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

THE PEOPLE,

Plaintiff and Respondent,

v.

PRIMITIVO ABEL FLORES,

Defendant and Appellant.

F066356

(Super. Ct. No. MCR043830)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. David D. Minier, Judge. (Retired judge of the Madera Sup. Ct., assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

Allan E. Junker, 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 Le Mon and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Poochigian, Acting P.J., Peña, J. and Sarkisian, J.†

† Judge of the Fresno Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Defendant Primitivo Abel Flores contends defense counsel provided ineffective assistance by misadvising him that the gang allegation he was admitting as part of his guilty plea was not a strike. He asserts that he must be permitted to withdraw his plea. We disagree. We conclude, however, that defendant is entitled to have his motion filed and heard in an evidentiary hearing to determine whether he should be permitted to withdraw his plea. Accordingly, we order a limited remand for this purpose.

PROCEDURAL SUMMARY

On June 19, 2012, the Madera County District Attorney charged defendant with being a felon in possession of a firearm (Pen. Code, § 29800, subd. (a)(1);¹ count 1) and actively participating in a criminal street gang (§ 186.22, subd. (a); count 2). The complaint alleged that count 1 was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), that defendant had suffered a prior strike conviction (§ 667, subds. (b)-(i)), and that he had served a prior prison term (§ 667.5, subd. (b)).

On September 10, 2012, defendant pled guilty to count 1 and admitted the prior strike and gang allegations in exchange for a stipulated prison term of six years.

On October 15, 2012, Judge David Minier sentenced defendant. Immediately after he ordered defendant remanded to custody for transportation to the State Reception Center, defense counsel interrupted and asked to briefly trail the matter so she could confer with defendant. The court agreed to trail the matter for a few minutes. Subsequently, the court informed defense counsel that defendant had been taken back to the jail, but agreed to trail the matter to the next day.

On October 16, 2012, defense counsel advised the trial court that defendant wanted to withdraw his plea based on receiving incorrect advice from counsel. Counsel explained that she incorrectly believed the gang allegation was not a strike and had advised defendant accordingly. She became aware that the gang allegation was a strike

¹ All statutory references are to the Penal Code unless otherwise noted.

when she received the probation report. The People requested a formal motion with points and authorities and suggested other counsel be appointed for that purpose. The court agreed and appointed alternate defense counsel to explore the possibility of filing a motion to withdraw the plea.

Despite numerous hearings over the course of almost four months, alternate defense counsel never submitted a written motion to withdraw the plea or a written motion to recall the sentence, and a hearing was never held on the original request for plea withdrawal. At the last hearing, held before Judge Dale Blea on February 8, 2013, the reporter's transcript of the October 16, 2012 hearing, which had been requested by the defense, still had not been filed. The parties and the court were frustrated there was no transcript and the jurisdictional time limit in which the court could act was only a few days away. Defense counsel then made an "oral request of the Court to consider withdrawing the sentencing" or "setting it aside" to allow for additional time to file the motion to withdraw the plea.² Later that day, the trial court ultimately declined defendant's invitation to recall the sentence, finding it had not "been presented with clear and convincing evidence justifying taking that action."

DISCUSSION

"It is well settled that 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." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.) The burden of proving ineffective assistance of counsel is on the defendant,

² "[Alternate defense counsel]: [M]y position is that, if the Court does not set aside the sentencing, then [defendant] moves forward and he goes to the state prison with his Notice of Appeal intact and it gets decided in the 5th. If the Court does grant his motion to set aside the sentencing, but does not agree that he did have the right to withdraw his plea, it just resentences him. And if the Court feels that in the interest of justice he should be allowed to withdraw his plea, then he'll be denied that interest of justice by being denied the fact that his sentence was not recalled."

and he is required to show both that defense counsel's performance was deficient and that he suffered prejudice because of it. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-696; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217.) In the context of a guilty plea, in order to show ineffective assistance of counsel, the defendant has the burden to prove by a preponderance of the evidence: (1) defense counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and (2) the defendant suffered prejudice from counsel's deficient performance in that "there is a reasonable probability that, but for counsel's errors, [the defendant] would not have pleaded guilty and would have insisted on going to trial." (*Hill v. Lockhart* (1985) 474 U.S. 52, 59, fn. omitted; see also *In re Resendiz* (2001) 25 Cal.4th 230, 239, 248-254, abrogated on another ground in *Padilla v. Kentucky* (2010) 559 U.S. 356, 370.) A defendant's assertion that "he would not have pled guilty if given competent advice 'must be corroborated independently by objective evidence.' [Citations.]" (*In re Resendiz, supra*, at p. 253.)

Here, defendant claims he was prejudiced because "a second strike carries serious potential prejudice," he would not have faced "substantially greater risk by going to trial even if convicted of the gang allegation," and the evidence supporting the gang allegation was weak.

Alternate defense counsel never filed a written motion and defendant, through no fault of his own, was never given the opportunity to litigate these issues below. On appeal, we do have the reporter's transcript of the October 16, 2012 hearing before Judge Minier. There, defendant's trial counsel admitted having misadvised defendant and informed the court defendant would not have entered the plea if he had correct advice because this was an "extremely important" factor to him. Defense counsel's statements made at least a prima facie case supporting a withdrawal of defendant's plea on ineffective assistance of counsel grounds. We conclude defendant should be given the

opportunity to litigate the issue in an evidentiary hearing. Therefore, we will remand for this limited purpose.

DISPOSITION

The judgment is set aside for the limited purpose of allowing defendant to make a motion to withdraw his plea within 20 days from the date the remittitur is filed and to have his motion heard on the merits. If no motion is made, or if it is made but denied, the judgment should be reinstated by the trial court. (See *People v. Osorio* (1987) 194 Cal.App.3d 183, 188-189 [case should be remanded to allow defendant to file a motion to withdraw a plea after defense counsel failed to file a potentially meritorious motion], disapproved on other grounds in *People v. Johnson* (2009) 47 Cal.4th 668.)