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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Appellant,

v.

JAMES R. THURMAN,

Defendant and Respondent.

F063398

(Super. Ct. No. CRF35339)

OPINION

APPEAL from a judgment of the Superior Court of Tuolumne County. Eleanor Provost, Judge.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Larenda R. Delaini, Deputy Attorneys General, for Plaintiff and Appellant.

Francine R. Tone, under appointment by the Court of Appeal, for Defendant and Respondent.

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INTRODUCTION

Respondent James Riley Thurman was charged with transportation of a controlled substance and being under the influence of a controlled substance. During the trial, the

judge made an offer in chambers which was repeated in the court room; Thurman accepted the offer over the People's objection. The People appeal, contending the trial court engaged in an unlawful judicial plea bargain and abused its discretion by dismissing Thurman's prior strike conviction and prior prison term enhancements.

We agree with the People that the trial court engaged in unlawful plea bargaining and that striking the prior conviction and prior prison term enhancements for the reason stated on the record was an abuse of discretion. Therefore, we will set aside the plea agreement and reinstate all charges and enhancements.

FACTUAL AND PROCEDURAL SUMMARY

On April 27, 2011, at approximately 10:00 a.m. Deputy Sheriff Alejandro Rivera was on patrol. Rivera saw Thurman driving a pickup truck, with Gina Cook sitting beside him; Rivera was looking for Cook. When Thurman pulled into a driveway, Rivera pulled up and parked his patrol car.

Thurman stepped out of the pickup truck and started walking toward Rivera; they met near the tailgate of the pickup truck. After a brief conversation, Rivera searched Thurman. Rivera found a baggie containing a white, crystalline substance in Thurman's pocket and suspected the substance was methamphetamine. Cook told Rivera that she had methamphetamine in her bra and recovered it for the deputy. Cook also had a methamphetamine pipe.

Sergeant Neil Evans arrived to assist Rivera. Evans conducted a Val-Tox test on the substance found in Thurman's pocket; it weighed .4 grams before testing. After arriving at the jail, Rivera performed field sobriety tests on Thurman and reached the opinion that Thurman was under the influence of methamphetamine or a stimulant.

A urine sample was obtained from Thurman and tested. The sample tested positive for amphetamine and methamphetamine and screened presumptive positive for marijuana. A urine test cannot determine when a person used methamphetamine;

methamphetamine can remain in the urine for up to 72 hours, or up to five days for a chronic user.

Thurman was charged with transportation of a controlled substance and being under the influence of a controlled substance. The information also alleged that Thurman had served three prior terms in state prison and had suffered one prior conviction for a serious or violent felony.

On June 22, 2011, trial by jury commenced. Outside the presence of the jury, Thurman admitted the truth of the prior conviction and prior prison term enhancements.

During the presentation of evidence, the People's last witness, a criminalist, was running late. The trial court called counsel into chambers and indicated "this case was not going to be a prison case in the Court's opinion." When the parties returned to the court room, the judge stated "I made an offer in chambers that I think is reasonable[] and ... [e]vidence-based" The judge then asked if Thurman was "willing to take" the court's offer. Thurman indicated he would take the offer.

The court's offer was to "strike the strike, I will strike the prior prison terms, I will give you six months in the county jail with five-year, no early termination of probation, search and test clauses, the usual standard stuff." The People stated that they had made an offer to Thurman which was refused. Based on Thurman's criminal history, the People opposed the trial court's offer stating, "this is the record that I make to oppose what's happening."

The trial court responded to the People's opposition with the following statement:

"I think we all need to be thinking more about what we are doing in the prison system. I'm getting more thoughtful about who I send and whether they ought to be there. We obviously can't keep doing this in California, and I don't want to talk politics here but we just can't keep this up.... So, that being the case, if you want to take the plea, now is your chance."

Thurman accepted the trial court's offer; the trial court took a waiver of rights; and Thurman's plea to the court's offer was entered.

The trial court indicated that the offer “didn’t come from the [criminalist] not being available.” The court continued to state, “it would have been worth waiting for had this case been worth a prison term of some number of years.”

The People filed a timely notice of appeal.

DISCUSSION

In this appeal, the People contend the trial court engaged in an unlawful judicial plea bargain and abused its discretion in dismissing Thurman’s prior strike conviction. We agree.

I. JUDICIAL PLEA BARGAIN

The central question on appeal is whether the trial court engaged in unauthorized judicial plea bargaining or instead gave defendant an indicated sentence which did not require the prosecutor’s consent.

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.” (Pen. Code, ¹ § 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

¹ References to code sections are to the Penal Code unless otherwise specified.

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.)

To obtain an indicated sentence, a defendant admits all charges and special allegations such that “all that remains is the pronouncement of judgment and sentencing.” (*People v. Vessell* (1995) 36 Cal.App.4th 285, 296; *People v. Allan* (1996) 49 Cal.App.4th 1507, 1516.) An indicated sentence involves no bargaining because no charges are reduced or dismissed that require the prosecutor’s consent; the prosecutor is still allowed to contest the indicated sentence. (*People v. Allan, supra*, 49 Cal.App.4th at p. 1516; *People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1271.) Here, Thurman pled to the two charges, in exchange for dismissal of the enhancements, over the objection of the People.

In addition, the trial court’s comments during the change-of-plea hearing reflect a commitment to imposing a six-month jail sentence, on its own motion, regardless of subsequent facts, argument, or probation department recommendations. These comments violated the principles of an indicated sentence. “An indicated sentence is just that: an indication. Until sentence is actually imposed, no guarantee is being made.” (*People v. Delgado* (1993) 16 Cal.App.4th 551, 555 (*Delgado*) [appellate court found that the trial court gave an indicated sentence based on the fact that the court retained its discretion to

change its sentencing choice after review of the probation report and statement from the victim].)

In contrast to *Delgado*, the probation report here notes that the trial court has already fixed the sentence at six months in the county jail with five years probation. The probation officer noted Thurman's criminal record of six prior offenses, one as a juvenile and five as an adult; four circumstances in aggravation in the current offenses and no mitigating circumstances. The probation officer in Thurman's case opined that given Thurman's criminal history and "the speed with which he engaged in illegal drug use following his parole release and scant indication he is serious about changing, this officer doubts he will remain free of incarceration for long."

The trial court's offer constituted more than an offer of an indicated sentence; the trial court engaged in unlawful judicial plea bargaining. "The traditional role of the judge, as envisioned by Penal Code section 1192.5, is one of approving or disapproving dispositions arrived at by counsel for defendant and the district attorney, who is the duly elected representative of the People. When the judge steps out of that role and bargains directly with the defendant as to the manner in which the judge's discretion will be exercised the dignity of the judiciary is impaired and public confidence in the judiciary is diminished." (*People v. Superior Court (Smith)* (1978) 82 Cal.App.3d 909, 914.)

On this record, the fundamental principles behind plea bargaining were violated. Accordingly, the judgment must be reversed and the parties returned to the status quo *ante*. The matter therefore is being remanded with directions to reinstate all charges and enhancements.

II. ABUSE OF DISCRETION

We address briefly the People's contention that the trial court abused its discretion in dismissing all prior convictions and prior prison term enhancements.

The standard for determining an abuse of discretion is well settled: the exercise of discretion is neither arbitrary nor capricious, "but is an impartial discretion, guided and

controlled by fixed legal principles, to be exercised in conformity with the spirit of the law.” (*People v. Stone* (1999) 75 Cal.App.4th 707, 716.)

Where the record reflects that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we affirm the exercise of discretion. (*People v. Myers* (1999) 69 Cal.App.4th 305, 309-310.) The Three Strikes Law “not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm and requires the court to explicitly justify its decision to do so.” (*People v. Carmony* (2004) 33 Cal.4th 367, 378.) The circumstances by which a career criminal falls outside the spirit of the Three Strikes Law must be extraordinary. (*Ibid.*)

Here, there were no extraordinary circumstances. The trial court refused to apply the law because of a personal opposition to the sentencing scheme and focused solely on the nature of the current offense. Such a rationale falls outside the bounds of discretion and constitutes an abuse of discretion. (*People v. Carmony, supra*, 33 Cal.4th at p. 379.)

DISPOSITION

The plea agreement is set aside, the judgment is reversed, and the matter remanded with directions to reinstate the original charges and enhancements, and conduct such further proceedings as may be appropriate.

Franson, J.

WE CONCUR:

Cornell, Acting P.J.

Gomes, J.