ["a promise to perform all or part of a conditional duty under an antecedent

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<sup>2</sup> Although defense counsel indicated that the parties discussed the method of payment before the plea, how restitution was to be paid was not part of the initial plea agreement. Had defense counsel not mentioned it after the colloquy, the method of payment term would not have been in the record and therefore not part of the plea agreement.

contract in spite of the non-occurrence of the condition is binding"]; 1 Witkin, *supra*, Contracts, § 856 at pp. 943-944 and cases cited therein [effects of waiver of breach].) The People offered to waive the term in their opposition to defendant's motion to withdraw by asking the trial court to designate some party to hold the restitution funds in trust for the victim until he could be found. Defendant's inability to perform a term of the plea agreement which was not material to the plea and was waived by its sole beneficiary, the People, does not render the plea impossible to perform.

The trial court's ruling that defendant established good cause to withdraw his plea was based on a mistake of law that the plea was impossible to perform. This was an abuse of discretion. (See *People v. Ravaux* (2006) 142 Cal.App.4th 914, 917 [no contest plea may only be set aside for good cause; trial court's ruling reviewed for abuse of discretion].) Since the trial court's remedy -- excusing defendant from paying restitution -- was predicated on this legal error, it too is an abuse of discretion. (*In re Esperanza C.* (2008) 165 Cal.App.4th 1042, 1061 [decision founded on error of law is necessarily an abuse of discretion].)

While the method of paying restitution was not material to the plea, defendant having to pay restitution or suffer adverse consequences was a material term of the agreement. "Although a plea agreement does not divest the court of its inherent sentencing discretion, 'a judge who has accepted a plea bargain is bound to impose a sentence within the limits of that bargain.

[Citation.] "A plea agreement is, in essence, a contract between the defendant and the prosecutor to which the court consents to be bound." [Citation.] Should the court consider the plea bargain to be unacceptable, its remedy is to reject it, not to violate it, directly or indirectly. [Citation.] Once the court has accepted the terms of the negotiated plea, "[it] lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant unless, of course, the parties agree." [Citation.]' [Citations.] [Fn. omitted.]" (*People v. Segura* (2008) 44 Cal.4th 921, 931 (*Segura*).)

Citing *Segura*, the People ask for specific performance of the plea by reestablishing the payment schedule and ordering defendant to pay restitution, with the funds being held by the State's Victim Compensation and Government Claims Board in trust for the victim or his estate if he cannot be immediately found. The problem with this contention is that specific performance of a stipulated sentence is generally disfavored. "Specific enforcement of a particular agreed upon disposition must be strictly limited because it is not intended that a defendant and prosecutor be able to bind a trial court which is required to weigh the presentence report and exercise its customary sentencing discretion. [Fn. omitted.]" (*People v. Kaanehe* (1977) 19 Cal.3d 1, 14 (*Kaanehe*).) Thus, "a defendant should not be entitled to enforce an agreement between himself and the prosecutor calling for a particular disposition against the trial court absent very special circumstances." (*Id.* at p. 13.)

Although *Segura* appears to support the People's position, it must be considered in the context of the facts before the Supreme Court. In *Segura*, the defendant sought to avoid the immigration consequences of his conviction by having the trial court modify his sentence after judgment was entered and his sentence had been served. (*Segura, supra*, 44 Cal.4th at p. 925.) "By this time, of course, it was impossible for the prosecution to rescind the plea bargain. In describing the trial court's powerlessness to modify the judgment, the Supreme Court [in *Segura*] could not have meant to suggest that it would have lacked such power on *timely* application—e.g., at sentencing—provided it offered the prosecutor an opportunity to rescind the agreement." (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1361, (*Kim*).) Although *Segura* did not mention the *Kaanehe* decision, the situation before the Supreme Court in *Segura* presented the "very special circumstances" justifying specific enforcement under *Kaanehe*.

*Segura* does not allow a reviewing court to divest the trial court of its authority to reject a plea and exercise its sentencing discretion. (*Kim, supra*, 193 Cal.App.4th at pp. 1361-1362.) Ordering a specific sentence to be entered is inappropriate unless "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." (*People v. Mancheno* (1982) 32 Cal.3d 855, 861.) The trial court here did not properly exercise its sentencing discretion because its original decision was based on two legal

errors -- that defendant had grounds to withdraw his plea and the court could modify the terms of the plea agreement. Accordingly, we shall vacate the sentence and remand for resentencing.

## II

The People also contend it was an abuse of discretion for the trial court to order no restitution. Since we are vacating the trial court's no restitution order, we consider this issue briefly for the trial court's guidance on remand.

Section 1202.4, subdivision (a)(1), governing restitution, states in part: "[A] victim of crime who incurs any economic loss as a result of the commission of a crime shall receive restitution directly from any defendant convicted of that crime." The statute also provides that "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court." (§ 1202.4, subd. (f).) We construe a victim's right to restitution broadly and liberally. (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1046.)

A sentence without an award of victim restitution (or a statement on the record of the "compelling and extraordinary reasons" for not making such an award) is invalid. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1225, quoting Cal. Const., art. I, § 28, subd. (b).) "A trial court has no discretion over

the issuance of the award itself . . . ." (*People v. Brown*, *supra*, at p. 1225.)

"Once the record contains evidence showing the victim suffered economic losses . . . this showing establishes the amount of restitution the victim is entitled to receive, unless challenged by the defendant." (*People v. Fulton* (2003) 109 Cal.App.4th 876, 886.) The factual basis of the plea stated that the victim paid \$25,000 to defendant to work on his home, and defendant did little or no work for him. As part of the plea, defendant admitted to owing \$25,000 in victim restitution. This establishes a \$25,000 economic loss to the victim and defendant's obligation to pay that amount.

The People's inability to find the victim to receive restitution in person does not establish compelling and extraordinary reasons for denying restitution. Third parties routinely collect restitution for victims. (See, e.g., § 2085.5, subd. (b) [authorizing Department of Corrections and Rehabilitation to collect a portion or a prisoner's wage to pay victim restitution].) If the victim cannot be found by the time of resentencing, the trial court can designate a new means of securing restitution.

#### DISPOSITION

The sentence is reversed and the matter is remanded for resentencing. Upon resentencing, the court may sentence defendant in accordance with the plea or reject the plea and allow defendant or the People to withdraw. If the court chooses to follow the plea agreement, it may designate a new means of

securing restitution payments from defendant if the victim is still unavailable.

BLEASE, Acting P. J.

We concur:

ROBIE, J.

DUARTE, J.