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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

SCOTT ALLEN DENO,

Defendant and Appellant.

F062338

(Super. Ct. No. BF132201A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Michael B. Lewis, 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, and Michael P. Farrell, Assistant Attorney General, for Plaintiff and Respondent.

Appellant Scott Allen Deno entered a plea of no contest to the charges against him, and admitted all of the various special allegations in the information, pursuant to a plea bargain under which he would receive a prison term of eight years. When Deno appeared for sentencing, he requested a continuance of the sentencing hearing. The trial court told Deno it would agree to a continuance only on the condition that, if Deno failed to appear on the new sentencing date, the court would not be limited to the negotiated disposition and Deno could be sentenced to a term of up to 12 years. Deno agreed. He then failed to appear on the new sentencing date, and the court issued a warrant for his arrest. He was later sentenced to a term of 12 years.

On appeal Deno contends (1) that the trial court engaged in unlawful judicial plea bargaining; (2) that imposition of enhanced punishment for his failure to appear at sentencing, without the benefit of a trial on that offense, or a knowing, intelligent, and voluntary waiver of his constitutional rights, deprived him of due process; (3) that he was denied assistance of counsel at a critical stage of the proceeding; and (4) that various fees and assessments imposed by the court must be stayed. We disagree that the trial court engaged in unlawful judicial plea bargaining, but agree that Deno was not properly advised that he could withdraw his plea if the court chose not to adhere to the plea bargain. We reverse and remand.¹

STATEMENT OF THE FACTS²

On May 13, 2010, at around 1:45 a.m., California Highway Patrol officers stopped Deno for driving with a non-working light. Deno, who appeared intoxicated, admitted that his driver's license was suspended and that he was on parole.

¹ Because we reverse and remand we need not and do not reach the remaining issues raised by Deno.

² The facts are not at issue and are taken from the probation report.

The officers searched Deno and found a hypodermic needle and a bindle with .1 gram of a substance containing methamphetamine. Deno had a blood alcohol level of .11 percent.

STATEMENT OF THE CASE

An information filed June 23, 2010, charged Deno, in count 1, of transporting a controlled substance (Health & Saf. Code, § 11379, subd. (a)); in count 2, of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)); in count 3, of driving a vehicle while under the influence (Veh. Code, § 23152, subd. (a)); in count 4, of driving with a blood alcohol content of .08 or greater (Veh. Code, § 23152, subd. (b)), in count 5, of driving with a suspended license (Veh. Code, § 14601.1, subd. (a)); and in count 6, of possession of drug paraphernalia (Health & Saf. Code, § 11364). It was further alleged, as to count 1, that Deno had suffered a prior drug conviction (Health & Saf. Code, § 11370.2, subd. (c)) and that he had served seven prior prison terms (Pen. Code, § 667.5, subd. (b))³; as to count 2, the same seven prison priors were alleged; as to counts 3 and 4, it was alleged that Deno had been previously convicted of driving under the influence twice within a ten-year period preceding the current charge (Veh. Code, § 23546, subd. (a)); and as to count 5, it was alleged that, within five years of the current offense, Deno had been twice convicted of driving with revoked driving privileges (Veh. Code, § 14601.1, subd. (b)(2)).

On August 24, 2010, the day set for trial, Deno waived his constitutional rights and pled no contest to all the charges and admitted all enhancements. The trial court represented to Deno that it would sentence him to no more than eight years in prison.

On October 26, 2010, the day set for sentencing, Deno moved to relieve counsel and a *Marsden*⁴ hearing was held in a different department. The motion was denied, but

³ All further statutory references are to the Penal Code unless noted otherwise.

⁴ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

alternate counsel appointed for the limited purpose of advising Deno about a motion to withdraw his plea.

On December 15, 2010, alternate counsel informed the trial court that there were no factual or legal grounds to support a motion to withdraw the plea. Counsel requested a continuance, to which the People objected. The trial court granted the continuance in exchange for Deno's agreement to a "*Cruz* waiver"⁵ permitting it to sentence Deno to up to 12 years in prison if he picked up a new case or failed to appear for sentencing. Alternate counsel was then relieved and the public defender of record reappointed.

Deno failed to appear for sentencing on January 4, 2011, and a bench warrant was issued for his arrest. On February 23, 2011, the trial court denied probation and sentenced Deno to an aggregate term of 12 years in state prison and imposed various fees and fines.

DISCUSSION

I. DID THE TRIAL COURT ENGAGE IN UNLAWFUL JUDICIAL PLEA BARGAINING?

Deno contends that his guilty plea, in which the trial court offered him an indicated sentence of no more than eight years, was "induced by illegal judicial bargaining, which also usurped the executive power." The People's concession on this issue is not well taken; as we shall explain, we disagree with both parties.

Procedural History

The following factual scenario is taken from the reporter's transcript for August 24, 2010, the first day of trial. Counsel for the people and the defense met with the trial judge off the record. An "understanding" was reached on a disposition for the case, whereby Deno would "plead as charged to all counts and admit all allegations..." and, if he did so, the court indicated it would sentence him to no more than eight years. Defense

⁵ *People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*).

counsel then met with Deno to review this “understanding” and completed a written waiver of rights and plea form. In the waiver form, in response to the statement on the form which states, “I have not been induced to enter this plea by any promise or representation of any kind, except: (State any agreement with the District Attorney or Court indicated sentence)” is a handwritten summary of the “understanding”: “Plea as charged w/court indicated 8 years.” At the change of plea proceeding later that same day, the trial court stated the following:

“It’s my understanding that the People’s offer in this matter is plead as charged to all counts and admit all allegations. That is essentially no offer. [¶] After reviewing the matter with counsel for the defense and counsel for the People, the Court notes a small amount of controlled substance, approximately .10 grams, but a continuous criminal history since about 1987. [¶] In light of the small amount of controlled substance and the age of the seven prior prison allegations, the Court’s willing to indicate to Mr. Deno that if he enters a plea as charged, admits all the allegations, that the Court would sentence him to no more than the midterm as to Count I, that is, three plus three for the 11370.2 plus two of the 667.5(b) allegations for eight, and that I would strike the remaining allegations and run the remaining counts concurrent.”

The trial court then asked defense counsel, the prosecutor, and Deno, separately, “is that your understanding?,” to which each replied, “Yes.” The court then addressed the waiver of rights form Deno had signed and asked Deno, “has anyone promised you anything other than what we have placed here on the record today to get you to enter this plea?” Deno replied “No.”

Standard of Review

“On appeal, we presume that a judgment or order of the trial court is correct, “[a]ll intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.” [Citation.]” (*People v. Giordano* (2007) 42 Cal.4th 644, 666.) We review allegations of judicial plea bargaining for abuse of discretion. This is because we may void the act of a trial court that is “in excess of the trial court’s jurisdiction” (*In re Andres G.* (1998) 64 Cal.App.4th 476, 483),

and “‘judicial plea bargaining in contravention of existing law are acts in excess of a court’s “jurisdiction”” (*People v. Turner* (2004) 34 Cal.4th 406, 418).

Applicable Law and Analysis

Plea bargaining is “any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.” (§ 1192.7, subd. (b) [defining plea bargaining “[a]s used in this section”].)

“‘The process of plea bargaining which has received statutory and judicial authorization as an appropriate method of disposing of criminal prosecutions contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.] Pursuant to this procedure the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged. [Citation.] This more lenient disposition of the charges is secured in part by prosecutorial consent to the imposition of such clement punishment [I]mplicit in all of this is a process of “bargaining” between the adverse parties to the case – the People represented by the prosecutor on one side, the defendant represented by his counsel on the other – which bargaining results in an agreement between them.’ [Citations.]” (*People v. Woosley* (2010) 184 Cal.App.4th 1136, 1145, italics added.)

Plea bargaining can affect what charges defendants are convicted of, i.e., charge bargaining. (*People v. Brown* (1986) 177 Cal.App.3d 537, 548.) Plea bargaining can also affect the sentences defendants receive, i.e. sentence bargaining. (*Ibid.*)

However,

““[The] court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of ‘plea bargaining’ to ‘agree’ to a disposition of the case over prosecutorial objection.” [Citation.] The “plea bargaining” process foreclosed to the judicial branch of government includes the acceptance of a plea of guilty in return for “clement punishment.” [Citation.] [Citation.] [¶] In addition to trenching on prosecutorial discretion, judicial plea bargaining – that is, disposing of charges over the objections of the prosecutor in order to induce

a guilty plea – may ‘contravene express statutory provisions requiring the prosecutor’s consent to the proposed disposition, would detract from the judge’s ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge’s participation in the matter.’ [Citations.]” (*People v. Woolsey, supra*, 184 Cal.App.4th at pp. 1145-1146, italics added.)

“Plea bargaining ... may be related to an “indicated sentence” but is a distinct way of compromising a case short of trial. When giving an “indicated sentence,” the trial court simply informs a defendant “what sentence he will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea.” [Citations.] An accused retains the right to reject the proposed sentence and go to trial. The sentencing court may withdraw from the “indicated sentence” if the factual predicate thereof is disproved.’ [Citations.]” (*People v. Woolsey, supra*, 184 Cal.App.4th at p. 1146.)

Deno argues that the trial court’s agreement to impose a sentence of no more than eight years in prison “was a promise of leniency to [Deno], who faced a much greater potential sentence if convicted of all charges and enhancement allegations, in exchange for his guilty plea.” Deno contends that the trial court expressly acknowledged that it had made a promise to persuade Deno to plead guilty when it asked Deno, “[H]as anyone promised you anything other than what we have placed here on the record today to get you to enter the plea?” In support of his argument that the trial court engaged in improper plea bargaining, Deno also cites to a later hearing in which the trial court granted Deno a short continuance and referred to “the negotiated disposition that [defense counsel] negotiated, an eight-year lid.”

Deno relies on *People v. Superior Court (Ludwig)* (1985) 174 Cal.App.3d 473 (*Ludwig*), in which the People challenged the superior court’s acceptance of a plea change, claiming the lower court engaged in improper plea bargaining. In *Ludwig*, the Court of Appeal found “a direct violation of Penal Code section 1192.7” when the trial

court, at the change of plea hearing, referred to a ““promise”” of a maximum sentence of eight years, ““made to induce”” defendant to enter the plea. The court later characterized its own actions as ““entering into a plea bargain over the District Attorney’s objection.”” (*Id.* at pp. 474-475.)

We find the facts in *Ludwig* distinguishable from those before us here. After an “understanding” was reached by counsel for both parties and the court, the court stated it was “willing to indicate” a sentence of eight years “if [Deno] enters a plea as charged” There is no basis to the contention that the trial court promised Deno something “to induce” him to enter the plea. Instead, the record shows that the trial court was simply reiterating an agreement (“understanding”)⁶ reached by both parties, the people and the defendant, off the record, not one initiated and offered by the court. Furthermore, the record shows that the court specifically asked defense counsel, the prosecutor and Deno each separately whether the terms of the plea, as outlined on the record at the hearing, was in agreement with their “understanding” of the offer. Each replied in the affirmative and no one, including the prosecution, voiced an objection to the agreement.

We find no improper judicial plea bargaining on the part of the lower court.

II. DID THE TRIAL COURT ERR IN FAILING TO ADVISE DENO THAT, IF IT CHOSE NOT TO ADHERE TO THE PLEA BARGAIN, HE COULD WITHDRAW HIS PLEA?

Deno contends that imposition of enhanced punishment for his failure to appear at sentencing, without the benefit of a trial on that offense, or a knowing, intelligent, and voluntary waiver of his constitutional rights, deprived him of due process. We agree.

Procedural History

As noted, *ante*, Deno pled no contest to all charges and admitted all enhancement allegations in exchange for a sentence of no more than eight years in state prison. A

⁶ An “understanding” is synonymous with an “agreement.” (See Black’s Law Dict. (9th ed. 2009) p. 1665, col. 1 [“An agreement, esp. of an implied or tacit nature”].)

month later, on October 26, 2010, the date set for sentencing, Deno moved to relieve counsel. A subsequent *Marsden* motion in another department was held and denied, but alternate counsel appointed for the limited purpose of advising Deno about a motion to withdraw his plea.⁷

On December 15, 2010, alternate counsel informed the trial court that there were no factual or legal grounds to support a motion to withdraw the plea. Counsel then moved for a continuance, to which the People objected. The trial court granted the continuance, but stated:

“the only way I’ll leave Mr. Deno out of custody since the matter has been set for sentencing since October 26th is with what we call a *Cruz* waiver, meaning that if he fails to appear on January 4, 8:30, in Department 2 or if he picks up a new case, the Court will not be limited to the negotiated disposition that [defense counsel] negotiated, an eight-year lid. [¶] Mr. Deno admitted, looks like, six prior 667.5(b)’s. And the Court’s indication was that the Court would strike four of those to give Mr. Deno an eight-year sentence. If he fails to appear, the Court’s indicating that he could be sentenced up to 12 years or if he picks up a new case. [¶] Mr. Deno, are you willing to enter into that waiver so that I may continue your sentencing till January 4?” (Italics added.)

Deno replied, “Yes, sir.” The trial court then relieved alternate counsel and reappointed the public defender as attorney of record.

Deno failed to appear for sentencing on January 4, 2011. On February 23, 2011, the trial court denied probation and sentenced Deno to an aggregate term of 12 years in prison.

Applicable Law and Analysis

Section 1192.5 provides, in pertinent part:

⁷ We note that the procedure used by the trial court in appointing substitute or “conflict” counsel for the sole purpose of evaluating a defendant’s complaint that his counsel acted incompetently with respect to advice regarding the entry of a guilty or no contest plea was recently rejected by our Supreme Court in *People v. Sanchez* (2011) 53 Cal.4th 80, 84, but the holding does not impact our analysis here.

“Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea. [¶] If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so.”

In *Cruz, supra*, 44 Cal.3d 1247, our Supreme Court held that section 1192.5 is applicable where the court withdraws its approval of the sentence because the defendant fails to appear for sentencing. The court stated a defendant “fully advised of his or her rights under section 1192.5” could expressly waive those rights, “such that if the defendant willfully fails to appear for sentencing the trial court may withdraw its approval of the defendant’s plea and impose a sentence in excess of the bargained-for term. Any such waiver, of course, would have to be obtained at the time of the trial court’s initial acceptance of the plea, and it must be knowing and intelligent.” (*Id.* at p. 1254, fn. 5.) Such a waiver is typically referred to as a *Cruz* waiver.

Consistent with the mandates of *Cruz*, where the increased sentence is not part of the original bargain between the defendant and the prosecutor, and where defendant has given no express waiver of his or her section 1192.5 rights, a defendant must be given the opportunity to withdraw the plea upon receiving a harsher sentence. (*People v. Jensen* (1992) 4 Cal.App.4th 978, 981-983; *People v. Casillas* (1997) 60 Cal.App.4th 445, 451-452.)

People v. Casillas, supra, 60 Cal.App.4th 445 delineated the guiding principles.

“First, when a defendant fails to appear at sentencing after entering a bargained plea with no discussion about a specific sanction for nonappearance, he or she is entitled to withdraw the plea if the court refuses to honor the plea bargain. Second, the same rule applies when, during the plea proceedings but after the parties have negotiated the basic plea bargain, the court imposes an additional condition providing a sanction for nonappearance.” (*Id.* at pp. 451-452.)

In this case, the record makes clear the second situation. The record indicates that the trial court accepted a proffered plea bargain and then, almost four months later, attached its own provision when Deno requested a continuance. At a hearing, which resulted in a continuance of the sentencing hearing, the trial court informed Deno it was imposing a greater sentence pursuant to *Cruz* if Deno failed to appear for the new time set for sentencing. The trial court unilaterally informed Deno it would give him a greater sentence than he bargained for. The trial court asked Deno if he understood these consequences and Deno replied that he did. Deno, however, did not expressly waive his right to be sentenced according to the plea agreement should he fail to appear for sentencing.

There was no valid *Cruz* waiver in the instant action. The *Cruz* waiver was not part of the original plea bargain. The plea bargain itself did not contemplate a higher prison term as a condition of Deno's failure to appear for sentencing. In addition, the trial court failed to obtain an express waiver of Deno's rights pursuant to section 1192.5 at the time of his plea on August 24, 2010, or on December 15, 2010, when the trial court unilaterally imposed the *Cruz* condition at the continuation of the sentencing hearing, or at any other time. Notwithstanding the trial court's description of what it did on December 15 as obtaining a "*Cruz* waiver," the record on appeal contains nothing constituting or even resembling a "knowing and intelligent" waiver by Deno of his right to withdraw his plea under section 1192.5. (*Cruz, supra*, 44 Cal.3d at p. 1254, fn. 5.)

While Deno never moved to withdraw his plea when the court obtained its so-called "*Cruz* waiver" on December 15, 2010, or when Deno ultimately appeared for sentencing on February 23, 2011, this does not deprive Deno of a remedy. "We have held that absent a section 1192.5 admonition, a defendant's 'failure affirmatively to request a change of plea should not be deemed a waiver of his right to do so. Since he was never advised of his rights under section 1192.5, he should not be held to have waived them.' (*People v. Johnson* (1974) 10 Cal.3d 868, 872, fn. omitted.)" (*People v.*

Walker (1991) 54 Cal.3d 1013, 1025, overruled on other grounds in *People v. Villalobos* (2012) 54 Cal.4th 177, 183.)

The proper remedy in such a case is to permit the defendant to withdraw his plea should the sentencing court exercise its discretion to impose a sentence in excess of the plea agreement, or, for the trial court to resentence the defendant according to the terms of the original plea bargain. (*People v. Rodriguez* (1987) 191 Cal.App.3d 1566, 1570-1571.)

DISPOSITION

The judgment is reversed. The case is remanded to the trial court with directions (1) to permit Deno to withdraw his plea should the sentencing court choose to impose a sentence in excess of the plea agreement, or (2) to resentence Deno according to the terms of the original plea bargain.

Franson, J.

WE CONCUR:

Cornell, Acting P.J.

Poochigian, J.