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

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL RUBEN ESPINOSA,

Defendant and Appellant.

F067071

(Super. Ct. Nos. CRL008933 &
CRL009007)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Edward M. Lacy, Jr.,[†] and Frank Dougherty, Judges.

Matthew A. Siroka, 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.

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

[†]Retired judge of the Stanislaus Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

INTRODUCTION

Defendant Michael Ruben Espinosa asserts the waiver he entered into pursuant to *People v. Cruz* (1988) 44 Cal.3d 1247 was not knowing and intelligent because he was confused as to the terms of the waiver, and his confusion was perpetuated by the court and counsel. Further, defendant contends the court's erroneous finding of a willful violation of the *Cruz* waiver violated his constitutional right to due process because the evidence of willfulness was insufficient. We will affirm, finding defendant's waiver was knowing and intelligent and also holding the evidence pertaining to the court's willfulness finding is sufficient.

PROCEDURAL BACKGROUND¹

In November 2012, defendant was charged via criminal complaint with unlawful taking and driving of a vehicle (Veh. Code, § 10851, subd. (a)), receiving a stolen vehicle (Pen. Code,² § 496d, subd. (a)), and possession of a switchblade knife in a vehicle (§ 21510). A number of enhancements were alleged as to the first two counts. Defendant pled not guilty.

In December 2012, another complaint alleged defendant had committed the crime of receiving stolen property (§ 496, subd. (a)). As before, a number of enhancements were also alleged. Defendant pled not guilty.

On December 19, 2012, both cases were resolved by way of pleas. Specifically, defendant pled no contest to receiving stolen property and unlawful taking of a vehicle, and he admitted the enhancements as alleged. He was released on a *Cruz* waiver and sentencing was scheduled for January 4, 2013.

¹A recitation of the facts has been omitted as the underlying facts of defendant's crimes are not pertinent to the issues on appeal.

²All further statutory references are to the Penal Code.

On January 4, 2013, defendant failed to appear and a bench warrant subsequently issued.

Once defendant was in custody, further proceedings were held on February 22, 2013. On that date, a motion made pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 was heard and denied. The court then sentenced defendant on both cases for a total term of 10 years 4 months in prison.

Defendant filed a timely notice of appeal.

DISCUSSION

The Relevant Proceedings and Documents Below

On December 19, 2012, plea forms and a *Cruz* waiver form were provided to the trial court indicating defendant would be pleading no contest to possession of stolen property and auto theft, as well as the enhancements related to those charges. The prosecutor acknowledged agreement to a term of five years four months in exchange for defendant's pleas. The trial court expressly stated as follows: "It's agreed that if he violates the Cruz waiver, his sentence would be ten years, four months." Defense counsel and the prosecutor agreed with the court's statement.

Next, after a brief recitation of the parties' calculation resulting in the agreed-upon term in exchange for defendant's pleas, the following colloquy took place:

"THE COURT: What are you going to do with the prison priors, if [defendant] does comply with the Cruz waiver?"

"[PROSECUTOR]: The agreement would be to stay the punishment on those.

"THE COURT: Okay. And, [defendant], is that what you wish to do on these matters?"

"THE DEFENDANT: Yes. Could I get the definition of stay the punishment?"

"THE COURT: What that means is for the three years for the prison priors, if you come back on the Cruz waiver, get your five-year, four-month prison sentence, the three additional years for the prison priors would be

stayed pending your successful completion of that sentence. And then they would go away forever on these cases.

“THE DEFENDANT: So complete the program and don’t worry about them, in other words?”

“[DEFENSE COUNSEL]: If we agree that Delancey Street, if you do— if that is—

“THE DEFENDANT: If all goes well?”

“[DEFENSE COUNSEL]: Then they would be stayed and they will go away. And also, if you completed the five-year sentence, after completion of that, you would also not have to do the time. You have to successfully complete it.

“THE DEFENDANT: Yes, I agree.

“THE COURT: Okay. [Defendant], have you gone over the facts of both cases with your attorney, discussed with him everything you know about them, any defenses you might have, the possible consequences of your pleas?”

“Are these your initials, your signature? Do you understand all the rights set forth therein? And do you give up all of your rights except for your right to a lawyer?”

“THE DEFENDANT: Yes, I do, Your Honor.

“THE COURT: And do you understand with the strike prior the sentence you would be serving, whether it’s five years, four months *or ten years, four months*, you’d be serving that at 80 or 85 percent time?”

“THE DEFENDANT: Yes, sir.

“THE COURT: Okay. [Defense counsel], you agree this is the appropriate disposition?”

“[DEFENSE COUNSEL]: Yes, Your Honor.

“THE COURT: And this is the People’s offer?”

“[PROSECUTOR]: It is, Your Honor. The one thing I should mention is that some mention was made of Delancey Street Program in San Francisco. Counsel has indicated that [defendant] wishes to pursue that program. At this point, *we are not making any offers concerning Delancey Street one way or the other. I did speak to [defense counsel] and indicate*

that should he seek that program, be accepted in that program, [w]e would then consider the possibility of that. It is not an offer at this time.

“THE COURT: Do you understand that, [defendant]?”

“THE DEFENDANT: Yes, sir.

“THE COURT: All right.” (Italics added.)

The court then accepted defendant’s no contest plea to one count of unlawful taking of a vehicle and his admissions that he suffered a prior serious felony conviction for robbery, and had served three prior prison terms. It also accepted his no contest plea to one count to possession of stolen property and the same admissions previously stated. After finding defendant understood his rights, defenses, and the consequences of his pleas, the trial court found defendant guilty and the People moved to dismiss the remaining counts. Sentencing was set for January 4, 2013, at 9:30 a.m., and the following discussion ensued:

“THE COURT: All right. At this time then you’ll be released on your own recognizance pending sentencing on the conditions that counsel stated, to which you agreed. *You’re to be back January 4th at 9:30 in this department.* [¶] ... [¶]

[PROSECUTOR]: Lastly, Your Honor, just for clarification purposes, there was a discussion between [defendant] and myself with [defense counsel] present concerning the consequences should he violate the Cruz waiver. It was made very clear that he would—he would receive ten years, four months. There would be no argument that would be the sentence he would receive should he violate the Cruz waiver. I further explained to him that a minor violation such as misdemeanors, driving on a suspended license, drug related offenses *or not showing up for court*, any of those violations could trigger that Cruz waiver violation, which would have to be proved by a preponderance of the evidence to the Court. I feel satisfied he understands the risks of the Cruz waiver that he is undertaking by being released.

“THE COURT: Is that all correct, [defendant]?”

“THE DEFENDANT: Yes, sir.

“THE COURT: All right. The Court will note that occasionally Cruz waivers, the possible sentence is so extraordinary and extreme compared to

the one you receive, if Cruz waiver was complied with, I would not take a Cruz waiver. My personal opinion is looking at all the charges here, [defendant]’s prior record, ten years, four months is not so excessive compared to the five years, four months that it should not be imposed. Okay.” (Italics added.)

A form entitled “PLEA DISPOSITION CRUZ WAIVER” provided, in relevant part, as follows:

“As a part of and as a condition of my plea disposition in this case, I understand and agree:

“1. I will be released on my own recognizance and promise to appear in person in the Superior Court of Merced County on the 4 day of January , at 9:30 ; [¶] ... [¶]

“I understand and agree that if I commit any felony or misdemeanor while I am released either on my own recognizance or while I am released on a pass, *or if I fail to appear in person in the Superior Court on the above-mentioned date and time (or any date the matter is continued to) after being released on my own recognizance or fail to return to custody on the above-mentioned date and time ...* my plea will remain in full force and effect except that the promises concerning my sentencing will not be binding on the sentencing judge and I will receive the following sentence: 10 years 4 months [¶] ... [¶]

“I further understand and agree that the sentencing judge need not give reasons for selecting any prison term imposed as a result of my violation of any of the terms of this Plea Disposition Cruz Waiver agreement.

“I further understand and agree that if it is alleged that I have violated any of the terms of this Plea Disposition Cruz Waiver agreement, the following applies”

The form is dated and signed by defendant. His attorney signed and dated the following statement: “I have discussed this waiver with the defendant and I am satisfied he/she understands the above.” The agreement was signed by the judge and filed with the court on December 19, 2012.

The Applicable Legal Standards and Analysis

In *People v. Cruz, supra*, 44 Cal.3d 1247, defendant Cruz entered a plea of guilty, pursuant to an agreement that provided he would receive the lower term of imprisonment

or probation with local custody, at his option. The court, however, did not admonish Cruz in accordance with section 1192.5. Cruz failed to appear for sentencing. When Cruz eventually was brought before the court for sentencing, the court rejected his attempt to withdraw his guilty plea and sentenced him to the middle term of imprisonment. (*Cruz*, at p. 1249.)

The Court of Appeal affirmed but the Supreme Court reversed, holding “[t]he imposition of an additional or enhanced sentence for a separately chargeable offense without the benefit of a trial on that charge, and in the absence of a knowing and intelligent waiver, is clearly offensive to the principles of due process.” (*People v. Cruz*, *supra*, 44 Cal.3d at p. 1253.) In reaching this conclusion, the court rejected the idea that failing to appear breached an implied term of the plea bargain that relieved the court of the restrictions of section 1192.5. Such failure to appear is, rather, a separate offense that may be punished in a separate proceeding. (*Ibid.*)

Nonetheless, the court in *Cruz* also stated that a defendant, under specified circumstances, could give up the protections of section 1192.5: “We do not mean to imply ... 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.” (*People v. Cruz*, *supra*, 44 Cal.3d at p. 1254, fn. 5.) Such a waiver is commonly called a “*Cruz* waiver.”

To satisfy *Cruz*, any waiver of section 1192.5 rights must be “knowing and intelligent.” (*People v. Cruz*, *supra*, 44 Cal.3d at p. 1254, fn. 5; see *People v. Collins* (2001) 26 Cal.4th 297, 308.) Where fundamental constitutional rights are at issue, any waiver of those rights is required to be “knowing in the sense that it was ‘made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.’” (*People v. Saucedo–Contreras* (2012) 55 Cal.4th 203, 219.)

The knowing nature of the waiver must be determined from the totality of circumstances. (*People v. Davis* (2009) 46 Cal.4th 539, 586.) ““On appeal, we independently examine the entire record to determine whether the defendant knowingly and intelligently waived”” his rights. (*People v. Elliott* (2012) 53 Cal.4th 535, 592.)

Here, defendant’s waiver was knowing and intelligent. Despite his assertions that the comments of court and counsel served to confuse him concerning his obligations, the record simply does not support those assertions. Read in its entirety, the record supports our findings otherwise.

Defendant complains the colloquy between the court and defendant was “critical” to his confusion, pointing to the discussion concerning the stay of defendant’s prison priors and the treatment of those priors pursuant to his plea. However, even before that discussion the trial court very plainly stated that if defendant were to violate the *Cruz* waiver, he would be sentenced to 10 years 4 months in prison. And, following the colloquy between the court and defendant concerning his priors, the court then made certain defendant understood that he faced “five years, four months *or* ten years, four months” (italics added), expressly referencing the *Cruz* waiver form. Defendant acknowledged initialing and signing the waiver form. That form clearly provides that defendant “promise[d] to appear” on January 4, 2013, at 9:30 a.m. It also very plainly explained the consequence for any failure to appear on that date: a sentence of “10 years 4 months.”³ In the totality of the circumstances, defendant’s waiver was knowing and intelligent. (*People v. Davis, supra*, 46 Cal.4th at p. 586.)

Moreover, the prosecutor’s comments on the record clearly indicated defendant’s participation in the Delancey Street Program, or any program for that matter, was not a part of the plea agreement, and any further discussion regarding such a program would occur in the future. An entirely reasonable inference is that any consideration would

³On the plea form, item 20 provides: “I understand the following additional consequences of my plea: [¶] If defendant fails to report from Cruz waiver 10y 4m will be imposed.”

occur at the sentencing scheduled for January 4, 2013. Significantly, when asked by the court whether he understood the Delancey Street Program was not a part of the offer, defendant replied, “Yes, sir.” The court then accepted defendant’s no contest pleas and ordered defendant “back January 4th at 9:30.” Thereafter, the prosecutor sought to clarify the record. He explained it had been “made very clear” to defendant that any violation of the *Cruz* waiver, including “not showing up for court,” would result in a sentence of 10 years 4 months. The court asked defendant whether the prosecutor’s statement was “all correct,” and defendant again replied, “Yes, sir.”

At no place in the record is there any suggestion that were defendant to enroll himself in the Delancey Street Program prior to the sentencing hearing of January 4, 2013, he would be excused from having to appear on that date.

Defendant was advised—verbally by the court and in writing on the *Cruz* waiver form—he would be sentenced on January 4, 2013. Defendant was also specifically advised that the Delancey Street Program was not a part of the People’s offer. And when asked by the court, defendant twice acknowledged he understood the People’s on-the-record explanations and clarifications. The terms of the parties’ agreement were unambiguous. (*People v. Shelton* (2006) 37 Cal.4th 759, 767.)

We find defendant’s waiver was knowing. He was fully aware of his rights and, more particularly, the consequences related thereto. (*People v. Saucedo–Contreras*, *supra*, 55 Cal.4th at p. 219.)

Defendant also argues the trial court erred in finding he willfully violated the *Cruz* waiver as a result of the same confusion previously complained of. Initially, we disagree the trial court, “by ... course of conduct” or its failure to “clarify that [defendant] had to return to court on January 4,” modified the terms of the plea so as to permit defendant “to go to Delancey Street.” As previously explained, a careful review of the record fails to support defendant’s assertion. The court mentioned the requirement that defendant appear on January 4th several times, and the record is plain that Delancey Street was not a part of defendant’s bargain but only a future, possible consideration.

Next, defendant contends the evidence was insufficient to support the trial court's finding that he willfully violated the *Cruz* waiver. In *People v. Rabanales* (2008) 168 Cal.App.4th 494, the appellate court explained our task on review:

“‘When a trial court’s factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins and ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination ...’ [Citation.] ‘Deferential review is particularly necessary when, as here, the factual determination depends in part on judging a witness’s credibility,’ and we must uphold such a determination if it is supported by substantial evidence. [Citation.] ‘We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact.’ [Citation.]” (*Id.* at p. 509.)

This court must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence, whether the evidence is direct or circumstantial. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053–1054.) If the circumstances reasonably justify the trier of fact’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding. (*Id.* at p. 1054.)

Here, it is clear following a review of the record that there is sufficient evidence to support the trial court’s determination that defendant’s violation of the *Cruz* waiver was willful.

As discussed more fully above, defendant was aware he was required to appear for sentencing on January 4, 2013, following his no contest pleas. Nevertheless, defendant failed to appear. Although defendant argued vociferously at the hearing of February 22, 2013, that he was confused or lacked a thorough understanding he was required to make a personal appearance on January 4, the trial court was not obligated to accept defendant’s

assertions. It considered defendant's argument, the People's opposition, and defense counsel's statements before concluding, in relevant part, as follows:⁴

“THE COURT: ... And now we have this case before us of car theft and receiving stolen property. Now, you came before the Court and you made it pretty clear to the Court that you wanted an alternative to serving five years, four months or six months in state prison. And you made it clear to your attorney and the Court that you wanted a program. And there's some discussion of various programs, including Delancey Street. But as I gather from the transcript and from the discussion with counsel, there was never a discussion where you were promised a particular program. And there was never a discussion where you were told that you would not be eligible for a program. You were simply advised that you would be coming back to court on January 4th for sentencing.

“Now, the Court went and accepted in this case what we call a Cruz waiver. And the Cruz waiver was part of your plea. And that waiver provided that you plead to those charges and you admitted those three prior prison offenses with the understanding that you would be sentenced on January 4th, and further, that you agreed that if for any reason you failed to appear in court on that date, you would get ten years, four months. And it was agreed at that time that there wouldn't even be any argument before the Court

“Now, I've allowed argument. I've allowed extensive argument in this case

“Now, in this case you apparently—you did enroll in the Delancey Street Program. They accepted you. And you enrolled on the 3rd knowing full well that your court date was on the 4th and then the next day [the 5th] you immediately left the program. Then you didn't contact the Court. You didn't contact your attorney. You didn't do anything for well over a month, until you had to be arrested on a warrant. [¶] ... [¶]

“So what I'm finding in this case is by a preponderance of the evidence, in fact, if I had to find beyond a reasonable doubt, I would do so, that your failure to appear on the 4th of January was, in fact, willful. And it's clear in this case that—that you knew what the consequences of the failure to appear were. You agreed to that. Not only did you agree to that, but it was your request that the Court give you a Cruz waiver so that you

⁴Judge Lacy took defendant's pleas and set the matter for sentencing. Ultimately, consideration regarding the alleged violation of the *Cruz* waiver and sentencing were handled by Judge Dougherty.

can avoid the five years, six months knowing full well that you would get ten years plus, if you did not.”

The trial court’s finding that defendant’s failure to appear on January 4, 2013, was willful is supported by sufficient evidence. The trial court considered the transcript of the December plea proceedings in making its determination. As we have already found, defendant’s *Cruz* waiver was knowing and intelligent. Defendant understood he was required to appear in person on January 4, 2013, for sentencing. He then failed to appear. His proffered excuses—primarily that the Delancey Street Program would not accommodate his religious practices and would prohibit his ability to visit with his children—were unacceptable. Whether the program complied with defendant’s wishes is irrelevant to whether defendant understood he was required to appear on January 4th. Defendant argues, without any citation to authority, that “his short stay raises questions about whether he was a suitable candidate for the program,” but maintains those facts raise “a separate question from whether he willfully violated the terms of the agreement.” We disagree and find those facts to be relevant to the trial court’s willfulness determination.

Section 7, subdivision 1 defines willfulness: “The word ‘willfully,’ when applied to the intent with which an act is done or omitted, implies simply a purpose or willingness to commit the act, or make the omission referred to. It does not require any intent to violate law, or to injure another, or to acquire any advantage.” Defendant entered the Delancey Street Program on January 3, 2013, the day prior to the date scheduled for his sentencing. He did not appear in court on January 4. And instead, on January 5, defendant withdrew from the Delancey Street Program. He took no further action whatsoever. Yet, defendant knew his personal appearance was required on January 4. The court’s determination that defendant’s actions were purposeful and willful need not be disturbed on appeal.

To the degree defendant argues that because his evidence was the only evidence pertaining to willfulness it must be accepted, he is mistaken. On issues of credibility, we

of course defer to the trier of fact. “The trier of the facts is the exclusive judge of the credibility of the witnesses. [Citation.]” (*Hicks v. Reis* (1943) 21 Cal.2d 654, 659.) In assessing a witness’s credibility, the trier of fact may consider the manner in which the witness testifies, the motive or interest of the witness in the outcome of the case, and any contradictory evidence. (*Ibid.*) “Provided the trier of the facts does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted.” (*Id.* at pp. 659-660.) Here, the trial court found defendant’s explanations lacking, and it acted well within its authority in so finding.

Defendant’s argument is essentially a request that this court reweigh the evidence in the form of accepting defendant’s argument that he was confused. However, that is not our task. This court does not reweigh evidence. (*People v. Kraft, supra*, 23 Cal.4th at p. 1054; *People v. Rabanales, supra*, 168 Cal.App.4th at p. 509.)

According the trial court’s willfulness determination the deference it is due, we find its determination to be supported by substantial evidence.

DISPOSITION

The judgment is affirmed.