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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VANDEZ LAMONT SMITH,

Defendant and Appellant.

D068872

(Super. Ct. No. SCD263028)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill and Michael S. Groch, Judges. Affirmed.

Devin Burstein, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Collette C. Cavalier and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

Vandez Lamont Smith entered a negotiated guilty plea to two counts of burglary (Pen. Code, § 459).¹ The court sentenced him to a stipulated term of three years and eight months in jail: the upper term of three years on count 1 and a consecutive term of eight months (one-third the middle term) on count 2. Smith appeals, contending he was deprived of his constitutional right to assistance of counsel when his trial counsel declined his request to file a motion to withdraw his guilty plea. We affirm.

II

BACKGROUND

A

Entry of Guilty Plea

In 2015, the district attorney charged Smith with three counts of burglary (§ 459), two counts of petty theft (§ 484), and one count of tampering with a vehicle. (Veh. Code, § 10852.) Smith pleaded guilty to two counts of burglary and received a negotiated sentence of three years and eight months in jail.

As the factual basis for his guilty plea, Smith stated under penalty of perjury on his change of plea form he unlawfully entered two vehicles with the intent to commit a theft. He further stated his only inducement for entering a guilty plea was the district attorney's agreement to the stipulated sentence and to refrain from amending the complaint to

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

include prior prison commitment conviction allegations (§ 667.5, subd. (b)). He also indicated, through his initials on the form, he had read and understood all of the conditions and consequences of his guilty plea and he was voluntarily giving up his constitutional rights, including the right to a jury trial and the right to confront the witnesses against him.

At his change of plea hearing, the court asked Smith a series of questions to determine whether he was knowingly and voluntarily entering his guilty plea. Of relevance to this appeal, the court asked him if he could think of any reason why the court should not accept his guilty plea, and he replied, "No." The court asked him if he had gone over the guilty plea form with his attorney, and he replied, "Yes." The court asked him if he had any questions for the court, and he replied, "No." He confirmed the factual basis for his guilty plea was his commission of two counts of burglary. He also confirmed he understood the consequences of his guilty plea, his waiver of his constitutional rights, and the plea bargain. He stated he did not have any questions about the waiver of his constitutional rights or the plea bargain, and no one had induced him to plead guilty by a promise or threat. Smith then pleaded guilty to two counts of burglary and the court accepted his guilty plea.

B

Marsden Hearing

The day of his sentencing, Smith told his counsel he did not want to go forward with sentencing and instead wished to go to trial. Defense counsel requested the court

hold a closed hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 to determine whether there was a basis for him to withdraw his guilty plea.²

During the *Marsden* hearing, Smith stated he was innocent of the charges against him. He explained he had felt pressured by defense counsel to accept the plea bargain because she told him his sentence would increase if he did not accept it. He stated she originally told him he would receive a short sentence. He also stated he did not know what he was doing when he signed the guilty plea form. He signed it because she told him to sign it and where to put his initials.³

When asked to respond to Smith's remarks, defense counsel stated when she first met with him, she was unaware of the full extent of his criminal history and believed it was likely he would receive a probation offer and 365 days. It was not until later she became aware the district attorney was contemplating filing an amended complaint alleging Smith's multiple prior prison commitment convictions. She negotiated down an offer of four years and six months to a "today-only" deal of three years and eight months, with an agreement the district attorney would not pursue any of the prior prison

² The parties do not dispute this was the appropriate procedure under the circumstances. (See *People v. Sanchez* (2011) 53 Cal.4th 80, 84; *People v. Smith* (1993) 6 Cal.4th 684, 696.)

³ According to the probation report, police believed Smith had been burglarizing vehicles along a particular street. There was video surveillance of some of Smith's alleged criminal acts, and police arrested him after two men had chased him down and confronted him because they saw him reach into a victim's car. According to Smith, he had nothing to do with the vehicle burglaries. He claimed he had briefly stepped out of his home after spending the day working on his application for Social Security benefits when he was confronted and arrested. He also denied having any prior prison commitment convictions, although the district attorney believed he had eight.

commitment conviction allegations. She then told Smith of the possible sentences and made him repeat back to her that, if he did not take the deal, the deal would be gone and there would be a risk going forward. He had been angry, but he decided to plead guilty.

Defense counsel stated she then went over the change of plea form thoroughly with Smith before he signed the form. She asked him whether he had any additional questions before he initialed the form, and he replied he did not. Smith did not tell her he wished to withdraw his plea until the sentencing hearing, when he then denied pleading guilty and said she had "forced" him to accept the plea bargain.⁴

After defense counsel concluded her response, the court asked Smith if he remembered having been asked at his change of plea hearing if there was any reason the court should not accept his guilty plea. He replied, "I was embarrassed to say, well, my lawyer put me up to it. Maybe I'll come back at this time and say, hey, I'll check into what I plead[ed] to." The court then reminded him he had admitted to unlawfully entering two vehicles with the intent to commit a theft and he had signed under penalty of perjury that he had read, understood, and initialed each item on his change of plea form and that everything on the form was true and accurate. He replied, "Maybe I did do that, said it like that, ... I thought, like, people said you'll have a change of plea later. One judge, they'll hear you at the preliminary hearing and one judge will hear you at the sentencing. ... So I know I did that, but now that I know I did something that I'm not supposed to do, I'm saying look, I apologize. I'd like to do it the right way somehow."

⁴ Smith does not raise duress as an issue on appeal.

At the conclusion of the *Marsden* hearing, defense counsel confirmed she could continue to represent Smith adequately and there had not been an irremediable breakdown of the attorney-client relationship. However, she declined to file a motion to withdraw his guilty plea because she did not believe he had a legal basis to withdraw his guilty plea and advised him against it.

The court then decided against appointing new counsel for Smith, finding he had not shown a substantial impairment of the attorney-client relationship or a denial of his constitutional right to effective assistance of counsel. The court also stated it had not "heard a basis upon which a motion to withdraw his plea may be based."

C

Sentencing Hearing

At the sentencing hearing, the court reiterated it did not "see a basis to withdraw the plea" and stated, "from the [c]ourt's perspective ... there is no legal cause why judgment may not now be imposed." The court then sentenced Smith to the stipulated term of three years and eight months in jail.

III

DISCUSSION

Relying on *People v. Brown* (1986) 179 Cal.App.3d 207, 214-216 (*J. Brown*), Smith contends we must reverse the judgment because defense counsel's refusal to file a motion to withdraw his guilty plea deprived him of his constitutional right to the assistance of counsel at a critical stage of the proceedings below. We disagree.

"On application of the defendant at any time before judgment ... the court may ... for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. ... This section shall be liberally construed to effect these objects and to promote justice." (§ 1018.) To establish good cause, a defendant must show by clear and convincing evidence he was operating under mistake, ignorance, fraud, duress, or any other factor overcoming the exercise of his free judgment. (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416; *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1207-1208.) " "Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged." " (*People v. Archer* (2014) 230 Cal.App.4th 693, 702; *People v. Sandoval* (2006) 140 Cal.App.4th 111, 123.)

"Although criminal defendants are entitled to competent representation in the presentation of a motion to withdraw a plea, appointed counsel may properly decline to bring a meritless motion." (*People v. Brown* (2009) 175 Cal.App.4th 1469, 1472.) Defense counsel properly declined to bring such a motion on Smith's behalf despite his claim of innocence because a defendant's bare assertion of innocence, without supporting facts credited by the court showing the defendant's free and clear judgment was overcome at the time of the plea, is insufficient to require plea withdrawal. (See *In re Brown* (1973) 9 Cal.3d 679, 685-686, disapproved on another point in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098 & fn. 7; *People v. Beck* (1961) 188 Cal.App.2d 549, 552-553.)

J. Brown, supra, 179 Cal.App.3d 207, upon which Smith bases this appeal, is inapposite because it did not involve a meritless motion. As the court in *J. Brown* explained, "We do not suggest that counsel is compelled to make a motion which, in

counsel's good faith opinion, is frivolous or when to do so would compromise accepted ethical standards. [Citation.] *Such a state of affairs, however, is not before us in this case and we do not purport to state a rule in anticipation thereof.*" (*Id.* at p. 216, italics added.) The related authorities he relies upon are inapposite for the same reason. Accordingly, we conclude Smith has not established defense counsel's refusal to file a motion to withdraw his guilty plea deprived him of his constitutional right to assistance of counsel at a critical stage of the proceedings below.

IV

DISPOSITION

The judgment is affirmed.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.