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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

RANDALL JON MORLEY,

Defendant and Appellant.

C080681

(Super. Ct. No. 12F2573,
13F7188, 15F1323)

In an earlier disposition of three separate cases, the details of which are not relevant to this appeal, the trial court imposed and suspended a sentence of six years eight months on defendant and placed him on formal probation. Later, after defendant admitted to violating the terms of his probation in exchange for a maximum sentence of six years *four* months, the trial court lifted the stay on the previously imposed and suspended sentence of six years *eight* months.

On appeal, defendant points out that the sentence imposed by the trial court exceeded by four months the maximum sentence he was promised in exchange for his admission to violating the terms of his probation. According to defendant, the

appropriate remedy is to either reinstate probation or provide him an opportunity to withdraw his probation violation admissions. The People do not dispute that the sentence given was greater than the sentence they had agreed would be the maximum in exchange for defendant's admissions. Instead they offer various reasons why the judgment should be affirmed (namely forfeiture and lack of prejudice), despite the fact that the sentence given was greater than the maximum sentence for which defendant had bargained.

On the facts presented by this case, we agree with defendant and therefore reverse and remand this matter.

I. DISCUSSION

We dispense with a detailed recitation of the underlying facts and procedural history of the case because they are not relevant to the resolution of this appeal.

Where, as here, the trial court “actually imposes sentence but suspends its *execution*, and the defendant does not challenge the sentence on appeal, but instead commences a probation period reflecting acceptance of that sentence, then the court lacks the power, at the precommitment stage [citation], to reduce the imposed sentence once it revokes probation.” (*People v. Howard* (1997) 16 Cal.4th 1081, 1084.) If the trial court orders probation revoked under these circumstances, it has three options: (1) reinstate probation on the same terms, (2) reinstate probation on modified terms, or (3) terminate probation altogether, revoke the suspension of execution of sentence, and commit the defendant to prison on the original sentence. (*People v. Medina* (2001) 89 Cal.App.4th 318, 321-323; *People v. Latham* (1988) 206 Cal.App.3d 27, 29.)

In this case, defendant admitted to violating the terms of his probation based on a promise his maximum sentence would be six years four months in prison—a term four months shorter than the sentence previously imposed and suspended. At sentencing, however, the trial court imposed the full suspended sentence of six years eight months. The parties failed to remind the court that the sentence imposed was contrary to the plea bargain. The record discloses that the defense counsel and the prosecutor who appeared

at the sentencing hearing were not the same attorneys who appeared at the probation revocation hearing. Perhaps for this reason, the prosecution incorrectly informed the trial court that defendant admitted to the probation violations in exchange for a sentencing lid of six years *eight months*. Everyone seemed completely unaware of the discrepancy.

Under these unusual circumstances, we conclude the judgment must be reversed. On remand, the trial court must permit defendant to withdraw his probation violation admissions if he chooses to do so. (See *People v. Kaanehe* (1977) 19 Cal.3d 1, 13-14, & fn. 9 [when trial court imposes a greater sentence than that called for in a plea agreement, the preferred remedy is to permit defendant to withdraw his plea and to restore the proceedings to the original status quo]; *People v. Calloway* (1981) 29 Cal.3d 666, 668, 670 [judgment must be reversed with directions to permit defendant to withdraw probation violation admission where sentence imposed was greater than agreed upon in plea bargain].) If defendant chooses to withdraw his plea, the trial court must hold a hearing on the allegations or otherwise allow the parties to resolve the allegations through the proper process. If defendant elects not to withdraw his admissions, or the court again finds that defendant has violated conditions of his probation, the trial court must either reinstate probation, with or without modification, or execute the previously imposed sentence of six years eight months.

Because of the unusual circumstances we have already described, which have resulted in a violation of defendant's due process right to receive the benefit of his plea bargain,¹ we exercise our discretion to review his claim on appeal despite the lack of objection below. (Pen. Code, § 1259 [an "appellate court may, without exception having

¹ Due process requires that both defendant and the prosecution abide by the terms of the plea agreement and that the punishment imposed not significantly exceed that which the parties agreed upon. (*People v. Villalobos* (2012) 54 Cal.4th 177, 182.)

been taken in the trial court, review any question of law involved in any ruling . . . which affected the substantial rights of the defendant”]; *People v. Denard* (2015) 242 Cal.App.4th 1012, 1020 [“an appellate court may exercise its discretion to review a claim affecting the substantial rights of the defendant despite forfeiture for failure to raise the issue below”], citing *In re Sheena K.* (2007) 40 Cal.4th 875, 887, fn. 7; *People v. Sanchez* (2014) 228 Cal.App.4th 1517, 1525.)

The People argue defendant should not be permitted to withdraw his probation violation admissions because he cannot show prejudice since the trial court *could* have found true any of the nine allegations asserting he had violated his probation. We are not persuaded by this argument, which is based on a hypothetical scenario that did not occur.

II. DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to permit defendant to withdraw his admissions if he chooses to do so and, if necessary, to hold a hearing on the allegations or otherwise allow the parties to resolve the allegations through the proper process. If defendant elects not to withdraw his admissions, or the court again finds that defendant has violated his conditions of probation, the trial court shall either reinstate probation, with or without modification, or execute the previously imposed sentence of six years eight months.

/S/

RENNER, J.

We concur:

/S/

NICHOLSON, Acting P. J.

/S/

DUARTE, J.