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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN KEITH WILSON,

Defendant and Appellant.

H037600

(Santa Clara County

Super. Ct. No. B1050331)

Defendant John Keith Wilson pleaded no contest to 21 counts of lewd conduct upon a child under 14 (Pen. Code, § 288, subd. (a)).<sup>1</sup> Following a court trial, defendant was found guilty of one additional count of lewd conduct upon a child under 14. After the court denied defendant's motion to withdraw his pleas, the court sentenced defendant to 50 years in prison.

On appeal, defendant contends that the trial court erred in denying his motion to withdraw his pleas. As we will explain, we will reverse the judgment and remand the matter to the trial court for further hearing.

**BACKGROUND**

Defendant was charged by first amended complaint filed February 14, 2011, with 13 counts of lewd conduct upon a child under 14 (§ 288, subd. (a); counts 1-13). The

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<sup>1</sup> All further unspecified statutory references are to the Penal Code.

information further alleged as to counts 1 through 9 that the offenses were committed against more than one victim (§ 667.61, subs. (b) & (e)).

On July 14, 2011, the date set for the preliminary examination, the complaint was amended on motion of the prosecution to add 10 counts of lewd conduct upon a child under 14 (§ 288, subd. (a); counts 14-23). Defendant pleaded no contest to counts 1 through 6, 8, and 10 through 23. Defendant entered his pleas with the understanding that count 9 would be dismissed, that all section 667.61 allegations would be dismissed, and that he would receive a determinate term of 48 years for the counts to which he pleaded no contest. Defendant also waived his right to a jury trial on count 7 with the understanding that a court trial would be conducted regarding that count. On August 10, 2011, an information that included the 10 additional counts of lewd conduct upon a child under 14 (counts 14-23), and that reflected the removal of the section 667.61 allegations, was filed.

On August 19, 2011, a court trial was held regarding count 7. Defendant's daughter, who was 14 years old at the time of trial, testified that defendant and her mother divorced when she was in the third grade. Thereafter, she sometimes stayed with defendant, and at times she slept in his bed. She testified that on one occasion, when she was 12 years old and in the sixth grade, defendant moved his hand back and forth on her vaginal area over her pajamas. She indicated that the touching had occurred on other occasions. The court took judicial notice of the fact that defendant entered "pleas to other counts in the complaint which [were] memorialized in the information" that was filed. The court ultimately found defendant guilty on count 7 (lewd conduct upon a child under 14; § 288, subd. (a)).

On September 7, 2011, a probation report was filed with the court. The following summary of defendant's offenses (excluding count 7) is taken from the probation report. The police department received a tip that defendant was sexually molesting a 13-year-old boy. The boy, whose mother had dated defendant, reported that defendant had

masturbated him beginning approximately two years prior, and that it occurred multiple times. On July 12, 2011, after the first amended complaint had been filed in this case, the boy further reported that defendant had used dildos on him, showed him child pornography, orally copulated him, and placed defendant's penis in the boy's anus. While the police were investigating the allegations, the police discovered additional victims of defendant. A 13-year-old boy, whose father lived in the same apartment complex as defendant, reported that defendant had given him (the boy) a massage in or near his groin area and under his shorts. Another victim, defendant's "adopted step-son," reported that he was sexually abused by defendant for more than eight years, beginning at the age of 12 or 13. The stepson, who was an adult at the time of his report to the police, indicated that the abuse included fondling and oral copulation. Defendant also showed him child and adult pornography.

On September 7, 2011, the date set for sentencing, a hearing was held on a motion by defendant to withdraw his no contest pleas.<sup>2</sup> The basis for the motion was that he was "not in a right state of mind to understand the gravity of his decision" at the time he entered the pleas. Declarations from defendant and a therapist, who was employed by the county and who had been present at the hearing when defendant entered his pleas, were filed in support of the motion. Both defendant and the prosecution submitted the matter on defendant's moving papers. The trial court denied the motion. The court then sentenced defendant to 50 years in prison, with 380 days custody credits. The sentence was calculated as follows. Pursuant to the plea bargain, defendant received the aggravated term of eight years on count 1, and consecutive terms of two years each, or

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<sup>2</sup> The copy of the motion in the record is not file-stamped. At the September 7, 2011 hearing, the trial court indicated that the motion had been hand-delivered to the court that day, and faxed to the court the day prior. Defendant's declaration is dated September 7, 2011, and the proof of service for the motion indicates that it was personally delivered to the prosecutor on September 7, 2011.

one-third the midterm, on counts 2 through 6, 8, and 10 through 23. On count 7, defendant received a consecutive term of two years, or one-third the midterm. The remaining count was dismissed. Defendant filed a timely notice of appeal and obtained a certificate of probable cause.

## **DISCUSSION**

### ***Background***

#### **The no contest pleas**

On July 14, 2011, before the trial court accepted defendant's no contest pleas, the record reflects the following. The trial court indicated that there had been "substantial discussions" in the case that day, and the proposed disposition was set forth on the record. After the court granted the prosecution's motion to add ten counts, defense counsel waived formal arraignment on the amended complaint. The court proceeded to ask defendant whether he was "satisfied" that he had "sufficient time to speak" with his counsel regarding the allegations in the case, the proof required of the prosecution at the preliminary examination and at trial, possible defenses and tactics, and the possible range of sentences. Defendant responded, "Yes, your Honor." The court then asked defendant whether his decision to resolve the case that day was "a free and voluntary decision." Defendant again responded, "Yes, your Honor." In response to the court's questions, defendant also confirmed that he had not been threatened to enter a plea that day, that no one had made any promises to him about the outcome of the case other than as stated on the record, that he was a native English speaker, and that he had not had trouble understanding the language or concepts used in court. Defendant also denied taking recently any medicine, drugs, or alcohol that adversely affected his ability to understand the proceedings. The court then explained to defendant the preliminary examination and trial rights he would be giving up by entering his plea. Defendant indicated that he understood and gave up those rights. The court also explained that a plea of no contest was the same as a plea of guilty, and explained the consequences of the plea. Regarding

sentencing, the court stated that “all victims have a right to appear at sentencing and be heard to make a victim impact statement.” The court also indicated that defendant would be sentenced to the agreed upon term of 48 years, unless something new was brought to the court’s attention leading it to believe that the sentence was unconscionable. The court eventually asked defendant whether he had any questions, and defendant responded, “No, sir, your honor.”

Immediately thereafter, the trial court stated to defendant, “you’re charged as previously stated in counts 1 through 23 and excepting count 9 which is taken under submission for dismissal at the time of sentencing and count 7 which will be set for court trial, how do you wish to plead to those enumerated charges?” Defendant responded, “No contest.” The court then asked defendant whether he had had an opportunity to review with counsel “the contents of the first amended complaint including the details regarding the time frames and alleged victims.” Defendant responded affirmatively. Thereafter, defense counsel indicated to the court that he was “satisfied” that defendant understood his rights and was “freely and voluntarily giving them up,” that he was “satisfied” that defendant was “conversant with the particulars of the allegations” as to each count, and that no further voir dire was necessary. The prosecutor and defense counsel then stipulated to a factual basis for the pleas based on various “offense reports.” The court then again asked defendant how he wished to plead to “all these counts except for Count 7 and 9,” and defendant again stated, “No contest.” The court found a factual basis and stated that “the plea is free, voluntary, knowing and intelligent.”

### **The motion to withdraw pleas**

In early September 2011, defendant filed the motion to withdraw his pleas. The sole basis articulated in the motion was that defendant “was not in a right state of mind to understand the gravity of his decision” at the time he entered the pleas. Declarations by a therapist and defendant were submitted in support of the motion.

The therapist, Donald A. Wilcox, stated in his declaration, dated September 6, 2011, that he was a licensed marriage and family therapist with a master's degree in educational psychology and a doctorate in education. He had worked "in this field for 23 years in a variety of settings," and his primary areas of expertise were substance dependence and attention deficit disorder. Dr. Wilcox had been employed by Santa Clara County since 1998, and he currently worked at Elmwood Correctional Facility for Adult Custody Mental Health on the "crisis team." As part of the crisis team, he saw inmates with a variety of mental health issues, including a "fair amount of inmates with acute stress reaction or shock." According to Dr. Wilcox, "[m]ental and emotional shocks are not uncommon in inmates, as in the death of a loved one, getting attacked by another inmate, or the prospect and/or reality of receiving a lengthy prison sentence."

Dr. Wilcox explained that on February 3, 2011, the Department of Corrections had requested that "Mental Health" evaluate defendant due to concerns about him possibly harming himself. Dr. Wilcox evaluated defendant for more than one hour. He determined that defendant should be placed on "15-minute checks" for the next 24 to 72 hours, given the nature of the charges against him, the fact that it was his first arrest, and the written expressions of hopelessness found in his cell. Dr. Wilcox was assigned to see defendant on a weekly basis, and had since seen him more than 25 times.

Dr. Wilcox indicated in his declaration that he was in court on the date set for defendant's preliminary examination. He was allowed to speak with defendant "at length while he was in the jury box contemplating a proposed disposition in his case." According to Dr. Wilcox, the disposition of defendant's case "appeared to be somewhat of a moving target, changing both in the number of counts he was to plead guilty to and the number of years he would receive as a sentence." Dr. Wilcox further stated: "In my professional opinion, [defendant] was experiencing acute stress reaction or shock during this time that I spoke with him and during the time that he was contemplating the proposed disposition. Pleading guilty to the charges proposed and receiving such a

lengthy prison sentence (in excess of 40 years) caused [defendant] to appear in the courtroom with symptoms of disorientation, poor attention span, and at time [*sic*] he was unable to understand or respond to present stimuli. This may be referred to as a daze.” After referring to defendant’s no contest pleas and his agreement to 48 years in prison, Dr. Wilcox stated: “In the courtroom at that time, [defendant] was physically flushing and he reported a rapid heartbeat. I noted that he was confused, detached and his judgment was impaired as I spoke with him then.” Defendant indicated to Dr. Wilcox that he did not have enough time to make such an important decision.

Dr. Wilcox stated that he also spoke to defendant the next day at Elmwood Correctional Facility. According to Dr. Wilcox, defendant “presented with a common symptom of acute stress reaction of partial amnesia when trying to remember our conversation in court and some other court proceedings at the time he entered his pleas.” Dr. Wilcox concluded: “In my professional opinion, [defendant] did not have the capacity needed to make a coherent and logical decision, given the stressor of the courtroom environment, the immediate time constraints, and the psychological trauma of facing 48 years in prison. These stressors were more than enough stimuli to create an acute stress reaction which impaired [defendant] at that time.”

In a declaration signed on September 7, 2011, defendant stated that the preliminary examination was scheduled for July 14, 2011. He had not received “an offer of a term of years before that date, and had been informed of many new developments in terms of discovery in the two days preceding that court date.” While he was in court on July 14, his counsel attempted to “negotiate a settlement of a term of years as opposed to the life sentence which was what [he] would have received had [he] been convicted of all the charges.” He was “overwhelmed by the need to make a decision in such a short period of time” and asked to speak with Dr. Wilcox. He was allowed to speak privately with Dr. Wilcox for “perhaps 15 minutes.” According to defendant: “That whole morning and afternoon was such a blur to me, and I was confused and in shock at the

number of years I was asked to accept, and I was not able to think clearly and to comprehend what I was doing at the time. [¶] . . . Due to the fact that I did not have enough time to make this life-changing decision, and due to the fact that I was also overcome with emotion about seeing people in the courtroom that I hadn't seen for a long time, including my brother, and due to the fact that I was not thinking clearly, I made a decision to accept the offer which I now believe was an erroneous decision, and I ask the court to allow me to withdraw my pleas and go ahead with the preliminary hearing in this case.”

### **The trial court's ruling**

At the hearing on the motion, the trial court observed that defendant's motion did not “cite any [ineffective assistance of counsel] issues or any defect in the *Boykin-Tahl* waiver procedures<sup>3</sup>” but rather was based “primarily on [defendant's] psychology and state of mind at the time the plea was taken.” Defense counsel stated that it was his recollection that the court conducted “a full and complete voir dire” of defendant at the time the no contest pleas were entered. The prosecutor and defense counsel subsequently agreed that there was no allegation in defendant's motion concerning “constitutional infirmity . . . or defect in the change of plea itself” or concerning ineffective assistance of counsel. The prosecutor and defense counsel also indicated that they were submitting the matter on the defendant's motion papers.

The trial court then ruled as follows: “[T]he court having read and reviewed the declarations *even assuming that the factual allegations in the declarations are true* and noting that . . . they've not at all been tested by cross-examination of the parties and that there is no live witness testifying to what the declarants testify to, based upon the case law of the State of California, based upon the court's own recollection of the very thorough voir dire process in which the defendant was fully engaged and given the

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<sup>3</sup> *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

opportunity on multiple occasions to state any hesitations, reservations or qualifications to his pleas and supported by the transcript which will be placed in the court file soon, now the court finds that the defendant has failed to make the standard of proof required for such a motion, that is proof by clear and convincing evidence that the defendant didn't know what he was doing at the time. The court finds he did know what he was doing, accordingly the motion will be denied.” (Italics added.)

### ***Contentions on Appeal***

Defendant contends that the trial court abused its discretion in denying his motion to withdraw his pleas, and that his state and federal constitutional rights were violated. Defendant characterizes Dr. Wilcox as a “disinterested third-party expert witness” who established through his declaration that defendant was “incapable of making a voluntary plea” given his state of mind at the time. Defendant argues that, if Dr. Wilcox’s declaration is “taken as true on its face, as the court did, it would be factually solid proof of involuntariness.” Defendant acknowledges that the court’s factual findings also included the court’s own observations concerning the taking of the plea. However, according to defendant, the trial court’s factual findings “make no sense in connection with the conclusion reached, unless the court found that Dr. Wilcox was not credible or otherwise untruthful. However it is clear from the record that that is not the case.”

The Attorney General contends that substantial evidence supports the trial court’s factual determination that defendant’s plea was voluntary. In making this contention, the Attorney General refers specifically to the court’s own observations of defendant during the taking of the plea. The Attorney General also argues that defendant fails to show that any stress he was under at the time was “different” than the distress any other individual in a similar situation might experience. The Attorney General further argues that, although Dr. Wilcox believed that defendant was experiencing acute stress when they spoke before defendant entered his plea, Dr. Wilcox’s “concern was not so great that he deemed it necessary to alert the court or defense counsel of any concern he had that

[defendant] was unable to knowingly and voluntarily continue with the proceedings.”

The Attorney General contends that, under the circumstances, defendant fails to demonstrate an abuse of discretion in the denial of the motion to withdraw the pleas.

In reply, defendant acknowledges that the trial court “could have discounted the Wilcox testimony” but contends that the court “did not do so.” Defendant argues that the “record shows that the court intended to give credence to Wilcox, but erred in believing that the Wilcox declaration was insufficient as a matter of law to controvert the court’s own observations.”

### ***Analysis***

Section 1018 allows the trial court to grant a defendant’s request to withdraw his or her plea of guilty or no contest “before judgment . . . for a good cause shown.” “Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. [Citations.] But good cause must be shown by clear and convincing evidence. [Citations.]” (*People v. Cruz* (1974) 12 Cal.3d 562, 566 (*Cruz*); accord *People v. Sandoval* (2006) 140 Cal.App.4th 111, 123; *People v. Mickens* (1995) 38 Cal.App.4th 1557, 1561.)

A plea “is ‘involuntary’ if done without choice or against one’s will.” (*People v. Knight* (1987) 194 Cal.App.3d 337, 344 (*Knight*)). A plea may not be withdrawn simply because the defendant has changed his or her mind (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456), or because the plea was made reluctantly or unwillingly by the defendant (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208-1209 (*Huricks*); *People v. Hunt* (1985) 174 Cal.App.3d 95, 103-104 (*Hunt*); *People v. Urfer* (1979) 94 Cal.App.3d 887, 892-893). Further, a defendant claiming that he or she was pressured into the plea must demonstrate that it was more than the pressure experienced by “every other defendant faced with serious felony charges and the offer of a plea bargain.” (*Huricks, supra*, at p. 1208.)

In ruling on a motion to withdraw a plea, the trial court may consider the court's own observations of the defendant, as well as "take into account the defendant's credibility and his interest in the outcome of the proceedings. [Citations.]" (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 918 (*Ravaux*)). Where the evidence is contradictory, the trial court is "entitled to resolve the factual conflict against" the defendant. (*Hunt, supra*, 174 Cal.App.3d at p. 104.)

We review the trial court's denial of a motion to withdraw a plea for abuse of discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) In making that determination, we adopt the trial court's factual findings if supported by substantial evidence. (*Ibid.*) We "will not disturb the denial of a motion unless the abuse is clearly demonstrated." (*People v. Wharton* (1991) 53 Cal.3d 522, 585.) "A discretionary order based on the application of improper criteria or incorrect legal assumptions is *not* an exercise of *informed* discretion and is subject to reversal even though there may be substantial evidence to support that order. [Citations.]" (*F.T. v. L.J.* (2011) 194 Cal.App.4th 1, 26; accord *In re Charlisse C.* (2008) 45 Cal.4th 145, 159; *People v. Knoller* (2007) 41 Cal.4th 139, 156.)

In this case, the trial court "assum[ed]" that Dr. Wilcox's and defendant's statements were "true." If the declarations were true, they could have been sufficient to show by clear and convincing evidence that defendant's exercise of free judgment had been overcome, such that there was good cause to grant defendant's motion to withdraw his pleas. (§ 1018; *Cruz, supra*, 12 Cal.3d at p. 566.) Dr. Wilcox, a licensed therapist, was employed by the county and worked at the correctional facility. He had seen defendant multiple times for therapy while defendant was in custody. He was physically present at defendant's plea hearing, and he spoke with defendant before and after the no contest pleas were entered. In his declaration, Dr. Wilcox stated that defendant "was experiencing acute stress reaction or shock" at the time he was contemplating the proposed disposition. According to Dr. Wilcox, defendant exhibited "symptoms of

disorientation, poor attention span,” and at times “he was unable to understand or respond to present stimuli.” Dr. Wilcox characterized defendant as being in a “daze.” He also found defendant to be “confused, detached,” and suffering from impaired judgment when he spoke to defendant. Dr. Wilcox ultimately concluded that defendant “did not have the capacity needed to make a coherent and logical decision” at the time, that he suffered from an “acute stress reaction,” and that he was “impaired.” Defendant’s declaration was consistent with Dr. Wilcox’s declaration, including defendant’s statement that he was “not able to think clearly and to comprehend what [he] was doing at the time” he entered the no contest pleas. These declarations by Dr. Wilcox and defendant, if “assum[ed]” to be “true” as stated by the court, could have been sufficient support for the court to conclude by clear and convincing evidence that defendant’s no contest pleas were involuntary and had been entered “without choice” by him. (*Knight, supra*, 194 Cal.App.3d at p. 344.)

We are not persuaded by the Attorney General’s reliance on *Huricks* and the argument that defendant “made no showing that any stress he may have been under was of a type different from the normal distress any individual might go through in agreeing to a 48-year prison sentence.” In *Huricks*, the defendant contended he was subjected to “ ‘overbearing duress’ ” when he entered his no contest plea. (*Huricks, supra*, 32 Cal.App.4th at p. 1208.) The only evidence supporting the defendant’s contention was “his statement at the hearing on the motion to withdraw his plea that he was ‘asked by [his] family to take this plea bargain’ and, according to his counsel, was ‘confused and indecisive’ as to whether to follow their advice.” (*Huricks, supra*, 32 Cal.App.4th at p. 1208.) In rejecting the defendant’s assertion of duress, the appellate court reasoned: “Huricks’s claim that his family pressured him into the plea is not enough to constitute duress. Nothing in the record indicates he was under any more or less pressure than every other defendant faced with serious felony charges and the offer of a plea bargain.” (*Ibid.*) In contrast, in this case, defendant’s claim of involuntariness was supported by a

declaration from a county-employed therapist, who had previously evaluated defendant at the request of the Department of Corrections due to concerns about him possibly harming himself, and who had talked to defendant on multiple occasions and had interacted with him during the plea hearing, and whose conclusions included that defendant was “impaired” such that he “did not have the capacity needed to make a coherent and logical decision.” Based on the declarations submitted in support of defendant’s motion to withdraw his pleas, and assuming that the statements contained in the declarations are true, those declarations could have provided sufficient support for the court to conclude that defendant’s no contest pleas were involuntary.

The record reflects that, in addition to considering the declarations of Dr. Wilcox and defendant, the trial court also considered the court’s own recollection of the plea hearing. (See *Ravaux, supra*, 142 Cal.App.4th at p. 918 [trial court may consider its own observations of the defendant in ruling on a motion to withdraw a plea].) The court believed that a “very thorough voir dire process” had occurred; that “defendant was fully engaged and given the opportunity on multiple occasions to state any hesitations, reservations or qualifications to his pleas”; and that defendant “did know what he was doing.”

The evidence before the trial court was thus clearly contradictory regarding whether defendant’s no contest pleas were voluntary, based on the declarations of Dr. Wilcox and defendant and the court’s own recollection of the plea hearing. Where the evidence is contradictory, the trial court is entitled to resolve the factual conflict against the defendant. (*Hunt, supra*, 174 Cal.App.3d at p. 104.) Here, however, the trial court ruled that, “even assuming that the factual allegations in the declarations are *true*,” and based on the court’s own recollection of the plea hearing, defendant did not meet his burden of proof on the motion. (Italics added.) As we have explained, because the declarations could have presented a sufficient basis upon which to grant defendant’s motion, the court was required to clearly resolve the factual conflict in order to properly

rule on the motion. (See *ibid.*) Because it is not clear from the court's comments how the court resolved the factual conflict, we will remand the matter to the trial court for further hearing on defendant's motion, which may include live testimony and cross-examination. We express no opinion as to how the court should resolve the factual conflicts, or as to the outcome of the motion.

**DISPOSITION**

The judgment is reversed, and the case is remanded to the trial court for further hearing on defendant's motion in accordance with the views expressed in this opinion.

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BAMATTRE-MANOUKIAN, J.

WE CONCUR:

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ELIA, ACTING P.J.

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MÁRQUEZ, J.