

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DENISE MARIE HERRERA,

Defendant and Appellant.

E055395

(Super.Ct.No. FVI1100465)

OPINION

APPEAL from the Superior Court of San Bernardino County. Lynn Poncin,
Judge. Affirmed.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

On March 3, 2011, a felony complaint¹ charged defendant and appellant Denise Marie Herrera with (1) conspiracy to commit possession of methamphetamine for sale under Penal Code section 182 and Health and Safety Code section 11378 (count 1); (2) possession for sale of a controlled substance under Health and Safety Code section 11378 (count 2); (3) kidnapping for ransom under Penal Code section 209, subdivision (a) (count 7); (4) home invasion robbery under Penal Code sections 211 and 213, subdivision (a)(1)(A) (count 8); (5) extortion under Penal Code section 520 (count 9); (6) false imprisonment by violence under Penal Code section 236 (counts 10 & 14); (7) assault with a firearm under Penal Code section 245, subdivision (a)(2) (count 11); (8) possession of a firearm by a felon under Penal Code section 12021, subdivision (a)(1) (counts 12, 18 & 23); (9) kidnapping for ransom under Penal Code section 209, subdivision (a) (count 13); and (10) street terrorism under Penal Code² section 186.22, subdivision (a) (count 29).

As to all counts, except count 29, the complaint also alleged that the offenses were committed for the benefit of a criminal street gang under section 186.22, subdivision (b)(1). The complaint further alleged that the offenses charged in counts 8 and 9 caused the sentencing to be under section 186.22, subdivision (b)(4)(B) and (b)(4)(C).

¹ Thirteen other individuals were also charged with various offenses in the felony complaint. None of them are parties to this appeal.

² All further statutory references are to the Penal Code unless otherwise specified.

As to counts 7, 8 and 13, the complaint alleged that a principal personally used a firearm under section “12022.53(b).”³

As to counts 7, 8, 9, 10 and 11, the complaint alleged that defendant personally inflicted great bodily injury under section 12022.7, subdivision (a).

As to counts 9, 10 and 11, the complaint alleged that defendant personally used a firearm under section 12022.5, subdivision (a).

As to counts 7, 8, 11, 13 and 29, the complaint alleged that on November 24, 2008, defendant had suffered a serious felony prior, street terrorism under section 186.22, subdivision (a), within the meaning of section 667, subdivision (a).

As to all counts, the complaint alleged that defendant had suffered a strike prior under sections 667, subdivisions (b)-(i), and 1170.12, subdivisions (a)-(d).

On April 5, 2011, defendant was arraigned. She pled not guilty to all charges, and denied all special allegations and priors.

On October 4, 2011, defendant entered a no contest plea as to count 8 (residential home invasion robbery) and agreed to a sentence for the midterm of four years, doubled to eight years for the strike prior. Defendant acknowledged that she was not eligible for a county prison commitment because of the strike prior, under section 1170, subdivision (h)(3).

At the change of plea hearing, the trial court advised defendant of the constitutional rights that she was waiving, that a no contest plea is the same as a plea of

³ It should have read “§§ 12022, subd. (a) & 12022.53, subd. (e)(1).”

guilty for all purposes and has the same consequences as a guilty plea, and that the plea could not be used against her in a civil lawsuit. In summarizing the plea agreement, the court reiterated that defendant would be pleading guilty to count 8, home invasion robbery, which carries a sentencing range of three, four or six years; that defendant was admitting a strike prior; and that she was admitting the section 1170, subdivision (h)(3) allegation that she was ineligible for county prison based on her prior strike conviction and on the charge she was pleading to that day. The court noted that defendant would be sentenced to the four-year midterm, doubled to eight years, and that all remaining counts and allegations would be dismissed. Defendant stated that she understood.

To the court's question whether "anyone made any other promises of a lesser sentence, probation, reward, immunity or anything else in order to get [her] to plead guilty or no contest," defendant responded, "No your Honor." Defendant indicated that no one had threatened her to enter her plea; that she was not under the influence of alcohol, drugs, narcotics, or medicine; that she had enough time to discuss her case with her attorney about her "rights, potential defenses, penalties, punishments, and future consequences" of her plea. The court also advised her of consequences if she were not a citizen of the United States.

Counsel indicated that he had gone over the declaration of plea form with defendant; that he was satisfied that defendant understood everything on the form; and that he joined in her waivers.

Thereafter, the trial court found the following: (1) that defendant had read and understood her plea form; (2) that defendant had understood the nature of the charge and allegations to which she was pleading; (3) that she had understood all consequences and punishments for the offense to which she was pleading and the allegations to which she was admitting; and (4) that she had understood each of her constitutional rights. The court further found that defendant had knowingly, intelligently, freely, and voluntarily waived each of her constitutional rights. The court then allowed defendant to withdraw her not guilty plea to count 8.

Defendant entered a no contest plea to count 8 and counsel joined. Defendant admitted that she had suffered a prior strike conviction and acknowledged that she was ineligible for county prison. The prosecutor concurred and accepted. Defense counsel and the prosecutor stipulated that if the court were to read and consider the felony complaint, the police reports, and any applicable rap sheets that the court would find a factual basis for the plea. They further stipulated that the court may consider the felony complaint as the information for purpose of confirming the section 859, subdivision (a) plea.

The trial court then found that there was compliance with *Boykin-Tahl*.⁴ On the prosecutor's motion, the trial court dismissed all remaining counts and allegations in the interests of justice under section 1385. The court then referred the case to the probation department to prepare a probation report.

⁴ *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

At the November 2, 2011, sentencing hearing, the trial court read and considered a memo from the probation officer requesting a one-week continuance to complete the probation report. The court informed defendant she had a right to be sentenced within 20 court days from the day she entered her plea, and asked, “Do you waive and give up that right and agree that your sentence would be timely if held on November 14, 2011?”

Then, the following discussion ensued:

“THE DEFENDANT: Um --

“THE COURT: That way you can have a probation report and your attorney can --

“MR. WATSON [defense counsel]: Otherwise, you’re going to be sentenced without a probation report. You don’t want that, okay?

“THE DEFENDANT: Is it going to matter since I already signed a plea?

“MR. WATSON: Well, it may with regard to additional terms and things like that.

“MS. FAHERTY [prosecutor]: She is going to state prison, but we did request the report because it’s her first trip to state prison.

“MR. WATSON: We can do a 1203(c). Do you want to be sentenced today?

“THE DEFENDANT: If it’s possible.

“MR. WATSON: Do you have a calculator? Can we get those --

“MS. FAHERTY: I can probably figure them out.

“THE BAILIFF: April 1st.

“THE COURT: Do you want to proceed with sentencing, Mr. Watson?

“MR. WATSON: She does.”

The trial court then sentenced defendant according to the terms of the plea agreement. Although the court ordered defendant remanded to the custody of the sheriff for immediate delivery to the Department of Corrections and Rehabilitation, the court ordered defendant to be held in county jail for 48 hours to allow the probation department to prepare a report under section 1203c.

On January 3, 2012, defendant filed a timely notice of appeal indicating she wished to challenge the validity of her guilty plea. She requested and was granted a certificate of probable cause.

STATEMENT OF FACTS

On May 6, 2009, defendant “unlawfully and by means of force and fear [took] personal property from the person, possession and immediate presence of Juan Carlos Llerenas and said offense was perpetrated in an inhabited dwelling.”

ANALYSIS

After defendant appealed, and upon her request, this court appointed counsel to represent her. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 setting forth a statement of the case, a summary of the facts, and potential arguable issues, and requesting this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, and she has done so. Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have independently reviewed the record for potential error.

In her 11-page typewritten supplemental brief, defendant, in essence, argues that (1) the trial court erred in failing to review a written probation report before sentencing her; and (2) the plea bargain was unauthorized.

We first address defendant's argument concerning the probation report. Defendant states: "[Defendant] does not contest the fact that she was statutorily ineligible for probation. However, [defendant] does contend that she had a right to preparation and review of a probation report prior to sentencing and that the record does not show proof of an express waiver thereof."

In this case, defendant waived her right to a probation report. (See *People v. Dobbins* (2005) 127 Cal.App.4th 176, 182 [defendant may waive a probation report pursuant to section 1203].) As provided in detail above, the trial court, in fact, told defendant that she did not want to be sentenced without a probation report. Defendant, however, asked if a probation report was necessary since she pled guilty. She then asked that she be sentenced "today" (without the probation report). Counsel, thereafter, indicated that they wanted to proceed with sentencing—with no objection from defendant.

Moreover, "a probation report is not necessarily required if defendant is statutorily ineligible for probation, for example, because of a prior strike." (*People v. Dobbins*,

supra, 127 Cal.App.4th at p. 180.) Here, defendant pled guilty to home invasion robbery and admitted to a strike prior—making her ineligible for probation. (See § 667, subd. (c)(4).) Thus, she was statutorily ineligible for probation; a probation report in this case was not mandated, as defendant agreed she was ineligible for probation. (See *People v. Johnson* (1999) 70 Cal.App.4th 1429, 1431-1432 [since defendant was ineligible for probation due to his strike a probation report was discretionary] [Fourth Dist., Div. Two]; *People v. Llamas* (1998) 67 Cal.App.4th 35, 39-40 [same].)

In sum, defendant never asked the trial court to prepare the probation report prior to sentencing and acknowledged when entering into the plea that she was ineligible for probation. In fact, when the court recommended that they continue the sentencing hearing for a probation report, defendant equivocally indicated that she wanted to be sentenced immediately. As such, we cannot find that the trial court erred in sentencing defendant without a probation report in this case.

We next address defendant’s contention that “the plea bargain was unauthorized under Penal Code section 1192.7.” Section 1192.7, subdivision (a)(2) states that “[p]lea bargaining in any case in which the indictment or information charges any serious felony . . . is prohibited, unless there is insufficient evidence to prove the people’s case, or testimony of a material witness cannot be obtained, or a reduction or dismissal would not result in a substantial change in sentence.” Defendant contends that no plea bargain was permitted because none of the exceptions were considered prior to reaching the plea agreement. Nonetheless, defendant cites no authority for the proposition that, if a

defendant enters into a plea agreement which allegedly violates section 1192.7, subdivision (a)(2), but which is advantageous to herself, she is entitled to reversal of her conviction based upon the violation. “In fact, a defendant who enters into a plea bargain may be estopped from attacking [her] conviction on grounds the bargain violated section 1192.7.” (*People v. Tung* (1994) 30 Cal.App.4th 1607, 1612, fn. 9.) Here, defendant did not challenge the validity of her plea bargain in the trial court and received a substantial benefit from her bargain; she is estopped to raise the challenge on appeal. (*People v. Webb* (1986) 186 Cal.App.3d 401, 410-412.)

We have now concluded our independent review of the record and found no arguable issues.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MCKINSTER
Acting P. J.

We concur:

RICHLI
J.

CODRINGTON
J.