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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

BOBBY C. GRIFFIN,

Defendant and Appellant.

F061193

(Super. Ct. No. F09907184)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Rosendo Peña, Jr., Judge.

Linda J. Zachritz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Wanda Hill Rouzan, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Cornell, J., and Gomes, J.

On July 22, 2010, appellant, Bobby C. Griffin, pled no contest to possession for sale of counterfeit registered trademarks with a value of over \$400 (Pen. Code, § 350, subd. (a)(2)).¹

On appeal, Griffin contends: 1) he was improperly induced to enter a plea he was denied the benefit of his plea bargain; and 3) one of his conditions of probation is unconstitutionally overbroad and vague. We affirm.

FACTS

On June 12, 2009, private investigators went to Griffin's shop, Jazzy Jeans 'N Things. The investigators advised Griffin that he was selling counterfeit apparel and served him with a cease and desist order. Nevertheless, on three subsequent occasions the investigators purchased counterfeit apparel at the store.

On December 14, 2009, an investigator reported to Fresno Police officers that Griffin was selling counterfeit merchandise. The next day, Fresno Police officers arrested Griffin at his shop.

On December 30, 2009, the district attorney filed a complaint charging Griffin with the one count to which he eventually pled. Later, Griffin filed a motion to suppress evidence alleging that his arrest and the search and seizure of evidence from his shop was without a warrant or probable cause.

On July 22, 2010, prior to the commencement of the preliminary hearing, the court denied Griffin's motion. The prosecutor then announced that Griffin had rejected a previous offer of no initial custody time in exchange for Griffin agreeing to pay \$11,000 in investigative costs to plea to the single count in the complaint. The offer would be withdrawn once the preliminary hearing began.

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

The court then granted defense counsel’s request to go off the record. When the matter resumed on the record, the court was handed an executed change of plea form, and the following colloquy occurred:

“[DEFENSE COUNSEL]: ... Your honor, at this point, the parties have reached a resolution. Mr. Griffin will be entering a plea of no contest to the sole count, a violation of ... Section 250(a)(2). The district attorney’s offer in this case is a NISP. My understanding is he will not be requesting custody time or alternative sentencing. There will be a stipulation of \$11,000 in restitution costs. I do have the executed change of plea form.

“In addition, Your Honor, the district attorney has communicated to me that his recommendation at the time of sentencing would be for three years probation. And I did say my client is prepared to enter a plea of no contest and ask that all -- *by law, Your Honor, he will reserve the right to appeal the pre-plea issue of the denial of the suppression motion.*

“THE COURT: Very well. Mr. Bobby C. Griffin, is that your correct name, sir?” (Italics added.)

The court then took Griffin’s plea.

DISCUSSION

The Court Did not Induce Griffin to Enter a Plea

In order to preserve appellate review of a suppression motion made at a preliminary hearing, a defendant must renew the motion in superior court. (*People v. Torres* (2010) 188 Cal.App.4th 775, 783.) Since Griffin did not renew his motion in the superior court he is foreclosed on appeal from challenging its denial. Griffin, however, contends that he was induced to enter his plea bargain by defense counsel’s statement that appellate review of Griffin’s suppression motion would be preserved and by the trial court’s acceptance of that statement. Therefore, according to Griffin, he should be allowed to withdraw his plea because he was induced to enter it based on the illusory promise that he would be able to obtain appellate review of his suppression motion. He relies on *People v. DeVaughn* (1977) 18 Cal.3d 889 (*DeVaughn*), *People v. Lee* (1980) 100 Cal.App.3d 715 (*Lee*), *People v. Bonwit* (1985) 173 Cal.App.3d 828 (*Bonwit*) in

support of this contention. We conclude these cases are inapposite and reject Griffin's contention.

“Where a defendant's plea is ‘induced by misrepresentations of a fundamental nature’ such as a bargain which is beyond the power of the trial court, a judgment based upon the plea must be reversed. [Citations.]” (*People v. Coleman* (1977) 72 Cal.App.3d 287, 292.)

In *DeVaughn*, two defendants moved to suppress, on Fifth Amendment grounds, extrajudicial statements constituting confessions. (*DeVaughn, supra*, 18 Cal.3d at pp. 893, 896, fn. 6.) After the court denied the defendants' motions, they pled guilty to second degree burglary as part of a negotiated plea. As part of the plea bargain the court issued certificates of probable cause that purported to preserve for review the issues raised in the defendants' motions. On appeal, the court held that the denial of the suppression motion did not survive the defendants' guilty pleas. (*Id.* at p. 893.) Nevertheless, the court reversed the defendants' convictions “because defendants' pleas were induced by misrepresentations of a fundamental nature.” (*Id.* at p. 896.)

In *Lee*, following the denial of his speedy trial claim, the defendant pled guilty to robbery and aggravated assault as part of a plea bargain. The plea agreement stated “[T]he Court has indicated that it would file a Certificate of Probabl[e] Cause with the Clerk under ... Section 1237.5 indicating that there is a constitutional issue relating to these proceedings, and that an appeal would lie following a guilty plea.” (*Lee, supra*, 100 Cal.App.3d at p. 718, fn. 1.) On appeal, the *Lee* court found that the speedy trial issue did not survive the defendant's guilty plea. Nevertheless, it reversed the judgment because “it was improper for the trial court to approve the negotiated plea bargain purporting to provide the otherwise illusory right of appeal. [Citation.]” (*Id.* at p. 718.)

In *Bonwit*, after the trial court denied the defendant's *Hitch*² motion, the defendant pled guilty to selling cocaine as part of a plea bargain. Even though the court's ruling on the *Hitch* motion was not appealable because of the defendant's guilty plea (*Bonwit*, *supra*, 173 Cal.App.3d at p. 833), during the change of plea hearing the court expressly promised to issue a certificate of probable cause "[i]n order to protect the defendant's rights on appeal." The *Bonwit* court reversed finding that "The [court's] promise was illusory and therefore was an improper inducement which void[ed] the plea." (*Bonwit*, *supra*, at p. 833.)

These cases are distinguishable from the instant case because in each one the defendant's plea bargain expressly provided that the court would issue a certificate of probable cause so the defendant could appeal issues which did not survive a guilty plea. In the instant case, Griffin's plea bargain did not expressly or implicitly provide that he would be able to appeal his suppression motion or that the court would issue a certificate of probable cause to allow him to do so. Instead, after reciting the terms of the plea that she negotiated with the prosecutor, defense counsel stated that "by law" Griffin was reserving the right to appeal the denial of his suppression motion. Although the trial court acknowledged defense counsel's comments, it did not purport to incorporate the right to appeal the denial of the suppression motion into the agreement or agree to issue a certificate of probable cause for that purpose.

This case is more like *People v. Hernandez* (1992) 6 Cal.App.4th 1355 (*Hernandez*). In *Hernandez*, after the court denied his motions to dismiss on speedy trial grounds and for the failure to ensure the availability of a material witness, the defendant pled guilty, as part of a plea bargain, to manufacturing methamphetamine. The defendant appealed challenging the court's denial of his motions. The *Hernandez* court, however,

2 *People v. Hitch* (1974) 12 Cal.3d 641.

found that these issues did not survive the defendant's guilty plea. (*Hernandez, supra*, 6 Cal.App.4th at p. 1357.)

The defendant in *Hernandez* claimed on appeal that “[a] reading of the plea bargain in the instant case and of the certificate of probable cause issued by the trial judge, clearly shows that the issues set forth in appellant’s opening brief were preserved, and further, that part of the plea agreement was that the defendant remain released on his own recognizance pending the appeal.” (*Hernandez, supra*, 6 Cal.App.4th at p. 1360.) The *Hernandez* court disagreed stating: “As pertinent to this contention, the change of plea form signed by defendant merely recites that ‘DEFT REMAIN FREE PENDING APPEAL ...’ In accepting the plea, the court merely ensured that defendant understood the rights he was giving up and that the court was bound only by a midterm ‘lid.’ At the actual sentencing, the court apparently signed a certificate of probable cause (... § 1237.5), as to which it is only apparent that some earlier discussions had been held. The record contains no representation by the court that an appeal would be permitted, nor any understanding that defendant’s plea was conditioned upon such an assumption.” (*Hernandez, supra*, 6 Cal.App.4th at pp. 1360-1361, fn. omitted.)

As in *Hernandez*, the record here does not contain any representation by the trial court that an appeal would be permitted or an understanding that Griffin’s plea was conditioned upon such an assumption. Further, although the trial court did not directly respond to defense counsel’s expressed intent to appeal the court’s denial of the suppression motion, nothing in the record indicates that its failure to do so was meant to induce Griffin into entering a plea. Thus, in accord with *Hernandez*, we reject Griffin’s claim that he was improperly induced by the trial court to enter a plea.

The Court did not Violate Griffin’s Plea Bargain

Griffin contends that the review of the denial of his suppression motion was a term of his plea bargain and since it cannot be reviewed, he was denied the benefit of his bargain. We disagree.

“Plea bargaining is an accepted practice in American criminal procedure. [Citation.] The process is not only constitutionally permissible [citation], but has been characterized as an essential and desirable component of the administration of justice. [Citation.] Concomitant with recognition of the necessity and desirability of the process is the notion that the integrity of the process be maintained by insuring that the state keep its word when it offers inducements in exchange for a plea of guilty.” (*People v. Mancheno* (1982) 32 Cal.3d 855, 859-860, fn. omitted.)

““This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when 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.]” (*People v. Mancheno, supra*, 32 Cal.3d at p. 860.)

As discussed in the previous section, appellate review of his suppression motion was not mentioned in Griffin’s change of plea form or by defense counsel in reciting the terms of Griffin’s negotiated plea on the record. Nor was it implicitly made a part of Griffin’s plea agreement by the trial court’s acquiescence to defense counsel’s statement that Griffin intended to file an appeal. Accordingly, we conclude that Griffin was not denied a benefit of his plea bargain by his inability to raise the denial of his suppression motion on appeal.

The Challenged Probation Condition

“The ... courts possess broad discretion in determining suitability for probation and the selection of probation conditions. [Citations] ‘A condition of probation will not be held invalid unless it “(1) has no relationship to the crime of which the offender was convicted, (2) relates to conduct which is not in itself criminal, and (3) requires or forbids conduct which is not reasonably related to future criminality....” [Citation.] Conversely, a condition of probation which requires or forbids conduct which is not itself criminal is valid if the conduct is reasonably related to

the crime of which the defendant was convicted or to future criminality.’ [Citation.]” (*People v. Harrison* (2005) 134 Cal.App.4th 637, 641.)

“The concern underlying the void for vagueness doctrine is the due process requirement of adequate notice. [Citations.] A probation condition is unconstitutional when its terms are so vague people of ““common intelligence”” must guess at its meaning. [Citation.] To survive a challenge on the ground of vagueness, a probation condition ““must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated.”” [Citation.] A condition is sufficiently precise if its terms have a ‘plain commonsense meaning, which is well settled....’ ([Citation]; *People v. Morgan* (2007) 42 Cal.4th 593, 605 [““any reasonable and practical construction”” of the statutory language at issue defeats a vagueness challenge].)” (*In re R.P.* (2009) 176 Cal.App.4th 562, 566-567.)

As one condition of probation the trial court ordered that Griffin “not possess or control any dangerous or deadly weapons.” Griffin contends that this condition is constitutionally vague and overbroad because it does not contain a knowledge requirement and the phrase dangerous or deadly weapon is not definite enough to provide him fair notice of the range of items he is prohibited from possessing or controlling.

A similar argument was recently considered and rejected in *In re R.P.*, *supra*, 176 Cal.App.4th 562. The court observed that “deadly weapon” is uniformly defined in statute (see § 245, subd. (a)(1)), case law (see *People v. Aguilar* (1997) 16 Cal.4th 1023, 1037) and jury instructions (CALCRIM Nos. 875, 2503, 3130) as an object or instrument used in a manner “likely to produce great bodily injury.” (*In re R.P.*, at pp. 567, 568.) The definition encompasses items that are dangerous per se, such as “dirks and blackjacks,” which are specifically designed as weapons and thus considered deadly weapons as a matter of law (*Aguilar*, at p. 1029), as well as other items that are not deadly per se, but which may be used in a manner likely to cause death or great bodily injury. (*In re R.P.*, at p. 567.) In cases involving objects that are not designed solely to be used as weapons, the relevant inquiry is whether the object was intended to be used in a deadly or dangerous manner. (*Ibid.*, citing *Aguilar*, at p. 1029 and *People v. Page* (2004) 123 Cal.App.4th 1466, 1471.) Based on these well-established definitions, we

adopt the reasoning of *In re R.P.* and hold the probation condition is sufficiently precise for Griffin to know what is required of him. (*In re R.P.*, at p. 565.)

Griffin contends *In re R.P.* is distinguishable because it involved a juvenile probationer and the variety of items an adult probationer might possess is exponentially greater. However, we find the reasoning of *In re R.P.* applicable irrespective of the number of items an adult or juvenile probationer might possess. Accordingly, we reject Griffin's challenge to the probation condition prohibiting him from possessing or controlling dangerous or deadly weapons.

DISPOSITION

The judgment is affirmed.