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

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANK OLGIN,

Defendant and Appellant.

F062079

(Super. Ct. No. BF131735B)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Kern County. Michael G. Bush, Judge.

Mark Shenfield, 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, Michael A. Canzoneri and Heather S. Gimle, Deputy Attorneys General, for Plaintiff and Respondent.

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\*Before Wiseman, Acting P.J., Kane, J., and Detjen, J.

## STATEMENT OF THE CASE

### *Amended Information*

On August 11, 2010, appellant, Frank Olgin, was charged in an amended information with the following transactionally related counts on March 24, 2010: robbery of an inhabited dwelling in concert (Pen. Code, § 213, subd. (a)(1)(A), count one),<sup>1</sup> three counts of assault with a firearm against, respectively, Narisha Molatore, Eliseo Snay, and Isiah Purvis (§ 245, subd. (a)(2), counts two, three, four), false imprisonment of Narisha Molatore, Eliseo Snay, and Isiah Purvis (§ 236, count five), and first degree burglary of Isiah Purvis's dwelling (§ 460, subd. (a), count six). All six counts alleged a gun use enhancement as to Olgin (§ 12022, subd. (a)(1)).<sup>2</sup> The amended information alleged four additional first degree burglary counts (counts seven, eight, ten, and eleven) and theft of a firearm (§ 487, subd. (d), count nine). Counts seven through eleven involved four transactionally unrelated burglaries from counts one through six.

### *Plea Bargain and Change of Plea*

On December 1, 2010, Olgin entered into a plea agreement. Olgin executed an advisement of rights, waiver, and plea form for felonies setting forth that Olgin would plead no contest to count one and admit an amended gun enhancement allegation (§ 12022.5, subd. (a)(1)). Under the terms of the agreement, Olgin would agree to a sentence with a lid of 12 years on count one, and a low term on the gun enhancement, with a *Harvey*<sup>3</sup> waiver. The remaining counts would be dismissed. No limitation on the *Harvey* waiver was set forth in the change of plea form.

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<sup>1</sup> All statutory references are to the Penal Code.

<sup>2</sup> Each count was also alleged as to Olgin's codefendant, Robert Louis Hart.

<sup>3</sup> *People v. Harvey* (1979) 25 Cal.3d 754 (*Harvey*).

Olgin waived his constitutional rights pursuant to *Boykin/Tahl*<sup>4</sup> in the change of plea form. The trial court determined that Olgin went over the change of plea form with his trial counsel, understood his rights, initialed and signed the form, and waived his rights. The parties stipulated that there was a factual basis for the plea based on the law enforcement reports and the preliminary hearing transcript. Olgin pled no contest to count one and admitted using a gun in the commission of the offense.<sup>5</sup>

The prosecutor, Jeff Prince, explained to the court that there would be a *Harvey* waiver just for restitution purposes. Counsel for codefendant Hart concurred with this statement. Olgin's counsel, Kyle Humphrey, said nothing. The court advised the defendants that even though the remaining allegations were being dismissed, the court could consider the dismissed allegations for restitution purposes. The remaining allegations were dismissed pursuant to the plea agreement.

#### ***Sentencing Statements and Probation Report***

Prior to the sentencing hearing, a new prosecutor, Sara Danville, filed a statement in support of a maximum sentence of 12 years for both defendants. Danville noted that victim Nancy Lovell's home was ransacked on March 9, 2010, and property worth \$3,911.44 was taken. Lovell recovered some of her jewelry that had been pawned. Maria Anfonso's master bedroom was ransacked on March 12, 2010. Anfonso was missing two watches.

On March 20, 2010, Jeffrey Peterson found the front door of his home kicked open. Peterson's home was ransacked. The defendants stole Peterson's 42-inch flat screen television, \$500 in cash, three Sobe drinks from the refrigerator, a rifle, and an Air Force pin.

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

<sup>5</sup> Codefendant Hart also entered into a plea agreement with a sentencing lid of 12 years.

On April 12, 2010, Maria Hernandez found the front door and door frame damaged. Several items had been moved from their original spots and placed by the front door. Hernandez saw a suspicious car outside her house and called her neighbor. The neighbor saw the two defendants wearing gloves. They were subsequently arrested.

On March 24, 2010, Isiah Purvis, Eliseo Snay, and Narisha Molatore walked into Purvis's house to find the defendants burglarizing the residence. The defendants forced their way into the front door and the door frame was partially torn from the wall. Olgin was armed with a hammer. Hart had the rifle he had stolen a few days earlier from Peterson. Hart hit Purvis in the neck with the rifle, forcing Purvis to the ground. Hart told Peterson: "Get the fuck down. Get the fuck on the floor!" The defendants took Purvis's cell phone and car keys. Eliseo and Molatore were also forced to the ground. Molatore's cell phone was stolen. The defendants locked all three victims in the hall closet.

Danville argued the defendants were unsuitable for probation and the crime involved great bodily harm, threat of bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness. Danville stated that: "If the court looks at this crime spree as a whole, it is evident that the defendants were becoming increasingly more violent." Danville argued there was no reason for Hart to strike Purvis in the neck and force him to the ground or for the defendants to lock the three victims in the closet. Danville argued the facts of the "crime" showed planning and sophistication and requested that the court "impose the maximum sentence of 12 years in prison as to both defendants."

Olgin's counsel, Humphrey, filed a reply to Danville's sentencing statement, arguing that it was improper for Danville to refer to facts from the dismissed counts. Humphrey specifically objected that under *Harvey*, it was improper to refer to count one as part of a spree and it would be improper to aggravate Olgin's sentence because the defendants were becoming increasingly more violent.

The probation report set forth the details of all of the offenses committed by the defendants. The statement included the losses suffered from each of the victims. In mitigation, the probation report noted that Olgin had no significant criminal history. The probation report stated that the manner in which the crime was carried out showed planning and the fact that there were multiple victims were both aggravating sentencing factors. The probation report recommended the upper term of 12 years as negotiated in the plea agreement.

### ***Sentencing Hearing***

On March 10, 2011, the sentencing hearing began with a statement from the trial court that it had read the probation report for each defendant, several letters, a psychologist's evaluation, and the sentencing statements of Mr. Humphrey and Ms. Danville.<sup>6</sup> Counsel for codefendant Hart argued the court should consider a prison sentence of six years. Counsel stated his client was young, had a strong family structure, and became addicted to drugs. Hart had done well in school. Counsel conceded that he could not downplay the severity of this case. Based on a psychological assessment of Hart, counsel did not believe Hart was at risk of future recidivism. As mitigating factors, counsel argued that Hart pled at an early stage of the proceedings and was addicted to drugs.

Humphrey argued that his client did not have the best IQ, suffered from drug use, admitted culpability, and cooperated with law enforcement after his arrest. Humphrey did not believe Olgin was a sophisticated criminal and was generally remorseful. Humphrey stated that Olgin was not seeking probation or a slap on the wrist but that society would be protected and rehabilitation could be accomplished by a sentence of six years.

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<sup>6</sup> Judge Bush presided over Olgin's change of plea hearing and sentenced Olgin.

Humphrey noted that restitution was a big concern, but within the court's sentencing discretion. Humphrey stated that someone in prison would not be able to make restitution. Humphrey reiterated that Olgin was deeply regretful and acknowledged that the people whose homes were burglarized clearly suffered greatly. Humphrey stated that whether Olgin received a sentence of six years or twelve years, it would not create closure for the victims because of the invasion of their sense of privacy. Humphrey argued that everything in this case favored a mitigated sentence of six years or nine years.

Danville took issue with Hart's counsel, arguing that the defendants did not enter their change of plea early in the proceedings but on the eve of trial. Danville pointed out that the court had to consider restitution as to all of the victims in the case. Lovell suffered damages of \$3,900. Purvis suffered damages of \$6,000. The damages suffered by all of the victims totaled \$24,000.

Danville pointed out that there was an incredible amount of damage. Danville believed this showed the callousness and viciousness of the crime. Danville explained that Isiah Purvis was assaulted with a weapon and it left a scar on his neck. Danville stated that for the reasons in her brief, there were more than enough aggravating factors to support the lid term of 12 years.

In rebuttal, Humphrey argued Olgin's psychological profile was not that of a hardened criminal who had been in and out of prison. Humphrey asked the court to exercise its discretion to give the weight it believed each sentencing factor deserved and asked the court to impose a sentence of no more than six or nine years.

The trial court noted again that it read and considered the reports, the statements given to him in writing, and the oral presentation of the parties. The court found that for both defendants, "the seriousness of this crime, the fact that these folks were -- weapons were used, such an extremely dangerous crime, that 12 years is appropriate." The court did not find that the defendants pled at an early stage. In mitigation, the court noted that

both defendants had no known prior criminal history, but the manner in which the crime was carried out indicated planning and involved multiple victims.

The court sentenced both defendants to the upper term of nine years on count one, plus a consecutive term of three years for the gun enhancement, for a total prison term of 12 years. On appeal, Olgin contends the prosecutor violated the plea agreement by referring to dismissed allegations in violation of *Harvey* and that the case must be remanded for a new sentencing hearing because the judge may have relied improperly on impermissible arguments by the prosecutor.

### **DISCUSSION**

Olgin argues that the prosecutor violated the plea agreement by referring to a crime spree and to the increasing seriousness of his offenses as aggravating factors in her sentencing statement. Olgin argues his limited *Harvey* waiver was a material term of the plea bargain that was breached by the prosecutor and that he should be resentenced. We disagree and affirm the judgment.

“When a guilty plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon.” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024 (*Walker*)). When a plea rests in any significant degree on a prosecutor’s promise or agreement, so that it is part of the inducement or consideration, the promise must be fulfilled. (*Santobello v. New York* (1971) 404 U.S. 257, 262 (*Santobello*); *Walker, supra*, 54 Cal.3d at p. 1024.) The requirements of due process attach to the plea bargain itself. (*Walker, at p. 1024.*)

This does not mean that any deviation from the terms of the plea agreement is constitutionally impermissible. The variance must be significant in the context of the plea bargain as a whole for it to violate the defendant’s rights. (*Santobello, supra*, 404 U.S. at p. 262.) A punishment or related condition that is insignificant relative to the

entire agreement, may be imposed whether or not it was part of the express negotiations. (*Walker, supra*, 54 Cal.3d at p. 1024.)

A negotiated plea agreement is in the nature of a contract and is interpreted according to general contract principles. The trial court's approval of the agreement binds the court to the terms of the bargain and the defendant's sentence must be within the negotiated terms of the agreement. (*People v. Martin* (2010) 51 Cal.4th 75, 79 (*Martin*).)

An implied term of a plea agreement is that a defendant will not be adversely affected by the underlying facts solely pertaining to a dismissed count. (*Martin, supra*, 51 Cal.4th at p. 81; *Harvey, supra*, 25 Cal.3d at p. 758.) In setting the terms of probation or in sentencing a defendant, the trial court cannot rely upon a dismissed charge or charges unless there is a transactional relationship between the charge or charges to which the defendant pled and the facts of the dismissed charge or charges. (*Martin, supra*, 51 Cal.4th at p. 82; *Harvey, supra*, 25 Cal.3d at p. 758.)

Before reaching Olgin's argument that the prosecutor violated a material term of the plea agreement, we need to determine whether the *Harvey* waiver limited to the issue of victim restitution was actually a material term of the plea agreement. The change of plea document executed by Olgin did not limit the *Harvey* waiver only to the issue of victim restitution. Olgin agreed in the change of plea form to a *Harvey* waiver of the dismissed allegations. Olgin's attorney, Humphrey, did not expressly join in the prosecutor's statement at the change of plea hearing that the *Harvey* waiver was limited to the issue of victim restitution. When Danville filed a sentencing statement that included indirect reference to the dismissed allegations, Humphrey filed an objection. Neither Humphrey nor Olgin sought to have the plea withdrawn. At best, we find that whether this was a material term of the plea agreement is ambiguous. Where a plea agreement is ambiguous, any ambiguities are generally construed in favor of the defendant. (*People v. Toscano* (2004) 124 Cal.App.4th 340, 345.) We, therefore,

presume that the limited *Harvey* waiver was a material term of the plea agreement and next determine whether prosecutor Danville materially breached that term of the agreement.

Under the terms of the plea agreement, including the *Harvey* waiver limited to the issue of victim restitution, prosecutor Danville was permitted to argue the issue of direct victim restitution as to *each* victim. This included the victims in allegations that had been dismissed. Pursuant to *Harvey* and *Martin*, Danville could argue the facts of any dismissed allegations that were transactionally related to the home invasion robbery alleged in count one, including the assault, false imprisonment, and burglary allegations alleged in counts two through six. Danville could also argue that Olgin receive the total lid prison sentence of 12 years.

Danville's sentencing statement discussed the damages suffered by each burglary victim, including the victims of dismissed counts. In some of Danville's descriptions, she referenced damage to doors and door frames cause by the defendants. This was fair commentary focusing on the restitution issue of damage caused by the defendants.

Danville, however, did refer to the defendants as being in a crime spree and that their conduct was of increasing seriousness. These comments were directed to the dismissed allegations. We observe, however, that referring to the increasing seriousness of the defendants' conduct, Danville was focusing on the most serious offense, the home invasion robbery. This offense was serious. Because counts two through six were transactionally related to count one, Danville could legitimately refer to facts of those dismissed allegations in her sentencing statement without violating *Harvey* and *Martin*.

Furthermore, and most importantly, Danville did not seek any greater sentence in her sentencing statement than the negotiated lid of 12 years. Danville limited her argument to the express terms of the plea agreement. We therefore find most of the authorities cited by Olgin in support of his assertion that the prosecutor violated the terms of the plea agreement to be inapposite to this case because, in each of those cases, the

prosecutor violated a material term of the plea agreement, usually by seeking a greater sentence than negotiated.<sup>7</sup> Here, Danville argued only for a sentence within the parameters of a lid sentence of 12 years.

Danville arguably should not have referred to the crime spree and increasing seriousness of the defendants' crimes as sentencing factors in her sentencing statement. Danville focused the rest of her argument on several other factors in her statement including the criminal sophistication of the offense, the great bodily harm or violence of the offense, the physical force used on victim Purvis, and the fact that the defendants did not have to lock the victims of the Purvis home invasion robbery in the closet. These comments were all transactionally related to count one.

The short comments in the sentencing statement referring to the dismissed allegations were done so indirectly and with a clear emphasis in Danville's argument of the seriousness of count one rather than on the dismissed offenses that were unrelated transactionally to count one. Also, during her oral arguments at the sentencing hearing, Danville's comments were directed to the gravity of the admitted offense. Any comments Danville made concerning the remaining dismissed allegations were directed

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<sup>7</sup> The cases relied upon by Olgin to support his contention that the prosecutor materially breached the plea agreement all involve obvious overreaching by the prosecutor or the court such that a key term of an agreement between the parties is not followed. (*People v. Quartermain* (1997) 16 Cal.4th 600, 606 [prosecutor agreed not to use inculpatory statement by defendant prior to trial, but later introduced it at trial]; *Walker, supra*, 54 Cal.3d at pp. 1028-1030 [restitution fine not included by court in its advisements to defendant]; *People v. Mancheno* (1982) 32 Cal.3d 855, 865-866 (*Mancheno*) [government failed to obtain diagnostic study for sentencing hearing]; *People v. Calloway* (1981) 29 Cal.3d 666, 670-673 [defendant not permitted to withdraw his plea when sentenced to state prison rather than probation]; *People v. Leroy* (1984) 155 Cal.App.3d 602, 605-606 [court imposed consecutive sentences rather than the concurrent sentences negotiated in plea agreement]; *People v. Gutierrez* (1980) 109 Cal.App.3d 230, 232-233 [court considered dismissed allegations in imposing prison term in violation of *Harvey*]; *People v. Jones* (1980) 108 Cal.App.3d 9, 16-17 [reference by trial court to dismissed allegations during sentencing hearing].)

either to transactionally related offenses to count one or to the issue of victim restitution, an issue preserved by the limited *Harvey* waiver. Under the facts of this case, we do not find a significant variance from the terms of the plea agreement as a whole. (*Santobello*, *supra*, 404 U.S. at p. 262.)

In his reply brief, Olgin argues that as with the sentencing judge in *Santobello*, we cannot presume that the court here was unpersuaded by any improper sentencing argument by prosecutor Danville.<sup>8</sup> Olgin ignores the fact that the trial court both presided over Olgin’s change of plea and the sentencing hearing. Presumably, the court was well aware of the limitation placed on the *Harvey* waiver because the court asked the parties about the nature of the waiver at the change of plea hearing. Defense counsel also lodged an objection to the comments by Danville that he thought violated the limitation on the *Harvey* waiver. The trial court indicated that it read the parties’ briefs.

In sentencing Olgin, the court specifically referred to the sentence it was imposing on Olgin’s “crime.” The court also did not refer to dismissed allegations, other than a reference to victim restitution after imposing the sentence. In selecting the lid term of 12 years, the court did not reference dismissed allegations but instead selected the sentencing factors of the seriousness of the crime and the use of a gun. The trial court made a clear record of how it was exercising its sentencing discretion and focused its exercise of that discretion on count one and the transactionally related counts. The record

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<sup>8</sup> In *Santobello*, a new prosecutor violated the original prosecutor’s agreement not to make any argument concerning sentencing. The original prosecutor’s agreement was an essential term of the plea agreement. Although the sentencing court stated on the record that it was not influenced by the new prosecutor’s argument that the defendant receive the maximum sentence, the *Santobello* court still found a violation of the plea agreement by the prosecutor. The *Santobello* court noted it had no reason to doubt the trial court’s statement that it was uninfluenced by the prosecutor’s sentencing argument but found that the interests of justice required the prosecution to live up to its promises. (*Santobello*, *supra*, 404 U.S. at pp. 259-260, 262-263.) Here, we do not find a significant variance in the terms of the plea agreement by either the prosecutor or the trial court.

here does not show that the court in any way violated the terms of the limited *Harvey* waiver, or the plea agreement.<sup>9</sup> This case is factually distinguishable from *Santobello* because there is affirmative evidence in the record that the court was aware of the terms of the *Harvey* waiver and followed those terms in sentencing Olgin.

We find that the gravamen of Danville's comments in her written sentencing statement focused almost entirely on count one, and the seriousness of that offense, rather than on the transactionally unrelated allegations that were dismissed. Any reference to the transactionally unrelated counts was made indirectly and to show the seriousness of count one. In so finding, we conclude that Danville did not materially breach an essential term of the plea agreement and reject Olgin's contention that the sentence should be vacated and the case be remanded for resentencing.

#### **DISPOSITION**

The judgment is affirmed.

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<sup>9</sup> We limit our discussion of the trial court's sentencing finding in order to establish that the trial court did not violate the terms of the limited *Harvey* waiver or the plea agreement. The parties concede that the California Supreme Court has generally held that where a plea agreement has been violated, courts do not analyze the case for harmless error. (*Walker, supra*, 54 Cal.3d at pp. 1026-1027; *Mancheno, supra*, 32 Cal.3d at p. 866.) Because we do not find a material breach of, or significant variance from, the plea agreement by the prosecutor, we do not reach the issue remedy argued by the parties.