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

In re ENRIQUE V., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ENRIQUE V.,

Defendant and Appellant.

F062253

(Super. Ct. No. JL003627)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. David W. Moranda, Judge.

Karli Sager, 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, Catherine Chatman and Jeffrey Grant, Deputy Attorneys General, for Plaintiff and Respondent.

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*Before Gomes, Acting P.J., Dawson, J., and Franson, J.

It was alleged in a juvenile wardship petition (Welf. & Inst. Code, § 602)¹ filed June 15, 2010,² that appellant, Enrique V., a minor, committed attempted robbery (Pen. Code, §§ 211, 664; count 1), assault with a deadly weapon, viz. a knife (Pen. Code, § 245, subd. (a)(1); count 2), and active participation in a criminal street gang (Pen. Code, § 186.22, subd. (a); count 3). On July 23, appellant, pursuant to an agreement, admitted counts 1 and 2, and count 3 was dismissed. On November 10, appellant filed a notice of motion to withdraw his admissions, and on December 17, the juvenile court denied the motion. On February 16, 2011, at the disposition hearing, the court ordered appellant committed to the Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ).

On appeal, appellant contends the court erred in denying his motion to withdraw his admissions. Alternatively, he argues that he admitted the allegations of the petition because his counsel promised that he would not be committed to DJJ and therefore he was denied his right to the effective assistance of counsel. Finally, appellant contends the court erred in not forwarding a copy of his individualized education program (IEP) (20 U.S.C. § 1414(d)(1)) to DJJ. We will reverse, and remand for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

The Instant Offenses

The report of the probation officer (RPO) dated August 16 states that according to a City of Merced Police Department report, the victim told the investigating police officer the following: On June 13, the victim was sitting in his car when appellant, accompanied by another juvenile, C.R., approached him and said, “I’m a Norteno[,] bitch. Do you

¹ Except as otherwise indicated, all statutory references are to the Welfare and Institutions Code.

² Except as otherwise indicated, all references to dates of events are to dates in 2010.

have any money?”” The victim said he did not have any money, and appellant punched him in the left ear. Another juvenile, O.B., then approached, at which point, appellant reached into his pocket, pulled out an “object” which the victim believed was “possibly a knife,” and “swung at the victim’s face.” The victim felt a sharp pain, and realized he was bleeding. The victim “went to his house to seek help,” and the three who accosted him ran off. The victim was taken to a hospital where he was treated for a large laceration on his left cheek which was bleeding profusely.

Other documents indicate that appellant was not the one who wielded the knife: A Merced County Probation Department document entitled “JJC - Arrest Summary Detail” sets forth an account similar to that in the police report, with the exception that it states that after O.B. approached appellant, C.R. pulled out the knife and struck the victim with it in the left cheek, causing a large gash; a report prepared by a defense investigator states that O.B. told the investigator that he (O.B.) “is the one that had the knife” and appellant “was present when the robbery took place but did not participate”; a Merced County Juvenile Justice Center admission form, apparently prepared by the admitting officer, also stated, in a summary of events that is otherwise consistent with the police report, that C.R. “pulled out what the victim believed to be a knife and struck the victim in the left cheek area causing a large gash”; and another form completed by the same officer states that O.B. “struck the victim ... with the knife” (Unnecessary capitalization omitted.)

Procedural Background

At the outset of the July 23 hearing, defense counsel Angela Mayfield informed the court that an agreement had been reached under which appellant would admit counts 1 and 2, and count 3 would be dismissed, and the deputy district attorney (DDA) told the court that the count 2 aggravated assault was an offense listed in section 707, subdivision (b) (section 707(b)). The court then informed appellant: “What that means, Enrique, is because it’s a 707(b) offense that you could go to [DJJ]. [¶] ... [¶] Do you

understand ... that?" Appellant answered, "Yes, sir."³ Thereafter, the court advised appellant of the "[p]ossible consequences of an admission," including "confinement in the [DJJ]," and asked appellant if he "underst[oo]d all of those possible consequences[.]" Appellant again affirmed that he understood.

Next, in response to questioning from the court, appellant indicated nobody had "promised [him] anything to get [him] to enter these admissions"; nobody had threatened him; he was not under the influence of drugs, alcohol or prescription medicine; and he "ha[d] a clear understanding of what [he was] doing here today." Thereafter, appellant entered his admissions to counts 1 and 2.

The probation officer, in his report dated August 16, recommended that appellant be committed to DJJ.

At the disposition hearing on August 18, Mayfield told the court, "I would like to support [appellant] withdrawing his plea if the Court is inclined to go with the [DJJ] recommendation" She acknowledged that appellant's admission "wasn't a conditional plea," but stated: "... the day his jurisdiction was set I advised [appellant] and his mother that since it was his first offense here and based on other cases with minors with extensive histories receiving less than [DJJ commitment], that it was

³ Currently, and as at all times relevant here, commitment to DJJ is not authorized unless the most recent offense alleged in a petition admitted or found true against appellant was a DJJ-eligible offense, i.e., an offense listed in section 707(b). (§ 733, subd. (c).) And at all times relevant here, the following applied: Section 707(b) offenses included "[a] felony offense in which the minor personally used a weapon listed in subdivision (a) of section 12020 of the Penal Code" (former § 707, subd. (b)(18)), and the weapons listed in Penal Code section 12020, subdivision (a) included a "dirk or dagger" (former Pen. Code, § 12020, subd. (a)(4)), defined as "a knife or other instrument with or without a handguard that is capable of ready use as a stabbing weapon that may inflict great bodily injury or death" (former Pen. Code, § 12020, subd. (c)(24)). Although there have been changes to this statutory scheme, including the repeal of Penal Code section 12020, any offense in which the minor personally uses a dirk or dagger remains a section 707(b) offense. (§ 707(b), Pen. Code, § 16590.)

unlikely that that would be the recommendation and he relied on that, so I think it's only fair to have him withdraw, and I'm willing to put that in a written motion."

Subsequently, during a discussion of whether it would be necessary to appoint substitute counsel for appellant to represent him in a motion to withdraw his admissions, the DDA asked, "what about the complication of the issue by what [defense counsel] has said is that the minor only wants to withdraw his plea if it's going to be a DJJ dispo?" Mayfield added, "Because I told him it wouldn't be."

At the second disposition hearing, on August 25, the DDA, in arguing for DJJ commitment, asserted that appellant slashed the victim with a knife. The court, at that point, indicated that it was under the impression that another person had used the knife, and defense counsel stated there were "conflicting statements in the report" on that point. After a recess, the court stated it had read the report, the report indicated appellant had wielded the knife, and therefore the court was "inclin[ed]" to order appellant committed to DJJ. In response, Mayfield argued that one report stated O.B. "had the knife" while another report stated C.R. "was the one," and asked that the hearing be continued so she could "look into that"

Mayfield added that appellant was "willing to go to jurisdiction [hearing]" because there were conflicting reports as to who personally used the knife. She stated further, "... my advice to him was because it was his first time and all that, and based on what happened to the co-responsibles that he would not be going to DJJ[,] and so that's why he would want to [contest the allegations of the petition at a hearing], and I'll provide a declaration to withdraw it and have a [jurisdiction hearing]. I think it's only fair, let him have his [jurisdiction hearing]." The court continued the hearing to determine whether appellant personally used a knife during the attempted robbery, and stated, "If I decide it is a DJJ case at that point ... we can appoint an attorney to look at a motion to withdraw."

At the next hearing, on September 24, the parties discussed whether a motion to withdraw appellant's admissions could be brought after disposition. Mayfield, argued that a post-disposition motion would be "timely," and stated, "That would be the basis of what I promised him"

At the next hearing, on September 29, the court stated it had "review[ed] all the documents," it "[found] that [appellant] was the one who used the knife," and it intended to order appellant committed to DJJ. At that point, Mayfield indicated that it was her "request to put this on for motion to withdraw a plea and have counsel appointed to do that[.]" The court thereafter relieved Mayfield as counsel for appellant.⁴

On November 10, appellant, represented by different counsel, filed a notice of motion to withdraw his admissions. In his declaration in support of that motion, appellant stated: "I entered into admissions to two felonies at Ms. Mayfield's recommendation with the understanding that I would not be sentenced to the [DJJ]. [¶] ... I would not have entered those admissions had I not been convinced that I would be granted Bear Creek Academy Long Term Program."

⁴ We note that the court relieved Mayfield and appointed new counsel without conducting a hearing on the matter. In *People v. Sanchez* (2011) 53 Cal.4th 53 Cal.4th 80 (*Sanchez*), our Supreme Court held that when a criminal defendant indicates a desire to withdraw a guilty or no contest plea on the ground that current counsel has provided ineffective assistance, the trial court must conduct a hearing on the issue of whether to appoint substitute counsel, pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*), and that if the accused makes the required showing at the *Marsden* hearing, new counsel should be appointed for all purposes. (*Sanchez*, at p. 84.) The court "specifically disapprove[d] of the procedure of appointing substitute or 'conflict' counsel solely to evaluate a defendant's complaint that his attorney acted incompetently with respect to advice regarding the entry of a guilty or no contest plea." (*Ibid.*) Here, the court appointed new counsel for all purposes, thereby avoiding the procedure disapproved in *Sanchez*, but the court erred in appointing new counsel without determining, by means of a *Marsden* hearing, whether appointment of new counsel was justified. The parties, however, do not address this issue, and, in any event, the court's error was harmless.

Mayfield stated the following in her supporting declaration: “I advised [appellant] that if he accepted the offer and plead to the charges, that he would not go to the [DJJ]. [¶] ... [Appellant] agreed to admit to the charges and he said it was only because he would not be going to the [DJJ]. [¶] ... Normally, I do not make promises to clients regarding outcomes and strongly regret having done that. [¶] ... I felt that since it was [appellant’s] first appearance before the court and based on the circumstances of the offense, that the most he would get would be the local long-term program.”

On November 24, Mayfield testified to the following: She “made [appellant] the promise” and “told him he would not go to DJJ” because, as she stated in her declaration, she “felt,” based on the “circumstances” and the fact that “it was [his] first appearance before the Court” that appellant would be committed to a long-term local program; she “told him he would not go to DJJ”; she “did not say it was [her] opinion”; and she “told him [he would not be committed to DJJ] because it was his first appearance before the Court and that he had not been tried locally with any other program and that [she] was sure that it would be the year-long program.”

Mayfield further testified:

“Q. Did you ever tell him that legally he couldn’t go to DJJ because the crime wouldn’t allow him to go to DJJ?

“A. I didn’t use those exact words but had the same effect.... [¶] ... [¶]

“Q. You understood that because it was a 707(b) offense he was eligible for DJJ; is that correct?

“A. Yes. [¶] ... [¶]

“Q. ... what did you tell the minor as to why he wouldn’t go to DJJ?

“A. I told him he would definitely not go to DJJ because it was his first appearance before the court, there was an adult involved; he hadn’t been to any program

prior to that and that he wouldn't have to worry about that if he pled to the charges because it would not be DJJ.

“Q. ... And you never told him that the offense was not one for which he couldn't go to DJJ though; is that correct?”

“A. We didn't get into that discussion and I didn't use those terms. No, I didn't.”

In ruling on the motion on December 17, the court stated: “... I am going to deny the motion to withdraw the admission based on my understanding of the law and the fact that I did acknowledge that I did tell the minor twice and he acknowledged twice, yes, that he could go the [DJJ].”

DISCUSSION

Motion to Withdraw Admissions

Appellant argues that he admitted the allegations that he committed the instant offenses in reliance on his counsel's promise that he would not be committed to DJJ, such reliance was reasonable, and therefore the juvenile court abused its discretion in denying appellant's motion to withdraw his admissions. Respondent, relying in part on *People v. Gilbert* (1944) 25 Cal.2d 422 (*Gilbert*), disagrees.

In *Gilbert*, our Supreme Court stated that a criminal defendant's plea of guilty that is induced by the “advice[,] ... persuasion[,] ... expression of matters of opinion,” or “unwarranted or even willfully false statements” by his or her attorney will not stand if the following conditions apply: such statements (1) are “substantially corroborated by acts or statements of a responsible state officer”; (2) “are in good faith and without negligence relied upon by the defendant, and [3] in truth operate to prevent the exercise of his free will and judgment” (*Gilbert, supra*, 25 Cal.2d at p. 443.) Respondent argues that under *Gilbert*, because neither the court nor the DDA corroborated “the opinion of appellant's counsel that the court would not commit appellant to the DJJ,”

counsel's opinion "did not provide a sufficient basis for appellant to withdraw his admissions."

Appellant counters that "[w]hile the *Gilbert* rule is still good law, the first prong (that a defense counsel's untrue representation must be substantially corroborated by a state officer) should not apply in the case of minors." Rather, appellant contends, "in the case of a minor, a court should consider the totality of the circumstances in determining whether a minor's reliance on counsel's advice was reasonable even in the absence of corroboration by a responsible state officer." In the instant case, appellant argues, "It is clear that appellant relied on counsel's mistake and inadvertence in admitting the allegations [of the instant offenses] 'on counsel's recommendation and belief that he would not be sentenced to DJJ,'" and therefore the court erred in not allowing appellant to withdraw his admissions. However, we need not decide whether *Gilbert* applies in the juvenile context because, as we explain below, the court applied an incorrect standard to appellant's motion to withdraw his admissions.⁵

Penal Code section 1018 states in pertinent part: "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." Penal Code section 1018 is not expressly applicable to admissions in juvenile court and there is no comparable provision in the Welfare and Institutions Code. However, the principles underlying the statute are applicable to juvenile court proceedings. (Cf. *In re M.G.S.* (1968) 267 Cal.App.2d 329, 339 [principles underlying section 1018 requirement that

⁵ If we were to conclude *Gilbert* does apply in the juvenile context, we would conclude further that the juvenile court erred in failing to address the question of whether counsel's promise that appellant would not be committed to DJJ was "substantially corroborated by acts or statements of a responsible state officer," under *Gilbert, supra*, 25 Cal.2d at p. 443.)

defendant personally enter plea applicable in juvenile proceedings]; *In re Francis W.* (1974) 42 Cal.App.3d 892, 903 [principles underlying section 1018 requirement that defendant personally enter plea applicable in juvenile proceedings]; *In re Jermaine B.* (1999) 69 Cal.App.4th 634, 640 [under Penal Code section 1192.5, a defendant who has been admonished of right to withdraw plea if punishment exceeds plea agreement relinquishes right to withdraw plea by failing to object to sentence; principles underlying Penal Code section 1192.5 make this rule applicable in juvenile proceedings].)

Those principles include the following: “Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea.” (*People v. Cruz* (1974) 12 Cal.3d 562, 566 (*Cruz*)). “It is the defendant’s burden to produce evidence of good cause by clear and convincing evidence.” (*People v. Wharton* (1991) 53 Cal.3d 522, 585.) “[S]ection 1018 ... requires liberal construction of its provisions to promote justice. However, the promotion of justice includes a consideration of the rights of the prosecution, which is entitled not to have a guilty plea withdrawn without good cause.” (*People v. Hightower* (1990) 224 Cal.App.3d 923, 928.) “[T]he withdrawal of a plea [of guilty or no contest] is within the sound discretion of the trial court *after due consideration of the factors necessary to bring about a just result.*” (*People v. Hightower, supra*, 224 Cal.App.3d at p. 928, italics added.)

The record here indicates the court denied the motion solely on the basis that the court advised appellant, and appellant voiced his acknowledgment, that appellant’s admissions could result in a DJJ commitment. The court did not reach the question of whether its advisements and appellant’s acknowledgements established that appellant actually understood that commitment to DJJ was a possible outcome. In other words, the court did not consider appellant’s actual state of mind, and did not determine whether as a result of his attorney’s promises and representations, appellant entered his admissions as a result of a mistake which operated as a “factor overcoming the exercise of [his] free

judgment” (*Cruz, supra*, 12 Cal.3d at p. 566.) Therefore, in denying appellant’s motion to withdraw his admissions the court did not properly exercise its discretion. (Cf. *People v. Aubrey* (1998) 65 Cal.App.4th 279, 282 [““an erroneous understanding by the trial court of its discretionary power is not a true exercise of discretion””].)

Under other circumstances we would remand the matter to allow the court to properly exercise its discretion. However, as we explain below, for other reasons appellant is entitled to withdraw his admissions.

Ineffective Assistance of Counsel

Appellant argues that even if the court did not err in denying his motion to withdraw his admissions, his counsel’s “promise” that the court would not order him committed to DJJ deprived him of his right under the United States and California Constitutions to the effective assistance of counsel, and therefore reversal is required.

“To prevail on a claim of ineffective assistance, a defendant must show both that counsel’s performance was deficient—it fell below an objective standard of reasonableness—and that defendant was thereby prejudiced. [Citation.] Such prejudice exists only if the record shows that but for counsel’s defective performance there is a reasonable probability the result of the proceeding would have been different.” (*People v. Cash* (2002) 28 Cal.4th 703, 734.) “It is well settled that where ineffective assistance of counsel results in the defendant’s decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea.” (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.) In order to show prejudice in this context, “a defendant must establish ... a reasonable probability that, but for counsel’s incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial.” (*Ibid.*) A defendant’s assertion that “he would not have pled guilty if given competent advice ‘must be corroborated independently by objective evidence.’ [Citations.]” (*In re Resendiz* (2001) 25 Cal.4th 230, 253.)

Appellant meets both prongs of the required showing. First, his counsel's performance was deficient. The RPO indicates that according to the police report, the victim's account of the relevant events suggests appellant slashed him with a knife. And as indicated above, adjudication of an offense in which appellant personally used a weapon would qualify him for DJJ commitment.⁶ Appellant's exposure notwithstanding, however, the record also indicates that counsel promised appellant he would not be committed to DJJ if he accepted the proposed agreement. In her declaration, counsel stated she told appellant that if he admitted committing the instant offense "he would not go to the [DJJ]" and that she regretted making that "promise[]," and she testified at the hearing on appellant's motion to withdraw his admissions that she "made [appellant] the promise" and "told him he would not go to DJJ." Given appellant's actual exposure, counsel's statements to appellant constituted representation that fell below an objective standard of reasonableness.

The record also demonstrates appellant was prejudiced by his counsel's deficient performance. He stated in his declaration in support of his motion that he would not have entered his admissions had it not been for his counsel's "recommendation" which "convinced" him he would not be committed to DJJ, and this is corroborated by counsel's statement in her declaration that appellant told her he agreed to admit committing two felonies "only because he would not be going to the [DJJ]." We find further independent corroboration for appellant's claim that he would have insisted on a jurisdiction hearing in the fact the record contains some indications that, contrary to the victim's statement to police indicating that appellant wielded the knife, one of appellant's co-participants, and not appellant, used the knife. As indicated above, it was the court's finding that appellant personally used a knife that made DJJ commitment possible. On this record, appellant

⁶ See footnote 3, *ante*.

has demonstrated he entered his admissions as a result of his counsel's deficient performance. Therefore, he was denied his right to the effective assistance of counsel, and he is entitled to withdraw his admissions.

Appellant's IEP

An IEP is a written statement for a child with a disability. (20 U.S.C. § 1414(d)(1).) Among other things, an IEP states the child's present level of academic achievement and that special education services to be provided to address the child's needs. (*Ibid.*) An IEP has been prepared for appellant, and a copy was attached to the report of the probation officer submitted to and considered by the court in advance of the February 2011 disposition hearing. Appellant argues the court had a duty to provide appellant's IEP to DJJ, and the court failed to do so. Respondent states, "while it is not clear from the record whether that IEP was provided to the DJJ, respondent does not object to an order requiring the trial court to ensure the IEP was or will be delivered to DJJ."

Section 1742 provides, in relevant part, that when a child has an IEP and the juvenile court orders the child committed to the DJJ, "the juvenile court ... shall not order the juvenile conveyed to the physical custody of the [DJJ] until the juvenile's [IEP] previously developed ... has been furnished to the [DJJ]." California Rules of Court, rule 5.805(5) provides, in relevant part: "The court must provide to the DJJ information regarding the youth's educational needs, including the youth's current [IEP] if one exists. To facilitate this process, the court must ensure that the probation officer communicates with appropriate educational staff."

At the February 2011 disposition hearing, the court stated: "The youth has an individualized [education] program, probation is directed to forward a copy of the youth's medical reports to the [DJJ]." As appellant argues and respondent does not

dispute, the court did not order the IEP provided to DJJ, as the court is required to do in the event a minor is committed to DJJ.

Although as set forth below, we reverse the judgment to allow appellant to withdraw his admissions, our disposition order leaves open the possibility that the judgment may be reinstated if appellant elects not to withdraw his admissions. In that event, the court must provide appellant's IEP to DJJ.

DISPOSITION

The judgment is reversed. The matter is remanded to the juvenile court for the purpose of allowing appellant to withdraw his admissions. If appellant elects to do so, the allegations of the original wardship petition filed June 15, 2010, shall be reinstated. If appellant elects not to withdraw his admissions, the juvenile court is directed to reinstate the original judgment and provide a copy of appellant's individualized education program to DJJ.