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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ADRIAN ARROYO,

Defendant and Appellant.

D060355

(Super. Ct. No. SCD229047)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

An information charged Adrian Arroyo with two counts of robbery (Pen. Code,¹ § 211), one count of attempted robbery (§§ 664/211), and alleged as to each count that the offense had been committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)). On March 14, 2011, Arroyo pled

¹ All statutory references are to the Penal Code unless otherwise indicated.

guilty to all charges and allegations, in exchange for an indicated prison sentence with a nine-year lid.

On April 26, 2011, Arroyo sent the trial court a letter requesting that different counsel be appointed and that he be allowed to withdraw his plea. After a *Marsden* hearing,² counsel was replaced. Arroyo's new counsel filed a motion to withdraw Arroyo's guilty plea under section 1018, which was denied. Arroyo was sentenced to prison for six years eight months.

On appeal, Arroyo challenges the trial court's denial of his motion to withdraw his guilty plea.³ Arroyo contends that at the time he entered into the plea he was operating under a mistake of fact; specifically, that he was pleading guilty to a single strike, not three strikes. We determine the trial court did not abuse its discretion in denying Arroyo's motion to withdraw his plea. Accordingly, we affirm the judgment.

FACTS⁴

Appellant, represented by Liesbeth Vandenbosch of the San Diego County Alternate Public Defender's Office, entered a guilty plea to two counts of robbery, one

² *People v. Marsden* (1970) 2 Cal.3d 118.

³ The appeal is properly before us as Arroyo obtained a certificate of probable cause. (*People v. Aguilar* (2003) 112 Cal.App.4th 111, 114.)

⁴ We limit our discussion of the facts to those relevant to Arroyo's sole appellate claim, namely, whether the trial court erred in denying his motion to withdraw his guilty plea.

count of attempted robbery and admitted that each offense was committed for the benefit of a criminal street gang. Before accepting the plea, the trial court questioned Arroyo and determine there was no reason the plea could not be taken and that Arroyo had adequate time to, and did, consult with his attorney about the plea and the change of plea form he had initialed. The court advised Arroyo that by pleading guilty he was waiving various enumerated constitutional rights, and faced certain maximum penalties. The court also advised Arroyo about the consequences of his plea, including that what he was pleading to was a strike offense and that he would face increased penalties for any future felony.

After entry of the plea, but before sentencing, Arroyo wrote to the trial court and asked to have Attorney Vandebosch relieved and to withdraw his guilty plea. After a *Marsden* hearing,⁵ Vandebosch was relieved, and Attorney Charles Guthrie was appointed to represent Arroyo.

Attorney Guthrie filed a written motion to withdraw Arroyo's guilty plea, asserting three bases for withdrawal: Arroyo was not told by his attorney or the court that if he were convicted of any future felony he would go to jail for twenty-five (25) years to life; Arroyo did not understand that he was pleading guilty to three (3) strikes and was confused because he thought concurrent meant he was pleading to one (1) strike; and, on the day of the plea and for the prior month, Arroyo had not taken medications for his attention deficit, bipolar and depression disorders, which may have affected his ability to

⁵ See footnote 2, *ante*.

understand the plea proceedings. The motion was supported by a declaration from Arroyo.

On August 11, 2011, the court held an evidentiary hearing on Arroyo's motion. The court judicially noticed Arroyo's change of plea form and the transcript from the change of plea proceedings, and then took live testimony from Arroyo, his wife, a psychologist hired by the defense and Attorney Vandembosch.

Arroyo testified that when he and his attorney discussed the change of plea agreement, which he thought came "from the court," his understanding was that he would plead guilty to two robberies and an attempted robbery and get "a nine-year lid with one strike." According to Arroyo, Attorney Vandembosch "said I was only getting one strike." Elaborating on that discussion, Arroyo said his attorney told him "[t]hat all three robberies were going to be concurrent and I was only going to get one strike for the — all three of the robberies." Arroyo thought concurrent meant "[e]verything together." While Arroyo recalled that his attorney reviewed the change of plea form with him, he did not recall any writing on that form indicating he would be receiving more than one strike. He also recalled that when he was questioned by the judge about his guilty plea he understood that he was pleading guilty to one strike, "because I heard I was only getting a California strike." The first time Arroyo found out that he had "signed for three strikes" was when he "got the [new] case."

Arroyo's wife, Serina, testified she was in the courtroom hallway on March 14, 2011, when the change of plea was discussed. She recalled Ms. Vandembosch say "the

nine-year lid was one strike, and three counts of robbery." She recalled nothing else about that conversation.

Appellant called Raymond G. Murphy, a clinical psychologist, to provide expert testimony. Based on the results of a cognitive intelligence test given to Arroyo, Murphy opined that defendant has an I.Q. of 72, which places him two standards below the mean. According to Murphy, Arroyo is in the borderline range of mental retardation and would have more difficulty than the average person in understanding the terms of a contract, such as a change of plea. The expert testified that it was possible for someone who had a motive not to do well on the cognitive test to manipulate the results. He also opined it was unlikely that an individual with an I.Q. of 72 could understand criminal procedure and file motions or otherwise represent himself in court.

Attorney Vandebosch was the final witness to testify in the evidentiary hearing. She testified she had 22 years of experience and was employed by the alternate public defender's office. On March 14, 2011, Vandebosch, the prosecutor and the court participated in a chambers conference concerning the various plea negotiations in Arroyo's case. After the conference, Vandebosch advised Arroyo about the pending offers. According to Vandebosch:

"Well we specifically discussed what the offer, the current offer from the district attorney was, which was essentially pleading to two strikes for a stipulated nine-year prison term, and what the indication from the court was if Mr. Arroyo would elect to just plead to the sheet, which did in fact include three strikes, because there was count three which was an attempted robbery, and so we discussed both scenarios, both the offer from the district attorney as well as what the court was proposing and what his alternative was, if he wanted to resolve the case but not accept the district attorney's offer."

Arroyo appeared to understand the differences between the two offers.

Following her usual practice, Vandebosch then reviewed the change of plea form with Arroyo. She testified that she would have read over the entire change of plea form; asked if Arroyo had any questions, responded to them; and, once Arroyo was prepared to go forward with the plea, she would have had him initial the appropriate boxes and sign the form. Vandebosch specifically recalled discussing paragraph 7(c) of the form (defendant's understanding his conviction in the case will be a serious/violent felony [strike] resulting in substantially increased penalties in any future felony case) with her client. Arroyo indicated to Vandebosch that he understood the paragraph, and initialed the box next to it on the change of plea form. At no time did Arroyo indicate that he was confused.

During the court proceedings in which Arroyo's plea was taken, Vandebosch put a statement on the record about the two different plea offers. She explained her reason for doing so:

"What I was wanting to put on the record at that time was that the offer from the district attorney included two strikes, so to clarify for the record that even though he was pleading to three strikes by pleading to the sheet, in fact, the offer from the district attorney, the best offer from the district attorney, had included two strikes."

Vandebosch felt it was important to put that statement on the record to clarify that she wasn't allowing a client to plead guilty to three strikes when there could have been a possibility of him resolving the case for one strike. Vandebosch never

indicated to Arroyo that pleading to the sheet would allow him to plead to only one strike.

According to Attorney Vandebosch, there was never any mention of concurrent sentences on the change of plea form or in court:

"No, not of concurrent sentences. The big difference between the offer from the district attorney's office was a stipulated nine-year term. So as I explained to Mr. Arroyo, that was nine years, no if's, and's or but's, and he would be serving 85 percent of that time.

"The offer from the court was a nine-year lid, and that was really the attractiveness of that offer, was that we could present mitigating documents, documents in support of less time in prison, and that was the whole discussion around the court's offer, that it gave Mr. Arroyo the opportunity of actually serving ultimately, if we put a sentencing statement together, the possibility of serving less than nine years."

Arroyo never indicated to Attorney Vandebosch that he was in an impaired mental state or needed medication in order to be of sound judgment on the day of the plea change. Moreover, Arroyo never indicated anything to the court during the change of plea proceedings that concerned Vandebosch about her client's state of mind.

At the end of the evidentiary hearing the court denied Arroyo's motion to withdraw his guilty plea, ruling:

"I am going to deny the motion. I believe that there has not been clear and convincing evidence that Mr. Arroyo has shown that there is good cause in which to allow him to withdraw his plea based on mistake or ignorance. I believe that the evidence that has been presented, including the change of plea form, as well as the transcript from the hearing, testimony from Ms. Vandebosch, as well as the testimony of Mr. Arroyo indicates to me that he has a basic understanding of the . . . process, an understanding that is adequate for him to understand what he was pleading to as well as the

consequences of his actions, and the waiver of his rights at the time he pled."

Arroyo appeals the ruling and the resulting judgment.

DISCUSSION

On appeal, Arroyo argues the trial court's ruling denying the motion to withdraw his guilty plea should be reversed because clear and convincing evidence established he was confused as to the terms of the plea and that he was "'operating under [a] mistake'" when it was entered. As support for his argument, Arroyo points to the defense psychologist's testimony as to his low I.Q., his own testimony regarding his confusion regarding the number of strikes to which he was agreeing, and the record of the entry of the plea which, he contends, consistently uses the singular, rather than the plural, when characterizing the strike convictions.

Under section 1018, a defendant who seeks to withdraw his plea of guilt may do so before a judgment is entered upon a showing of good cause. (§ 1018; *People v. Sandoval* (2006) 140 Cal.App.4th 111, 123; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254 (*Fairbank*).) Mistake, ignorance or inadvertence, or any other factor overreaching defendant's free and clear judgment may constitute good cause if established by clear and convincing evidence. (*Fairbank*, at p. 1254; *People v. Cruz* (1974) 12 Cal.3d 562, 566; *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1207-1208; *People v. Weaver* (2004) 118 Cal.App.4th 131, 145 (*Weaver*).) A plea may not be withdrawn simply because the defendant has changed his mind. (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1457.)

Instead, a defendant must demonstrate that the ends of justice would be subserved by permitting a change of plea to not guilty. (*Weaver*, at p. 145.)

When a defendant is represented by counsel, the grant or denial of a motion to withdraw a guilty plea is purely within the discretion of the trial court and, on appeal, the ruling will be upheld unless appellant establishes a clear abuse of that discretion. (*In re Brown* (1973) 9 Cal.3d 679, 685; *People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416; *People v. Shaw* (1998) 64 Cal.App.4th 492, 496.) In our appellate review, we accept the trial court's factual findings which are supported by substantial evidence. (*Fairbank, supra*, 16 Cal.4th at p. 1254; *People v. Quesada* (1991) 230 Cal.App.3d 525, 533 (*Quesada*)). Here, substantial evidence supports the court's factual determination that Arroyo was not operating under a mistake of fact when he entered his guilty plea, and we discern no abuse of discretion in the trial court's ruling denying his motion to withdraw that plea.

We first address Arroyo's claim that the defense psychologist's testimony regarding his low I.Q. provides clear and convincing evidence he did not understand the change of plea proceedings and therefore was operating under a mistake of fact when the plea was entered. We are not convinced. Dr. Murphy did *not* testify that with an I.Q. of 72 Arroyo could not understand the terms of his plea, only that he would have more difficulty doing so than the average person. The expert also conceded it was possible for someone to manipulate the results of the cognitive test upon which appellant's I.Q. determination was made. Finally, the psychologist's opinion was undermined by evidence that for two months Arroyo represented himself in court and received "straight

A's" in classes taken in juvenile hall — something the psychologist testified would be unlikely if an individual had an I.Q. of 72.

The trial court's factual finding that Arroyo had a basic understanding of the process — one that was adequate for him to understand his plea — is supported by substantial evidence. Before accepting the plea the court inquired as to whether there was any reason why it should not accept Arroyo's plea, and determined there was not. After adequate consultation with Attorney Vandebosch, Arroyo initialed and signed the change of plea form stating that his judgment was not impaired, and that he had read, understood and initialed each item in the form and attached addendum. Attorney Vandebosch testified that nothing she observed in the change of plea proceeding caused her concern about her client's state of mind. Finally, in the change of plea proceedings the trial court itself had the opportunity to observe defendant's conduct and demeanor. In so doing, it was able to independently assess Arroyo's understanding of the process. We therefore determine substantial evidence supports the trial court's finding that Arroyo had a basic understanding of the process, one that was adequate to understand the terms of his plea. (*Fairbank, supra*, 16 Cal.4th at p. 1254; *Quesada, supra*, 230 Cal.App.3d at p. 533.)

We next focus our attention on Arroyo's appellate assertion that the trial court's ruling denying defendant's motion to withdraw his guilty plea should be reversed because Arroyo's testimony established he was confused as to the number of strikes to which he was agreeing by pleading guilty. Arroyo does not cite the specific testimony upon which he relies. We presume he bases his argument on two testimony passages: (1) he

understood he would plead guilty to two robberies and an attempted robbery, and get a nine-year lid with one strike, based upon statements made to him by his former attorney ("that all three robberies were going to be concurrent and I was only going to get one strike for the . . . all three of the robberies"); and (2) when questioned by the trial judge about the change of plea, he understood that he was pleading guilty to one strike "[b]ecause I heard I was only getting a California strike." We are not convinced.

In determining the facts on a motion to withdraw a guilty plea, a trial court is not bound by the uncontradicted statements of a defendant. (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103 [in determining the facts on a motion to withdraw a plea of guilt, the trial court is not bound by the uncontradicted statements of defendant]; *People v. Brotherton* (1966) 239 Cal.App.2d 195, 201, citing *People v. Parker* (1961) 196 Cal.App.2d 704, 708 [trial court was justified in not giving credence to defendant's affidavit that he was confused and hesitantly entered a plea of guilty].) The trial court could have disbelieved Arroyo, based upon his former attorney's testimony she never indicated to Arroyo that pleading to the sheet would allow him to plead to only one strike and did not mention concurrent sentences. Similarly, the trial court had before it the transcript of the change of plea proceeding and could verify that it did not tell Arroyo that he "was *only* getting *a* California strike."

Apparently according little to no credence to Arroyo's testimony, the trial court found that Arroyo understood "what he was pleading to." Substantial evidence supports that finding. Attorney Vandebosch testified she discussed two plea offers with Arroyo, neither of which entailed pleading guilty to only one strike offense. Arroyo was present

in court when Vandebosch placed a statement on the record that, although her client was pleading guilty to three strikes, the best offer from the district attorney had been a plea of guilty to two strikes. Neither then, nor later during the change of plea proceedings, did Arroyo ever state that he understood he was only pleading guilty to one strike.

Finally we turn to Arroyo's claim that given that the record of the entry of pleas consistently utilizes the singular, rather than the plural, when characterizing the convictions, there is clear and convincing evidence Arroyo was operating under a mistake of fact when he entered his guilty plea. The primary focus of Arroyo's argument appears to be the language used in paragraph 7c of the change of plea form: "7c. I understand that my conviction in this case will be *a serious/violent felony ('strike')* resulting in mandatory denial of probation and substantially increased penalties in any future felony case." (Italics added.) Arroyo's argument is singularly unconvincing.

Before the change of plea form was prepared, Attorney Vandebosch discussed the two available plea scenarios with Arroyo: (1) a negotiated plea with the district attorney, pleading guilty to two strikes in exchange for a stipulated nine-year prison term; or (2) an indicated prison sentence from the court with a nine-year lid, in exchange for a plea to the sheet — *which included three strikes because of the attempted robbery count*. As Vandebosch stated: "[W]e discussed both scenarios, both the offer from the district attorney as well as what the court was proposing and what [Arroyo's] alternative was, if he wanted to resolve the case but not accept the district attorney's offer." And, as she later explained, "[t]he offer from the court was

a nine-year lid, and that was really the attractiveness of that offer . . . , it gave Mr. Arroyo . . . the possibility of serving less than nine years." Arroyo appeared to understand the differences between the two plea alternatives.

The change of plea form was consistent with Arroyo's selection of the court's indicated offer. In paragraph 1 of the form Arroyo stated he was pleading to all three counts in the information. In paragraph 2, he stated he had not been induced to enter his plea by any promise or representation of any kind, except: "no agreement w/District Attorney, court gives nine (9) year lid." Attorney Vandebosch went through the entire change of plea form with Arroyo, including paragraphs 1, 2 and 7c. Arroyo had no questions about paragraph 7c. From this evidence the court reasonably could conclude Arroyo was not confused by the language of paragraph 7c, but understood that he was accepting the court's indicated offer of pleading guilty to the sheet, which included three strikes, in exchange for the potential to serve less than nine years in prison.⁶

Before concluding, we address Arroyo's contention that the court misadvised him as to the consequences of his plea by asking whether he understood that what he was pleading to was *a* strike under California law. Arroyo argues that under *In re Moser* (1993) 6 Cal.4th 342, 344 (*Moser*), he "can validly complain that he was

⁶ For similar reasons we conclude that Arroyo was not misled by the court's question as to whether Arroyo understood that *what* he was pleading to — robbery *and attempted robbery* — constituted a California strike.

incorrectly advised of the consequences of the plea whether those consequences are viewed as direct or collateral."

The argument is forfeited as it was not raised until the reply brief. (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1005 [we do not consider an argument raised for the first time in a reply brief where the appellant makes no attempt to show good cause for failing to raise the issues earlier].)⁷

Even if we were to consider the argument we would reject it. First, a defendant need only be informed of the direct, not the indirect or collateral, consequences of a plea. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) A defendant need not be advised of the possible future use of a conviction in the event he commits a later crime. (*People v. Aguirre* (2011) 199 Cal.App.4th 525, 528; *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1457; *People v. Crosby* (1992) 3 Cal.App.4th 1352, 1355.) *Moser, supra*, 6 Cal.4th 342, cited by Arroyo, does not provide to the contrary. (*Id.* at p. 347 [mandatory term of parole at issue was a *direct* consequence of a conviction].) Second, were we to find error, which we do not, the claim still fails. A defendant is entitled to relief based upon a trial court's misadvisement *only* if he establishes that he was prejudiced by the misadvisement — i.e., that he would not have entered into the plea of guilty had the

⁷ At trial Arroyo specifically disavowed making a claim that he was not adequately informed of the consequences of his plea such that the plea was not knowing, intelligent or voluntary. (*People v. Smith* (2003) 110 Cal.App.4th 492, 500.)

court given a proper advisement. (*Moser*, at p. 352.) Arroyo has not demonstrated any prejudice from the court's purported misadvisement.

In conclusion, defendant has not demonstrated by clear and convincing evidence that he was operating under a mistake of fact, ignorance or any other factor overcoming the exercise of his free judgment when he entered his plea. After evaluating the totality of the circumstances, the trial court acted well within its discretion in denying Arroyo's motion to withdraw his guilty plea. Accordingly, we affirm the judgment.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.