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

THE PEOPLE,

Plaintiff and Respondent,

v.

JORGE DELACRUZ,

Defendant and Appellant.

H040616

(Santa Clara County
Super. Ct. No. C1198901)

Defendant Jorge Delacruz pleaded no contest to assault with a firearm (Pen. Code, § 245, subd. (a)(2))¹ and discharging a firearm from a vehicle (former § 12034, subd. (c)) and admitted allegations that he had personally used a firearm (§ 12022.5, subd. (a)) in the commission of these offenses and committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)). The court denied his motion to withdraw his pleas and admissions and sentenced him to five years in state prison. Defendant claims that his pleas and admissions were invalid due to ineffective assistance of counsel and due to the trial court's improper coercion. We find no error in the court's denial of the motion and conclude that the record affirmatively reflects that the pleas and admissions were knowing and voluntary. Consequently, we affirm the judgment.

¹ Subsequent statutory references are to the Penal Code unless otherwise specified.

I. Background

The preliminary examination transcript is not included in the appellate record. The only indication of the facts is the summary in the probation report. On September 26, 2010, the driver of a white truck fired several shots at the victim. The victim was not a gang member, but he “‘hung out’” with Sureno gang members. The victim ducked and fled, and he avoided being struck by any of the shots. Surveillance video from a nearby business showed both the driver and his vehicle. Defendant was a Norteno gang member and owned a white truck. The victim and other witnesses identified defendant in a photo lineup as the shooter. Defendant was arrested in February 2011, and “a multitude of gang affiliated paraphernalia” was found in his home and vehicle along with bullets and brass knuckles.

The court initially appointed the public defender to represent defendant. In March 2011, defendant substituted retained counsel Richard Pointer for the public defender. After a July 2011 preliminary examination, defendant was bound over for trial and charged by information with assault with a firearm and discharging a firearm from a vehicle with gang and firearm enhancements. He pleaded not guilty and denied the enhancement allegations. Lucy McAllister substituted in as his retained counsel in October 2011.

In April 2012, McAllister sought a continuance of the trial, which was then scheduled for April 30, 2012. She explained that the defense at trial would be identity. Her investigation had been delayed by difficulties in arranging with the prosecutor for her and her investigator to view the physical evidence. McAllister also had another trial scheduled to begin on the same day as defendant’s trial. She declared that she had been negotiating with the prosecutor in an attempt to settle the case and needed four more weeks to fully investigate the case. Her request was granted, and the case was rescheduled to June 2012. Defendant was apparently released on bail in May 2012. The June 2012 date was rescheduled to August 2012. In August 2012, the prosecutor

obtained a continuance to October 2012. The case was subsequently continued to December 2012, then to February 2013, then to May 2013, and then to June 2013. On June 11, 2013, a hearing was held before Judge Ron Del Pozzo. Defendant was not present. The appellate record contains no transcript of the June 11 hearing. The case, which remained on the master trial calendar, was continued to June 17, 2013.

At the June 17, 2013 hearing, the prosecutor told the court that he was ready to proceed. McAllister told the court that she was “not ready” because “there has been an irreparable disintegration between the relationship between my client and myself, and he has hired another attorney.” She explained that the “irreparable breakdown” had occurred only “[w]ithin the last week” when defendant failed to (1) come to her office, (2) “provide additional witnesses with whom I had prepared a defense,” and (3) “failed to provide additional funding so that I can put on a defense with witnesses and/or investigators.” The court noted that the “case has been on the master trial calendar for quite some time.” McAllister told the court that she had been consumed with another case that had just resolved on June 12. After that, she needed to work on a different case, which was heard on June 14. McAllister first told the court that “no substantial preparation had been made on this case,” but then stated that “we have done investigation in this case, there has been preparation . . . there has been a great deal of work.” However, her “hands became tied” due to lack of time and defendant’s failure to provide funds for “investigation” and a gang expert witness. McAllister asserted that she was not prepared to go to trial. She did not believe that she could obtain funding from the county because “my client is not indigent.” McAllister had not requested a continuance because she was busy on other cases.

Attorney Nan Bucknell was also present at the June 17, 2013 hearing “appearing specially” for defendant, and she told the court she had been “[p]artially” retained and would “make a general appearance” “upon full payment of the attorney’s fees.” She explained: “The only way I could make a general appearance is if I was given the time to

prepare for trial and finish being paid by the client” “I would need eight weeks to prepare after being retained.”

The court was not pleased that this “old case” was not ready to be tried and McAllister had not even sought a continuance. “So right now I don’t feel with what I’ve heard so far that I’m not going to be hearing the same reasons if I give you eight weeks from now, that I’m not going to be hearing the same reasons of why either you need to get out and someone else needs to come in.” It asked McAllister if she had discussed with defendant “an offer” made by Judge Del Pozzo. McAllister said that she and Bucknell could discuss the offer with defendant. The prosecutor interrupted to tell the court that “to the best of my knowledge there is no offer at this juncture.” “I personally relayed [Judge Del Pozzo’s] offer to [defendant] who had until Friday [June 14] to accept it. He has not.” The prosecutor said that defendant had “gone to not one, but three different attorneys during the weekend who called me” with Bucknell “being the third this morning in an effort to get another lawyer to somehow circumvent this trial.” The prosecutor was opposed to the seven-year offer.

McAllister told the court that she had agreed to let the prosecutor convey the “offer” to defendant after it had been discussed in chambers because she had to appear in another department. “I did not have time to have a conversation with my client.” She had not yet had any opportunity to discuss the offer with defendant. The court decided to allow her to discuss the offer with defendant and also to determine “who is going to be representing him.” Although the court initially told Bucknell, “just so you know, I’m not giving you eight weeks,” the court then agreed to continue the trial to August 26 after Bucknell made clear that she would not accept the case with so little preparation time available. The court told Bucknell that she needed to arrange for payment from defendant “in advance so that if for any reason he’s not able to pay you” the court would know “early on” in case defendant “is going to have to have to then resort to get a public defender” The court told the attorneys that it was “willing to honor Judge Del

Pozzo's offer" "[b]ut that is today only." Bucknell told the court "that would be abundantly gracious of the court to do that on behalf of my client." The prosecutor objected to the offer "just for the record." The court recessed for defendant to discuss the offer with McAllister and Bucknell.

When they returned later that day, defendant was represented by McAllister with Bucknell "serving as assistant counsel." McAllister presented the court with a waiver form that defendant had completed, initialed, and signed. The court questioned defendant about his understanding of the waiver form and his constitutional rights and the consequences of his pleas and admissions, and it invited him to ask any questions. It explained that the "court offer" was "that you would be pleading as charged, and that it would be a top/bottom of seven years." The court told defendant that his maximum exposure on the charges was 28 years and four months.

Defendant affirmed that he did not need to ask his attorneys any additional questions, that he understood his rights, and that he wished to waive them. The court asked defendant if there was "anything that's not clear to you" and if he had any questions, and defendant said "No." The court asked defendant "did anyone threaten or pressure you or coerce you in any way . . . to get you to enter into this plea of no contest?" Defendant responded "No." The court advised defendant of each of his rights, and defendant waived them. Defendant pleaded no contest to both counts and admitted all of the allegations. The court expressly found that defendant "has made a knowing, intelligent, free and voluntary waiver" of his constitutional rights and accepted his pleas and admissions.

McAllister continued to serve as defendant's counsel throughout the June 17, 2013 hearing, including agreeing to the scheduling of an August 5, 2013 sentencing hearing. On August 5, defendant appeared with McAllister. He had sent a letter to the court seeking to discharge McAllister as his counsel, stating that he lacked funds to retain an attorney, and apparently stating that he wished to withdraw his pleas and admissions.

The letter does not appear in the appellate record. The court permitted defendant to discharge McAllister and referred defendant to the public defender's office. The public defender was promptly reappointed to represent defendant.

In October 2013, defendant filed a motion to withdraw his pleas and admissions under section 1018 on the ground that McAllister had not provided him with effective assistance and asserted that her demands that he provide additional funds "caused him to make a decision without clear judgment because he felt like he had no other choice but to enter a plea of guilty." Defendant submitted a declaration in support of his motion. He asserted that McAllister had been hired by his family, and his family had paid her \$25,000 "with the understanding that the funds would cover all case expenses - from investigation through a complete jury trial." McAllister never met with him while he was in jail to discuss the case. After he was released on bail, he met with her for one hour and was led to believe that the case would be proceeding to a jury trial. McAllister stopped answering his calls after that. In June 2013, he met with her again. She told him that she needed another \$5,000 for investigation of his case. He told her he could not pay anything more. Defendant's mother then gave McAllister another \$1,100, but defendant was upset that McAllister had not been keeping him updated on his case. When he expressed his concerns, McAllister told him he could "fire" her. Two days before the June 17, 2013 hearing, defendant contacted Bucknell and gave her \$10,000 to be his attorney. Defendant declared that the prosecutor had told him to "take the deal." On June 17, he was under "serious pressure" from both McAllister and Bucknell. He asserted that he should be allowed to withdraw his pleas and admissions because these attorneys "pressured" him to take the plea deal and "did not help me fight my case." He claimed that, if they had not pressured him, he would not have pleaded.

At the November 2013 hearing on the motion, defendant was represented by the public defender. The parties submitted "on the papers," and the court denied the motion. The court explained that it had looked at the transcript of the plea colloquy and found no

support for defendant's assertions. "I don't take this lightly because whenever someone tells me I didn't understand what I was doing, it not only reflects on me, but it is something that directly I was involved in." The court found that defendant had "freely" entered his pleas and admissions and had failed to show that the representation provided by McAllister was deficient. The sentencing hearing was continued to January 2014.

Defendant told the probation officer that he had "taken the deal" to avoid a trial that could result in a more lengthy prison sentence" At the January 2014 sentencing hearing, the court announced that defendant "agreed" and the prosecutor "has not objected" to a "disposition" of "a five-year top-bottom." The court imposed the two-year low term for the assault count, the three-year low term for the firearm use enhancement attached to it, and a concurrent term for the other count, and it struck the punishment for the gang enhancements. The court urged defendant to take responsibility for his acts and noted that it had "reviewed the evidence against you," including the "color video," and "[t]here is no mistaking that it was you." Defendant timely filed a notice of appeal and obtained a certificate of probable cause.

II. Discussion

Defendant contends that the trial court erred in denying his motion to withdraw his pleas and admissions. Pleas and admissions may be withdrawn upon a showing of "good cause." (§ 1018.) "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." (*People v. Cruz* (1974) 12 Cal.3d 562, 566.) "The defendant must also show prejudice in that he or she would not have accepted the plea bargain had it not been for the mistake." (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416.) "A decision to deny a motion to withdraw a guilty plea "rests in the sound discretion of the trial court"" and is final unless the defendant can show a clear abuse of that discretion. [Citation.] Moreover, a reviewing court must adopt the

trial court's factual findings if substantial evidence supports them.” (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.)

Defendant claims that the trial court abused its discretion in concluding that he had failed to establish by clear and convincing evidence that his pleas and admissions were the product of deficient representation and “pressure” and that he would not have entered them in the absence of these factors. The trial court expressly found that defendant did not receive deficient representation and that he freely entered his pleas and admissions. We must credit these findings if they are supported by substantial evidence.

Defendant argues that McAllister was deficient because she “failed to communicate with appellant and failed to prepare for trial.” The trial court rejected defendant’s claim that McAllister had provided deficient representation. Defendant relies almost entirely on his declaration, but the trial court was entitled to reject his declaration, particularly because it was both self-serving and inconsistent with other evidence. Defendant’s claim that McAllister “failed to communicate” with him is based on McAllister’s failure to personally communicate the offer to him and the week-long “disintegration” of their attorney-client relationship that followed. While McAllister’s failure to personally and promptly convey the offer to defendant was inexcusable, the record does not support a finding that this omission prejudiced defendant. Defendant was promptly made aware of the offer, and McAllister and defendant were given ample time to discuss the offer on June 17, 2013 before he decided to accept it.

Defendant’s contention that McAllister was ineffective is based on the fact that she was not prepared to go to trial on June 17, 2013. Like the trial court, we take a dim view of McAllister’s list of excuses for her failure to be prepared to begin the trial on June 17, 2013, particularly since she had failed to even seek a continuance. However, her failure to be ready to *try the case that day* did not mean that her performance in advising defendant regarding the court’s offer was deficient. Before McAllister discussed the offer with defendant, the trial court stated on the record that it would be willing to grant

an eight-week continuance for trial preparation and that it understood that it might be necessary to appoint the public defender to represent defendant if defendant was unable to provide the funds necessary to pay retained counsel. In this context, McAllister's failure to be ready to try the case on June 17 did not mean that defendant was faced with a choice of accepting the offer or proceeding with unprepared counsel.

The record does not reflect that McAllister was unprepared to advise defendant regarding the offer. She had investigated the case, was aware of the evidence against defendant, understood his possible defenses, and therefore was in a position to competently advise him whether to accept or reject the offer. She told the court that she had "done investigation" and engaged in "preparation." "It's not as if the file has sat dormant on my desk, there has been a great deal of work." "I have received an abundance, 278 photos in this case, six or seven video tapes, multiple gang enhancement police reports, predicate offense information." "I've reviewed [the prosecutor's] file. I have prepared the case to the degree possible" What she had not yet done was to prepare in limine motions, interview witnesses that defendant had claimed he could provide but had not yet provided, subpoena those witnesses, and hire a gang expert. McAllister was not ready to try the case, but the trial court could reasonably conclude that her investigations and preparations were sufficient to enable her to competently advise defendant with regard to the offer.

Defendant claims that the time-limited nature of the offer was "coercive" and deprived him of adequate time to discuss the offer with counsel. Defendant expressly affirmed during the plea colloquy that he had not been pressured or coerced and that he had no further questions of the court or his counsel about the nature of the offer or its consequences. He also expressly affirmed that he was aware of his rights and that he wanted to waive them and accept the court's offer. The trial court, having itself conducted the plea colloquy and taken defendant's pleas and admissions, was in the best possible position to judge from defendant's demeanor at that time whether defendant's

affirmations were true or the product of undue pressure. It was also aware of the amount of time that defendant had been given to confer with counsel about the offer, a fact that is not apparent from the record. Substantial evidence supports the trial court's finding that defendant freely entered the pleas and admissions.

Defendant also contends that the fact that the trial court had presided over the change-of-plea hearing rendered it "unable to objectively evaluate the merits" of defendant's motion to withdraw. This counterintuitive argument lacks merit. A judge who personally conducts a plea colloquy with a defendant is uniquely situated to evaluate the merits of a claim that the pleas and admissions made during that colloquy were not freely entered. Demeanor and other non-record indications of the voluntariness of the pleas and admissions are generally susceptible only to those who are present during the plea colloquy. Defendant's reliance on the trial court's statement that defendant's claim that the pleas and admissions were not freely entered "reflects on me" takes that statement out of context. The court's apparent point was that it took such allegations seriously because it wanted to ensure that it did not make any mistakes during a plea colloquy. Such a laudable goal does not raise any concerns regarding the court's impartiality.

Finally, defendant claims that the judgment must be reversed because his pleas and admissions were not knowing and voluntary. "[A] plea is valid if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances." (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.) The plea colloquy reflects that defendant's pleas and admissions were knowing and voluntary. Yet defendant asserts that the trial court's renewal of Judge Del Pozzo's offer for "today only" was improperly coercive because it "implied that the sentence would be worse if appellant delayed." During the plea colloquy, the trial court explicitly stated that "this sentence [(the seven-year offer)], the court would impose would be regardless of whether Mr. Delacruz was convicted by a plea that he's willing to enter *and/or by a trial.*" (Italics

added.) This statement rebuts defendant's claim that the "today only" offer implied that a harsher sentence would be imposed if defendant went to trial. Hence, the seven-year offer was a proper indicated sentence that did not depend on defendant's decision to plead or go to trial. Indeed, since the indicated sentence was for pleas and admissions to all charges, defendant's decision depended entirely on his evaluation of his prospects at trial. It is notable that defendant was not in custody, and there was no indication before he pleaded that he would not remain free on bail regardless of his decision on the offer. We find no evidence in the record that the trial court improperly coerced defendant's pleas and admissions. The totality of the evidence reflects that defendant's pleas and admissions were knowing and voluntary.

III. Disposition

The judgment is affirmed.

Mihara, J.

WE CONCUR:

Bamattre-Manoukian, Acting P. J.

Márquez, J.