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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

LOUIS CORNELL HOLIDAY,

Defendant and Appellant.

C070864

(Super. Ct. Nos. SF097844A,
MF032771A, SF116090A,)

Defendant Louis Cornell Holiday entered into a plea arrangement with the trial court despite an objection by the People. Pursuant to the arrangement, defendant pleaded no contest to second degree robbery, attempted first degree robbery, first degree burglary, criminal threats, and receipt of stolen property. He also admitted certain enhancement allegations. Consistent with the plea arrangement, the trial court imposed a sentence of 19 years eight months in state prison, but stayed execution of the sentence and released defendant on his own recognizance with the understanding that if defendant personally

appeared at the next scheduled hearing, defendant would be permitted to withdraw his plea and enter a new plea to lesser charges. In that event, the trial court would reduce his sentence to a term of eight years eight months in prison. But if defendant failed to appear at the next scheduled hearing, the trial court would execute the imposed sentence of 19 years eight months in prison.

Defendant did not personally appear at the next scheduled hearing, and the trial court executed the previously imposed sentence of 19 years eight months in prison. Defendant obtained a certificate of probable cause.

On appeal, defendant contends (1) the trial court violated defendant's right to due process when it executed sentence, because defendant did not willfully fail to appear; (2) in the alternative, defendant should be allowed to withdraw his plea because either he did not receive the benefit of his bargain or he entered into the plea agreement under a mistake of fact; and (3) an error in the abstract of judgment must be corrected.

The People counter that defendant's plea must be set aside because there was no negotiated plea agreement between defendant and the prosecution; instead, defendant's plea was improperly induced by promises from the trial court over objection from the prosecution.

We conclude the trial court entered into an unlawful judicial plea bargain. Because we conclude there was no valid plea agreement and we reverse with directions to vacate the plea, it is not necessary to address defendant's contentions or his requested remedy of specific performance and/or withdrawal of the plea.

BACKGROUND

Defendant pleaded no contest in 2005 to receipt of a stolen vehicle (Pen. Code, § 496d, subd. (a); San Joaquin County case No. SF097844A). The trial court suspended imposition of sentence and placed defendant on probation for five years with 300 days in county jail. Probation was revoked in 2007 and reinstated in 2008.

Subsequently, in consolidated San Joaquin County case Nos. MF032771A and SF116090A, the People charged defendant with receiving stolen property, attempted residential robbery, residential burglary and criminal threats. The People then filed a second amended information in case No. SF116090A, charging defendant with second degree robbery (count 1), attempted residential robbery (count 2), first degree residential burglary (count 3), criminal threats (count 4), and receipt of stolen property (count 5), with enhancement allegations that defendant personally used a firearm and committed the offenses while on bail.

At a hearing on September 13, 2011, in case No. SF116090A, defense counsel described the following plea arrangement that had been discussed in chambers: defendant would “plead to the sheet, the exposure on that is [19 years eight months in state prison]. He’s going to be granted a stay for a week” and come back on September 21. After the prosecutor said he was unavailable that day, defense counsel and the trial court agreed on a September 22 date. Defense counsel then continued describing the terms of the plea arrangement: “when [defendant] comes back, Your Honor, he will be entitled or allowed to withdraw his plea and enter a new and different plea essentially to Count 1, SF116090A, PC 211, for upper term five [years], he’ll plead to -- or admit -- or plead to [Penal Code section] 12022.5[, subdivision] (a) for three years, which is eight” and plead no contest to receipt of stolen property for a consecutive eight month term, and a concurrent term on the probation violation in case No. SF097844A, for a total term of eight years eight months.

The trial court told defendant: “And, Mr. Holiday, what’s going to happen here today is over the People’s objection -- ‘cause they’re objecting to me releasing you -- I am going to release you here today with a plea to what’s called the sheet; you’re going to be admitting all the charges and enhancements and I’m going to sentence you to the maximum term under that, and what’s going to happen is as long as you do everything I tell you[,] you don’t need . . . to worry. However, if you violate the law, pick up a new

criminal offense or you do not appear in court on the time and date that I give you, you will not be resentenced and you'll receive the sentence that I'm imposing today."

After defendant said he understood, the trial court continued: "As long as you follow everything I tell you today, when you come back to court you'll be allowed to withdraw your plea on certain charges, certain charges you will not, as far as negotiation, and your sentence will be reduced to a term of eight years, eight months." Defendant again said he understood and had enough time to talk to his attorney. The trial court then commenced a plea colloquy in which defendant pleaded no contest to second degree robbery (Pen. Code, § 211),¹ attempted first degree robbery (§§ 664/212.5), first degree burglary (§ 459), criminal threats (§ 422), and receipt of stolen property (§ 496, subd. (a)). He also admitted certain enhancement allegations.

Following off-the-record discussions, the trial court said: "Mr. Holiday, it's been brought to our attention at this time -- it's the first time I'm aware of the fact that you actually have a hold from another jurisdiction. So if we release you, the other jurisdiction is going to take you, it's going to defeat what I'm trying to do here today for you. I'm going to put it over to see if maybe both attorneys can find out what is going on with that Placer hold. I'm not going to change what my agreement is with you, I'm just going to change the time" The trial court continued the matter.

At the next hearing on October 18, 2011, defense counsel told the trial court: "we had negotiated a deal where he was going to get a stay. He wants to kind of -- against my better judgment, he wants to follow through with that." According to defense counsel, defendant wanted "19 years, eight months, release him, and then he'll deal with Placer County."

¹ Undesignated statutory references are to the Penal Code, and all statutory references are to the statutes in effect during the relevant time period.

The trial court said it intended to keep the promise to defendant on the “deal” that they had discussed, and it reiterated the terms of the arrangement. The trial court then told defendant, “I’m going to put your case over for four days for you to come back to court, which will be Monday the 24th. And at that time, if you’re not present, the Court will issue a no bail warrant, which will act as a hold on Placer County. [¶] So if you’re taken to Placer County, you’ll have that hold. So as soon as you take care of Placer County, you’re required to come back here.”

Defendant said he understood, and the trial court continued: “And, in addition, what the Court will do is actually contact Placer County to make sure that they do recognize that hold and it’s in place to make sure you will come back. [¶] If they don’t take you, you’re going to be out of custody, so you’ll be required to come back here on that date. Do you understand that? [¶] So you’re going to be required to be here on Monday if you’re released from custody. That will be October 24th.”

Defendant asked for more explanation. After off-the-record discussions between defendant and defense counsel, the trial court added: “The -- the only way you would not be required to be here is if Placer County took you.” Defendant replied, “[a]ll right,” and the trial court continued, “Otherwise, I want you here. And if you’re not here, the Court’s not going to re-sentence you.” The trial court said if defendant did not personally appear, he would receive the previously imposed 19 year eight month sentence.

After informing defendant it was his responsibility to appear if Placer County released him early, the trial court told defendant: “I want you here on Monday unless it’s not your fault, such as someone -- you’re taken on some type of hold. I’m not holding that against you, because I anticipate that’s going to happen. [¶] But if you are released, I want you to understand, you have to be here, though.”

After defendant said he understood, the trial court continued: “That’s the only way this is going to fall through is if you don’t follow through something that we’re talking about today. [¶] So I want you here Monday. And the only way you’re going to

get here is if you walk in through that door. The San Joaquin County Jail is not going to bring you because I'm releasing you on our case. So you're going to have to come here on your own."

The prosecutor reiterated for the record that the arrangement was over the People's objection. The trial court then imposed a sentence of 19 years eight months in state prison and released defendant under the following terms and conditions: "You obey all laws. Do not commit a same or similar offense. You keep all of your court appearances. You keep all the meetings with your attorney, any member of his office. [¶] Do not leave the State of California without written permission by the Court. Do not own any firearms, weapons or ammunition. Submit to a general search waiver. And stay away from the victims and their location." After defendant agreed to the conditions, the trial court released defendant and continued the matter to October 24. But after further off-the-record discussions between defense counsel and defendant, counsel said defendant was concerned that if Placer released him on October 24, he would not be able to get to the courthouse by 8:30 a.m. The trial court replied: "No, because then -- then I'll put the warrant for you. And I'll have a hold on you. That's my -- let me think -- I want to put the hold on you. [¶] And then we'll have a date for you -- if they don't pick you up at all, then that's the release -- at that time I'll have a date for you to come back to court and then you've already taken care of the Placer [hold]."

Defendant replied, "But if they don't come to get me, Monday, it -- they're going to release me. It's from San Joaquin County, right?" The trial court told defendant: "Well, they may not necessarily release you, but you'll have a defense for that matter because they didn't pick you up within a certain period of time. [¶] It doesn't -- it doesn't necessarily mean, by law, they're going to release you on the hold. It means that you would have a -- now you have a legal argument you could make with that county why they didn't pick you up in that time. [¶] And actually, to be sure, I can put it on the fifth day, if you want me to do that" Defendant agreed to an October 25 hearing.

After further discussion, the trial court told defendant: “I will not hold it against you if someone’s keeping you from being here. [¶] If you’re in custody somewhere, that’s not your fault if you’re not here. And, in fact, I expect you not to be here, is what I expect. [¶] I do not expect you to be here on that date. So I can issue a warrant and put the hold on by Placer. So once you take care of Placer, you’ll come back here.”

Defense counsel told the trial court that defendant’s “concern is that he’s still sitting down in San Joaquin County and --” But the trial court said, “then I’ll recognize that and I’ll have you transported here and we’ll discuss that at that time.” Defense counsel said he told defendant he would check with the court and see “if you’re still up to it.” The trial court then told defendant, “I’ll try to keep track of where you’re going.” The trial court then set the next hearing for October 25, 2011, at 8:30 a.m.

Defendant did not appear on October 25. The trial court revoked his release and issued a bench warrant.

Another hearing was held on March 21, 2012. Defense counsel informed the trial court that defendant was present, having been extradited from the State of Nevada. Defense counsel said: “When we released him and gave him a date four days later to appear if he was released from Placer County, because that’s where he was going, and I don’t believe he had been released from Placer County until after that time, and then he didn’t have a date here and obviously didn’t come back. [¶] But I would like an opportunity to meet [with] him and find out what happened in Placer and how he ended up here today.”

The trial court related its understanding of the arrangement -- that defendant would plead “to the sheet” and receive a sentence of 19 years eight months, with execution stayed “under certain terms and conditions, including that he obey all laws and keep all of his court appearances as ordered.” If defendant committed any new offenses or did not appear in court on time, “he would not be re-sentenced, and the sentence the Court imposed which was the 19 years, eight months, would be the sentence that he would have

to serve.” According to the trial court, if defendant did not show up for sentencing, the sentence would be executed without any further hearing, so the only purpose of the March 21 hearing was to execute the sentence.

The trial court said defendant did not appear in court on October 25, 2011, and the People represented that defendant was found living with another person in Reno, Nevada. At the time of his arrest, defendant indicated that he missed his sentencing hearing in San Joaquin County. Defense counsel stated: “The Court did release him on his OR so that Placer would take him to Placer County to take care of business there. And then we re-impose a warrant so that he would be brought back here for this sentencing hearing. [¶] That, of course, didn’t happen. They -- they -- they let him go. And he wasn’t brought back here pursuant to the order. [¶] The date the Court is talking about was the date he was to appear if Placer did not pick him up and he was released on his OR in our county. And that didn’t happen.”

Defense counsel informed the court that defendant had been taken into custody by Placer County and he was in custody on the date he was supposed to appear for sentencing. The trial court said it understood defense counsel’s argument, but at some point defendant was released, did not report to the court, and made a “conscious decision not to come back to court, which violates what the Court had indicated.” The trial court said it made it very clear that if defendant did not follow through with what the trial court asked of him, the trial court would execute the original sentence “without a hearing.”

The trial court executed the 19 year eight month sentence and awarded presentence credit. Defendant obtained a certificate of probable cause.

DISCUSSION

We begin our analysis by determining the nature of the plea arrangement. Defendant argues the plea arrangement was a variant of what is known as a “*Cruz*”² waiver. The People assert the arrangement instead involved an indicated sentence and a plea improperly induced by the trial court’s promise of leniency. We disagree with both assertions.

A

The plea arrangement was not a *Cruz* waiver. Section 1192.5 provides that “if a plea agreement is accepted by the prosecution and approved by the court, the defendant ‘cannot be sentenced on the plea to a punishment more severe than that specified in the plea’ The statute further provides that if the court subsequently withdraws its approval of the plea agreement, ‘the defendant shall be permitted to withdraw his or her plea if he or she desires to do so.’ [Citations.]” (*People v. Masloski* (2001) 25 Cal.4th 1212, 1217, fn. omitted.)

In *Cruz*, *supra*, 44 Cal.3d at p. 1249, the Supreme Court held that section 1192.5 is applicable where the trial court withdraws its approval of the sentence because the defendant fails to appear for sentencing. But the court noted that a defendant fully advised of his rights under section 1192.5 could expressly waive those rights, “such that if the defendant willfully fails to appear for sentencing the trial court may withdraw its approval of the defendant’s plea and impose a sentence in excess of the bargained-for term. Any such waiver, of course, would have to be obtained at the time of the trial court’s initial acceptance of the plea, and it must be knowing and intelligent.” (*Id.* at p. 1254, fn. 5.) Under *Cruz*, if a defendant agrees to a higher sentence if he fails to appear, the trial court may impose a higher sentence without a section 1192.5 waiver if

² *People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*).

the defendant fails to appear for sentencing. (*People v. Masloski, supra*, 25 Cal.4th at pp. 1223-1224; *People v. Vargas* (1990) 223 Cal.App.3d 1107, 1113.)

On a superficial level, the arrangement in this case may look like a *Cruz* waiver because defendant agreed that he would receive a greater sentence if he failed to appear for sentencing. But the similarity to a *Cruz* waiver disappears on closer inspection. In this case, the arrangement involved defendant pleading to additional crimes and receiving a greater sentence at the outset, with the promise that he could subsequently withdraw his plea, enter a new plea, and receive a lesser sentence if he appeared for sentencing.

In any event, the protections articulated in *Cruz, supra*, 44 Cal.3d 1247 are inapposite because here there was no valid plea agreement. Section 1192.5 expressly refers to a plea “accepted” by the prosecuting attorney in open court, but as we will explain, in this case the prosecutor repeatedly objected to the arrangement.

B

The People contend the arrangement constituted an indicated sentence and a plea improperly induced by the trial court’s promise of leniency.

“In an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed. No ‘bargaining’ is involved because no charges are reduced. [Citations.] In contrast to plea bargains, no prosecutorial consent is required. [Citation.]” (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516.) “In such cases, the trial court ‘may indicate to [the] defendant what its sentence will be on a given set of facts without interference from the prosecutor except for the prosecutor’s inherent right to challenge the factual predicate and to argue that the court’s intended sentence is wrong.’ [Citation.] An ‘indicated sentence’ . . . falls within the ‘boundaries of the court’s inherent sentencing powers.’” [Citation.]” (*People v. Woosley* (2010) 184 Cal.App.4th 1136, 1146.) “The sentencing court may withdraw from the ‘indicated sentence’ if the factual predicate thereof is

disproved. [Citation.]” (*People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1271.)

Again, on a superficial level, the arrangement here may look like an indicated sentence because defendant pleaded to the sheet based on the sentence indicated by the trial court, without any agreement from the prosecution. But defendant did not agree to enter the plea based on the indicated sentence of 19 years eight months in prison; instead, he entered his plea based on the trial court’s promise that he would be released and could subsequently withdraw his plea, enter a new plea and receive a lesser sentence if he appeared at the next hearing. That arrangement was not a disposition by indicated sentence.

C

Rather than a *Cruz* waiver or a disposition by indicated sentence, we conclude the arrangement was an unlawful judicial plea bargain.³

“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

³ The challenge to the validity of the plea is not forfeited by the People’s failure to appeal the judicial plea bargain or to seek review of defendant’s release on his own recognizance via extraordinary writ. Defendant raises the issue on appeal by asking to withdraw from the plea agreement if we do not find he is entitled to specific performance. While defendant did not seek to withdraw from the plea at the March 21, 2012 hearing, failure to object does not forfeit a contention “if doing so would be futile.” (*People v. Wilson* (2008) 44 Cal.4th 758, 793.) Because the trial court’s conduct of the hearing shows any such objection would have been futile, the challenge is not forfeited.

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.)

"California law is clear that there is no contract until there has been a meeting of the minds on *all* material points. [Citations.]" (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 357-358, original italics.) "Mutual intent is determinative of contract formation because there is no contract unless the parties thereto assent, and they must assent to the same thing, in the same sense. [Citation.] . . . [T]he failure to reach a meeting of the minds on all material points prevents the formation of a contract even though the parties have orally agreed upon some of the terms, or have taken some action related to the contract. [Citations.]" (*Id.* at pp. 358-359, italics omitted.) "Consent is not mutual, unless the parties all agree upon the same thing in the same sense." (Civ. Code, § 1580.) "The existence of mutual consent is determined by objective rather than subjective criteria, the test being what the outward manifestations of consent would lead a reasonable person to believe.' [Citation.] . . . If there is no evidence establishing a manifestation of assent to the 'same thing' by both parties, then there is no mutual consent to contract and no contract formation. [Citations.]" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811.)

A plea bargain does not have to resolve every aspect of a case. The most common example is where a defendant admits some charges in exchange for dismissal of other charges, while leaving sentencing to the trial court's discretion. However, every material part of the plea agreement must be agreed upon by both the defendant and the People.

Here, the promise to release defendant on his own recognizance in return for pleading to the sheet was a material part of the plea arrangement. The release was important to defendant -- he wanted to follow through with it against his attorney's

“better judgment” and he was willing to risk more than doubling his sentence and pleading no contest to three additional serious felonies to obtain it.⁴ The trial court referred to its “promise” and the “deal,” but the People did not agree to that material aspect of the arrangement and hence there was no valid plea bargain. Instead, the trial court and defendant reached an understanding for a particular disposition over the objection of the prosecution. The judicial plea bargain was beyond the trial court’s authority and usurped the executive branch’s sole authority over the charging function. (*People v. Woosley, supra*, 184 Cal.App.4th at pp. 1145-1146.)

Accordingly, we will reverse the judgment and direct the trial court to vacate the plea.

DISPOSITION

The judgment is reversed with directions to the trial court to vacate defendant’s plea.

MAURO, J.

We concur:

BLEASE, Acting P. J.

HULL, J.

⁴ Defendant pleaded no contest to four serious felonies -- attempted first degree robbery, second degree robbery, first degree burglary, and criminal threats. (§ 1192.7, subs. (c), (18), (19), (38), (39).) If he completed his obligations under the plea arrangement, the trial court said it would allow him to withdraw the plea and admit to a single serious felony, second degree robbery.