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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ANDREW ALLEN McCALLISTER, Defendant and Appellant.	B265666 (Los Angeles County Super. Ct. No. VA138301)

APPEAL from a judgment of the Superior Court of Los Angeles County. Lori Ann Fournier, Judge. Affirmed.

John Doyle and Jennifer Hansen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Andrew A. McCallister appeals from a judgment which sentences him to four years and four months in county jail for identity theft and grand theft of personal property. He contends the trial court erred in rejecting his motion to withdraw his plea of no contest. We affirm the judgment.

FACTS[1]

In an information dated March 16, 2015, McCallister was charged with two counts of identity theft in violation of Penal Code section 530.5, subdivision (a) and one count of grand theft of personal property in violation of section 487, subdivision (a). At the preliminary hearing, the owner of Harper Air Tool testified McCallister's late wife worked at Harper Air Tool for seven months before her death in 2013. While employed there, McCallister's wife received paychecks containing the company's routing number and account number. In December 2014, the owner noticed the payroll account was about to be overdrawn due to unauthorized deductions. She discovered checks totaling $3,879 had been drawn to pay for accounts at Charter Communications and Southern California Edison. Further investigation by the police revealed the checks were paid to an account at Charter belonging to Morgan McCallister, McCallister's daughter, and an account at Edison under McCallister's name and address. When the police interviewed him on February 10, 2015, McCallister admitted he used Harper Air Tool's accounts, but believed the company owed his late wife for unpaid overtime.

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1 Because the conviction was based on a plea, the following facts are derived from the probation report and testimony presented at the preliminary hearing.

On May 15, 2015, McCallisters pled no contest to the three counts alleged in an open plea which released him until sentencing, at which time he would be required to pay restitution in full in order to receive probation or a split sentence with time served. If he failed to appear at sentencing, it was agreed the court could impose the maximum sentence of four years and four months. If he appeared at the sentencing hearing, but was unable to pay the restitution, however, it was agreed he could receive something other than probation. McCallister indicated he understood the terms of the plea.

McCallister failed to appear for the sentencing hearing on June 5, 2015, and a no bail arrest warrant was issued. He was taken into custody on June 29, 2015. At the July 1, 2015 sentencing hearing, he apologized for failing to appear on June 5, claiming he had no transportation from Pasadena to the courthouse. McCallister then advised the trial court he wanted to withdraw his plea because he recently learned a man named William Ware committed the thefts against Harper Air Tool. According to McCallister, Ware stole McCallister's identity while he was in custody. When McCallister confronted him, Ware purportedly admitted he committed the crimes.

McCallister also informed the court he was unable to pay the restitution amount because his social security debit card had been frozen due to inactivity while he was in custody. The trial court denied the motion to withdraw the plea, finding McCallister's reasons not credible. The trial court sentenced McCallister to four years in county jail and four months of mandatory supervision after release. The trial court further ordered him to pay $300 to the victim restitution fund, a $40 court operations assessment fee, and a $30 criminal conviction

fee. McCallister timely appealed and we appointed counsel to represent him.

DISCUSSION

On appeal, McCallister contends the trial court erred when it denied his motion to withdraw his plea. He claims the newly discovered identity of the "actual perpetrator" demonstrated good cause for withdrawal of his plea. The trial court disbelieved McCallister's story and we conclude the court did not abuse its discretion in this instance. In the alternative, he contends he received ineffective assistance of counsel, which rendered his plea invalid. We disagree and affirm.

I. Purported Newly Discovered Evidence

At sentencing, McCallister told the trial court there was newly discovered evidence which invalidated his plea. Without any corroborating evidence, he claimed he discovered that the "true perpetrator" of the crimes was a man named William Ware. McCallister first became aware of Ware when he committed identity theft against McCallister. McCallister then claimed Ware admitted to the thefts against Harper Air Tool when he was confronted. The trial court did not believe McCallister's self-serving statement.

Penal Code section 1018 grants the trial court discretion to permit a guilty plea to be withdrawn at any time before judgment "'for a good cause shown.'" The trial court is to liberally construe section 1018 "'to effect these objects and to promote justice.'" "The defendant has the burden to show, by clear and convincing evidence, that there is good cause for withdrawal of his or her guilty plea." (*People v. Breslin* (2012) 205 Cal.App.4th 1409, 1415-1416 (*Breslin*).) Good cause includes "mistake, ignorance, or any other factor overcoming the exercise of his or her free

judgment, including inadvertence, fraud, or duress." (*Id.* at p. 1416.) "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." (*Ibid.*)

We review the trial court's decision for an abuse of discretion and adopt the trial court's factual findings if substantial evidence supports them. (*Breslin, supra,* at pp. 1415-1416; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) We thus pay considerable deference to the hearing court's factual findings in ruling on a section 1018 motion. "'All questions of the weight and sufficiency of the evidence are addressed, in the first instance, to the trier of fact, in this case, the trial judge.'" (*People v. Harvey* (1984) 151 Cal.App.3d 660, 667 (*Harvey*).) A trial judge is the judge of the credibility of the witness and is not required to accept as true the sworn testimony of a witness, even in the absence of evidence contradicting it. (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146.) "'Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged.' [Citation.]" (*Ibid.*)

With these guidelines in mind, we find the trial court did not abuse its discretion in denying McCallister's motion to withdraw his plea for this purported newly discovered evidence. It was McCallister's burden to show by clear and convincing evidence that his motion to withdraw resulted from "mistake, ignorance, or any other factor overcoming the exercise of his or her free judgment, including inadvertence, fraud, or duress." (*Breslin, supra,* 205 Cal.App.4th at p. 1416.) He failed to do that. Substantial evidence instead supports the trial court's finding that McCallister's story about William Ware was not credible. The timing was suspect: he conveniently discovered the true

perpetrator of the crimes just as he faced the maximum sentence for failing to appear. Moreover, he failed to provide any corroborating information about William Ware, including who he is, where he lives, how he managed to obtain Harper Air Tool's account information, and why he would use that information to pay McCallister's bills.

The facts presented here are similar to those found in *Breslin, supra*, 205 Cal.App.4th at page 1414. There, the defendant sought to withdraw her guilty plea after submitting a sworn declaration from the victim which recanted his statements to the police about her assault on him. The defendant further argued that ineffective assistance of counsel prevented her from making an intelligent decision since her counsel failed to inquire whether the victim would recant prior to her guilty plea. (*Id*. at p. 1415.) The trial court's denial of the motion to withdraw was affirmed on appeal. The appellate court found "the trial court's decision to place little weight on the victim's recantation was, in fact, relevant in determining whether [the defendant] met her burden of establishing a mistake of fact regarding the existence of a meritorious defense at the time she entered her guilty plea." (*Id*. at p. 1417.) The court found the timing of the victim's disavowal to be suspect, coming just before the sentencing hearing, and concluded "the trial court was right to view the victim's new statements with skepticism." (*Ibid*.) The court further reasoned, "It might be a different matter if there were actually persuasive, independent evidence the victim had committed perjury or if the prosecution had withheld critical evidence. But we emphasize that there is good reason to believe the victim's new account was the product of latent misgivings

about [the defendant] facing criminal punishment." (*Id.* at pp. 1417-1419.)

Similarly, the timing of McCallister's discovery of William Ware's purported identity theft is suspect and the trial court had ample reason to disbelieve it. The only evidence of William Ware's guilt was McCallister's self-serving statements. As in *Breslin,* it might be a different matter if there were actually persuasive, independent evidence that William Ware committed the crimes at issue. McCallister, however, provided no corroborating evidence for the trial court, or this court, to consider. Further, we are not persuaded by the cases cited by McCallister, none of which questioned the existence or credibility of later-discovered evidence. (See *Harvey, supra,* 151 Cal.App.3d at pp. 670-671 [psychiatrist's report that potentially negated a required element of the crime to which she pleaded guilty]; *People v. Dena* (1972) 25 Cal.App.3d 1001, 1007-1008 [blood alcohol test report that could have supported a defense of diminished capacity]; *People v. Ramirez* (2006) 141 Cal.App.4th 1501, 1504-1508 [supplemental police report that identified new defense witnesses and implicated another suspect].)

II. Ineffective Assistance of Counsel

McCallister next challenges the judgment on the ground he received ineffective assistance of counsel. He contends he was afforded ineffective assistance of counsel due to the alternate public defender's failure to determine whether he possessed the funds to pay the restitution amount before he entered his plea. We find his argument unpersuasive.

Following the trial court's rejection of McCallister's request to withdraw his plea, McCallister stated he lacked sufficient funds to pay the restitution agreed upon under the plea deal.

He explained a hold had been placed on his Social Security funds due to inactivity on his debit card. He claimed he asked his alternate public defender either to obtain the funds or determine whether the funds were available at the time he entered into the open plea. His alternate public defender explained he was unable to comply with his client's request because his office had a policy not to handle any client's property. He discussed with the trial court the efforts he made to help McCallister, including contacting his daughter and two private attorneys to get the money. McCallister's daughter failed to return counsel's phone calls and one of the private attorneys was no longer in the area. The other attorney stated he would consider going to see McCallister, but apparently elected not to do so.

The trial court disbelieved McCallister, stating, "in all of the time that we dealt with this case . . . [the alternate public defender] tried everything that he could. You never once mentioned that the money might not be there, or if there was inactive use—you never said it to me. You never mentioned that in your plea. You said you need to get out and get the money."

To show ineffective assistance of counsel, a defendant has the burden to show (1) the counsel's performance was below an objective standard of reasonableness under prevailing professional norms and (2) the deficient performance prejudiced the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 691-692; *Hill v. Lockhart* (1985) 474 U.S. 52, 58 (*Hill*).) "Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.' " (*Hill, supra,* at p. 56.) "The second, or

'prejudice,' requirement, on the other hand, focuses on whether counsel's constitutionally ineffective performance affected the outcome of the plea process. In other words, in order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Id.* at p. 59, fn. omitted.)

McCallister contends the alternate public defender rendered ineffective assistance by failing to: 1) determine whether McCallister's funds from the Social Security Administration were placed on hold, 2) contact the Social Security Administration with information that could release the hold, and 3) arrange for the release of the funds. McCallister presents no authority to support the proposition that it was within his counsel's duties to render this type of assistance or that his counsel's efforts were outside the range of competence demanded of attorneys in criminal cases. Even so, his counsel tried to contact McCallister's daughter and two private attorneys, one of whom indicated he would call McCallister about the matter. There is no indication McCallister, on the other hand, made any efforts himself to ensure he had the necessary funds from the time he was released on May 15, to July 1, when he was brought in for sentencing.

More importantly, McCallister has failed to show prejudice. Although he claims he would not have pled no contest but for his counsel's failures, the facts show otherwise. McCallister admitted he knew a hold may have been placed on his account because he asked his counsel to confirm the availability of funds prior to his plea. He never received any assurance the funds were available, yet entered the plea anyway. Further, it is

apparent from the terms of the plea agreement that the parties contemplated the possibility McCallister would be unable to pay. The trial court advised McCallister of the consequences of both failing to pay the full amount of the restitution or failing to appear at sentencing. McCallister indicated he understood. Given these circumstances, even were we to assume the alternate public defender had a duty to resolve McCallister's issues with his social security funds, he has failed to demonstrate prejudice by counsel's failure to do so.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

GRIMES, J.

SORTINO, J.*

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