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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KRISTEN N. RUST,

Defendant and Appellant.

D064264

(Super. Ct. Nos. SCN315611,
SCN312994, CN313941, SCN310754)

APPEAL from a judgment of the Superior Court of San Diego County,

Aaron H. Katz, Judge. Reversed with directions.

Gary V. Crooks, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

Kristen N. Rust pleaded guilty to shoplifting with the terms of her plea bargain providing that she would be continued on Proposition 36 probation with respect to two

prior drug cases. Rust contends, and the Attorney General concedes, the trial court erred when it failed to reinstate Proposition 36 probation as it agreed to do when it accepted her plea bargain. We reverse and remand the matter with directions to sentence Rust according to the terms of her plea bargain.

FACTUAL AND PROCEDURAL BACKGROUND

Rust was on Proposition 36 probation in two drug cases (SCN312994, CN313941, the prior drug cases) when she was arrested for shoplifting (SCN315611, the instant offense). At that time, she also was on probation after pleading guilty to an earlier shoplifting offense (SCN310754). She later pleaded guilty to the instant offense. The terms of her plea bargain provided, among other things, that she would be continued on Proposition 36 probation with respect to her two prior drug cases and continued on probation for her prior shoplifting offense.

At sentencing, the trial court granted probation on the instant offense, with Rust to be released to a drug abuse program. Instead of continuing Rust's Proposition 36 probation on the prior drug cases, the court imposed formal probation, concurrent with the instant offense, with jail terms suspended pending her successful completion of the drug abuse program. For the prior shoplifting offense, Rust received probation concurrent to the instant offense. Rust appealed and obtained a certificate of probable cause.

DISCUSSION

Proposition 36 sets forth a statutory scheme diverting defendants who are convicted of nonviolent drug possession offenses from incarceration by granting them

probation, but with the condition of completing a drug treatment program. (Pen. Code, § 1210 *et seq.*; *In re DeLong* (2001) 93 Cal.App.4th 562, 566.) Rust contends the trial court erred in imposing formal probation on the two prior drug cases instead of Proposition 36 diversion. The Attorney General concedes the trial court erred when it failed to reinstate Proposition 36 probation as it agreed to do when it accepted her plea bargain. Nonetheless, the Attorney General argues the appeal should be dismissed as moot because Rust has since violated the terms of her probation and will need to be resentenced. Alternatively, the Attorney General asserts the matter should be remanded with directions to sentence Rust according to the terms of her plea bargain or allow her the opportunity to withdraw her plea. Rust agrees with the concession of error, but claims her argument is not moot as her probation has not been revoked. We accept the Attorney General's concession of error because Rust's current conviction for a nondrug-related offense did not render her ineligible for Proposition 36 diversion. (Pen. Code, § 1210.1, subd. (b); *People v. Superior Court (Edwards)* (2007) 146 Cal.App.4th 518, 521-522.) We also conclude the error is not moot.

""[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." [Citation.] [¶] The Supreme Court has thus recognized that due process applies not only to the procedure of accepting the plea [citation], but that the requirements of due process attach also to implementation of the bargain itself. It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy.' [Citations.]" (*People v. Walker* (1991) 54 Cal.3d

1013, 1024.) "The usual remedies for violation of a plea bargain are to allow defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain." (*People v. Mancheno* (1982) 32 Cal.3d 855, 860-861.)

Here, Rust has not indicated a desire to either withdraw her plea or go to trial; accordingly, the appropriate remedy is specific enforcement of the plea bargain. Turning to the issue of mootness, we grant respondent's request for judicial notice of documents showing arrest warrants were issued and that Rust was arrested and placed in custody. These documents, however, do not show the court exercised its discretion to summarily revoke Rust's probation. (Pen. Code, § 1203.2, subd. (a).) Because there is no evidence that Rust's probation has been revoked, we conclude this appeal is not moot.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court with directions to sentence Rust according to the terms of her plea bargain.

MCINTYRE, J.

WE CONCUR:

HALLER, Acting P. J.

O'ROURKE, J.