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

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEL MATTHEW GRAY,

Defendant and Appellant.

F068375

(Super. Ct. No. VCF288349)

**OPINION**

**THE COURT\***

APPEAL from a judgment of the Superior Court of Tulare County. James W. Hollman, Judge.

Katharine Eileen Greenebaum, 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 and Charity S. Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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\* Before Gomes, Acting P. J., Kane, J. and Poochigian, J.

Defendant Joel Matthew Gray was charged with obtaining aid by misrepresentation (Welf. & Inst. Code, § 10980, subd. (c)(2))<sup>1</sup> and perjury (Pen. Code, § 118).<sup>2</sup> The complaint also alleged he had suffered a prior strike conviction within the meaning of the Three Strikes law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) and had suffered two prior felony convictions within the meaning of section 1203, subdivision (e)(4).<sup>3</sup> Defendant pled no contest to both counts. The trial court dismissed the prior strike conviction, granted defendant five years' felony probation with 270 days in jail, and imposed several restitution fines. On appeal, defendant contends the trial court violated the plea agreement by sentencing him to five, rather than three, years of probation, and he is entitled to specific enforcement of his plea bargain. We reverse and remand for clarification and resentencing.

### **BACKGROUND**

At the October 29, 2013, hearing, the following occurred:

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<sup>1</sup> Welfare and Institutions Code section 10980, subdivision (c)(2) provides: “Whenever any person has, willfully and knowingly, with the intent to deceive, by means of false statement or representation, or by failing to disclose a material fact, or by impersonation or other fraudulent device, obtained or retained aid under the provisions of this division for himself or herself or for a child not in fact entitled thereto, the person obtaining this aid shall be punished as follows: [¶] ... [¶] (2) If the total amount of the aid obtained or retained is more than nine hundred fifty dollars (\$950), by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for a period of 16 months, two years, or three years, by a fine of not more than five thousand dollars (\$5,000), or by both that imprisonment and fine; or by imprisonment in the county jail for a period of not more than one year, by a fine of not more than one thousand dollars (\$1,000), or by both imprisonment and fine.”

<sup>2</sup> All statutory references are to the Penal Code unless otherwise noted.

<sup>3</sup> Section 1203, subdivision (e)(4) provides: “Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] ... [¶] (4) Any person who has been previously convicted twice in this state of a felony or in any other place of a public offense which, if committed in this state, would have been punishable as a felony.”

“THE COURT: This is set for a preliminary hearing conference today.

“[DEFENSE COUNSEL]: We have a resolution. I think we have a resolution. May we approach for just a second?

“(Off the record discussion.)

“[DEFENSE COUNSEL]: Your Honor, my client is reiterating his request for release today.

“THE DEFENDANT: It was alcohol related.

“THE COURT: What’s alcohol related?

“[DEFENSE COUNSEL]: The former, the former strike apparently.  
[¶] ... [¶]

“THE COURT: I’ll settle it when I have a probation report. If what you’re telling me is true, I’ll consider releasing you but it’s going to take a few days to get a report.

“[DEFENSE COUNSEL]: What I’d like to do is settle the case today with the understanding that if the probation report comes back in a, in a way that’s favorable, that we can get a release at that time.

“THE COURT: I’ll consider it.

“[DEFENSE COUNSEL]: Okay. Are you okay with that?

“(Off the record discussion.)

“[DEFENSE COUNSEL]: So do you want to put the whole thing over?

“THE COURT: No. We can take the plea if he wants.

“[DEFENSE COUNSEL]: We’ll take a plea today, change of plea.

“(Off the record discussion.)

“[DEFENSE COUNSEL]: He’s prepared to change his plea.

“THE COURT: All right. You’re advised if you’re not a citizen of this country that conviction of this offense for which you have been charged may have the consequences of deportation, exclusion from

admission to the United States or denial of naturalization pursuant to the laws of the United States.

“[DEFENSE COUNSEL]: I’m sorry, sir. I didn’t talk to him about immigration. I assumed he’s a citizen. Are you a citizen?”

“THE DEFENDANT: Yes. Very much.

“THE COURT: The sentencing range on these charges, Count 1 will be 16 months, 2 years or 3 years in prison. Count 2 will be 2 years, 3 years and 4 years in prison. It’s alleged right now that you have a strike. The court has indicated we don’t know if that’s a strike actually or not. We’re still waiting for it from New York but the court has indicated I will[,] based on the length of the time between when that occurred and this, the court will strike the strike and place you on probation. You’ll receive 270 days in custody. Is that your understanding?”

“THE DEFENDANT: Yes.

“[DEFENSE COUNSEL]: I should also advise you that you’ll be on felony probation for three years. And if you violate your probation, they can give you additional jail-time. Do you understand that?”

“THE DEFENDANT: Yes.

“[DEFENSE COUNSEL]: Okay.

“(Off the record discussion.)”

“THE COURT: Should you violate the terms and conditions of probation, you can be sent to prison up to the maximum amount of time. [¶] You can pay a fine up to \$10,000, a restitution fine of up to \$10,000. You will be required to pay full restitution in this matter.

“Other than what the court has promised you, has anyone else promised you anything to get you to enter a plea today?”

“THE DEFENDANT: No.

“THE COURT: Has anybody threatened you or any member of your family to get you to enter a plea?”

“THE DEFENDANT: No.

“THE COURT: You have been represented by an attorney throughout these proceedings. Have you given your attorney all the

information you have about the case and been advised of the possible defenses you might have?

“THE DEFENDANT: Yes.

“THE COURT: Have you had enough time to speak with your attorney?

“THE DEFENDANT: Yes.

“THE COURT: Are you satisfied with your attorney’s advice?

“THE DEFENDANT: Yes.

“THE COURT: You have the following rights. You have a right to a trial by court or by jury. You have a right to a preliminary hearing. You have a right to cross examine and confront any witnesses that are called to testify against you. You have a right to call witnesses to testify on your own behalf and have the court issue subpoenas to compel those witnesses to testify at no cost to you and you have the right to remain silent. Do you understand each of those rights?

“THE DEFENDANT: Yes.

“THE COURT: And do you give up each of those rights?

“THE DEFENDANT: Yes.

“THE COURT: [Defense counsel], have you had enough time to speak with your client about this case?

“[DEFENSE COUNSEL]: Yes, sir.

“THE COURT: Have you discussed with him his rights, defenses and the possible consequences of his plea?

“[DEFENSE COUNSEL]: Yes.

“THE COURT: Do you believe your client does understand his rights?

“[DEFENSE COUNSEL]: I do.

“THE COURT: Do you consent and concur in the change of plea and all representations made here in open court by your client?

“[DEFENSE COUNSEL]: Yes.

“THE COURT: Both counsel stipulate there’s a factual basis for the plea and the court can consider the police reports for that purpose?

“[DEFENSE COUNSEL]: Yes.

“[PROSECUTOR]: Yes.

“THE COURT: You agree I need not read the full complaint?

“[DEFENSE COUNSEL]: Yes, Your Honor.

“THE COURT: You’re charged in Count 1 with between October 1st[,] 2010 [and] January 31st[,] 2013 the crime of receiving aid by misrepresentation, a felony. How do you now plead to that charge?

“THE DEFENDANT: Huh uh. No contest.

“THE COURT: You understand that a no contest plea is the same as a guilty plea for purposes of sentencing?

“THE DEFENDANT: Yes.

“THE COURT: Count 2 is perjury on the same date. How do you plead to that charge?

“THE DEFENDANT: No contest.

“THE COURT: The court finds the defendant understands and freely waives his constitutional rights. He understands the nature of the crimes charged and all the consequences of the plea. The plea is free and voluntary. There is a factual basis for the plea. The court orders the waiver of constitutional rights and the pleas of no contest be accepted and entered into the minutes of the court. [¶] I’m going to refer this matter to our Probation Department....

“[DEFENSE COUNSEL]: Thank you, Your Honor.

“THE COURT: You’re welcome.”

The minute order of this hearing noted an indicated sentence of felony probation with 270 days’ jail time, based on the record available in court that day. The minute order also noted, “Court to strike the strike.”

On November 7, 2013, the probation officer filed her report. It noted an indicated sentence of felony probation with 270 days in jail, with the court to dismiss the prior strike conviction. The probation officer recommended that the court grant defendant three years' probation.

At the sentencing hearing on the same day, the following occurred:

“THE COURT: The Court has read and considered the report. [¶] Any additional comments?

“[DEFENSE COUNSEL]: Your Honor, I ask that all the fines and fees be reduced to the mandatory minimum. There is significant restitution in this matter. My client is prepared to stipulate to the \$8,890 of restitution, and in light of that I would ask that fines and fees be reduced to a mandatory minimum. He is also requesting release today. That was—

“THE COURT: We'll take that up after I sentence him.

“[DEFENSE COUNSEL]: Okay.

“THE COURT: Any comments?

“[PROSECUTOR]: We would request five years' probation due to the amount of restitution, as well as the ten percent interest per annum.

“THE COURT: The defendant's application for probation is granted for a period of five years, subject to the following terms and conditions:

“The defendant is ordered to serve 270 days. He has credit for 48. [¶] Count 2, no time will be imposed. [¶] He is to pay a restitution fine in the amount of \$500 at \$50 per month commencing 30 days after release from custody. [¶] He is to pay \$500 pursuant to [section] 1202.44 which will be suspended pending successful completion of probation. [¶] He is to pay the restitution in the amount of \$8,890 plus ten percent per annum at the rate of a hundred dollars per month commencing I'll make it—

“[DEFENSE COUNSEL]: It's really only fair to make that after his release.

“THE COURT: We'll make it on or before April 1st and each and every month thereafter until paid in full. [¶] Within 72 hours of release from custody, he is to report to the Probation Officer of Tulare County at 100 East Center Street, as well as Probation Accounting Services. [¶] ...

[¶] I will take up the OR/bail issue at this time. He's requesting release. He's got a failure to appear ... from 2011.

“[DEFENSE COUNSEL]: I think there's good cause to release him, notwithstanding that failure to appear. He indicates that his source of income is the catering business. He does have a job currently. If he were released for the holidays, he could start making restitution payments. That's really the objective here. He's nonviolent. According to the report, the risk of general recidivism is low, the risk of violence is low. And in light of that—

“THE COURT: I've got two cases here. He failed to appear on both cases, [20]08 and 2011. [¶] You don't have a good record. You don't have a good record for appearing.

“[PROSECUTOR]: And, your Honor, I want to point out that this report does not include all of his prior record due to the fact that he does have two different Social Security numbers. There are only two cases here; however, he has a lengthy record from New York when he was using his prior Social Security number. [¶] ... [¶]

“THE COURT: I understand. I'm not gonna release you at this time. You have two failure-to-appear's in this court, which doesn't look good.

“[DEFENSE COUNSEL]: No attorney's fees, your Honor?

“THE COURT: No attorney's fees at this time.

“[PROSECUTOR]: And I also have an order for restitution.

“THE COURT: Okay. And [defendant], just one other issue. If you ignore the restitution, you'll be right back here in custody.

“THE DEFENDANT: I know.

“THE COURT: We get people all the time that think that they don't have to pay that once they get out of custody. Make sure you start paying off your restitution. As long as you do, you won't be back here. Okay?

“THE DEFENDANT: I mean, that failure to appear, I was not aware of the—

“THE COURT: Okay. Well, you've got two of them.”

No mention was made of the prior conviction at the hearing, although the minute order states that the remaining counts and special allegations were stricken on the court's own motion.

### **DISCUSSION**

Defendant acknowledges that the record of the change of plea hearing does not contain any statement by the trial court promising him three years' probation, but he argues that the trial court's failure to respond to or deny defense counsel's statement that defendant would be granted three years' probation demonstrates the three-year term was indeed part of a plea bargain. Defendant posits that because neither he nor defense counsel "noticed" that the court imposed the five-year term at the sentencing hearing, "it is entirely possible, if not probable, that the trial court's sentence ... was simply an inadvertent mistake."

The People respond that there was no plea bargain negotiated between defendant and the prosecutor. Rather, the trial court facilitated resolution of the case by providing an indicated sentence of felony probation with 270 days of jail time.

Generally, a plea bargain is a negotiated settlement between the defendant and the prosecutor, where both parties receive a reciprocal benefit, which is approved by the court. (*People v. Segura* (2008) 44 Cal.4th 921, 929-930.) "A plea agreement 'is a tripartite agreement which requires the consent of the defendant, the People and the court.' [Citations.]" (*People v. Feyrer* (2010) 48 Cal.4th 426, 436-437.) Only a prosecutor is authorized to negotiate a plea agreement, and a trial court may not substitute itself in the place of the prosecutor in the negotiation process or agree to a disposition over the objection of the prosecutor. (*People v. Segura, supra*, at p. 930.) "Acceptance of the agreement binds the court and the parties to the agreement." (*People v. Feyrer, supra*, at p. 437.)

If a negotiated plea is accepted by the prosecutor and approved by the trial court, the defendant cannot be sentenced on the plea to a harsher punishment than that specified

in the plea agreement. (§ 1192.5; *People v. Masloski* (2001) 25 Cal.4th 1212, 1217.) Nevertheless, statutory and due process concerns are not “offended by minor deviations from the bargain; to warrant relief, the variance must be “significant” in the context of the plea bargain as a whole.” (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1359; see *People v. Brown* (2007) 147 Cal.App.4th 1213, 1221-1222.) When, after a negotiated plea agreement, a trial court imposes punishment significantly exceeding that to which the parties agreed, relief from this unauthorized sentence “may take any of three forms: a remand to provide the defendant the neglected opportunity to withdraw the plea; ‘specific performance’ of the agreement as made [citation]; or ‘substantial specific performance,’ meaning entry of a judgment that, while deviating somewhat from the parties’ agreement, does not impose a ‘punishment significantly greater than that bargained for.’” (*People v. Kim, supra*, at p. 1362.)

An indicated sentence, on the other hand, occurs when the court “merely disclose[s] 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.” (*People v. Clancey* (2013) 56 Cal.4th 562, 575 (*Clancey*)). “Because an indicated sentence is merely an instance of ‘sentencing discretion wisely and properly exercised’ [citation], the indicated sentence must be the same punishment the court would be prepared to impose if the defendant were convicted at trial. An indicated sentence, properly understood, is not an attempt to induce a plea by offering the defendant a more lenient sentence than what could be obtained through plea negotiations with the prosecuting authority. When a trial court properly indicates a sentence, it has made no *promise* that the sentence will be imposed.” (*Ibid.*) With an indicated sentence, the defendant admits every charge, including any special allegations, and “all that remains is the pronouncement of judgment and sentencing.” (*People v. Vessell* (1995) 36 Cal.App.4th 285, 296.)

“To be sure, an indicated sentence is not a promise that a particular sentence *will* ultimately be imposed at sentencing. Nor does it divest a trial court of its ability to exercise its discretion at the sentencing hearing, whether based on the evidence and argument presented by the parties or on a more careful and refined judgment as to the appropriate sentence. As stated above, the utility of the indicated-sentence procedure in promoting fairness and efficiency depends to a great extent on whether the record then before the court contains the information about the defendant and the defendant’s offenses that is relevant to sentencing. The development of new information at sentencing may persuade the trial court that the sentence previously indicated is no longer appropriate for this defendant or these offenses. Or, after considering the available information more carefully, the trial court may likewise conclude that the indicated sentence is not appropriate. Thus, even when the trial court has indicated its sentence, the court retains its full discretion at the sentencing hearing to select a fair and just punishment. An indicated sentence does not shift the burden to the People at sentencing to argue against its imposition.”<sup>4</sup> (*Clancey, supra*, 56 Cal.4th at pp. 576-577.)

*Clancey* expressly declined to resolve whether the trial court *must* permit a defendant to withdraw his plea when the court decides not to impose the indicated sentence or, alternatively, has *discretion* to determine whether there is good cause for withdrawal of the plea. (*Clancey, supra*, 56 Cal.4th at pp. 583-584.) Section 1192.5 is explicitly limited to plea agreements between the defendant and the prosecutor; a plea made without conditions is not subject to the requirements of section 1192.5. (*People v. Hoffard* (1995) 10 Cal.4th 1170, 1181 [§ 1192.5 only applies to negotiated pleas]; *People*

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<sup>4</sup> “When a trial court has invoked its statutory power to dismiss the strike allegation in order to indicate the sentence it would impose, the court has not engaged in plea bargaining. [Citation.] Accordingly, the Three Strikes law does not restrict a trial court’s power to fashion an indicated sentence. [Citation.]” (*Clancey, supra*, 56 Cal.4th at pp. 582-583.)

*v. Fairbank* (1997) 16 Cal.4th 1223, 1245 [§ 1192.5, by its terms, applies only to negotiated pleas].) Hence, we believe section 1018 governs a request to withdraw a plea that was entered in response to an indicated sentence. Section 1018 provides that “the court may, ... for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted.” It follows that a trial court has discretion under section 1018 to decide whether to permit a defendant to withdraw a plea entered in response to an indicated sentence when the court decides not to impose the indicated sentence.

In this case, the record does not clearly demonstrate that a deal was negotiated between defendant and the prosecutor. Defense counsel’s statement, “We have a resolution,” and the court’s reference to promises are vaguely suggestive of a plea agreement, but certainly do not establish the existence of one. The prosecutor never represented to the court that she and defense counsel had reached a plea agreement. Nor did she accept the plea in open court. Defendant did not fill out a written plea form. But it is nevertheless possible that a plea agreement did exist and did include a three-year probation term (as possibly negotiated during off-the-record discussions).

On the other hand, the record suggests the trial court’s “offer” of felony probation and 270 days’ jail time was an indicated sentence. Even if we again assume the court was referring to a three-year probation term, as mentioned by defense counsel and later by the probation officer’s report, the court was under no obligation to impose that term at sentencing, especially after consideration of the amount of restitution owed by defendant.

Because we are unable to discern the exact nature of what occurred in the trial court, we believe the best resolution of this case is remand for clarification.

### **DISPOSITION**

The judgment is conditionally reversed and the matter remanded for the trial court to clarify on the record whether defendant was sentenced pursuant to a plea agreement or

an indicated sentence, to provide any appropriate remedy, and to resentence defendant in an appropriate manner.