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

THE PEOPLE,

Plaintiff and Respondent,

v.

RALPH LUCAS CELAYA,

Defendant and Appellant.

F064128

(Super. Ct. No. F10905593)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Kristi Culver Kapetan, Judge.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the Attorney General, Sacramento, California, for Plaintiff and Respondent.

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

Appellant, Ralph Lucas Celaya, pled no contest to one count of sexual penetration by force (Pen. Code, § 289, subd. (a))¹ and admitted a serious felony enhancement (§ 667, subd. (a)) and allegations that he had two prior convictions within the meaning of the three strikes law (§ 667, subds. (b)-(i)).

On December 9, 2011, the court struck the two strike convictions and sentenced Celaya to an aggregate, eight-year term. Following independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Celaya was married to the confidential victim for 25 years. However, when he committed the sexual penetration offense, Celaya's drug abuse had caused them to become estranged, and Celaya was living on the streets. Nevertheless, Celaya occasionally slept on the victim's back porch.

On October 20, 2010, at approximately 1:30 a.m., the victim was lying in bed when she heard Celaya at her front door. As she got out of bed, she heard the door open and Celaya come into the house. Celaya came into the victim's bedroom and began arguing with her. As the victim attempted to leave, Celaya grabbed her, pushed her to the ground, and locked the door. After telling the victim that he was going to "check" her to see if she was having sex with anyone, Celaya forcibly put his finger in her vagina. When the victim's daughter knocked on the door, Celaya let her in. Celaya then began running around the house, "mumbling that someone was going to die that night," and yelling, "Where is he?" When the victim said she was going to call 911, Celaya yelled, "There is gonna be two dead people in this house!" The victim ran back into her bedroom and Celaya left the residence. Celaya was arrested on November 2, 2010.

On December 20, 2010, the district attorney filed an information charging Celaya with sexual penetration by force (count 1), false imprisonment (count 2/§ 236), and making criminal threats (count 3/§ 422). The information also alleged a serious felony

¹All further statutory references are to the Penal Code.

enhancement, three prior prison term enhancements (§ 667.5 subd. (b)), and that Celaya had two prior convictions within the meaning of the three strikes law.

On July 20, 2011, Celaya entered his plea as part of a plea bargain that provided that the court would strike the two strikes and remaining enhancements, dismiss the remaining counts, and sentence Celaya to a stipulated eight-year term.

On October 28, 2011, defense counsel filed a motion to withdraw Celaya's plea.

On November 29, 2011, Celaya filed a *Marsden*² motion.

On December 9, 2011, the court heard and denied Celaya's *Marsden* motion. It then heard and denied Celaya's motion to withdraw his plea. Afterwards, the court struck Celaya's two strike convictions and sentenced him to the stipulated eight-year term: the mitigated term of three years on the forcible sexual penetration offense and a five-year serious felony enhancement.

On December 16, 2011, the court issued a certificate of probable cause, and defense counsel filed a notice of appeal in this matter.

Celaya's appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People v. Wende, supra*, 25 Cal.3d 436.) However, in a document filed on May 2, 2012, Celaya contends he was misled when entered his plea because: (1) he did not know that he was pleading to a charge of sexual penetration by force; and (2) he was led to believe the two prior convictions he admitted both qualified as strike convictions when only one did because the sentence on one conviction was stayed. Since these are the same issues Celaya raised in his motion to withdraw plea, Celaya, in essence, is challenging the trial court's denial of his motion to withdraw his plea.

“Section 1018 states in relevant part: ‘Unless otherwise provided by law, every plea shall be entered or withdrawn by the defendant himself or herself in open court.... On application of the defendant at any time before judgment ... the court may, and in case of a defendant who appeared

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

without counsel at the time of the plea the court shall, for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.... This section shall be liberally construed to effect these objects and to promote justice.’

“The general rule is that the burden of proof necessary to establish good cause in a motion to withdraw a guilty plea is by clear and convincing evidence. [Citations.]

“Withdrawal of a guilty plea is left to the sound discretion of the trial court. A denial of the motion will not be disturbed on appeal absent a showing the court has abused its discretion.’ [Citations.]

“To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor overcoming the exercise of his free judgment. [Citations.] Other factors overcoming defendant’s free judgment include inadvertence, fraud or duress. [Citations.] However, ‘[a] plea may not be withdrawn simply because the defendant has changed his mind.’ [Citations.]” (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1207-1208.)

Neither the court nor the change of plea form referred to the charge Celaya pled to as sexual penetration. Further, during the change of plea proceeding, the court twice referred to the sexual penetration offense only as a violation of “Penal Code section 289(a)(1),” including when it actually took Celaya’s plea. However, Celaya did not ask any questions regarding what Penal Code section he was pleading to or otherwise indicate that he did not understand what charge he was pleading to. Further, defense counsel signed an acknowledgement in the change of plea form that he reviewed the form with Celaya, answered his questions, and discussed the case with him, including the consequences of his plea and the elements of the charged offenses. It is reasonable to assume that in doing so, counsel explained to Celaya that Celaya would be pleading to the sexual penetration count pursuant to his plea bargain. Thus, the court reasonably could have found from these circumstances that in entering his plea, Celaya understood that he was pleading to a charge of sexual penetration by force as alleged in count 1.

Moreover, the court did not abuse its discretion when it treated each of Celaya’s two prior convictions as strikes even if the punishment on one conviction was stayed

when he was originally sentenced on those convictions. In *People v. Benson* (1998) 18 Cal.4th 24, the Supreme Court held that an otherwise qualifying conviction may be treated as a strike even if punishment on the conviction was stayed pursuant to section 654. (*Benson*, at pp. 26-27.) The court did leave open the possibility that, in some circumstances, prior convictions may be so closely connected, e.g., when they arise out of a single act, that it would be an abuse of discretion for the trial court not to strike one. (*Id.* at p. 36, fn. 8; see also *People v. Burgos* (2004) 117 Cal.App.4th 1209, 1211 [it is abuse of discretion not to strike one of two prior strike convictions that arose from same act]; but cf. *People v. Scott* (2009) 179 Cal.App.4th 920, 921 [in such cases, trial court is not compelled to strike one of the prior convictions].) However, that situation does not exist here because the trial court struck both of Celaya's prior strike convictions. Thus, we conclude that the court did not abuse its discretion when it denied Celaya's motion to withdraw his plea.

Further, following an independent review of the record, we find that no reasonably arguable factual or legal issues exist.

DISPOSITION

The judgment is affirmed.