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

THE PEOPLE,

Plaintiff and Respondent,

v.

GABRIEL MARTINEZ GALLEGOS,

Defendant and Appellant.

C080969

(Super. Ct. No. CRF15000076)

Defendant Gabriel Martinez Gallegos entered a negotiated plea of no contest to residential burglary (Pen. Code, § 459)¹ and making a criminal threat (§ 422). The trial court sentenced him to serve two years in prison. On appeal, defendant contends the sentence imposed by the trial court violates the terms of his plea agreement and due process. We conclude defendant has forfeited his right to challenge his

¹ Undesignated statutory references are to the Penal Code.

sentence. Even if not forfeited, we reject defendant's contentions on the merits. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In February 2015, defendant entered an inhabited apartment where his wife and children were staying.² He was told to leave, but before doing so, he said he would return and "kill them all." When defendant returned, he entered the apartment and "started attacking the homeowner in his bed." According to the probation report, three people were inside the residence when defendant entered: defendant's wife, Autumn N., Frances M., and Baldemar G. The probation report states defendant punched Baldemar multiple times in the face and head. It further states defendant was eventually restrained until police officers arrived and arrested him. At the time defendant entered his wife's residence, he was subject to a domestic violence restraining order.

Defendant was charged by felony complaint with first degree residential burglary (§ 459) (count 1), making a criminal threat (§ 422) (count 2), battery (§ 242) (count 3), violation of a court order--domestic violence protective order (§ 273.6, subd. (a); Fam. Code, § 6218) (count 4), and trespassing (§ 602.5, subd. (a)) (count 5). For enhancement purposes, it was alleged another person was present in the residence at the time defendant committed the residential burglary (§ 667.5, subd. (c)(21)). On the same day as the complaint was filed, a criminal protective order was issued that prohibited defendant from coming within 1,000 yards of his wife, Autumn, Frances, and Baldemar.

² At the change of plea hearing, defendant stipulated the facts recited by the prosecutor supplied the factual basis for his no contest pleas. Unless otherwise specified, the facts above are taken from the prosecutor's brief description of the acts underlying the offenses to which defendant pleaded no contest.

Pursuant to a negotiated disposition, defendant pleaded no contest to counts 1 and 2, and admitted the enhancement allegation. In exchange for the no contest pleas and admission, the parties agreed defendant would be sentenced to serve not less than two years but not more than six years, and counts 3, 4, and 5 would be dismissed. The parties also agreed as follows: “[Defendant] will plead no contest to counts one and two. He will be given an O.R. release and sentencing will be put off for 6 months. If [defendant] has no negative contacts with law enforcement, the victims, and/or this court, he will be allowed to withdraw his plea to [the burglary offense] at sentencing and be granted probation on the [criminal threat offense]. If he does have negative contact, he will be sentenced on the [burglary offense] as an open plea.” At the change of plea hearing, the prosecutor noted defendant agreed to take anger management classes prior to sentencing.

On the initial date set for sentencing, defendant appeared and requested a continuance to provide written proof he completed anger management classes. The trial court granted the continuance, but remanded defendant into custody after the prosecutor stated defendant had violated the criminal protective order. The prosecutor explained defendant’s wife had called the police and reported she had seen defendant drive by her residence numerous times. The wife also reported to an investigator that defendant had texted her son in violation of a family law court order. The trial court directed the prosecutor to submit the police report to the probation department, and referred the matter to probation for a report on judgment and sentencing.

Prior to sentencing, the probation officer submitted a report recommending defendant be sentenced to serve the low term of two years on the burglary offense and a consecutive eight months on the criminal threat offense. In support of this recommendation the report stated, following his no contest pleas, defendant failed to

comply with the criminal protective order. The report explained defendant admitted to driving by his wife's residence on several occasions. It noted defendant had driven by the residence and honked his horn, and Frances relocated out of fear of defendant. The report also noted defendant's wife reported she was "tired of living in fear" of "an abusive man." Defendant, for his part, told the probation officer he never stopped or attempted to look in the direction of his wife's residence when he was driving by. He also claimed he needed to drive by the residence to get to his cousin's house.

At the outset of the sentencing hearing, the trial court indicated it had reviewed the probation officer's report. The trial court then asked whether there was any legal cause why judgment should not be pronounced. In response, defense counsel stated he wanted to clarify one thing from the probation officer's report; namely, the plea bargain provided for dismissal of the criminal threat offense and sentencing on the burglary offense if defendant failed to comply with the terms and conditions of his own recognizance release.³ The trial court asked the prosecutor whether this was the "resolution." The prosecutor responded in the affirmative and asked the court to dismiss the criminal threat offense. After the court granted the prosecutor's request, defense counsel stated, "[W]ith the information in the probation report, we are prepared to submit for the recommendation of the low term of two years on the [burglary offense]." The prosecutor agreed, and the trial court sentenced defendant to serve two years in prison. Defendant did not object to the sentence imposed by the trial court. Nor did he move to withdraw his no contest pleas.

Defendant filed a timely notice of appeal.

³ It is evident defense counsel raised this issue in response to the probation officer's recommendation that defendant be sentenced on both the burglary offense and the criminal threat offense.

DISCUSSION

Defendant contends the sentence imposed by the trial court violates the terms of his plea agreement and due process. According to defendant, he was entitled to have the burglary count dismissed and to be granted probation on the criminal threat offense because there was insufficient evidence to establish he had any negative contacts within the meaning of the plea agreement. Defendant asserts the appropriate remedy is to vacate his sentence and remand the matter for the trial court to either sentence him in accordance with the plea agreement (i.e., specific performance) or reject the plea and allow him to withdraw it. We disagree.

“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.)

“ ‘While no bargain or agreement can divest the court of the sentencing discretion it inherently possesses [citation], 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 . . . unless, of course, the parties agree.” [Citation.]’ [Citation.]” (*People v. Tang* (1997) 54 Cal.App.4th 669, 680.)

The type of arrangement entered into by the parties in this case is referred to as a “*Vargas* waiver,” based on the approval of a similar agreement in *People v. Vargas* (1990) 223 Cal.App.3d 1107 (*Vargas*). In *Vargas*, the defendant was released on bail following a guilty plea. As part of a plea bargain, he agreed to a two-tiered sentence--a specified greater term if he failed to appear for sentencing and a specified lower term if he did appear as directed by the court. (*Id.* at pp. 1108-1109.) The defendant failed to appear. When he was later apprehended and brought before the court, his attorney moved to withdraw the plea. The court denied the motion and sentenced the defendant to serve the greater term as provided in the plea bargain. (*Id.* at p. 1111.) On appeal, the defendant argued the sentence imposed was illegal for failure to comply with section 1192.5. Although section 1192.5 allows a trial court to withdraw its approval of a plea agreement in light of new information in order to impose a more severe sentence, the trial court must first give the defendant an opportunity to withdraw his or her plea if he or she so desires. (*Vargas*, at p. 1111.) Since the parties had agreed to the two-tiered sentence, however, the appellate court concluded the trial court had properly imposed the greater term. The court explained the trial court had simply implemented the reasonable expectations of the parties when it imposed the greater term without repudiating the plea agreement and without imposing “a sentence more onerous than that which defendant had agreed to accept as part of the bargain itself.” (*Id.* at p. 1113.)

As an initial matter, we agree with the People defendant has forfeited his right to challenge the sentence imposed by the trial court. Defendant contends the trial court erred by imposing a sentence that violated the terms of his plea agreement and due process. However, because defendant did not object below, he cannot raise this issue for the first time on appeal. (*People v. Scott* (1994) 9 Cal.4th 331, 353.) But even if defendant had not forfeited this argument, we conclude it fails on the merits.

The question of whether defendant had negative contacts within the meaning of the plea agreement is a factual question reviewed under the substantial evidence test. (See *People v. Rabanales* (2008) 168 Cal.App.4th 494, 509 (*Rabanales*)). The issue is whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, that will support the determination. (*Ibid.*) “ ‘We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact.’ ” (*Ibid.*)

We reject defendant’s contention there is insufficient evidence to support the sentence imposed by the trial court. The record makes clear the plea bargain contemplated a finding by the trial court on the issue of whether defendant had any negative contact with law enforcement, the victims, and/or the trial court. As part of the plea agreement, defendant agreed the trial court could impose one of two specified sentencing choices: (1) if defendant had no postplea negative contacts with law enforcement, the victims, or the trial court, the trial court was required to allow him to withdraw his plea to the burglary offense and to be granted probation on the criminal threat offense; or (2) if defendant had negative postplea contacts, the trial court was required to sentence him on the burglary offense as an open plea. The trial court was limited by the plea agreement to resolve any disputed factual contentions regarding whether defendant had engaged in any negative contacts. At sentencing,

defense counsel conceded there was sufficient evidence to support a finding of negative contacts. Defense counsel stated, “[W]ith the information in the probation report, we are prepared to submit for the recommendation of the low term of two years on the [burglary offense].” Under these circumstances, defendant is foreclosed from challenging the sentence imposed by the trial court. (See *People v. Pijal* (1973) 33 Cal.App.3d 682, 697 [it is well established the defendant is bound by the admission of his or her counsel and cannot mislead the court and jury by seeming to take a position on issues and then disputing or repudiating the same on appeal].) In any event, the record discloses a reasonable trier of fact could conclude, based on the preponderance of the evidence, defendant had negative contacts with the victims. (See *Rabanales, supra*, 168 Cal.App.4th at p. 509 [finding it appropriate for the trial court to apply the preponderance of the evidence standard].) It is undisputed defendant drove by his wife’s residence on several occasions in violation of a criminal protective order.

We are unpersuaded by defendant’s contention his conduct did not amount to negative contacts within the meaning of the plea agreement. In view of the information contained in the probation report, the trial court did not err in determining defendant had negative contacts with the victims after entering his no contest pleas. Having found defendant had negative contacts with the victims, the trial court was bound to sentence defendant in accordance with the expectation of the parties as expressed in the plea agreement. Because the trial court did so, we conclude there was no sentencing error. The record demonstrates defendant had adequate notice and ample opportunity to prepare

and mount a defense to the allegation he had negative contacts with the victims. As a result, there was no violation of due process.⁴

DISPOSITION

The judgment is affirmed.

/s/
HOCH, J.

We concur:

/s/
DUARTE, Acting P. J.

/s/
RENNER, J.

⁴ Defendant mentions he was not advised of his right to withdraw his no contest pleas under section 1192.5 if the trial court subsequently disapproved of the plea agreement. However, because the trial court acted in accordance with the terms of the agreement (i.e., did not change the bargain), the provisions of section 1192.5 that permit a defendant to withdraw his or her plea if the court withdraws approval of the agreement were not implicated. (See *People v. Masloski* (2001) 25 Cal.4th 1212, 1223-1224; *Vargas, supra*, 223 Cal.App.3d at p. 1113.)