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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.

ALBERTO HERNANDEZ,

Defendant and Respondent.

C069967

(Super. Ct. No.
SF118952A)

Following an unreported pretrial conference, defense counsel indicated that defendant Alberto Hernandez desired to resolve the case as outlined by the trial court. Defendant would plead guilty to petty theft with a prior and the trial court would sentence him to the low term of 16 months in prison, doubled for a prior strike, but the trial court would dismiss a second strike allegation. The prosecutor objected to the proposed resolution and asked the trial court to state a reason for dismissing the second strike allegation. The trial court

replied, "I think . . . it's unconstitutional and cruel and unusual punishment to do life for a petty theft." The prosecutor said "[i]t sounds like . . . you disagree with the three-strikes law, because a three-strikes law petty theft can result in that;" the trial court answered, "yeah, I guess I do in that." Defendant pleaded guilty and the trial court sentenced him to prison for the low term of 16 months, doubled for a prior strike.

The People appeal (Pen. Code, § 1238, subd. (a)(8) & (10));¹ *People v. Trujillo* (2006) 40 Cal.4th 165, 173), contending the trial court (1) entered into an unlawful judicial plea bargain, (2) abused its discretion by dismissing a prior strike without considering the *Williams*² factors and without recording its reasons for striking the prior conviction in the court minutes, and (3) incorrectly concluded that a third-strike sentence for petty theft would constitute cruel and unusual punishment.

We conclude (1) the trial court entered into an unlawful judicial plea bargain, (2) the trial court improperly dismissed the prior strike allegation without considering the *Williams* factors or stating its reasons in the court minutes, and (3) because we reverse and remand for further proceedings, we need not reach the People's third contention.

¹ Undesignated statutory references are to the Penal Code.

² *People v. Williams* (1998) 17 Cal.4th 148.

BACKGROUND

The matter was resolved by plea and defendant waived referral to probation. Accordingly, our statement of facts is taken from the prosecutor's statement of the factual basis for the plea. On November 13, 2011, defendant entered a Wal-Mart store on Hammer Lane, concealed \$100 worth of items, and left the store without paying for them. Defendant has three prior theft-related convictions for which he served periods of incarceration: a Merced County conviction in March 1987 for receiving stolen property, a Fresno County conviction in April 1990 for vehicle theft, and a San Joaquin County conviction in September 2008 for petty theft with a prior.

The complaint in this case accused defendant of petty theft with a prior theft-related conviction. (§ 666.) The complaint alleged defendant had three prior theft-related convictions (§ 666) and two prior serious or violent felony convictions (§§ 667, subds. (b)-(i), 1170.12).

Following an unreported "pretrial conference or pre-prelim conference," defense counsel indicated defendant's desire to resolve the case "around the lines of what the Court outlined" If defendant were to plead guilty or no contest to the present charge, admit the theft priors, and "admit one of the enhancements under" section 1170.12, the trial court would impose double the low base term. The trial court said it would also dismiss the second strike allegation. The prosecutor "noted for the record this disposition is over the DA's objection."

Before taking the plea, the trial court told defendant: "Your record doesn't suggest that you deserve any real breaks. On the other hand, I think it's way over the top to suggest that you should be doing life for petty theft." When the prosecutor asked the trial court to state a reason for the dismissal, the trial court replied, "I think that for this offense, a petty theft, essentially a petty theft with a prior, that it's unconstitutional and cruel and unusual punishment to do life for a petty theft." When the prosecutor said, "[i]t sounds like you're saying you disagree with the three-strikes law, because a three-strikes law petty theft can result in that," the trial court answered, "Yeah, unless there's -- yeah, I guess I do in that." The trial court invited the prosecutor to seek extraordinary writ relief.

Defendant pleaded guilty to petty theft with a prior. He admitted the three theft-related convictions and one of the prior serious felony convictions, a 1994 conviction for lewd acts with a child. (§ 288, subd. (a).) The trial court dismissed the second prior serious felony allegation, a February 2000 conviction for lewd acts with a child. Defendant waived referral to probation and the trial court sentenced him to prison for the low term of 16 months, doubled for the prior strike, and awarded him 26 days of custody credit and 24 days of conduct credit.

DISCUSSION

I

The People contend the trial court entered into an unlawful judicial plea bargain. We agree.

Where, as here, a defendant resolves a case on the basis of a plea to less than all the charges, without the prosecutor's consent to dismissal of the remaining charges, the only parties consenting to the disposition are the defendant and the trial court. This is an unlawful judicial plea bargain.

“[T]he charging function of the criminal process is the sole province of the executive [branch of government]. [Citation.] It is equally the function of the executive [branch] to engage in any negotiation with the defense by which a lenient disposition of the charge made is secured without trial. [Citation.] “[The] court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of ‘plea bargaining’ to ‘agree’ to a disposition of the case over prosecutorial objection.” [Citation.] . . .’ [Citation.]” (*People v. Woosley* (2010) 184 Cal.App.4th 1136, 1145-1146.)

If, on remand, the case again resolves by plea to less than all charges, it must occur with the approval of the prosecution as explained in *Woosley*. (*People v. Woosley, supra*, 184 Cal.App.4th at pp. 1145-1146.)

II

The People further contend the trial court erred by dismissing a prior strike without considering the *Williams*

factors and recording its reasons for striking the prior conviction in the court minutes. Again we agree.

A trial court must follow established procedures to dismiss a prior strike allegation. “[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, ‘in furtherance of justice’ pursuant to Penal Code section 1385(a) . . . , the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams, supra*, 17 Cal.4th at p. 161.) There is no indication in this record that the trial court considered the *Williams* factors in dismissing the prior strike allegation.

In addition, section 1385, subdivision (a) provides in relevant part: “The reasons for the dismissal must be set forth in an order entered upon the minutes.” This requirement is mandatory, and in the absence of such a statement the dismissal order may not stand. (*People v. Bonnetta* (2009) 46 Cal.4th 143, 148-153.) It is insufficient that the reasons may be gleaned from the reporter’s transcript. (*Id.* at p. 149.)

Here, the trial court’s reasons for dismissing the prior strike allegation are not set forth in the court minutes.

III

The People also contend that the trial court erred in concluding that a third-strike sentence for petty theft would constitute cruel and unusual punishment.

Because we remand for further proceedings, we need not reach this constitutional question, which has been addressed by other courts. (See, e.g., *Lockyer v. Andrade* (2003) 538 U.S. 63, 66 [155 L.Ed.2d 144, 151-152] [third strike sentence for two counts of petty theft with a prior for stealing, on separate occasions, merchandise valued at \$84.70 and \$68.84]; *Ewing v. California* (2003) 538 U.S. 11, 28, 30-31 [155 L.Ed.2d 108, 121-122, 123] [third strike sentence for shoplifting golf clubs worth \$1,200]; *In re Lynch* (1972) 8 Cal.3d 410, 424-427.)

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

MAURO, J.

We concur:

NICHOLSON, Acting P. J.

BUTZ, J.