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

THE PEOPLE,

Plaintiff and Respondent,

v.

ERNESTO VELASCO SIFUENTES,

Defendant and Appellant.

F065676

(Super. Ct. No. F06401197)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Fred Dupras and Jeffrey Y. Hamilton, Jr., Judges.*

Nuttall & Coleman and Roger T. Nuttall for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Catherine Chatman and Raymond L. Brosterhous II, Deputy Attorneys General, for Plaintiff and Respondent.

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* Judge Dupras presided at the change of plea hearing; Judge Hamilton imposed sentence and presided over the subsequent motion hearings.

INTRODUCTION

Defendant Ernesto Velasco Sifuentes alleges the trial court erred when it denied his motion to withdraw his 2007 guilty pleas. We disagree and affirm.

PROCEDURAL BACKGROUND¹

The Proceedings in 2006 and 2007

On October 2, 2006, the Fresno County District Attorney filed a criminal complaint alleging defendant had committed the following crimes: possession of a firearm by a felon (Pen.² Code, former § 12021, subd. (a)(1), a felony; count 1); evading an officer (Veh. Code, § 2800.1, subd. (a), a misdemeanor; count 2); driving under the influence of alcohol (Veh. Code, § 23152, subd. (a), a misdemeanor; count 3); driving with a 0.08 percent or higher blood alcohol level (Veh. Code, § 23152, subd. (b), a misdemeanor; count 4); resisting or obstructing a peace officer (§ 148, subd. (a)(1), a misdemeanor; count 5); driving when privilege suspended for prior driving under the influence conviction (Veh. Code, § 14601.2, subd. (a), a misdemeanor; count 6); and having a concealed firearm in a vehicle (former § 12025, subd. (a)(1), a felony; count 7). As to counts 3 and 4, it was alleged that defendant had suffered two prior driving under the influence convictions within the meaning of Vehicle Code section 23546. The following day, defendant was arraigned and pled not guilty to all counts and denied all priors and enhancements. He was represented by attorney Glenn Lostracco.

On February 22, 2007, pursuant to a plea agreement, defendant pled guilty to possession of a firearm by a felon (count 1) and misdemeanor driving under the influence (count 4), with the understanding he would avoid a state prison sentence.

¹ A recitation of facts has been omitted as those facts are unnecessary for resolution of the instant appeal.

² All further statutory references are to the Penal Code unless otherwise indicated.

However, at sentencing on March 22, 2007, the trial court indicated it could not honor the plea bargain, in particular, the previously indicated sentence of no initial state prison, following its consideration of the probation officer's report. Defendant was offered, but rejected, the option to withdraw his guilty plea, and was sentenced to the middle term of two years in state prison on the felony. Sentence was never pronounced as to count 4, the misdemeanor driving under the influence charge (DUI).

The Proceedings in 2012

Over five years later, on May 3, 2012, defendant appeared with retained counsel Roger T. Nuttall on a motion seeking to strike the prior 2007 DUI conviction.³ Argument was heard on the motion. At the request of counsel, supplemental briefing was permitted to address the consequences of the trial court's failure to impose a sentence in 2007 on the misdemeanor DUI conviction. Hence, the ruling on the motion was deferred pending additional proceedings.

On May 29, 2012, defendant moved to withdraw his earlier pleas.

On June 13, 2012, a continuance was granted to allow the People to respond to defendant's additional briefing. The court asked that the parties be prepared to address this court's decision in *People v. Miller* (2012) 202 Cal.App.4th 1450 at the next hearing.

On June 27, 2012, a further hearing was held on defendant's motions. Argument was heard; the motions were denied. The trial court then imposed sentence on the misdemeanor DUI count, awarding defendant credit for time served.

Defendant filed a notice of appeal, and on August 27, 2012, the trial court issued a certificate of probable cause.⁴

³ The record reflects defendant was then facing new criminal charges in Fresno County Superior Court case numbers 11F500058, 11M501070, and 11M501071.

⁴ In his request for a certificate of probable cause, defendant asserted eight separate bases for its issuance, referencing both the 2007 and 2012 proceedings.

DISCUSSION

Defendant alleges the trial court erred in its denial of his motion to withdraw his 2007 guilty pleas in that it failed to recognize judgment was not final in light of the trial court's failure to impose a sentence in count 4 in 2007.

Section 1018 provides, in pertinent 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 or within six months after an order granting probation is made if entry of judgment is suspended, the court may, and in case of a defendant who appeared 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 six-month limitation of section 1018 is mandatory. (*People v. Miranda* (2004) 123 Cal.App.4th 1124, 1133, 1134.) However, assuming the judgment was not final as to count 4 because the trial court failed to pronounce sentence following defendant's guilty plea in 2007, defendant had a right to move to withdraw his plea pursuant to section 1018. The People recognize this right unequivocally. As the People deftly point out however, defendant does not have a right to have said motion *granted*.

Defendant also contends that, because he established good cause to withdraw his pleas, the trial court erred in denying his motion.

“A motion to withdraw a guilty plea must be supported by a showing of good cause, whether the defendant was represented by counsel when entering the plea or waived his right to representation. The distinction drawn between the two classes is this: The requisite showing of good cause having been made, the court *must* grant a withdrawal motion made by a defendant who entered his plea without counsel, whereas the court *may* grant a withdrawal motion made by a defendant who entered his plea with counsel.” (*People v. Cruz* (1974) 12 Cal.3d 562, 566, original italics.) “Mistake,

ignorance or any other factor overcoming the exercise of free judgment” may amount to good cause. (*Ibid.*) Such cause “must be shown by clear and convincing evidence.” (*Ibid.*) We review the trial court’s decision to deny a motion to withdraw a guilty plea for abuse of discretion. (*People v. Holmes* (2004) 32 Cal.4th 432, 442-443.) We adopt the trial court’s factual findings to the extent they are supported by substantial evidence. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.)

Here, defendant was represented by counsel when he entered his plea. Thus, the trial court had the discretion to grant any motion by defendant to withdraw his plea, but, it was not required to do so.

Defendant argues he presented good cause in the form of the following three situations: (1) the trial court failed to honor the promises that induced his guilty plea and failed to inquire whether that plea was freely and voluntarily made; (2) the People failed to honor their promises that induced his guilty plea by arguing for a greater sentence; and (3) counsel at the time defendant entered his guilty plea rendered ineffective assistance of counsel for failing to consult with defendant regarding his appellate rights, failing to ensure the terms of the plea negotiations were met, and failing to protect defendant’s rights regarding the use of the misdemeanor DUI conviction as an aggregating factor.

Good Cause Assertions Concerning the Trial Court

Defendant contends the trial court committed error when it refused to honor its previously indicated sentence at the proceedings in March 2007. He implies the trial court knew of his criminal history when it originally indicated a willingness to render a “nisp,” or no initial state prison, sentence.

On March 22, 2007, the trial court called the matter, taking appearances and providing the People with a copy of the probation officer’s report. The court advised the parties it could not honor the “nisp with long term alcohol treatment program,” in light of defendant’s criminal history. The court explained:

“THE COURT: ... After reading a full probation record getting a complete picture of the Defendant it sometimes changes one’s view. Here he completely has no regard for prior orders of the Court and clearly doesn’t care that he’s been to prison. He has killed someone while drinking. He’s been to prison for possessing a loaded firearm which is fine if you’re licensed to do that but he’s not and he’s a convicted felon and he does it anyway, and he does it while brandishing and being completely blotto as a .21/.23. I’m not putting him on probation. If he wants to go for two years to CDC he can do that right now, otherwise, he can withdraw his plea and he’ll probably go for four, which is what he’s looking at.

“[DEFENSE COUNSEL]: Your Honor, with all [due] respect when this was originally discussed his history was available.

“THE COURT: I’m not saying I don’t know his history.

“[DEFENSE COUNSEL]: We discussed all of this and the fact that he repeats the DUI and the guns.

“THE COURT: I’m sure you did. I’m not saying you didn’t tell me that. What I’m saying is when it’s more fully flushed out by probation in writing and a judge reads it it’s a little different sometimes, and in this case it’s certainly different. When I’m looking at his history and reading the narrative of his history and looking at a narrative of the facts of this case I can’t in good conscious [*sic*] give him probation. He’s had every opportunity to change his behavior and he’s chosen not to and I am not going to give him probation. I will give him two years in state prison and probation is recommending the aggravated. He doesn’t -- he’s not eligible for probation. There’s no unusual circumstances to give him probation under 1203[.]4 and so that’s really the best that I can do at this point after reading the RPO.”

A plea bargain is a contract between the accused and the prosecutor. (*People v. Vargas* (2001) 91 Cal.App.4th 506, 533.) Both these parties are bound to the terms of the agreement; when the court approves the bargain, it also agrees to be bound by its terms. (*People v. Armendariz* (1993) 16 Cal.App.4th 906, 910-911.) Both the accused and the People are entitled to the benefit of the plea bargain. (See *People v. Panizzon* (1996) 13 Cal.4th 68, 80.) “When either the prosecution or the defendant is deprived of benefits for which it has bargained, corresponding relief will lie from concessions made.” (*People v. Collins* (1978) 21 Cal.3d 208, 214.) “[T]he court, upon sentencing, has broad discretion

to withdraw its prior approval of a negotiated plea.” (*People v. Johnson* (1974) 10 Cal.3d 868, 873.) “Such withdrawal is permitted, for example, in those instances where the court becomes more fully informed about the case [citation], or where, after further consideration, the court concludes that the bargain is not in the best interests of society.” (*People v. Superior Court (Gifford)* (1997) 53 Cal.App.4th 1333, 1338.) In deciding whether to withdraw approval of a plea bargain, the court may “be expected to consult the probation report....” (*People v. Stringham* (1988) 206 Cal.App.3d 184, 194, citing *People v. Kaanehe* (1977) 19 Cal.3d 1, 14.) “A change of the court’s mind is thus always a possibility.” (*People v. Stringham, supra*, at p. 194.)

While the trial court indicated its initial approval of the plea bargain as understood by defendant and the People, at sentencing,⁵ the trial court explained it had become more fully informed about the case and about defendant’s criminal history, and that in consideration of those factors, it concluded the bargain was not in the best interest of society. This was a proper exercise of the trial court’s discretion. (*People v. Johnson, supra*, 10 Cal.3d at p. 873; *People v. Superior Court (Gifford), supra*, 53 Cal.App.4th at p. 1338; *People v. Stringham, supra*, 206 Cal.App.3d at p. 194.) The trial court clearly indicated the probation report provided it with a “complete picture” because that report “more fully flushed out” defendant’s criminal history.

One can infer from the record that while it appears the trial court was made aware of defendant’s repeat violations for driving under the influence and firearms possession, it was not aware that defendant’s prior conduct included conduct that led to the loss of another’s life. Nor perhaps did it have a clear understanding of the extent to which defendant ignored prior court orders.

⁵ Here, defendant initialed and signed the completed felony advisement, waiver of rights, and plea form that expressly advised “[t]he matter of probation and sentence is to be determined solely by the court.”

Defendant's responsibility for another's death also supports the inference the court was additionally concerned with defendant's willingness to continue to commit and engage in criminal behavior. The probation officer's report reflects that, after a conviction for vehicular manslaughter yet before the 2007 charges, defendant was convicted of another alcohol related driving offense. Tellingly, in 1997, defendant stated to probation that "he stopped drinking alcohol" and that he had "decided that it was creating too many problems."

Significantly, the trial court permitted defendant the opportunity to withdraw his plea in light of its decision. The proper remedy was thus offered following the trial court's decision to depart from its original indicated sentence. (§ 1192.5;⁶ *People v. Delgado* (1993) 16 Cal.App.4th 551, 554 [indicated sentence is not guaranteed; if court decides to impose greater term, defendant's remedy is to withdraw plea, not to enforce indicated sentence].) Defendant, after conferring with counsel, elected not to withdraw his guilty plea. Instead, he agreed to proceed with sentencing in light of the court's indication it would impose a sentence of two years; a sentence less than that recommended in the probation report. (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1361-1362.) The trial court did not err.

Next, defendant contends the trial court erred by failing to inquire into the voluntariness of his plea, and the factual basis for the plea in light of its "unjustified modification of the indicated sentence." The court had previously inquired into these matters when it accepted defendant's plea in February 2007. Defendant acknowledged executing a misdemeanor advisement, waiver of rights and plea form, and a felony

⁶ Section 1192.5 provides, in relevant part, that the trial court "may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its [earlier] approval in light of further consideration of the matter" and that the defendant should "be permitted to withdraw his or her plea if he or she desires to do so."

advisement, waiver of rights and plea form. As to each form, defendant stated he understood his rights and was voluntarily giving up those rights.

Defendant has provided this court with no authority requiring a court to re-establish the voluntariness of a plea following a trial court's decision not to adhere to the sentencing portion of the parties' bargain following its receipt of the probation report. Our own research has failed to find such a requirement. The trial court did not err.

Defendant asserts that by virtue of its refusal to go forward with the indicated sentence at sentencing, the trial court coerced his plea by referencing the potential for imposition of a harsher sentence. As previously excerpted, the trial court indicated it had reviewed the "full probation record getting a complete picture," and thus came to the conclusion that it could not, in good conscience, allow defendant to be sentenced to probation. While the court acknowledged it had been provided with information concerning defendant's criminal history during prior discussions, it is plain the court learned something new from the probation report. After explaining why it would not be imposing probation, the trial court advised defense counsel that if defendant wished to agree to a sentence of "two years to CDC he can do that right now, otherwise, he can withdraw his plea and he'll probably go for four, which is what he's looking at." Shortly thereafter, in response to a comment by defense counsel, the trial court reiterated its position by indicating it would give defendant "two years in state prison" whereas the probation officer was recommending the greater aggravated term. Defendant was also made aware that if he did not choose to be sentenced to two years, he could withdraw his previously entered guilty plea.

Here, the trial court was merely advising defendant and defense counsel that defendant would not be granted probation in light of his criminal record and that defendant could accept a sentence of two years in prison or withdraw his plea and face the potential of a greater sentence. This court finds no coercion on this record. An indicated sentence is not a promise from the court. (*People v. Clancey* (2013) 56 Cal.4th

562, 575.) By indicating a sentence, “the court has merely disclosed to the parties at an early stage—and to the extent possible—what the court views, *on the record then available*, as the appropriate sentence so that each party may make an informed decision.” (*Ibid.*, italics added.) To the degree defendant contends the trial court engaged in inappropriate judicial plea bargaining, he is mistaken. The trial court did not err in concluding defendant had failed to establish good cause for the withdrawal of his guilty pleas in 2012.

Good Cause Assertions Regarding the Prosecution

Defendant contends he established good cause for the trial court to grant his motion to withdraw the plea because the prosecution failed to honor its bargain in 2007. His argument however seems to confuse a prosecutor’s withdrawal of a previously agreed-to bargain with the trial court’s refusal to sentence defendant in accordance with an indicated sentence.

As determined in *People v. Segura* (2008) 44 Cal.4th 921:

“Because a ‘negotiated plea agreement is a form of contract,’ it is interpreted according to general contract principles. [Citations.] Acceptance of the agreement binds the court and the parties to the agreement. [Citations.] “When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement.” [Citations.]” (*Id.* at pp. 930-931, fn omitted.)

In this case, in 2007, the People agreed to a bargain wherein defendant’s plea to felon in possession of a firearm⁷ would result in a sentence “no greater than the mitigated

⁷ In 2007, section 12021, subdivision (a)(1) provided that: “Any person who has been convicted of a felony under the laws of the United States, the State of California, or any other state, government, or country ... and who owns, purchases, receives, or has in his or her possession or under his or her custody or control any firearm is guilty of a felony.”

term,” or 16 months. At sentencing, after having an opportunity to review the probation report provided by the court, the People indicated:

“[PROSECUTOR:] The People would just like to highlight the part in the probation report. The fact that the Defendant poses serious danger to the community and the Defendant continues to drive while intoxicated.... We agree with [the] probation report[']s findings the only way to keep the community safe from the Defendant is to keep him confined as long as the law allows. We’ll submit on that, Your Honor.”

Even assuming the People erred by submitting on the probation report at the time of sentencing, reversal is not required. Here, the appropriate remedy for such an error was offered by the trial court: the opportunity for defendant to withdraw his guilty plea. (*People v. Calloway* (1981) 29 Cal.3d 666, 673 [“due process principles do not invariably demand that specific performance be ordered; the state courts retain wide discretion to fashion an appropriate remedy”].) Defendant was afforded that opportunity and ultimately elected not to withdraw his plea.

Good Cause Assertions Regarding Counsel

Next, defendant maintains that at the time of sentencing in 2007, trial counsel was ineffective for failing to (1) consult with him concerning his appellate rights, (2) ensure the terms of the plea negotiations were met, and (3) protect defendant’s rights regarding the use of the DUI as an aggravating factor.

To prevail on an ineffective assistance of counsel claim, defendant must establish two things: (1) the performance of his or her counsel fell below an objective standard of reasonableness, and (2) that prejudice resulted. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Hernandez* (2012) 53 Cal.4th 1095, 1105; *People v. Bradley* (2012) 208 Cal.App.4th 64, 86-87.) The *Strickland* court explained prejudice is “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland v. Washington, supra*, 466 U.S. at

p. 694.) Further, the high court stated that a reasonable probability is “sufficient to undermine confidence in the outcome” of the proceeding. (*Ibid.*)

“The pleading—and plea bargaining—stage of a criminal proceeding is a critical stage in the criminal process at which a defendant is entitled to the effective assistance of counsel guaranteed by the federal and California Constitutions.” (*In re Alvernaz* (1992) 2 Cal.4th 924, 933.) Accordingly, ineffective assistance of counsel may constitute good cause for withdrawal of a guilty plea. (*Id.* at p. 934 [“where ineffective assistance of counsel results in the defendant’s decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea”].) However, “in order successfully to challenge a guilty plea on the ground of ineffective assistance of counsel, a defendant must establish not only incompetent performance by counsel, but also a reasonable probability that, but for counsel’s incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial.” (*Ibid.*) “A defendant’s statement to that effect is not sufficient. Rather, there must be some objective showing. [Citation.]” (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1140.)

““Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.” [Citation.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 437.) If the record on appeal ““sheds no light on why counsel acted or failed to act in the manner challenged[,] ... unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal must be rejected,” and the “claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.)

Defendant’s argument that counsel was ineffective for failing “to ensure that the prosecution and the trial court fulfilled their obligations under the terms of the plea bargain contract” lacks merit. As we have explained, the trial court did not err by

refusing to sentence defendant in accordance with its previously indicated sentence following its receipt of the probation officer's report. Similarly, defense counsel cannot be found to be ineffective because of actions taken independently by the prosecutor. Defense counsel argued his position to the court—the original indicated sentence should be adhered to despite the information in the probation officer's report—following the comments of both the prosecutor and the court. That his argument was rejected does not render his representation ineffective. Attorney Lostracco's performance at the sentencing hearing did not fall below an objective standard of reasonableness. (*Strickland v. Washington, supra*, 466 U.S. at p. 687.)

Regarding defendant's assertion that counsel provided ineffective assistance of counsel because he "actually advised the judge he could use the prior DUI as an aggravating factor," this claim also lacks merit. A trial court is presumed to know the law. (See, e.g., *People v. Coddington* (2000) 23 Cal.4th 529, 644, overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; see also *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 836.) Hence, defense counsel did not render ineffective assistance of counsel during the sentencing proceedings in March 2007 by stating he had explained to defendant "that the Court could very easily use the DUI in evading circumstances and as aggravating factors in its decision as well." A defense counsel's statement does not amount to a rebuttal of the presumption that a trial court knows and follows the law.

Any remaining claims of ineffective assistance of counsel in 2007 cannot be properly considered because any evidence concerning whether Lostracco failed to advise defendant regarding any potential appeal falls outside this record. Without a record of how Lostracco advised defendant we cannot review the matter on direct appeal. (See *People v. Smith* (2007) 40 Cal.4th 483, 507.)

Defendant has failed to establish that counsel's representation fell below any objective standard of reasonableness.⁸

Cumulative Error

Defendant contends the errors complained of herein rise to the level of cumulative error requiring reversal. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 [“a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error”].)

We have rejected all of defendant's contentions on appeal. There were no errors to accumulate.

DISPOSITION

The judgment is affirmed.

DETJEN, J.

WE CONCUR:

CORNELL, Acting P.J.

GOMES, J.

⁸ Having addressed defendant's issues on the merits, we express no opinion on the People's assertion of estoppel.