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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WESLEY BRISENO,

Defendant and Appellant.

H041820

(Santa Clara County

Super. Ct. No. C9886818)

After twice proceeding through both state and federal courts without a certificate of probable cause,¹ this third appeal is now properly before us, as defendant Michael Wesley Briseno has obtained the requisite document. Defendant seeks reversal on the ground that his guilty plea to 32 counts of child molestation was involuntary, because (1) the court and trial counsel failed to inform him of the statutory mandatory minimum sentences for those counts and (2) the court made an illusory promise of a reward at sentencing in exchange for his plea. We will affirm the judgment.

Procedural History

In June 1999 defendant was charged by information with the following crimes: 26 counts of lewd conduct with a child under 14, in violation of Penal Code section 288, subdivision (a); ² five counts of attempted lewd conduct; and two counts of oral

¹ (*People v. Briseno* (Feb. 28, 2012, H022562) [nonpub. opn.] (*Briseno*).)

² All further statutory references are to the Penal Code.

copulation with a minor, in violation of Penal Code section 288a, subdivision (b)(2). These acts were variously alleged to have occurred between 1995 and March 31, 1998, with one exception occurring in 1991. Twenty-six of the counts involved more than one victim, within the meaning of the one-strike provision of section 667.61. Altogether the charged crimes were alleged to have been committed against five boys who were between 10 and 13 years old. A sixth alleged victim, the subject of count 33, was defendant's own five-year-old son, but that count was dismissed at sentencing.

In September 1998, while the charges were pending in a third amended complaint, defendant's attorney, Thomas Salciccia, expressed his view that defendant was incompetent within the meaning of section 1368. The court suspended the proceedings for an evaluation of defendant's mental condition. The following month Dr. Leonard J. Donk, the evaluating psychologist, submitted a report describing defendant's pathology, notably pedophilia, but finding that defendant was "at this time able to understand the nature of the proceedings being taken against him and he is also able to very adequately assist counsel in the conduct of a defense in a rational manner." The trial court found insufficient evidence of incompetency.

Defense counsel again raised the question of defendant's mental competency on September 28, 1999, asserting "an impairment of reasoning and an emotional disturbance and a mental retardation accompanied by an erratic and irrational behavior." Salciccia supported his view by pointing to letters defendant had written, not only to him but also to the prosecutor. The court, however, found no facts to justify suspending the proceedings for another competency examination. The court explained to defendant that there was an insufficient showing that defendant had "the type of mental disorder that would justify a finding that you were incapable of proceeding to trial and that you failed to understand the nature and circumstances of the offense or that you're unable to aid your counsel."

After a brief recess to permit defendant to discuss his situation with counsel, the court resumed the proceedings, and the prosecutor first moved to dismiss count 33. The court indicated that it would do so at the time of sentencing, and it proceeded to hear defendant's change of plea. Defendant pleaded guilty to 32 counts of the third amended complaint and admitted all of the special allegations.

Not long after his change of plea, however, defendant reconsidered that decision. In early January 2000 he wrote to the judge who had conducted the proceedings. Defendant explained that he had pleaded guilty only because he wanted the "unfair hearsay charge" that his five-year-old son was the victim in count 33 to be "dropped." Yet the San Jose Mercury News had published a story mentioning this charge, and now he wanted to "pull [his] plea" and find an attorney willing to "fight for [him] with all his heart." At a hearing on February 4, 2000, he again asserted his wish to "pull" his plea. Initially he wanted to discharge Salciccia, his retained attorney, and represent himself; but by the end of the hearing he was willing to have Salciccia make the requisite motion. On his part, Salciccia continued to declare his belief that defendant was incompetent. Although he felt that the evidence was "deadly against" defendant, Salciccia accepted a continuance to look into the possible merit of a motion to withdraw the plea.

On March 7, 2000, Salciccia submitted defendant's motion to withdraw his plea, asserting the incompetency of defendant and violation of the plea bargain through the release of information about count 33 to the press. Counsel continued to believe that when defendant entered his guilty plea he "was not competent to understand the nature of the proceedings or to assist counsel in the conduct of a defense in a rational way." Defendant himself wrote more letters to the judge, again requesting that he be allowed to "pull" his plea and go to trial. Defendant told the judge that he had made "a terrible mistake by trusting the judicial system when I plead[ed] guilty to all those 32 counts in order to be rid of the one terrible false allegation of sexually violating a 5 year old."

The prosecutor opposed the motion, noting that no promises had been made that the alleged victims' ages, which were part of the public record, would be kept confidential. She further noted that the question of defendant's competency had already been resolved in the September 1999 proceedings.

On March 31, 2000, after stating that it had carefully reviewed the matter, the court denied the motion. It found "most telling" the "quite extensive" voir dire it had conducted at the plea hearing, which was "quite binding." In the court's view, the San Jose Mercury News publication was "totally insufficient as a matter of law" to support withdrawal of the plea; and the asserted incompetency of defendant was "totally refuted by the evidence." Defendant appeared to be seeking a trial "solely for the purpose of testing some form of jury nullification."

The matter was then set for sentencing on May 12, 2000. Meanwhile, defendant continued writing letters to the judge, complaining about his housing classification in custody and the "exaggeration and illegal slander" in the news. Defendant vaguely represented that he had filed civil lawsuits, which he hoped would help the judge decide if he deserved "one chance at probation."

At the sentencing hearing on May 12, 2000, defendant asked that he be permitted to discharge his retained attorney and have one appointed for him, because he did not believe there was "any ethical reason" for him to go to prison. The trial court noted the repeated continuances that had already been granted since the beginning of the year. A further continuance at this late stage would serve "no purpose whatsoever" because the motion to withdraw had been denied, there being no facts or law to support it. Thus, based on the law and the "overwhelming" evidence in the case, the court refused to entertain any further "disruption of the orderly processes of justice" and denied defendant's request. Defendant alternatively asked for surgical castration; that request, too, was denied.

The court then permitted a witness to testify in support of defendant's character, but it found further testimony of that nature irrelevant, as probation was not an option and the penal consequences were dictated by the law. The court did allow defendant to make a lengthy statement, in which he claimed to have been made mentally ill by devoting his life to children. He was ashamed of what he had done, but he had "never showed any type of force." In fact, he said, he was "very vulnerable"—and "by the way," he "didn't commit 32 counts; he pleaded guilty "to protect people, not to hurt people." When he was arrested, the officer had told him, "[W]e're going to keep your case low key if you cooperate." He had confessed because he did not want "to cause more problems. I [didn't] want to cause more pain. I want[ed] to prove I'm sorry. I want[ed] to prove it's never going to happen again. My sincere confession was betrayed with gross unethical unjust [*sic*] betrayal." Defendant also insisted that the investigating officer had induced the victims to lie. He suggested that he "wouldn't mind spending more time in county jail," but because of the newspaper publicity, his life would be in danger if he went to prison.

The court emphasized to defendant that it did not pass any moral judgment on him or judge his credibility, nor did it "quarrel with" defendant's beliefs, "feeling of salvation," or "feelings of injustice." It explained to defendant that most of the counts against him involved grave misconduct which carried a statutory penalty of 15 years to life. The court pointed out that there were five separate victims between 10 and 14 years old, whom defendant had molested over a substantial period of time. Although defendant's self-surrender and lack of prior criminal conduct were mitigating factors, they were, in the court's view, far outweighed by the aggravating factors—particularly his violation of the young victims' trust and the planned nature of the repeated offenses. The court also noted defendant's "attempt to blame other individuals," even the victims, as well as his claim that no one was harmed by his conduct, all of which shocked the conscience of the court.

Defendant was then sentenced to an indeterminate prison term of 210 years to life, plus a consecutive determinate term of nine years, four months for the remaining seven counts.

Defendant filed a timely notice of appeal in June 2000. Among his arguments on appeal were the court's failure to advise him of the mandatory minimum term for his offenses and his attorney's failure to tell him that his plea would result in his spending the rest of his life in prison. Had he received independent counsel, defendant argued, he probably would have been allowed to withdraw his plea.

Defendant did not, however, seek a certificate of probable cause. In September 2002 this court dismissed the appeal because defendant had raised only issues going to the validity of the plea. We further denied defendant's accompanying petition for a writ of habeas corpus. In the course of the appellate proceedings defendant twice moved for relief from default and leave to apply for a certificate of probable cause. We denied those motions as well. The California Supreme Court denied review of the second motion for relief from default, the habeas petition, and the appeal. The remittitur from this court issued on December 2, 2002.

Defendant sought further consideration in the federal district court, asserting ineffective assistance of counsel based on his attorney's (1) failure to obtain a certificate of probable cause; (2) failure to advise him of the consequences of his guilty plea; and (3) encouragement to plead guilty despite knowledge of defendant's incompetency. Defendant further asserted a due process violation in the court's failure to advise him of the consequences of his plea, thus making his plea involuntary.

The district court rejected all of these contentions and denied the petition. (*Briseno v. Woodford* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 72418, *68 (*Briseno I*.) The Ninth Circuit Court of Appeals, however, reversed "in part" in a 2-1 decision.

(*Briseno v. Woodford* (9th Cir. Cal. 2010) 413 Fed. Appx. 2 (*Briseno II*)). That court considered only Salciccia's failure to obtain a certificate of probable cause.³ It found no prejudice with respect to defendant's competency, because there was no reasonable possibility of success in arguing this issue on appeal. With respect to the failure to advise defendant of the mandatory minimum sentence, however, the majority did find prejudice, because there was "a reasonable chance he would be successful on appeal." (*Id.* at *4.) Accordingly, on remand the district court granted the petition and ordered the Department of Corrections to release defendant unless the state permitted him to appeal the judgment on the ground that he was denied effective assistance of counsel "when his trial counsel failed to request a certificate of probable cause on the issue of the trial judge's failure to inform him of the mandatory minimum sentences for each charge." This court thereafter granted a motion to recall the remittitur, thereby reinstating defendant's appeal.

Defendant still had not procured a certificate of probable cause, however. We again dismissed the appeal on February 28, 2012, and the Supreme Court denied review. Another round of petitions in the federal court followed. The district court denied relief, but in September 2014 the Ninth Circuit Court of Appeals ordered the district court to grant a "conditional writ of habeas corpus unless the State, within ninety days, affords Briseno the opportunity to appeal his conviction on the ground that his plea was involuntary, given that both the California Superior Court and his trial counsel failed to inform Briseno of the statutory mandatory minimum sentences; i.e., the writ shall be granted unless the State affords Briseno the opportunity to apply for a certificate of

³ The district court had issued a certificate of appealability only as to "whether Briseno was denied effective assistance of counsel in violation of his Sixth Amendment rights when his trial counsel failed to obtain a certificate of probable cause from the trial court, thus precluding him from appealing certain issues." (*Briseno v. Woodford* (N.D. Cal. 2007) 2007 U.S. Dist. LEXIS 101251,*2

probable cause to appeal that issue.” The district court complied, ordering the Department of Corrections to “either (1) release [defendant] from custody or (2) initiate proceedings to retry him, [sic] unless, within 90 days of the date of this conditional writ, the state affords petitioner the opportunity to apply for a certificate of probable cause to appeal on the ground that his plea was involuntary, given that both the California Superior Court and his trial counsel failed to inform petitioner of the statutory mandatory minimum sentences.” The superior court granted a certificate of probable cause on December 11, 2014, thus enabling defendant to obtain appellate review under section 1237.5.

Discussion

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. [Citations.] 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 maintains that his guilty plea was involuntary because (1) he was never advised of the statutory minimum sentence he was required to serve, which was “at least 60 or 75 years to life,” and (2) the court made an illusory promise of a reward for pleading guilty.⁴ Consequently, he argues, the trial court erred by not allowing him to withdraw his plea. We find no basis for reversal in these arguments.

⁴ The People dispute defendant’s right to raise this second issue, or to contend that he was incapable of making a rational decision due to mental impairment and his hope for leniency. They insist that defendant is not “authorized” to argue these points because the Ninth Circuit “plainly contemplated that appellant should be afforded an opportunity to seek a certificate of probable cause to appeal only on the ground that his plea was involuntary because he was not advised of the mandatory minimum sentence.” As we have already stated in *Briseno, supra*, H022562, however, we are not operating on a remand from a higher court, and the scope of the Ninth Circuit’s disposition does not circumscribe the issues we may address in this state court appeal. Federal courts in (continued)

1. Advisement of the Minimum Sentence

Defendant is correct, of course, that before accepting a guilty plea, the court must advise the accused of the direct consequences of such a plea, including “the permissible range of punishment provided by statute.” (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; *People v. Gurule* (2002) 28 Cal.4th 557, 634.) However, “[u]nlike the admonition of constitutional rights . . . advisement as to the consequences of a plea is not constitutionally mandated. Rather, the rule compelling such advisement is ‘a judicially declared rule of criminal procedure.’ ” (*People v. Walker* (1991) 54 Cal.3d 1013, 1022, overruled on another point in *People v. Villalobos* (2012) 54 Cal.4th 177, 183; *People v. Barella* (1999) 20 Cal.4th 261, 266; cf. *Hill v. Lockhart* (1985) 474 U.S. 52, 56 [federal Constitution does not require advisement about parole eligibility for guilty plea to be voluntary].) It follows that “[a] trial court’s failure to comply with this judicial rule of criminal procedure requires reversal only if it is reasonably probable a result more favorable to the defendant would have been reached if he had been properly advised.” (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 196, quoting *People v. Wright* (1987) 43 Cal.3d 487, 495.) In other words, when a motion to withdraw is based on an asserted misadvisement, “the sentencing court must determine whether the error prejudiced defendant, i.e., whether it is ‘reasonably probable’ the defendant would not have pleaded guilty if properly advised. [Citation.]” (*People v. Walker, supra*, at p. 1023.) “Whether defendant was prejudiced by the trial court’s incomplete advisements is a factual question, appropriate for decision by the trial court in the first instance.”

habeas corpus proceedings “hold no supervisory authority over state judicial proceedings and may intervene only to correct wrongs of constitutional dimension.” (*Smith v. Phillips* (1982) 455 U.S. 209, 221; see also *People v. Zapien* (1993) 4 Cal.4th 929, 989 [“decisions of intermediate federal appellate courts, while they may be of persuasive value, are not binding on state courts, even when they interpret federal law”].)

(*People v. Superior Court (Zamudio)*, *supra*, at p. 210.) This requirement of prejudice is fatal to defendant's position on appeal.

For purposes of this appeal, we will assume *arguendo* that the trial court erred in failing to advise defendant that he faced a lengthy sentence with his guilty plea. (See *People v. Dakin* (1988) 200 Cal.App.3d 1026, 1033 [failure to advise of mandatory one-year jail term and license revocation implicitly found erroneous but not prejudicial; cf. *People v. Spears* (1984) 153 Cal.App.3d 79, 87 [advisement of maximum term insufficient to overcome failure to advise defendants that probation was statutorily disfavored, where court led defendants to believe probation was likely]; but see *People v. Barella*, *supra*, 20 Cal.4th at pp. 271-272 [court not required to inform defendant of "theoretical minimum portion" of sentence to be served in custody].) In this case, however, the asserted error was not prejudicial.

In a letter addressed to the district attorney in August 1999, defendant expressed the belief that a jury would forgive him if he simply explained his "emotional weakness" at trial and his plan not to act on his admitted pedophilia. At the change-of-plea hearing in September 1999 the court first explained in detail the role and function of a jury and the factual and legal considerations involved in the judge's sentencing decision. The court followed that lengthy discourse with an invitation to defendant to ask any questions he had. Defendant responded that he did not have many questions; he only wanted to point out that he had turned himself in to avoid, not cause, more problems. The "last thing I want to do," he added, "is have a jury trial and I don't want to have the jury trial, all right, and I'm not going to have a jury." The court emphasized that it had no intention of urging defendant to do something against his will, and it encouraged defendant to listen to the advice of his attorney.

After ascertaining that defendant was not under the influence and knew exactly what was going on, the court explained the "possible maximum consequences" of the plea, including a maximum penalty of a determinate sentence of "ten years and eight

months followed by a consecutive sentence of 360 years to life.” Each offense, the court noted, was a strike offense, and the court explained that consequence as well as the mandatory sentence enhancement for any future serious or violent felony. Defendant then assured the court that he was changing his plea “freely and voluntarily,” that he had had enough time to discuss with his attorney the elements of the crimes and defenses, and that he was satisfied with the representation he had received from his attorney.

Thus, the record does not indicate that defendant was relying on an expectation of any particular *sentencing* consequence when he changed his plea to guilty. Nor do defendant’s post-plea letters to the judge suggest that the failure to advise him of the minimum prison term was the reason he wanted to withdraw his plea and go to trial. In January 2000, in the first of his many letters to the judge, defendant said, “*I plead[ed] guilty to many charges that I was unsure of in hopes to prevent the unfair hearsay charge of having my 5 year old son as a victim dropped.*” (Italics added.) Defendant insisted that he had been the object of exaggeration and slander, and the media publicity about the 33d count involving his young son had caused other jail inmates to attack him. In an April 26, 2000 letter defendant suggested that “[p]erhaps” the results of lawsuits he was pursuing because of the “unfair exaggeration and illegal slander” in the media might help him obtain probation. If he went to trial to disprove that charge, he could tell his story to the jury without an attorney. He also believed that the “boys” could be prepared to be “100% honest” in court about their sexuality and thereby go down in history as inspiring a nation “to overcome sexual weakness” and “free the world of resentment, fear, hate, and confusion” He wanted people to “become 100% more aware of adults that have the awkward characteristics of ped[o]philia.” A trial could also teach parents that “if they don’t care for their children with great Love and affection and if they over punish [*sic*] their children with harmful bodily harm that their children may seek outer relationships of affection and Love that could very well be of an adult that has the genetic characteristic of ped[o]philia and is in a[n] episode of stress or depression where they

might not reject young innocent affection or where they might be seeking it.” He admitted that he was “a classic ped[o]phile to the highest degree” and that he had “allowed the boys to make love to [him].” But he was nevertheless “in control and basically harmless” and “could never hurt a flea.” “We know,” he added, “I’m the under dog [*sic*].” His goal in going to trial was to tell “the real story” and thereby “save lives” and “evolve humanity.” He “truly believe[d]” that a jury would find him not guilty “if they had a chance to hear it all.”

Defendant’s trial counsel, in filing the formal motion to withdraw the plea, also represented that defendant “chose to enter a plea of guilty based upon the further plea bargain that [count 33] would be dismissed . . . The defendant entered the plea of guilty during the plea bargaining believing that [neither] the public nor the inmates at any institution would know that one of the alleged victims was six years of age or younger. The defendant feels that his plea bargain was violated by the release to the media of the six year old information, and that this placed him in great jeopardy in the prison system where almost immediately he was beaten and became the subject of attacks, both physical and oral. Threats have been made to him, and now the defendant wants his day in court to prove that the allegation about Doe 6 was totally untrue, as well as other counts.”

For nearly six months *after* sentencing defendant continued writing to the judge, to express his outrage at the San Jose Mercury News and to “demand” a jury trial, with the goal of being “100% honest to a jury in hopes of my Legal right to nullify a jury.” He accused the prosecutor of coercing him into pleading guilty, and he insisted that he had pleaded guilty to “many sex crimes that I did not committ [*sic*]” based on false accusations. He blamed his attorney, the prosecutor, the police investigator, and the media, along with his own “emotional unstableness” due to “sexual entrapment.” He said that no one had explained what those 32 counts “really were.” He wished to go to trial to “disprove the unfair charges and exaggerations.” Defendant insisted that he was a “good person,” that he was “falsely accused on many counts,” and that the boys were not

harm. By October 2000 he was still complaining to the judge about the “unfairness” caused by the media’s “slander” and threatening a lawsuit against his attorney, because Salciccia had persuaded him “to plead guilty to all those counts that he did not describe to me in detail in order to get the false Allegation of my (5) year old son Dropped.”

Defendant’s only mention of his sentence was in asking the judge for clarification; he did not understand the implications of an indeterminate sentence. He just wanted to serve his “9 yrs 4 month [determinate sentence] at 85% and have 3 years credit from the county” and then return to society. Defendant did not claim until his opening brief on appeal that he would not have pleaded guilty if the court had explained the minimum sentence he would be required to serve.

On this record we agree with the district court judge, the Honorable Phyllis J. Hamilton, that defendant “possessed reasons for pleading guilty independent of the length of the sentence or the strength of the prosecution’s case against him.” (*Briseno I, supra*, 2007 U.S. Dist. LEXIS 72418, *44-45.) As Judge Hamilton pointed out in denying defendant’s habeas corpus petition in 2007, defendant clearly pleaded guilty to avoid a trial, which would expose the case to publicity regarding count 33, the charge involving his five-year-old son. Trial counsel’s declaration in support of the withdrawal motion confirmed his representation that “Mr. Briseno decided to change his plea (to guilty) because the charge was untrue, and, [*sic*] defendant wanted to spare Doe 6 the rigors of a trial. Further, a trial would result in notoriety that would plague him while incarcerated, whether the charge was provable or not.” Because defendant’s reason for pleading guilty was independent of the expected length of the sentence, defendant was not entitled to withdrawal of his plea on this ground.

To the extent that defendant incorporates his contention that he was mentally impaired when he pleaded guilty, we note that both the federal district court and the Ninth Circuit Court of Appeals found this assertion unpersuasive as a basis for finding prejudice in trial counsel’s failure to obtain a certificate of probable cause. (*Briseno I*,

supra, 2007 U.S. Dist. LEXIS 72418, *33-34 ; *Briseno II, supra*, 413 Fed. Appx. *4.)

The Ninth Circuit observed that the trial judge had expressed no doubt about defendant's competency, nor was there substantial evidence to the contrary. (*Briseno II supra*, 413 Fed. Appx. *4.) We agree.⁵ Because the trial court properly found defendant fully competent based on a licensed psychologist's evaluation and the judge's own observations of defendant's conduct, there is no basis for finding that mental impairment contributed to the asserted involuntariness of the plea. (See *People v. Blacksher* (2011) 52 Cal.4th 769, 797 [defendant has burden to prove incompetency, and competency ruling must be upheld if supported by substantial evidence].)

Nor, as in *Brady v. United States* (1970) 397 U.S. 742, 750, was there a showing that in deciding to plead guilty defendant "was so gripped by . . . hope of leniency that he did not or could not, with the help of counsel, rationally weigh the advantages of going to trial against the advantages of pleading guilty." The transcripts of the plea and post-plea hearings clearly demonstrate that the court found defendant fully capable of rationally weighing the pros and cons of forgoing a trial and pleading guilty. It is beyond cavil that many, if not most, defendants hope for leniency by the sentencing judge; this defendant was unquestionably vocal and admittedly "verbose" in his persistent expression of those hopes, compounded by his insistence that the charges were based on lies. Defendant

⁵ As the district court reasoned, "There is nothing in the record that suggests the trial court violated *Briseno's* due process rights in the competency procedures or standards it utilized, or in its ultimate conclusion that *Briseno* was competent. At one point, the trial court temporarily stayed the proceedings and appointed an expert to evaluate *Briseno's* competency. It considered the motions filed by *Salciccia*, the supporting evidence, the expert's opinion, and *Briseno's* own testimony in concluding that he was competent. The trial court even re-evaluated *Briseno's* competency on the same day that he pled guilty. It followed the guidelines for ensuring that *Briseno's* plea was voluntary and intelligent, and that he voluntarily waived his right to a jury trial . . ." (*Briseno I, supra*, 2007 U.S. Dist. LEXIS 72418, *34.)

unequivocally stated at the plea hearing that “the last thing” he wanted was a jury trial; and in seeking withdrawal of the plea he repeatedly explained that he had pleaded so that “the one terrible false allegation” of abusing his five-year-old son would not come to light. Once the San Jose Mercury News released the information about this charge, he wanted a jury trial to disprove it. Although the record certainly supports the inference that he had hoped for a much lighter sentence, it does not reflect a hope that made him unable to make a rational decision about whether to go to trial or plead guilty to 32 of the 33 charges. Nor, as defendant implicitly acknowledges, would such a hope alone be a sufficient basis for withdrawal of his plea. (*People v. Martin* (1941) 48 Cal.App.2d 514, 516; see also *People v. Gottlieb* (1938) 25 Cal.App.2d 411, 415 [hope for milder punishment no ground for grant of motion to withdraw guilty plea]; *People v. Dabner* (1908) 153 Cal. 398, 402, [in pleading guilty defendant “always hopes for less, and, if his disappointment [were] sufficient to give the right to withdraw the plea, it would in such a case always be withdrawn”].)

2. *Illusory Promise*

The assertion that defendant’s plea was rendered involuntary by the illusory promise of a “meaningful sentencing hearing” is also without merit. The record reflects the court’s careful, lengthy explanation of what defendant could and could not expect at sentencing before accepting defendant’s guilty plea. The court advised defendant that at the sentencing hearing there would be evidence of “circumstances relating to that defendant’s background, his attitude, sometimes evidence of other individuals that know the defendant to support or even contradict those criteria, but there is certainly a format for determining a sentence whereby the defendants are allowed to, in effect, participate and submit certain evidence to a judge, which will aid that judge in determining what penalty or punishment should be imposed, but that has absolutely nothing to do with the issue of guilt or innocence.” The court emphasized to defendant that although he

appeared to disagree with the law that made his conduct illegal, no trier of fact had the power to change the law or make exceptions to it.

When asked if he had any questions, defendant conveyed his belief that at sentencing the court would “listen to all the circumstances.” The court then cautioned defendant that “the last thing I want to do . . . is to have you feel that anything that I’m saying is in any way coercive or somehow urging you to do something against your will by some kind of force from the bench. You’re presumed innocent until your guilt is proven beyond a reasonable doubt, and that presumption of innocence certainly applies to you to the extent that I have not pre-judged your case or anything of that nature. That’s why I started off [the hearing by] stating that your attorney is in the best possible position to give you advice as to that area.”

At that point the court added that “people are never, I repeat, never punished for going to trial. No one is ever going to say you’re going to be punished if you exercise your constitutional right to go to trial. However, defendants frequently are, and the system always recognizes that people can be, in effect, rewarded for not going to trial.” The court continued, “Remorse, contrition, all of those factors are clearly recognized in the law and to be frank with you, by District Attorneys, when they see an effort to avoid the trauma of trial, and there obviously are no commitments from the District Attorney, she is not in a position to do so.”

After assuring defendant that his constitutional rights were being “zealously guarded,” the court stated that it wanted to be “absolutely certain” that defendant’s change of plea was to be entered “freely, voluntarily, and not under any kind of threat, pressure of promise or force of any kind whatsoever” from the prosecutor, defense counsel, or the court. The court again invited questions from defendant, who had none.

With all these precautionary admonitions the court did not induce defendant’s plea through misleading promises, implied or otherwise, of a sentencing hearing other than what he received. As discussed above, defendant’s plea was motivated by the dismissal

of count 33, not by any assurances of a sentencing hearing filled with witnesses who would testify to his background, attitude, and good nature. Sentencing was conducted in accordance with established procedures, supplemented by information provided in the probation report and the many letters defendant himself sent to the court.

Disposition

The judgment is affirmed.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

WALSH, J.*

The People v. Briseno

H041820

*Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.