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

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS ALVAREZ,

Defendant and Appellant.

F068849

(Super. Ct. No. 1438268)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Stanislaus County. Marie Sovey Silveira, Judge.

Steven A. Torres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Julie A. Hokans and Ryan B. McCarroll, Deputy Attorneys General, for Plaintiff and Respondent.

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

INTRODUCTION

Appellant and defendant Jesus Alvarez was charged with three counts of attempted murder, four counts of assault with a firearm, one count of participating in a criminal street gang, and one count of discharging a firearm at an occupied building; gang enhancements also were alleged. Pursuant to a plea agreement, he admitted one count of attempted murder, one count of assault with a firearm, and that he personally and intentionally discharged a firearm. In exchange for his plea, the remaining charges and allegations would be dismissed and he would receive a sentence of no more than 13 years and four months.

Defendant contends the trial court erred in denying his motion to set aside his plea. He also contends the trial court imposed a restitution fine enacted after the date of the offenses, which he maintains violates the ex post facto clause. We affirm.

FACTUAL AND PROCEDURAL SUMMARY

The Stanislaus County District Attorney charged defendant with nine felonies: in counts I, II, and III with attempted murder; in counts IV, V, VI, and VII with assault with a firearm; in count VIII with the crime of participating in a criminal street gang; and in count IX with discharging a firearm at an occupied building. As to counts I through VII and IX, a gang enhancement was alleged. It was alleged the offenses occurred October 23, 2011.

The public defender was appointed to represent defendant on November 3, 2011. The public defender declared a conflict and was relieved as counsel for defendant on November 9, 2011. Conflict counsel was appointed on November 14, 2011, and represented defendant at several hearings. Conflict counsel, however, declared a conflict and was relieved as counsel for defendant on August 9, 2012.

A second conflict counsel was appointed on August 13, 2012. That counsel declared a conflict and was relieved as counsel on August 24, 2012. The trial court appointed attorney Scott Mitchell to represent defendant on September 5, 2012. The next

several hearings reflect that defendant was being represented by Mitchell's office, with attorney Douglas Belyeu appearing.

A preliminary hearing was commenced on February 25, 2013. Defendant was represented by Belyeu at that hearing. The preliminary hearing was continued to March 6, 2013, and Belyeu represented defendant at the continued hearing. It was continued again, to March 11, 2013, with Belyeu also representing defendant at the March 11 continued hearing.

At the conclusion of the preliminary hearing, the trial court did not issue a holding order. Instead, it asked if defendant would waive time on the case, in order to allow the trial court to "go back and take a look at the evidence that's been presented by way of the transcript." Defendant agreed. Defendant was in custody with bail set at \$1 million.

On May 1, 2013, the parties were before the trial court for a change of plea hearing. Belyeu represented defendant at the change of plea hearing. The trial court discussed with defendant his rights, including the right to an attorney, and the consequences of entering a plea.

At one point, the trial court asked defendant, "have you told your lawyer all the facts and circumstances known to you about this case?" Defendant responded affirmatively and was asked, "Do you think you've had enough time to talk to him about your case?" Defendant responded affirmatively to this question. The trial court also asked Belyeu if he had discussed with defendant his rights, defenses, and the consequences of entering a no contest plea and admitting enhancements; Belyeu responded that he had. The trial court asked Belyeu if he believed "that [he] had sufficient time to discuss the case and all the ramifications" with defendant; Belyeu stated he had.

After these exchanges, the trial court found a factual basis for the plea based upon the transcript of the preliminary hearing. Thereafter, defendant pled no contest to one count of attempted murder and one count of assault with a firearm; and admitted a

section 12022.5, subdivision (a) enhancement. The trial court found defendant had expressly, intelligently, knowingly, and voluntarily waived his rights and entered a plea.

On June 6, 2013, a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) was held. Defendant indicated he wished to withdraw his plea and wanted a new lawyer. When asked to explain his reasons, defendant stated, "I took the deal because I thought that my attorney didn't feel too confident going further in my case." The trial court asked for clarification as to whether it was "something about the evidence, or is it something about him personally." Defendant responded, "Nothing about him, just about my case."

Belyeu was asked to respond and stated that if defendant went to trial, he faced a considerably longer sentence and the risk "was pretty severe" that defendant might receive a 20 year or longer sentence. The trial court noted the charges potentially would have defendant "end up with life in prison." Belyeu indicated he did not "have a great deal of confidence" about taking the case to a jury trial, but that "Mitchell would have been here for that part of it."

Although Belyeu handled the preliminary hearing and other hearings in the case, he had discussed the nature of the evidence, the nature of the charges, and the case with Mitchell. Those conversations included a discussion and decision that Mitchell would handle any trial; Belyeu did not feel comfortable handling the trial with an attempted murder charge, considering his relative inexperience. Belyeu had been admitted to practice law in 2010.

Before ruling on the *Marsden* motion, the trial court indicated defendant should have an opportunity to speak with Mitchell directly about the case. At the continued *Marsden* hearing on June 7, 2013, Mitchell was present. Mitchell stated he had "some discussion" with defendant, but that defendant was not ready to make a decision on whether to move to withdraw his plea or move forward to sentencing on the plea.

There was a further hearing on the *Marsden* motion on July 12, 2013. At that time, the defense indicated it had not yet received copies of the transcripts of the preliminary hearing. The trial court continued the matter again.

At the continued hearing on August 19, 2013, defendant stated he had spoken to Mitchell; he wanted a new attorney; and he wanted to withdraw his plea. When asked the reasons, defendant stated “my attorney doesn’t feel too comfortable going into trial.” Mitchell was not present; Belyeu was present. The trial court again continued the matter and asked that Mitchell be present.

On August 28, 2013, at the continued hearing, Mitchell was present with defendant. Mitchell informed the trial court that defendant “continues to waffle back and forth” on whether to pursue withdrawing his plea. Mitchell told the trial court that “whether Mr. Belyeu has been practicing for a long time or not, he’s done what I can tell is a very good job and accurate job, and I’ve gone over it with him. It’s not like I’ve been completely absent from the case.”

The trial court confirmed that defendant had spoken with both Mitchell and Belyeu about the case. The trial court asked, “Did they [the attorneys] say anything to you now when they’ve talked to you about this that’s different than anything they had ever told you before?” Defendant responded, “No. Nothing.”

The trial court told defendant that “A deal is a deal.” The trial court had reviewed the plea transcript and noted that defendant had been questioned at the time about whether he wanted to enter into the plea agreement. The trial court stated, “you have two attorneys working on your case” and “you are appreciating how serious it is now.”

The trial court opined that there was no evidence of a “breakdown” between defendant and his lawyers and that “I don’t think they haven’t done a good job of describing the case to you.” The trial court denied the *Marsden* motion.

On October 29, 2013, a motion to withdraw the plea was filed. Both Mitchell and Belyeu signed declarations in support of the motion. Mitchell stated that although he had

multiple discussions with defendant, he did “not recall telling [defendant] that [he] would be appearing as his trial attorney.” Belyeu stated he did discuss the case with Mitchell, related every offer to defendant, and “did invest a considerable amount of time in negotiations” to achieve what he continued “to believe is a decent agreement to resolve this matter.” Belyeu opined that while he discussed the case extensively with defendant, he may not have provided the “type of exact information, or in a format that was readily comprehensible, to a defendant with this level of understanding about the criminal process.”

The People filed written opposition to the motion. The People noted that the trial court had “slowly and methodically” discussed with defendant his rights and the consequences of entering a plea before accepting the plea. The People opined that the trial court spoke in “plain language” and “deliberately ensured” defendant “had no questions” and “understood the choices” before taking his plea. The People asserted that defendant was suffering from “post plea apprehension,” which is an insufficient ground to set aside a plea.

At the December 6, 2013, hearing on the motion to withdraw the plea, the trial court denied the motion. The trial court noted that defendant was potentially facing life in prison; had originally been offered a plea bargain that called for a 17-year term; then accepted a plea bargain in exchange for a term of 13 years and four months. At the time he entered his plea, defendant had heard the evidence presented at the preliminary hearing; had been provided an opportunity to speak with his attorneys about the case; the trial court spent a “long time talking” to defendant; and defendant’s “options” and the “consequences” were explained to him.

Prior to accepting the plea, “the Court was very careful about explaining to him what the terms of the plea bargain was and what the sentence was, and by the time the plea was completed, [defendant] said he understood and he entered the plea, and it was a plea that was done willingly, voluntarily, intentionally, knowingly, and under the

advisement of his attorneys.” After this statement, the trial court proceeded with sentencing.

The trial court imposed a term of nine years for the attempted murder conviction; one-third the midterm, or one year, for the assault with a firearm conviction; and one-third the aggravated term, or three years and four months, for the section 12022.5, subdivision (a) enhancement. The total term imposed was 13 years and four months, in conformance with the plea agreement. As for fines, the trial court stated that it had “indicated at the time of the plea that it would set the Restitution Fund fine at the minimum amount of \$280, rather than setting it according to the number of years in prison, with an equal [\$]280 stayed pending successful completion of parole.”

Defendant filed a notice of appeal, challenging the validity of the plea. The trial court issued a certificate of probable cause.

DISCUSSION

Defendant contends the trial court erred in denying his motion to withdraw his plea. He also contends the imposition of the \$280 restitution fine constitutes a violation of ex post facto laws.

I. Plea Bargain

Defendant contends the trial court erred in denying his motion to withdraw his plea. We disagree.

Section 1018 allows a trial court to grant a defendant’s request to withdraw a plea if there is good cause for the withdrawal. Mistake, ignorance, or any other factor overcoming the free judgment of the defendant is good cause for withdrawal of a plea; good cause must be shown by clear and convincing evidence. (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) The burden is on the defendant to produce clear and convincing evidence the plea should be allowed to be withdrawn. (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.)

“When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court” (*People v. Shaw, supra*, 64 Cal.App.4th at pp. 495-496.) The trial court’s decision on a motion to withdraw a plea will be upheld unless there is a clear showing of abuse of discretion. An abuse of discretion is shown if the trial court exercises its discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. (*Id.* at p. 496.)

Here, defendant’s sole contention is that he “had no idea that his trial attorney would be the experienced Scott Mitchell instead of the very inexperienced Douglas Belyeu.” However, an indigent defendant, such as defendant, has no right to a particular deputy public defender or representation by a particular attorney. (*Drumgo v. Superior Court* (1973) 8 Cal.3d 930, 934.) The name Scott Mitchell is noted on the minute order appointing counsel, but the trial court and Mitchell’s firm obviously considered the appointment to be of the Scott Mitchell Law Offices because Belyeu made several appearances on behalf of defendant as an employee of that firm, without objection from the trial court, or from defendant.

Moreover, Belyeu and Mitchell both indicated in their declarations that they had contact with defendant about the case. Mitchell’s declaration states that he had “multiple discussions with [defendant] regarding the strength and weakness of his case.” If defendant had wanted one particular attorney to represent him at a trial, he had multiple opportunities to make this request and resolve any doubt or concerns at or before he entered his change of plea, either by asking Belyeu or Mitchell. Defendant affirmatively told the trial court at the change of plea hearing that he had spoken with his counsel about the change of plea and “had enough time to talk to him.” If, as defendant now claims, the issue of which attorney would represent him at trial was important to him, he had multiple opportunities to clarify this point. Defendant did not make any inquiry in this regard, but affirmatively represented he had spoken with his attorneys about the change

of plea, leading one to conclude that the issue of which attorney would handle any trial was not of significance to defendant in deciding whether to change his plea.

There was no mistake or misrepresentation made about who would represent defendant in a trial in order to induce defendant to change his plea. Defendant's inattention to this point until after he entered his change of plea is not sufficient grounds for withdrawing a plea. (See *People v. Gari* (2011) 199 Cal.App.4th 510, 523.)

The record reflects that defendant's counsel knew the relevant law, kept him informed about the proceedings, negotiated a plea deal that provided for a term of approximately 13 years instead of the potential life in prison, and advised defendant of the relative strengths and weaknesses of the case. As such, the record reflects that defendant received competent advice of counsel before knowingly and voluntarily entering his change of plea. (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103, 105.)

Where two conflicting inferences may be drawn from the evidence, it is the appellate court's duty to adopt the inference supporting the challenged order. (*People v. Knight* (1987) 194 Cal.App.3d 337, 344.) Here, defendant's change of mind regarding his plea appears to be based more on post-plea apprehension, or buyer's remorse, rather than on any lack of information before entering the change of plea. A plea is not invalid simply because a defendant has post-plea apprehension or failed to correctly assess every relevant factor before entering his plea. (*Ibid.*)

The trial court did not abuse its discretion in denying defendant's motion to withdraw his plea. (*People v. Shaw, supra*, 64 Cal.App.4th at p. 496.)

II. Restitution Fines

Defendant contends the trial court violated ex post facto clauses of both the state and federal Constitutions when it imposed a restitution fine and parole revocation fine in the amount of \$280 each, when the minimum fine at the time of the offenses was \$200. This contention is forfeited.

At the December 6, 2013, sentencing, the trial court did indicate that it intended to impose a restitution and parole revocation fine in the “minimum amount,” rather than a multiplier of the number of years of imprisonment imposed. The restitution fine is imposed pursuant to section 1202.4, subdivision (b)(1); section 1202.45 requires the imposition of a parole revocation fine in the same amount as the section 1202.4 restitution fine.

The ex post facto clause requires that the determinative date for calculation of restitution fines is the date of the offense, not the date of imposition of judgment. (*People v. Souza* (2012) 54 Cal.4th 90, 143.) In 2011, the amount of the restitution fine that could be imposed ranged from a minimum of \$200 to a maximum of \$10,000. (Stats. 2011, ch. 45, § 1.) The minimum amount was increased to \$240, effective January 1, 2012, and to \$280 effective January 1, 2013. (Stats. 2011, ch. 358, § 1; § 1202.4, subd. (b)(1).)

When the restitution fine and parole revocation fine were imposed at sentencing, there was no objection. Because the trial court did not have information on custody credits, the sentencing was continued. No issue was raised about the amount of the restitution fine or parole revocation fine at the continued sentencing hearing.

The failure to object to the amount of the restitution fine and the parole revocation fine in the trial court precludes a challenge on appeal. (*People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468.) The forfeiture rule applies “to claims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices.” (*People v. Scott* (1994) 9 Cal.4th 331, 353.) By failing to object on ex post facto grounds in the trial court, defendant has forfeited the contention. (*People v. Martinez* (2014) 226 Cal.App.4th 1169, 1189.)

Defendant maintains that the fines imposed amount to an unauthorized sentence, thus the issue is cognizable on appeal despite the lack of objection in the trial court. He is mistaken. The amounts of the restitution fine and parole revocation fine are not

unauthorized. The sentence would be unauthorized if it could not lawfully be imposed in the case. (*People v. Scott, supra*, 9 Cal.4th at p. 354.) Unlike *People v. Zito* (1992) 8 Cal.App.4th 736, 740-742, where the trial court imposed fines in excess of the maximum allowable under the statutes, fines of \$280 each lawfully could be imposed in defendant's case because the amount is within the allowable range at the time of the offenses, namely \$200 to \$10,000. (Stats. 2011, ch. 45, § 1.)

DISPOSITION

The judgment is affirmed.