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

THE PEOPLE,

Plaintiff and Respondent,

v.

CRYSTAL ANNTONNETTE AGCAOILI,

Defendant and Appellant.

F063797

(Super. Ct. No. BF135590A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Michele A. Douglass, 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, Louis M. Vasquez, Leanne LeMon, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Poochigian, J., and Franson, J.

Appellant, Crystal Anntoinette Agcaoili, pled no contest to transportation of methamphetamine (count 1/Health & Saf. Code, § 11379, subd. (a)), possession of methamphetamine (count 2/Health & Saf. Code, § 11377, subd. (a)), possession of marijuana in jail (count 3/Pen. Code, § 4573.6)¹, resisting arrest (count 4/§ 148, subd. (a)(1)), possession of paraphernalia (count 5/Health & Saf. Code, § 11364), and possession of marijuana (count 6/Health & Saf. Code, § 11357, subd. (b)). Agcaoili also admitted two prior conviction enhancements in count 1 (Health & Saf. Code, § 11370.2, subd. (c)) and a prior prison term enhancement (§ 667.5, subd. (b)).

On appeal, Agcaoili contends the court erred by its failure to allow her to withdraw her plea because it sentenced her in violation of her plea bargain and without taking a *Cruz*² waiver. We affirm.

FACTS

On February 10, 2011, officers stopped a car in which Agcaoili was a passenger. The officers arrested Agcaoili after searching her and finding a glass smoking pipe and a baggie containing methamphetamine in her bra. When officers attempted to put Agcaoili in a patrol car, she pulled away which required the officers to use a wrist lock to get her in the car. During a search at the jail, an officer found a baggie of marijuana in Agcaoili's underwear.

On March 7, 2011, the district attorney filed an information charging Agcaoili with the charges and enhancements she ultimately pled to.

On July 12, 2011, Agcaoili agreed to plead no contest to all charges in the information and admit all enhancements in exchange for an indicated sentence by the

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

² *People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*).

court of two years. After filling out a change of plea form evidencing the plea agreement and indicated sentence, the following colloquy occurred:

“THE COURT: ... [¶] This is the time and place set for jury trial in this matter. However, it looks like we reached a disposition, ma’am, where you’ll be pleading guilty or no contest as charged, to the charging document, for no more than two years in the state prison.

“Is that correct?

“THE DEFENDANT: That’s correct.

“THE COURT: All right. Is that what you want to do today, ma’am?

“THE DEFENDANT: Yes.

“THE COURT: Okay.

“[DEFENSE COUNSEL]: Your Honor, this is not part of the plea bargain, but Miss Agcaoili is requesting a sentencing on the week of September 12th so she can arrange her personal affairs prior to going into custody.

“THE COURT: Mr. Harrold [the prosecutor], your thoughts?

“MR. HARROLD: With the appropriate [Cruz] waiver, I have no objection.

“THE COURT: All right. One second.

“All right, ma’am, what the prosecutor has asked for is that you be informed at the time of your plea that the Court may sentence you in excess of the agreed upon time if you fail to appear on time at the time of the sentencing in September, if you fail to cooperate with probation in preparing their sentencing reports, or you pick up a new violation of the law between now and sentencing.

“If you do any of that, I can give you more time.

“Do you understand that?

“THE DEFENDANT: I understand that.

“THE COURT: So do you still want to go ahead and put the sentencing off until September?

“THE DEFENDANT: Yes.

“THE COURT: Okay. Very good. That’s fine....”

The court then took Agcaoili’s plea. It did not, however, advise Agcaoili that she had the right pursuant to section 1192.5 to withdraw her plea, if she desired to, in the event the court withdrew approval of the indicated punishment specified in her plea agreement.

On September 12, 2011, Agcaoili failed to appear for sentencing.

On October 14, 2011, Agcaoili appeared in court in custody after having been arrested on an outstanding warrant. After hearing argument from counsel, the court sentenced Agcaoili to an aggregate nine-year term: the lower term of two years on count 1, two three-year prior conviction enhancements on that count, a one-year prior prison term enhancement, a stayed term on count 2, and concurrent terms on the remaining counts.

DISCUSSION

Agcaoili contends that the increased sentence for failing to appear was not part of her plea agreement. She further contends that the court did not take a *Cruz* waiver, i.e., a waiver of her rights pursuant to section 1192.5 to withdraw her plea if the court did not sentence her in accord with her plea bargain. Thus, according to Agcaoili, since the court violated the terms of her plea agreement and she did not waive her rights pursuant to section 1192.5, the court erred by its failure to allow her to withdraw her plea and she should be allowed to do so. We find that the plea agreement included a provision that if the defendant failed to appear at sentencing, she could be sentenced beyond the time previously indicated and the court therefore did not violate the terms of her plea agreement when it sentenced her to nine years. Because the trial court did not violate the

plea agreement, the failure to take a waiver of Agcaoili's section 1192.5 rights was harmless.

Under section 1192.5, "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." (§ 1192.5.)

In *Cruz, supra*, 44 Cal.3d 1247, our Supreme Court held that a defendant who fails to appear for sentencing does not lose the protections of section 1192.5. Though committing "a separate offense of failure to appear[] ([s]ee §§ 1320 and 1320.5[])," for which punishment may be imposed, the defendant must still be permitted to withdraw his or her plea if the court insists on imposing additional punishment in excess of that provided by the plea agreement. (*Id.* at p. 1253.)

However, the Supreme Court added the following caveat, which recognized the ability of a defendant to waive the protections afforded by section 1192.5: "We do not mean to imply by this holding that a defendant fully advised of his or her rights under section 1192.5 may not 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." (*Cruz, supra*, 44 Cal.3d at p. 1254, fn. 5.)

Section 1192.5 is implicated, and the foregoing waiver 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....” (*People v. Casillas* (1997) 60 Cal.App.4th 445, 451-452 (*Casillas*)). In that situation, the defendant must be allowed to withdraw his or her plea. However, “when the parties themselves agree *as part of the plea bargain* to a specific sanction for nonappearance, the court need not permit the defendant to withdraw his or her plea but may invoke the bargained-for sanction.” (*Id.* at p. 452, italics added.) “The ultimate question will be not whether the bargain occurred in a hermetically sealed environment from which the judge was excluded, but whether the return provision resulted from the give-and-take of plea bargaining or was a judicially imposed afterthought.” (*Id.* at p. 452, fn. omitted.)

The case of *People v. Masloski* (2001) 25 Cal.4th 1212 (*Masloski*) involved the second of the situations described above, where the sanction for nonappearance was deemed included in the plea agreement. In that case, the trial court explained the terms of the defendant’s plea agreement, “which included what the court referred to as a ‘*Cruz* waiver.’” (*Id.* at p. 1222.) The trial court later explained that a “‘*Cruz* waiver’” meant defendant could receive an increased sentence of up to six years in prison if she failed to appear for sentencing.³ Defense counsel, the defendant, and the prosecutor then confirmed that this was their understanding of the terms of the plea agreement. Our Supreme Court, in affirming the six-year sentence, acknowledged the trial court’s error in failing to advise the defendant pursuant to section 1192.5, but concluded: “[T]his error was of no consequence, because the superior court did not disapprove the plea agreement. Rather, when defendant failed to appear on the date set for sentencing, she was sentenced

³ The agreed upon sentence, if the defendant appeared for sentencing, was two years eight months.

to a term of four years in prison, in accordance with the terms of the plea agreement. The provisions of section 1192.5 that permit a defendant to withdraw his or her plea if the court withdraws its approval of the plea agreement were not implicated, because the court adhered to the terms of the plea agreement by sentencing defendant to a prison term that did not exceed (and in fact was less than) the maximum sentence authorized by the plea agreement in the event that defendant failed to appear on the date set for sentencing.” (*Masloski*, at pp. 1223-1224.)

In the instant case, as in *Masloski*, the term “*Cruz* waiver” signified that the plea agreement included a provision that Agcaoili’s sentence could be increased if she failed to appear at sentencing and the trial court did not take a waiver of Agcaoili’s rights, pursuant to section 1192.5, to withdraw her plea if the court withdrew approval of the plea. After accepting the court’s indicated sentence, and prior to Agcaoili entering a plea, defense counsel advised the court that Agcaoili was requesting to be released from custody until her sentencing in order to “arrange her personal affairs prior to going into custody.” The court asked the prosecutor to comment and he replied that he did not have any objection to a release with a “*Cruz* waiver.” The court then explained that the “*Cruz* waiver” meant that if she failed appear for sentencing, failed to cooperate with probation in preparing a probation report, or committed a new offense, the court would be able to sentence her to more than the two years originally provided by the plea agreement. After Agcaoili agreed to this additional term, the court took her plea. Thus, even though the original agreement between Agcaoili and the court did not include a term allowing Agcaoili to be released from custody and the court to increase her sentence if she failed to appear for sentencing, prior to Agcaoili entering her plea, it was added to the agreement by the mutual agreement of Agcaoili and the prosecutor. It was part of a “give and take plea bargaining,” and not “a judicially imposed afterthought.” Further, as in *Masloski*, the failure to advise Agcaoili of her rights pursuant to section 1192.5, or take a waiver of

those rights, was harmless because the court did not violate the terms of her plea agreement.⁴ (*Masloski, supra*, 25 Cal.4th at pp. 1223-1224.)

Agcaoili relies on *People v. Morris* (1979) 97 Cal.App.3d 358 (*Morris*), *People v. Barrero* (1985) 163 Cal.App.3d 1080 (*Barrero*), and *People v. Jensen* (1992) 4 Cal.App.4th 978 (*Jensen*) to contend that the provision allowing the court to increase her sentence was not part of her plea agreement. According to Agcaoili, “[t]he facts of the instant case are, for *Cruz* waiver purposes, practically identical to [these] cases.” We find these cases inapposite.

In *Morris*, the defendant agreed to a plea bargain that, in pertinent part, provided for a grant of probation. After the terms of the plea were announced in open court, the trial judge announced his intention to summarily impose a state prison sentence with execution stayed for the sole purpose of assuring the defendant’s appearance upon his being released on his own recognizance pending formal sentencing. (*Morris, supra*, 97 Cal.App.3d at p. 361.) The court then took the defendant’s plea without advising him of his section 1192.5 rights, sentenced him to a stayed two-year term, and released him on his own recognizance. When the defendant subsequently appeared in court after failing to appear for sentencing and being apprehended, the court denied his motion to withdraw plea and ordered him into custody to begin serving the previously imposed prison

⁴ The prosecutor’s use of the term “*Cruz* waiver” is a misnomer because the ensuing colloquy makes clear that the prosecutor was not asking the court to take a waiver of Agcaoili’s rights under section 1192.5 and that the prosecutor was actually proposing to Agcaoili that he would agree to her release if she agreed that the court could impose a greater sentence if she failed to show up for sentencing. Additionally, we note that over time the term “*Cruz* waiver,” instead of referring to a waiver of a defendant’s section 1192.5 rights, has consistently been used to refer to the practice of including in a plea agreement a term that allows the defendant to be released from custody in exchange for a greater penalty if he or she fails to appear for sentencing or violates any other specified condition. (See, e.g., *Masloski, supra*, 25 Cal.4th at p. 1222.)

sentence. (*Id.* at pp. 362-363.) The *Morris* court reversed, finding that the condition placed on the defendant's release was invalid because it was unilaterally imposed by the trial court and that the defendant was entitled to withdraw his plea because the court did not sentence him in accord with his plea agreement. (*Id.* at pp. 363-365.)

In *Barrero*, the defendant pled guilty to a count of felony joyriding in exchange for a 16-month term. However, in taking the defendant's plea, the court advised him that it would allow him to be released on bail, but if he did not report to the probation department or return for sentencing, the court would sentence him to a two- or three-year term instead of the 16-month term provided for by his plea agreement. Thereafter, the defendant failed to appear for sentencing. When he again appeared before the court after being apprehended on a warrant, the court sentenced him to a three-year term. (*Barrero, supra*, 163 Cal.App.3d at p. 1082.) The *Barrero* court reversed, finding that the return condition was unilaterally imposed by the court and not part of the plea bargain. It also held that since the defendant was not advised of his rights pursuant to section 1192.5, he was entitled to withdraw his plea unless sentenced within the parameters of his plea bargain. (*Id.* at p. 1085.)

In *Jensen*, the defendant pled guilty to being an ex-felon in possession of a firearm as part of a plea agreement that provided for an initial grant of probation. After defense counsel recited the terms of the agreement, he requested a stay of execution. The court then advised the defendant that its policy with respect to stays of execution was to sentence the defendant to two years and if he "doesn't show up or picks up another beef, ... he goes to the [CDCR]." The court then sentenced the defendant to a two-year term with the caveat that if he returned to court as directed, with no additional offenses, the court would place him on probation for one year. The defendant failed to appear at a subsequent hearing and a warrant for his arrest issued. When he subsequently appeared before the trial court, following his apprehension on the warrant, the court denied his

motion to withdraw his plea and sentenced him to a two-year term. (*Jensen, supra*, 4 Cal.App.4th at pp. 980-981.) In reversing the judgment, the *Jensen* court held that because the return provision was unilaterally imposed by the trial court without allowing the defendant to withdraw his plea pursuant to section 1192.5, it was not a valid part of the defendant's plea bargain. (*Id.* at pp. 983-984.)

Morris, Barrero, and Jensen are easily distinguishable because in each case, the trial court unilaterally conditioned the defendant's release from custody on the defendant receiving a greater sentence than that provided for by the defendant's plea bargain if the defendant failed to show up for sentencing. Here, as discussed earlier, the court did not unilaterally impose a term allowing the court to increase Agcaoili's sentence as a condition of releasing Agcaoili. Instead, this term was made part of Agcaoili's plea agreement by the mutual agreement of Agcaoili and the prosecutor. Thus, we conclude that the court did not violate the terms of Agcaoili's negotiated plea when it sentenced her to a nine-year term or err by its failure to allow her to withdraw her plea.

DISPOSITION

The judgment is affirmed.