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

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYMOND SANCHEZ,

Defendant and Appellant.

F061714

(Super. Ct. Nos. VCF220711B,
VCF226447D, VCF229800)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Darryl B. Ferguson, Judge.

Rita Barker, 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, Stephen G. Herndon and Harry Joseph Colombo, Deputy Attorneys General, for Plaintiff and Respondent.

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An information charged Raymond Sanchez with four counts of second degree robbery, four counts of felon in possession of a firearm, and one count of forgery. The information alleged personal use of a firearm, a strike prior, and two prison term priors.

Twice he pled no contest and admitted the allegations, the first time after the court gave an indicated sentence of 21 years four months. The court later withdrew the indicated sentence and allowed him to withdraw his plea. The second time was after the court gave an indicated sentence of 27 years four months, which the court imposed after denying his motion to withdraw his pleas.

On appeal, Sanchez argues that the court committed an abuse of discretion by withdrawing the first indicated sentence and by denying his motion to withdraw his pleas after accepting the second indicated sentence. He argues, too, that the court's failure to take his admission to one of the firearm-use allegations requires vacating that part of his sentence. We remand for further plea proceedings on the firearm-use allegation. In all other respects, we affirm the judgment.

FACTUAL BACKGROUND

On July 21, 2009, a Hispanic male about 25 to 30 years old and about five foot eight, with a medium build and a shaved head, used a pay phone outside a convenience store in Visalia.¹ Then he walked into the store, pulled out a long-barreled blue steel revolver, demanded money from the clerk, and left with about \$80. A police officer who compared surveillance footage of the robbery with California Department of Corrections and Rehabilitation photographs identified Sanchez as the robber. A latent print on the pay phone matched Sanchez's left middle finger.

On August 20, 2009, a Hispanic male adult about five foot seven, with a medium build and a shaved head, walked into a different convenience store in Visalia, pulled out a handgun, and demanded the cash register drawer from the clerk. Another person with a handgun stood nearby. The clerk handed over the drawer with about \$400 to \$500 inside.

¹ At the time of Sanchez's pleas and admissions, counsel stipulated to a factual basis in "the police reports and the preliminary hearing." Since the police reports are not in the record, the preliminary hearing transcript is the sole source of the facts here.

The same police officer who identified Sanchez as the perpetrator of the robbery a month earlier identified him from surveillance footage as the perpetrator of the new robbery. A latent print on the drawer, which was recovered nearby, matched his left ring finger.

On August 22, 2009, two suspects, one with a handgun, entered a sportswear store in Farmersville. One of the suspects demanded money from the store clerk. The suspect with the handgun took a notebook computer and money from the cash register. The other suspect took a video recorder from the store surveillance system. The two fled from the store with those items and some clothing. In a photographic lineup, the clerk identified Sanchez as one of the robbers.

On August 28, 2009, two men entered another convenience store in Visalia and took money from the clerk at gunpoint. In a photographic lineup, the clerk identified Sanchez as one of the robbers.

On August 29, 2009, a Visalia police officer who made contact with Sanchez found five counterfeit bills in his possession. One was a \$100 bill. The other four were \$20 bills.

PROCEDURAL BACKGROUND

On December 3, 2009, an information charged Sanchez with four counts of second degree robbery (counts 1, 12, 15 & 21; Pen. Code, §§ 211, 212.5, subd. (c)),² four counts of felon in possession of a firearm (counts 2, 14, 16 & 23; former § 12021, subd. (a)(1)), and one count of forgery (count 24; § 476) in Case No. VCF226447D.³ The information also alleged a serious felony prior within the scope of the three strikes law (§ 667, subds. (a)(1), (b)-(i), 1170.12, subds. (a)-(d)), personal use of a firearm in the commission of the

² Later statutory references are to the Penal Code except where otherwise noted.

³ In charges irrelevant to the issues before us, the information accused three other individuals as well.

robberies (§ 12022.53, subd. (b)), and two prior prison terms (§ 667.5, subd. (b)). On December 8, 2009, he pled not guilty and denied the allegations.

On January 13, 2010, the court gave an indicated sentence of 21 years four months. Sanchez withdrew his pleas, accepted the indicated sentence, pled no contest, and admitted the allegations. On March 3, 2010, after researching the law and conferring with counsel, the court withdrew the indicated sentence and allowed Sanchez to withdraw his pleas, at which time he again pled not guilty and denied the allegations.

On October 18, 2010, the court gave an indicated sentence of 27 years four months. Sanchez again withdrew his pleas, accepted the indicated sentence, pled no contest, and admitted the allegations.⁴ On December 6, 2010, he filed a motion to withdraw his pleas. (§§ 1018, 1192.5.) On December 15, 2010, the court denied his motion and imposed the indicated sentence of 27 years four months.

DISCUSSION

1. Withdrawal of First Indicated Sentence

Sanchez argues that the court committed an abuse of discretion by withdrawing the first indicated sentence. The Attorney General argues the contrary.⁵ We agree with the Attorney General.

Our discussion begins with the state of the record. In the briefs, the parties disagree about whether the indicated sentence of 21 years four months was “an illegal sentence” but fail to articulate each of the components of that sentence. The rules of

⁴ On that day, the court also accepted Sanchez’s no contest plea to possession of methamphetamine (Case No. VCF229800) and found him in violation of probation in his felony assault prior for the benefit of a criminal street gang (Case No. VCF220711B).

⁵ In the interest of judicial efficiency, to preclude a later claim that the lack of an objection on federal constitutional grounds constituted ineffective assistance of counsel, we analyze the merits of Sanchez’s argument without addressing the Attorney General’s forfeiture argument. (See *People v. Williams* (1998) 61 Cal.App.4th 649, 657, citing, e.g., *People v. Marshall* (1996) 13 Cal.4th 799, 831.)

court require that each brief support any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears. (Cal. Rules of Court, rules 8.204(a)(1)(C), 8.360(a).) So we requested supplemental briefs.

In his supplemental opening brief, Sanchez muses, “From the *context* of the record, it *appears* that the court contemplated imposing” an aggregate indicated sentence that “*appears* to refer” to sentencing statutes that he candidly acknowledges the record fails to identify. (Italics added.) He admits that his inferences add up to an aggregate sentence of “20 years, not 21 years 4 months” and proceeds to postulate three “options for reaching an aggregate sentence of 21 years, 4 months.” The components of each option differ from one another.

In her supplemental respondent’s brief, the Attorney General observes, “There is nothing in the record which reveals what sentencing choices the trial court intended to make in order to achieve the ‘indicated sentence’ of 21 years 4 months. Accordingly,” she correctly observes, the reviewing court “is left to speculate as to how the trial court intended to proceed in following through on its representation regarding sentencing.” In his supplemental reply brief, Sanchez acknowledges that, although the court stated that the aggregate length of the indicated sentence was 21 years four months, “nowhere in the record did the sentencing court further or more precisely explain how it intended to structure its indicated sentence.”

On that state of the record, we decline to engage in idle speculation about the legality of the court’s indicated sentence. We have no duty to consider arguments that are improperly presented or developed and have the option to interpret casual treatment of the rules of court as a lack of reliance on those arguments. (See *In re Keisha T.* (1995) 38 Cal.App.4th 220, 237, fn. 7; *In re David L.* (1991) 234 Cal.App.3d 1655, 1661.)

So we address only the issue whether the court committed an abuse of discretion by withdrawing the indicated sentence. “The matter of ultimate sentencing is a matter of judicial discretion to be exercised within limits prescribed by the Legislature.” (*People v.*

Superior Court (Smith) (1978) 82 Cal.App.3d 909, 916.) Giving an indicated sentence is within the boundaries of a court's inherent sentencing powers. (*People v. Vessell* (1995) 36 Cal.App.4th 285, 296.) Ordering specific performance of an indicated sentence, on the other hand, would curtail a court's normal sentencing discretion. (*People v. Delgado* (1993) 16 Cal.App.4th 551, 555 (*Delgado*)). Ordering a remand for the court to impose the indicated sentence, as Sanchez requests, would do the same.

On appellate review for abuse of discretion, the party attacking the sentence has the burden to show clearly that the court's decision was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) Sanchez fails to make the requisite showing. So we presume that the court acted to achieve legitimate sentencing objectives and will not set aside the court's exercise of discretion. (*Ibid.*) "An indicated sentence is just that: an indication. Until sentence is actually imposed, no guarantee is being made. We are [] 'tempted at this point to quote that eminent philosopher, baseball great Yogi Berra: "The umpire ain't ruled until he's ruled.'" (*Delgado, supra*, 16 Cal.App.4th at p. 555, quoting *City of Stanton v. Cox* (1989) 207 Cal.App.3d 1557, 1564.)

2. Denial of Motion to Withdraw Pleas to Second Indicated Sentence

Sanchez argues that the court committed an abuse of discretion by denying his motion to withdraw his pleas after accepting the second indicated sentence. The Attorney General argues the contrary. We agree with the Attorney General.

In his motion to withdraw his no contest plea, Sanchez argued that he "did not understand that if he were accused of a 'violent felony' in the future, he could face an additional five-year sentence for each of his prior strikes in addition to the sentence of 25 years to life." His declaration focused on his belief that "California prisons are so violent and dangerous" that he might be falsely accused of a violent felony even if he were to act in self-defense and "actually get fifty years to life." At the hearing on the motion, the prosecutor argued, "No matter how many strikes he pled to in this case, there is only one

667(a)(1) that comes out of this case” since “all of them were tried together.” Sanchez’s attorney submitted without argument. The court denied the motion.

On appeal, the crux of Sanchez’s argument is “that he was not advised that the current convictions would also result in additional exposure to enhancements” under the serious felony prior statute. (§ 667, subd. (a)(1).)⁶ “Five years,” he argues, “is a long time to be incarcerated, deprived of one’s freedom, and subjected to the dangers of a violent prison environment.”

The trial court has the authority to allow a defendant to withdraw a guilty or no contest plea for “good cause shown.” (§ 1018) “‘Good cause’ means mistake, ignorance, fraud, duress or any other factor that overcomes the exercise of free judgment and must be shown by clear and convincing evidence.” (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917, citing *People v. Cruz* (1974) 12 Cal.3d 562, 566.) A ruling denying a motion to withdraw a guilty plea or a no contest plea rests in the sound discretion of the trial court and, in the absence of a clear showing by the defendant of an abuse of discretion, will be upheld on appeal. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254; *People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796.) Just as, in the trial court, Sanchez failed to show by clear and convincing evidence that mistake, ignorance, fraud, duress or some other factor overcame the exercise of his free judgment, so, on appeal, he fails to make a clear showing that the trial court’s ruling denying his motion was an abuse of discretion.

3. *Lack of Admission to Firearm-Use Allegation*

Sanchez argues, the Attorney General agrees, and we concur that the court failed to take his admission in open court of one of the firearm-use allegations. Sanchez and the

⁶ In relevant part, the statute authorizes, for “any person convicted of a serious felony who previously has been convicted of a serious felony, ... a five-year enhancement for each such prior conviction on charges brought and tried separately. The terms of the present offense and each enhancement shall run consecutively.” (§ 667, subd. (a)(1).)

Attorney General disagree on the remedy, however. Sanchez argues that the remedy is to vacate the enhancement. The Attorney General argues that the remedy is to remand for further plea proceedings. We agree with the Attorney General.

Indisputably, the record shows Sanchez's intent to admit the firearm-use allegation in count 12. While articulating each and every component of the indicated sentence, the court stated, inter alia, "In count 12, it would be one year consecutive. That would be the midterm plus four years – plus three years four months for the gun." Summarizing the indicated sentence, the court stated, "And so your maximum term will be 27 years four months." The court took the requisite waivers, Sanchez agreed to the indicated sentence, and the court proceeded, count by count, to take his pleas and admissions. In an obvious inadvertence, the court failed to take his admission of the count 12 firearm-use allegation before imposing the indicated sentence which, of course, included one year on count 12 and three years four months on the count 12 firearm-use enhancement. An admission in open court is a statutory requirement. (§§ 1018, 12022.53, subd. (j).)

Sanchez argues that the double jeopardy clause requires us to vacate the count 12 firearm-use enhancement. We disagree. On the record here, the double jeopardy clause does not require, in the Attorney General's words, "a windfall in the form of a reduction of his sentence by three years four months due to the inadvertence of the trial court." All that is required "is to return the proceedings to the point at which the court erred and reroute them to the proper track." (*People v. Bryant* (1992) 10 Cal.App.4th 1584, 1597-1598 (*Bryant*), quoting *Mourmouris v. Superior Court* (1981) 115 Cal.App.3d 956, 962.)⁷

⁷ Our Supreme Court cited *Bryant* with approval in *People v. Bright* (1996) 12 Cal.4th 652, 661, disapproved on another ground by *People v. Seel* (2004) 34 Cal.4th 535, 550, fn. 6.

DISPOSITION

The matter is remanded to the superior court for further plea proceedings on the count 12 firearm-use allegation. In all other respects, the judgment is affirmed.

Gomes, J.

WE CONCUR:

Cornell, Acting P.J.

Kane, J.