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

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTWON ALBERTY,

Defendant and Appellant.

F063767

(Super. Ct. No. F11903901)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Fresno County. Jon N. Kapetan, Judge.

John Hardesty, 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, Deputy Attorney General, for Plaintiff and Respondent.

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\* Before Gomes, Acting P.J., Kane, J., and Poochigian, J.

Antwon Alberty stole a pair of shoes and resisted a clerk's efforts to detain him. He was charged with second degree robbery (Pen. Code, § 211)<sup>1</sup> with four prior prison term enhancements (§ 667.5, subd. (b)). Before the preliminary hearing, he pled no contest to robbery and admitted one prior prison enhancement, with the understanding that the other enhancements would be struck and the court would impose the three-year midterm. The court subsequently denied his motion to withdraw his plea and imposed the agreed-upon term. Alberty appeals contending the trial court abused its discretion by denying his motion. We affirm.

### FACTS

The probation report disclosed that on July 5, 2011, Alberty took a pair of shoes and a bag of socks from Payless Shoe Store, placed them in a plastic bag he had, and walked toward the door. When the store employee attempted to stop him, he grabbed her right forearm and said, "Bitch, these are my shoes and don't touch me." He pushed her backwards and left the store. A responding police officer saw Alberty walking nearby. The officer motioned for Alberty to approach. Alberty responded, "I didn't do anything," and began to walk away. After a brief struggle, the officer detained Alberty and the victim identified him.

On the date set for the preliminary hearing, Alberty agreed to enter a plea of no contest to robbery and admit one prison prior with the understanding the court would strike the enhancement at sentencing and impose the middle term of three years for robbery. Alberty completed a "FELONY ADVISEMENT, WAIVER OF RIGHTS, AND PLEA FORM," in which he acknowledged and waived the pertinent constitutional rights and acknowledged the consequences of his plea. In open court, Alberty identified his initials and signature on the form, and affirmed that he had had enough time to discuss

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

the matter with his attorney and understood what he had signed and initialed on the form. He then entered his plea, which the court found to be freely, voluntarily and intelligently entered.

On the date set for sentencing, Alberty asked to withdraw his plea. The court appointed conflict counsel to represent him for the motion. The motion was made on four grounds: (1) Alberty was not advised of the potential maximum sentence, (2) counsel did not investigate the case and the court did not grant a continuance to do so, (3) Alberty could not make a sound-minded decision at the time due to “stress, emotional instability and fear,” and (4) an investigation might have shown that Alberty did not use sufficient force to constitute robbery. In support of the motion, Alberty declared that he did not fully understand the terms of the plea, particularly that he would get only 15% percent time credits and he wanted more time to discuss the offer with his family.

The court denied the motion. It noted that the record showed that Alberty had been advised of the six-year potential maximum sentence. It had denied a continuance to investigate the case until defense counsel filed the proper paperwork and that was never done. Instead, at the next hearing, Alberty entered his guilty plea. Finally, there was nothing other than Alberty’s declaration to support his duress claim and that Alberty believed he might not be guilty of robbery was not grounds to grant his motion.

At sentencing, the court denied Alberty’s request for a short continuance to investigate alternative sentencing options. The court noted his lengthy record and stated it would not entertain alternative sentencing.

### **DISCUSSION**

Alberty contends the trial court abused its discretion in denying his motion to withdraw his “involuntary” plea and his trial counsel was ineffective. The People disagree.

## **Motion to Withdraw Plea**

A defendant will be permitted to withdraw his guilty plea for good cause. (§ 1018.) “Good cause” includes mistake, ignorance, fraud, duress or any other factor that overcomes the exercise of free judgment. It must be shown by clear and convincing evidence. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917-918.) On appeal, we review the denial of a motion to withdraw a guilty plea for abuse of discretion. (*Id.* at p. 917.) And we accept all factual findings of the trial court that are supported by substantial evidence. (*Ibid.*) Here, there is substantial evidence to support the trial court’s determination that Alberty’s plea was knowingly and intelligently entered of his own free will and with adequate representation.

Alberty contends the totality of the circumstances show his plea was not knowing, intelligent, and voluntary. He claims his acknowledgement and waiver of his constitutional rights on the plea form is inadequate because the form was filled out, initialed and signed at the time of the change of plea hearing “without time to reflect on the wisdom of waiving” his constitutional rights. He faults the trial court for limiting its inquiry to whether he recognized the form, whether those were his initials and signature on the form, if he had enough time to confer with counsel and if he understood “each and every item” on the form. He points out that the form contained 21 items, only eight of which pertained to his understanding and waiver of his rights. He concludes, “the trial court blithely swept over” his constitutional rights.

The record does not support these claims. First, the plea form advised Alberty explicitly of each of his constitutional rights and required that he waive each one by initialing eight separate boxes. Alberty initialed each box and he answered affirmatively to the court’s queries whether he had had enough time to discuss the case with counsel and whether he understood each and every item he initialed. A validly executed plea form is sufficient to satisfy the dictates of *Boykin v. Alabama* (1969) 395 U.S. 238 and *In*

*re Tahl* (1969) 1 Cal.3d 122. (*In re Ibarra* (1983) 34 Cal.3d 277, 285-286.) Second, Albery was no stranger to the criminal justice system. A defendant's prior experience with the criminal justice system is relevant to whether he knowingly waived his constitutional rights. (*Parke v. Raley* (1992) 506 U.S. 20, 37.) Here, Albery's prior convictions—including a number for theft-related crimes—date back to 1997 and continue uninterrupted through the current offense, covering four pages of the probation report. He had served four prior prison terms and was on parole when he committed the robbery. As such, the record does not support his claim that he entered his plea hastily and was unaware of the rights he was waiving.

In a similar vein, Albery argues the case for a robbery conviction was “not strong.” He submits the force referred to in the police report was slight and an interview with the store clerk could have clarified the force used. Because counsel did not investigate this line of defense, he suggests counsel was eager to conclude his case and move on to the next. Thus, it was reasonably probable that counsel did not adequately explain his constitutional rights to him and his plea was not knowing or voluntary. We disagree. Nothing in the record supports the claim that counsel gave the case inadequate attention so she could move on to her next case. Rather, the record reflects that Albery was a recidivist thief, who had repeatedly taken merchandise from larger stores. This time, his theft from a smaller store resulted in an employee's effort to stop him and his use of oral and physical force to make off with the goods. It is unlikely that anything exculpatory would have ensued from further investigation. Moreover, the terms of the plea offer made early in the process—no prison time for the prior prison term enhancements—were quite favorable, and may have been less favorable had the case been prolonged for investigation.

Albery next contends his plea was not knowing because he did not understand “the time constraints”—the 15 percent conduct credit limitation—consequence of his

plea. Not so; a defendant is not entitled to withdraw a guilty plea on the ground the trial court, in accepting the plea, failed to advise the defendant of a limit on conduct credits available, a collateral consequence of the plea. (*People v. Barella* (1999) 20 Cal.4th 261, 272.)

Alberty has not shown that the trial court abused its discretion in denying his motion to withdraw his guilty plea because his plea was involuntary or uninformed.

### **Ineffective Assistance**

Where a defendant has been denied effective assistance of counsel in entering a guilty plea, he is entitled to an opportunity to withdraw his plea. (*People v. Hunt* (1985) 174 Cal.App.3d 95, 104.) Alberty makes two claims of deficient performance. First, defense counsel failed to advise him that by pleading no contest to a robbery charge, he would be subject to section 2933.1's credits limitation. This claim fails because even if counsel did not discuss custody credits with Alberty before he entered his plea, under established case law, that does not constitute ineffective assistance. (*People v. Reed* (1998) 62 Cal.App.4th 593, 597 [counsel's failure to inform defendant about section 2933.1's credit limitations is not ineffective assistance].)

Second, Alberty claims that counsel's inadequate investigation of the case before he entered his plea constituted ineffective assistance. Here, the record is silent regarding why counsel acted as she did. When the record on appeal sheds no light on why counsel acted in the manner challenged, the claim must be raised in a habeas corpus proceeding. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Alberty has failed to demonstrate that his counsel provided ineffective assistance entitling him to withdraw his guilty plea.

### **DISPOSITION**

The judgment is affirmed.