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

THE PEOPLE,

Plaintiff and Respondent,

v.

IPOLITO MARCOS MALDONADO,

Defendant and Appellant.

F063255

(Super. Ct. No. VCF230022)

**OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Glade F. Roper and Valeriano Saucedo, Judges.†

Meredith J. Watts, 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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† Judge Roper presided over pretrial proceedings, which are the substance of this appeal; Judge Saucedo presided over trial and sentencing.

## INTRODUCTION

Appellant Ipolito Maldonado contends the People entered into a negotiated plea agreement, then reneged, and he seeks enforcement of the alleged plea agreement. The record reflects that there was no negotiated plea agreement. Therefore, we will affirm the judgment and the sentence.

## FACTUAL AND PROCEDURAL SUMMARY

The circumstances of the underlying offenses are not disputed in this appeal; consequently, we will not set forth the facts of the underlying offenses. We will focus on the trial court proceedings that are relevant to this appeal.

On March 18, 2010, Maldonado was charged with possession of methamphetamine; being under the influence of a controlled substance, specifically, methamphetamine; possession of narcotics paraphernalia; and driving while under the influence of alcohol and/or a controlled substance. It was further alleged that Maldonado previously was convicted of three serious and/or violent felonies. On March 22, 2010, Maldonado pled not guilty to all charges and denied all enhancements.

At the April 5, 2010, trial setting hearing before Judge Kalashian, it was decided that eligibility and suitability for probation and referral to drug court would be determined by proceedings to be held before Judge Roper. On April 7, 2010, an initial hearing regarding drug court suitability was held before Judge Roper. The minute order from the April 7 hearing states that defense counsel will be filing a motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) and the People would be filing opposition to the motion.

Maldonado filed a *Romero* motion on May 3, 2010, asking the trial court to strike all of his prior convictions in the interests of justice. The People filed an opposition to the *Romero* motion on June 30, 2010. In their opposition, the People opposed striking any of Maldonado's priors and asserted that Maldonado was exactly the type of career

criminal to which Three Strikes should apply. The People also reserved the right to present “other evidence or argument” at the hearing on the motion.

On July 14, 2010, a hearing on Maldonado’s *Romero* motion was conducted before Judge Roper. Maldonado was represented by Attorney Cheryl Smith. Maldonado asked that his priors be struck and that he be given an option of drug court. The People, represented by Wes Meyer, stated they were “not encouraging” the trial court to strike all the prior convictions and that striking all three prior convictions “goes beyond what a reasonable court should do.” The People further argued that if the trial court was inclined to strike a prior conviction, only one should be struck.

The trial court, Judge Roper, opined that “[i]f [Maldonado’s] entire pattern of criminality is a result of drug addiction ... that’s the strongest argument in favor of putting [Maldonado] into a drug treatment program” and “[i]f the source of the problem is the drug addiction you can deal with that then all the other stuff goes away.” Maldonado stated that he had never heard of “this Drug Court,” but asked to be “allowed to do it.”

Toward the conclusion of the July 14 hearing, the People stated, “I’m sensing the Court is striking all three strikes.” To which the trial court responded, “That’s not accurate. I’m not leaning either way.” The People replied that they “strongly urge the Court not to strike all three strikes.” At the conclusion of the July 14 hearing, the trial court stated, “I would like to consider this further and give a written decision so everybody understands what my thinking is for whatever I decide.”

A further hearing on the *Romero* motion was held before Judge Roper on July 28, 2010. At that time, the trial court indicated it had a copy of its written ruling for both parties and that “I’m indicating that I’m willing to take the extraordinary step of striking the prior strikes if he wants to participate in the Drug Court.” The trial court further stated that the “appropriate sentence would be the aggravated term of three years plus three for the prior prisons” with six years as a total suspended sentence to be served if

Maldonado violated drug court probation. At that point, defense counsel stated that Maldonado wanted to enter drug court on the terms outlined by the trial court.

Judge Roper noted that Maldonado had not yet pled to any offense, and asked the People if there was any offer. The People, represented by Mr. Meyer, responded that no offers - no plea bargains - had been offered Maldonado. The trial court indicated that if convicted, Maldonado would be placed on probation and enter drug court. The trial court asked Maldonado, "has any body promised you anything else to get you to plead to the charges?" Maldonado responded, "No, sir."

The trial court then proceeded to advise Maldonado of his constitutional rights surrounding a trial; Maldonado waived those rights and indicated he had been provided sufficient time to discuss those rights with his counsel. The trial court then proceeded to accept a plea. Maldonado pled to one offense, count one, but the proceedings were halted when defense counsel asked to consult with Maldonado.

In order to allow defense counsel to consult with Maldonado, the trial court recessed proceedings and then reconvened. After the trial court reconvened, defense counsel asked for a brief continuance of the proceedings, which was granted.

When the matter next came before the trial court for hearing on August 2, Maldonado's counsel stated Maldonado was ready to plead to "all the charges and enter into Drug Court." The People, represented by Ben Taksa, responded with "the People do object to the Drug Court" and noted Maldonado's "excessive criminality" and that "in particular two things strike us as being strange in this case, the first being that DUI are not supposed to be --" At this point, defense counsel objected that the People should not be allowed to state any opposition because they "had an opportunity to make their objection last week."

The trial court allowed the People to proceed to make their record of objection. The People noted that DUI offenses "are not supposed to be allowed into Drug Court" and it was the district attorney's office, not the trial court, who were to determine

eligibility for the program under “a very clear division of powers” according to correspondence at the time drug court was established. “[P]ersons driving under the influence of drugs would be excluded” from drug court.

The trial court noted that there was “nothing referring to driving under the influence” on the drug court eligibility sheet. Defense counsel objected to the People “adding new arguments after a bad decision.” The People responded that their pleading and argument at the prior hearing had been directed to the *Romero* motion; they were now addressing sentencing. The defense again objected to the People raising as an issue that the DUI precluded Maldonado from participating in drug court.

The trial court’s response was “I don’t think I’ve granted anything.” The trial court opined that, “What I indicated was my intention to strike the priors because of the unusual circumstances ....” The trial court then asked for clarification as to whether Maldonado was charged with a DUI; the People responded affirmatively.

After the defense objected again to the People addressing eligibility for drug court, the trial court indicated “that there needs to be a meeting to clarify eligibility and I have in fact asked for such a meeting with the assistance of the District Attorney. He indicated in the last correspondence that he is unavailable until after next Monday.” The trial court further indicated, “I want to review what I wrote in the previous correspondence and potentially have a further meeting to clarify eligibility.”

Defense counsel reiterated an objection to allowing the People to challenge drug court eligibility. The trial court noted that the People “found him not eligible.” The trial court further noted with respect to defense counsel’s objection, “The problem is with that is it’s not what excludes people that is at issue. It is what makes them -- what charge is even considered eligible.”

The defense further opined that the People should not have “a second chance at an entirely new argument after the Court has rendered its opinion.” The trial court stated

that the reason the hearing was being held is because Maldonado had “indicated last week he wasn’t willing to plead as charged.” The matter was continued to August 23.

At the August 23 hearing, the trial court stated:

“Mr. Maldonado, as you know it was previously indicated that I think you would be a good candidate for the participation in the Drug Court. The agreement as originally set up indicated that people with a driving under the influence of drugs charge would not be eligible to participate, and that is Count 4. Quite frankly, even though I think you would be a good candidate for it, by the agreement that was set up for the Drug Court, that charge is not eligible.”

The trial court then stated, “So I cannot put you into the Drug Court over the objection of the District Attorney’s Office and they objected to it.”

After this ruling, the defense asked for “two weeks to regroup” and the matter was continued. Eventually, a trial was scheduled on all charges. A jury was impaneled on June 20, 2011, and presentation of evidence began. On June 21, 2011, the jury returned verdicts of guilty on counts 1, 2, and 4; and a verdict of not guilty on count 3 (possession of paraphernalia). Maldonado waived a jury trial on the prior conviction allegations and after a court trial, the prior conviction allegations were found true.

Maldonado filed a second *Romero* motion on July 8, 2011. The People opposed the motion. ! On August 19, 2011, the trial court partially granted the *Romero* motion and struck two of Maldonado’s prior strikes. Maldonado was sentenced to an aggregate term of seven years in prison.

## **DISCUSSION**

Maldonado’s primary contention on appeal is that the People agreed, through Mr. Meyer, to allow him to enter the drug court program and should be held to that agreement. His related contention is that for the People, specifically Mr. Taksa, to have claimed he was ineligible for referral to drug court constituted prosecutorial misconduct. Last, Maldonado claims the trial court abused its discretion, in that it did not understand

its discretionary power to place Maldonado on probation and order drug treatment, even if he was ineligible for drug court.

#### I. NO PLEA AGREEMENT AND NO PROSECUTORIAL MISCONDUCT

A review of the reporter's transcript of the hearings discloses that at no time did the People ever offer any plea agreement to Maldonado and the People never agreed or acquiesced to Maldonado entering the drug court program on probation with a suspended sentence, as Maldonado claims. Throughout this appeal, Maldonado persists in stating that there was an agreement to place him on probation and order a drug treatment program akin to drug court. There was no agreement. Furthermore, Maldonado's repeated requests to the trial court were for admission to drug court, not probation and a drug treatment program.

Admission to the drug court program is in conjunction with a deferred entry of judgment. The drug court program is a statutory creation pursuant to Penal Code<sup>1</sup> section 1000. Section 1000, subdivision (a) provides for the adoption of criteria for deferred entry of judgment and entry into a drug court program. The drug court eligibility sheet used by the Tulare County District Attorney's Office states that the criteria set forth on the sheet were adopted in accordance with section 1000, subdivision (a) and an agreement between the Tulare County District Attorney's Office, Superior Court, and Probation Department.

The eligibility sheet lists criteria that makes a defendant ineligible for the program and includes boxes that can be checked to indicate whether the particular defendant is eligible or ineligible and the specific criteria present in the case that make a defendant ineligible. On the form filed in Maldonado's case, the boxes indicating he was ineligible for deferred entry of judgment and for drug court were checked.

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<sup>1</sup> References to code sections are to the Penal Code unless otherwise specified.

When Maldonado filed his *Romero* motion, the People opposed it and opined that Maldonado was exactly the type of career criminal for whom Three Strikes was designed. The People argued that Maldonado's recidivism warranted application of the Three Strikes law, which necessarily would entail a prison term, not probation.

At the July 14, 2010, hearing on Maldonado's *Romero* motion, the People reiterated their opposition to striking all of Maldonado's prior strike convictions. It was Maldonado who asked to enter the drug court program. The trial court took the matter under submission and scheduled a further hearing to announce its decision.

The continued hearing on Maldonado's *Romero* motion was held on July 28, 2010. At that time, Judge Roper gave both counsel his order on the *Romero* motion, where he wrote that he "is prepared to strike the prior strike convictions for purposes of sentencing and place Defendant into the Drug Court should he agree to participate under the strict terms of probation." Maldonado indicated he wanted to enter the drug court program on the terms outlined by the trial court. Judge Roper confirmed that the People had made no offer of any kind to Maldonado with respect to the pending charges.

As Judge Roper was proceeding to take Maldonado's plea to the charges and enhancements, defense counsel asked to consult with Maldonado. After consulting with Maldonado, defense counsel asked for a continuance of the proceedings, which was granted.

Throughout the proceedings on July 14 and July 28, and consistent with their written opposition, the People opposed Maldonado's *Romero* motion. We are unable to find any instance where the People, through Mr. Meyer or any other representative, agreed to Maldonado's *Romero* motion. There was no plea "deal" made by the People, as Maldonado claims, to allow Maldonado to enter drug court on probation with a suspended sentence. The trial court specifically confirmed on July 28, that there was no plea bargain or offer of any kind made to Maldonado by the People.

The People are not required to offer a plea bargain to a defendant and there is no constitutional right to a plea bargain. (*Weatherford v. Bursey* (1977) 429 U.S. 545, 561.) No such offer was made in this case. Maldonado's claim that he is entitled to enforcement of the "plea agreement" fails because there is absolutely no evidence in the record that any plea agreement or offer of a plea agreement was ever made by the People.

As for Maldonado's contention that the People, by Mr. Taksa, committed prosecutorial misconduct because they reneged on the plea agreement, this contention necessarily fails because the record unambiguously discloses there was no plea bargain offered by the People and no plea agreement was entered into by the People.

Whatever "offer" was presented on July 28 was made by the judicial officer, who indicated that if Maldonado pled to all charges, the prior strike convictions would be struck and Maldonado would be placed on probation. However, instead of proceeding to complete his entry of plea on July 28, Maldonado requested and received a continuance.

When the People, through Mr. Taksa, continued to object at the August 2, 2010, continued hearing to Maldonado entering the drug court program, there was no prosecutorial misconduct. The drug court eligibility sheet set forth that the district attorney's office found Maldonado ineligible for drug court and deferred entry of judgment and the People consistently maintained that position throughout the proceedings. The People's position regarding Maldonado's ineligibility for deferred entry of judgment and drug court is borne out by the language of section 1000, subdivision (a). (See *People v. Duncan* (1990) 216 Cal.App.3d 1621, 1626-1627.)

When Mr. Taksa appeared on behalf of the People at the August 2 hearing, he merely maintained a consistent position that previously had been taken by the People in this case. Maldonado's whole contention of prosecutorial misconduct is based on repeated mischaracterizations of the earlier proceedings as a plea bargain agreed to by the People when the record clearly shows no such agreement.

Moreover, the comments from the judicial officer at the August 2 hearing that “nothing referring to driving under the influence” appeared on the drug court eligibility sheet is factually incorrect. The felony complaint was filed as a Three Strikes complaint. The drug court eligibility sheet was filed early in the proceedings and clearly states the People’s position that Maldonado is not eligible for drug court and a deferred entry of judgment program because of a “pattern of excessive criminality” and a narcotics offense that makes him ineligible, specifically “driving.”<sup>2</sup>

Maldonado relies upon *People v. Sanders* (2012) 203 Cal.App.4th 839, 850 for the proposition that the People are estopped from refusing to go forward with the plea agreement, even if the contemplated disposition was in excess of jurisdiction, because a plea had been entered and there was detrimental reliance. This contention is flawed on three grounds. First, there was no agreement with the People, as we have set forth in detail. Second, Maldonado did not complete entry of a change of plea at the July 28 hearing or at any other hearing; thus, his plea of record remained not guilty. Third, there was no detrimental reliance by Maldonado; he was not convicted based upon a plea to any agreement; rather, he went to trial and was convicted by a jury.

### Conclusion

The record is devoid of a fundamental element of a plea agreement - a negotiated agreement expressing a mutual intent between the People and the defendant. (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) There was no mutual intent and no agreement, which the circumstances and the conduct of the People demonstrated. The People repeatedly objected to Maldonado’s *Romero* motion; objected to Maldonado entering drug court; declared Maldonado ineligible for drug court and deferred entry of judgment; and argued that Maldonado should be sentenced in accordance with Three Strikes.

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<sup>2</sup> It is not entirely clear, but this sheet apparently was attached to the felony complaint.

## II. NO ABUSE OF DISCRETION

Although Maldonado's repeated requests to the trial court at the July 14, July 28, and August 2, 2010, hearings were for referral to drug court and all that entailed, he claims in this appeal that he was "offered" a grant of probation, which would require a plea, a suspended sentence, and referral to drug treatment. Clearly, there was no such offer from the People, as discussed in Part I. There was no agreement between the People and Maldonado, either for probation and drug treatment or drug court and deferred entry of judgment.

What appellant refers to as an "offer" was a statement made by the judicial officer, who indicated that if Maldonado pled to all charges, he would "be placed on probation and placed into the Drug Court." At most, this was an "indicated sentence" if he would plead to all charges. However, instead of proceeding to complete his entry of plea on July 28, Maldonado requested and received a continuance.

The August 23, 2010, continued hearing was held because Maldonado previously had not been willing to plead as charged. At the August 23, 2010, continued hearing, the trial court noted that it believed Maldonado would have been a good candidate for drug court, but pursuant to the rules under which drug court was established, Maldonado was ineligible. When the trial court made this announcement, defense counsel asked for "two weeks to regroup," which was granted.

Maldonado contends the August 23 hearing was a "post-plea probation case" and the trial court did not understand that although Maldonado may have been ineligible for drug court referral, the trial court did have discretion to place Maldonado on probation. First, the characterization of the hearing as a "post-plea" case is inaccurate. Second, there is no indication the trial court misunderstood its discretion to impose probation.

At the hearing on July 28 where the trial court initially proceeded to accept a plea, Maldonado pled to one offense, but halted the proceedings before completing his plea to the charges. At the August 2 hearing, Maldonado continued to insist on referral to drug

court. At the August 23 hearing, the trial court notified Maldonado that a final determination had been made that he was ineligible for drug court. When then asked what Maldonado wanted to do, the request for “two weeks to regroup” was made. Clearly, there was no completed entry of a change of plea.

Although Maldonado claims the July 28 hearing was continued because the charges in the information were incorrect, any confusion regarding the nature of the charges was clarified before the July 28 hearing concluded. At subsequent hearings, Maldonado continued to insist on a referral to the drug court program. The defense never indicated to the trial court that Maldonado was seeking or expecting an indicated sentence other than referral to drug court. Because Maldonado was not eligible for drug court, the trial court properly denied Maldonado’s request to be referred to drug court.

Contrary to Maldonado’s contention, the record does not support a conclusion that the trial court misunderstood its discretion to place Maldonado on probation. We will not conclude the trial court misunderstood the scope of its sentencing discretion “in the absence of some affirmative showing that it [did].” (*People v. Alvarez* (1996) 49 Cal.App.4th 679, 695.) ““We must indulge in every presumption to uphold a judgment, and it is defendant’s burden on appeal to affirmatively demonstrate error -- it will not be presumed. [Citation.]’ [Citations.]” (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1523.) Thus, there is a “normal presumption of regularity concerning the exercise of sentencing discretion.” (*People v. Mosley* (1997) 53 Cal.App.4th 489, 497.)

Maldonado has not shown affirmatively that the trial court misunderstood its discretion. The trial court, after several hearings, did reach a conclusion that Maldonado was ineligible for drug court. We find no indication in the record, and Maldonado has failed to cite to any portion of the record, where the trial court indicates a belief that Maldonado was ineligible for probation.

Maldonado *assumes* the trial court misunderstood its discretion because it failed to impose probation after concluding Maldonado was ineligible for drug court. This assumption is insufficient for us to find the trial court misunderstood its discretion.

First, an appellate court assumes discretion is understood, unless the record affirmatively demonstrates to the contrary and here, it does not. (*People v. Alvarez, supra*, 49 Cal.App.4th at p. 695.) In fact, the record indicates the trial court understood it could impose a sentence of felony probation, with an indicated sentence of six years in prison if Maldonado violated probation.

Second, the trial court at the August 23 hearing could not impose a sentence of probation or any sentence because Maldonado never completed his change of plea on July 28; consequently, his guilty pleas to the charges were still a matter of record. The trial court could not impose sentence of any type until Maldonado was convicted, either by a change of plea or trial.

#### **DISPOSITION**

The judgment is affirmed.

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Franson, J.

WE CONCUR:

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Cornell, Acting P.J.

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Kane, J.