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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIE ANN SHANHOLTZER,

Defendant and Appellant.

G044555

(Super. Ct. No. 08WF1650)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

Stephen S. Buckley and Christian C. Buckley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Steve Oetting, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Julie Ann Shanholtzer pleaded guilty to possession of methamphetamine and related charges after the trial court offered (without securing the prosecutor's consent) to strike her prior prison terms for purposes of sentencing, suspend execution of a six-year prison sentence, and grant her probation. The court subsequently vacated the grant of probation after realizing the grant was statutorily invalid. On appeal, defendant contends the court engaged in judicial plea bargaining, voiding her guilty pleas. She asserts she must be given the opportunity to withdraw her guilty pleas. As we shall explain, because defendant received the benefit of her bargain, she is estopped to challenge it on appeal. The judgment is affirmed.

FACTS

In a felony complaint, the People charged defendant with unlawful possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); unlawful possession of drug paraphernalia, i.e., a pipe (Health & Saf. Code, § 11364); and unlawful possession of a syringe (Bus. & Prof. Code, § 4140). The People alleged she had suffered one prior strike conviction (Pen. Code, §§ 667, subds. (d) & (e)(1), 1170.12, subds. (b) & (c)(1))¹ and served three prior prison terms (§ 667.5, subd. (b)). On August 15, 2008, defendant pleaded not guilty to all charges.

At a January 5, 2009 pretrial hearing, the court granted defendant's motion to withdraw her not guilty pleas. In anticipation of defendant's pleading guilty to all charges, the court questioned her about (and defendant acknowledged she understood) the following considerations: She faced a maximum penalty of nine years in prison.² But the

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

² The maximum sentence was calculated by doubling the high term of three years on the Health and Safety Code section 11377, subdivision (a) violation, and one additional year for each of the prison priors under section 667.5, subdivision (b).

court was offering a sentence it characterized as a “do or die.” It was giving her “a chance, an opportunity, to go to Delancey Street,” a drug rehabilitation facility. If she did well there, she would be on probation for five years. The court would strike her prison priors, but not her strike conviction. If she violated any condition of probation, she would go to prison for six years. The court stated: “Now, you also understand that the People have made you an offer of four years so you compare the two. We don’t want you to go to state prison.” The court stated: “I want to make sure you fully understand this process that we all spent a lot of time on. If you mess up and if you have a probation violation within five years, you’re gonna go to state prison for six years. There’s no talking about it. . . . There’s no ‘Well, let’s take another look at it.’ It’s you don’t pass go; you just go straight for six years. [¶] You understand that?” Defendant replied, “Yes.” She then pleaded guilty to all charges and admitted her prior conviction and prison terms. The court sentenced defendant as it had promised: It struck the prison priors for purposes of sentencing, imposed a six year prison term, stayed execution of sentence, and placed defendant on probation on condition, inter alia, that she complete a two-year program at Delancey Street.

Over seven months later, on August 20, 2009, defendant admitted she had violated her probation.

At the October 30, 2009 sentencing hearing, or what the court called a “modification for sentencing,” the court summarized the “history” of the case: Defendant had pleaded guilty and was sentenced to a six-year prison term pursuant to a “negotiated plea.” The six-year term resulted from a doubling of the upper term (for possession of methamphetamine) due to her “strike prior.” The court had suspended execution of sentence and placed her on probation for five years subject to the condition she successfully complete a two-year program at Delancey Street. Delancey Street is “the only alternative to prison.” The court “gives Delancey Street very sparingly,” and had done so no more than eight times in the last year. Yet, defendant failed to “even show[]

up” at Delancey Street; she “never even went.” “She sat in this court and told [the court] what she was going to do, that she was going to make this happen.” She told the court she wanted and needed the drug program, but then she “didn’t give it a chance.” After her failure to show up at Delancey Street, a no-bail warrant had been issued for her arrest. On August 13, 2009, defendant, then eight months pregnant, “presented herself to this court” with her attorney, her pastor, her boyfriend, and his parents. The boyfriend (who was, at the time of the October 2009 hearing, “now her fiancé and the father of her child”) had committed to the court on January 5, 2009 that he would take defendant to Delancey Street, but had failed to do so. The court recognized defendant now had a job.

After giving this summary of the case history, the court stated it now belatedly realized defendant’s sentence was improper. The sentence was illegal because the court was not permitted to stay execution of sentence and grant probation unless it also struck her strike conviction. The court reiterated: “She was given a lesser offer by the prosecution. She didn’t want that. She wanted Delancey Street.” The court stated: “The defendant’s remedy would have been to appeal the execution of the sentence suspended, resentencing . . . would only be appropriate if she were to be given probation for a lesser term.”

The court stated defendant’s criminal history included 12 convictions, most of them felonies. She had a “gang strike” and three prison priors. The court now had to decide “whether she goes to state prison for the six years strike terms, whether she gets a lesser term, or whether she gets probation and goes to jail.” The court “correct[ed] the sentence” as follows: It lifted the stay of sentence, vacated the grant of probation, and stated defendant would serve six years in prison. The court stated: “There’s no prejudice to the defendant, as the term is the same as the term defendant agreed upon. As indicated, her remedy would have been to appeal the illegal grant of probation.”

On October 19, 2010, we granted defendant's petition for a writ of habeas corpus to file a late notice of appeal. The trial court executed a certificate of probable cause as required by section 1237.5 for an appeal after a guilty plea.

DISCUSSION

Defendant Is Estopped From Challenging the Sentence

Defendant contends her guilty plea and six-year sentence “resulted from illegal judicial plea bargaining in excess of the court’s jurisdiction, constituted an illegal sentence, and therefore she must be given the opportunity to withdraw her plea.” She contends that because the People offered her four years, she “would have either agreed to a lower sentence or presumably have gone to trial” if the court had not engaged in illegal judicial plea bargaining. The Attorney General counters that defendant is estopped to challenge the plea bargain to which she agreed and from which she benefited.

Our Supreme Court has made clear that judicial plea bargaining exceeds a court’s jurisdiction and cannot be countenanced. (*People v. Turner* (2004) 34 Cal.4th 406, 417-418.) “[T]he court has no authority to substitute itself as the representative of the People in the negotiation process and under the guise of ‘plea bargaining’ to ‘agree’ to a disposition of the case over prosecutorial objection. Such judicial activity would contravene express statutory provisions requiring the prosecutor’s consent to the proposed disposition, would detract from the judge’s ability to remain detached and neutral in evaluating the voluntariness of the plea and the fairness of the bargain to society as well as to the defendant, and would present a substantial danger of unintentional coercion of defendants who may be intimidated by the judge’s participation in the matter.” (*People v. Orin* (1975) 13 Cal.3d 937, 943 (*Orin*), fn. omitted.)

Appellate courts, however, have recognized a distinction between illegal judicial plea bargaining and permissible indicated sentences. “Some trial courts want to

encourage resolution of criminal cases without the prosecutor’s consent, and employ what has come to be known as the ‘indicated sentence.’ ‘In an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed. No “bargaining” is involved because no charges are reduced. [Citations.] In contrast to plea bargains, no prosecutorial consent is required. [Citation.]’ [Citations.] In such cases, the trial court ‘may indicate to [the] defendant what its sentence will be on a given set of facts without interference from the prosecutor except for the prosecutor’s inherent right to challenge the factual predicate and to argue that the court’s intended sentence is wrong.’ [Citation.] An ““indicated sentence” . . . falls within the “boundaries of the court’s inherent sentencing powers.”” (People v. Woosley (2010) 184 Cal.App.4th 1136, 1146 (Woosley).)

Here, the Attorney General concedes the court engaged in illegal judicial plea bargaining, because the court agreed to strike defendant’s three prior prison terms. This concession is based on *Woosley, supra*, 184 Cal.App.4th at pp. 1146-1147, where the trial court agreed to dismiss an on-bail enhancement (§ 12022.1, subd. (b)) in exchange for a guilty plea. The *Woosley* court stated: “[T]he trial court gave what appeared to be an indicated sentence. But that sentence could be imposed only if the trial court dismissed the on-bail enhancement. Therefore, it was more than just an indicated sentence; it included, anticipatorily, the dismissal of the on-bail enhancement.” (Woolsey, at p. 1147.)³

³ The dividing line between the permissible striking of a charged count or sentencing enhancement under section 1385 in conformance with an “indicated sentence,” and the impermissible judicial plea bargain has remained somewhat problematic for years. The seeming ease with which the difference between an indicated sentence and a judicial plea bargain has been described is belied by the differing treatment of similar pleas by our Supreme Court and the Courts of Appeal. (Compare *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 512 [“when the Legislature does permit a charge to be dismissed the ultimate decision whether to dismiss is a judicial, rather than a prosecutorial or executive, function; to require the prosecutor’s consent to the disposition of a criminal charge pending before the court unacceptably

Assuming (without deciding) that the court engaged in judicial plea bargaining here, defendant is estopped from challenging the sentence on that basis. It is undisputed that defendant received a chance to attend Delancey Street as a condition of probation. (*People v. Collins* (1978) 21 Cal.3d 208, 214 [concept of reciprocal benefits is “[c]ritical to plea bargaining”].) But she chose not to “show up.” Having received the benefit of her bargain, she may not challenge it on appeal.

“A criminal defendant who receives the benefit of [her] plea bargain should not be allowed to seek to improve the bargain on appeal. [Citations.] Even if the court’s sentence exceeded its jurisdiction, a defendant cannot complain of getting what [she] bargained for so long as the court had fundamental jurisdiction.” (*People v. Vera* (2004) 122 Cal.App.4th 970, 983.) “[F]undamental jurisdiction,” as used in this rule, refers to the court’s jurisdiction of the subject matter (*In re Griffin* (1967) 67 Cal.2d 343, 347), i.e. “the court’s power to hear and determine the cause” (*id.* at p. 346). When an accusatory pleading is properly filed with the court, the court “clearly has subject matter jurisdiction to hear and determine the case.” (*People v. Webb* (1986) 186 Cal.App.3d 401, 411.) Thus, “[a] litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when ‘[t]o hold otherwise would permit the parties to trifle with the courts.’” (*In re Griffin*, at p. 348.) We will not allow defendant here to

compromises judicial independence”] and *People v. Vergara* (1991) 230 Cal.App.3d 1564, 1567 [“there is no requirement that the People need to consent when a defendant pleads guilty to all charges of the information”] with *Woosley, supra*, 184 Cal.App.4th at pp. 1146-1147 [court’s anticipatory dismissal of on-bail enhancement without prosecutor’s consent results in illegal judicial plea bargain] and *People v. Clancey* (2012) 202 Cal.App.4th 790, 793 [court’s anticipatory strike of a strike results in illegal judicial plea bargain; judicial plea bargain results if sentence is contingent on defendant’s guilty or no contest plea, or if defendant has option to withdraw plea or admission if court fails to impose stated sentence].) But here, we need not chart the rocky shoals separating a permissible indicated sentence and an impermissible judicial plea bargain, since, as we shall discuss, defendant is estopped from challenging the sentence.

“trifle with the court” by challenging the beneficial bargain to which she willingly consented. Defendant is estopped from challenging her sentence on the ground it resulted from an illegal judicial plea bargain.

The Court Considered Appropriate Factors in Sentencing Defendant

Defendant argues in the alternative that the court abused its sentencing discretion when it imposed the six-year prison sentence. Defendant’s principal argument is that the court improperly considered her failure to report to Delancey Street as the primary basis for imposing the six-year term. Her argument is premised on the assumption that the court did not simply lift the stay of *execution* of the original prison sentence, but instead treated the entire original sentence as illegal and sentenced defendant *as if* it were imposing a sentence for the first time upon revocation of probation, and *as if* probation had been originally granted with imposition of sentence suspended. Under this theory, defendant notes that California Rules of Court, rule 4.435(b)(1), requires that upon revocation and termination of probation, where *imposition* of sentence had been previously suspended, “[t]he length of sentence must be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term”

It is not clear how the court was proceeding. On the one hand, the court seemed to proceed as though it were exercising sentencing discretion in the first instance by stating: “I have to make the decision whether she goes to state prison for the six years strike terms, whether she gets a lesser term, or whether she gets probation and goes to jail.” On the other hand, when the court pronounced judgment, it seemed to proceed as though it were simply lifting the stay of execution of the sentence previously imposed, stating: “The court’s going to correct the sentence at this time. The court lifts the suspension or stay of the sentence, and vacates the grant of probation. Defendant shall serve the six-year term in state prison that was imposed.”

Assuming (without deciding) that the court did exercise its sentencing discretion anew as if imposition of sentence had originally been suspended, we conclude the court appropriately based the length of the sentence on circumstances existing at the time the plea was initially taken, i.e., on January 5, 2009. The court summarized the case history. It then stated: “We’re now where we are right now and I have to make the decision whether she goes to state prison” for six years, or gets a lesser term or probation. Next, the court, before announcing its sentence, discussed the relevant factors. The court “look[ed] at [defendant’s] history with her 12 prior convictions, with her gang strike, [and] her three prison priors.” The court noted defendant had three other children (besides her new baby) and had abandoned those children.

Although the court did discuss events subsequent to the grant of probation (such as defendant’s new church membership, her newborn baby, her efforts to reconnect with her other children, and her rejection of a drug program recommended by child protective services), such comments were in response to *defendant’s* argument that she had made progress and her submission to the court of letters of support from her relatives, pastor, coworkers, and nurses. In this discussion by the court (as opposed to its case history recitation), the court mentioned only once that defendant failed to show up at Delancey Street. Furthermore, defendant failed to object to any of the factors mentioned by the trial court before it announced the sentence.

Thus, assuming the court believed it was proceeding upon a revocation of probation, and as if *imposition* of sentence had originally been suspended, the court based the length of defendant’s sentence on proper aggravating (e.g., numerous prior convictions) and mitigating factors (e.g., early admission of guilt) under California Rules of Court, rules 4.421 and 4.423. And assuming the court believed it was simply proceeding upon a revocation of probation, where *execution* of sentence had been previously suspended, the court was following the requirements of California Rules of Court, rule 4.435(b)(2), which provides: “If the execution of sentence was previously

suspended, the judge must order that the judgment previously pronounced be in full force and effect” In either case, there was no abuse of the court’s sentencing discretion.

DISPOSITION

The judgment is affirmed.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

FYBEL, J.