

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

SONYA DEVON HOWARD,

Defendant and Appellant.

B276136

(Los Angeles County
Super. Ct. No. TA140233)

APPEAL from a judgment of the Superior Court of Los Angeles County. John J. Lonergan, Judge. Conditionally reversed and remanded with directions.

James M. Crawford, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Pursuant to an agreement, Sonya Devon Howard pleaded no contest to possession of a firearm by a felon. The trial court sentenced her to 16 months in county jail. Because the trial court and the prosecutor misled Howard into believing she could challenge her conviction on appeal, however, she is entitled to withdraw her plea. Therefore, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Charges*

Howard was sitting in her car outside a medical marijuana clinic. A passerby told security guards that Howard had a gun, and the guards detained her until the police arrived. Officers searched Howard and found a loaded revolver in her waistband. After the officers advised her of her rights to remain silent, to an attorney, and, if indigent, to appointed counsel, Howard made incriminating statements.

The People charged Howard with one count of possession of a firearm by a felon in violation of Penal Code section 29800, subdivision (a).¹ The People also alleged Howard had served two prison terms for felonies within the meaning of section 667.5, subdivision (b).

B. *The Plea*

At her arraignment, Howard was represented by appointed counsel. When the proceedings began, the prosecutor acknowledged Howard wanted the court to replace her attorney,

¹ Statutory references are to the Penal Code.

but he urged her to consider his plea offer: “Based upon your record, I would give you 16 months at 50 percent Now, I want you to understand something. I’m not doing that past this morning. I get it. You want to fire your lawyer. That’s all good. But if you don’t accept the 16 months this morning, it will be two years.” After some discussion concerning an unrelated injury to Howard’s hand, the trial court asked the prosecutor to advise Howard of her maximum possible sentence in the case. The prosecutor told Howard her maximum sentence was seven years, which he later revised to five years.

The trial court asked Howard if she wanted “to fire” her attorney. Howard responded by stating she had a question. “And my question at hand is, it was supposed to have been a motion for [an] illegal search and different type of stuff.” The court instructed Howard to discuss that issue with her attorney. The court then told Howard, “I need to know right now before I go any further if you want to fire your attorney.” Without answering, Howard asked where she would be serving the 16-month jail term. The prosecutor answered, “County jail. I said that. Do you understand me? County jail. . . . Yes or no to 16 months.” Howard answered, “Yeah. Can I do an appeal?” The prosecutor replied, “You can appeal anything you want.” Howard said, “All right. So, can I put that on the record?” Neither the court nor the prosecutor responded.

The prosecutor began to advise Howard of her constitutional rights and the nature and consequences of her plea, but he stopped when it appeared Howard had a question. The prosecutor asked Howard if she wanted to say something. Howard answered, “I just want to appeal after this is done.” The prosecutor said, “Okay. All right. You can appeal all you want.

But what I need for you to understand is, we have to communicate now. So you understand your rights. Okay. That's all. All right." Howard subsequently acknowledged that no one had coerced her to enter her plea and that she was pleading no contest freely and voluntarily.

In response to the prosecutor's inquiry whether Howard had any questions about her constitutional rights, defenses, or "anything at all," Howard requested a copy of the transcript from her "last court appearance, probable cause and when that stuff was signed off." The trial court intervened and told Howard, "You can work with your attorney on all that. I need you to focus right now. Do you want this deal that's only available right now, the 16 months?" Howard answered, "Yeah." The court advised Howard that, after the court had entered her plea, she could talk to her attorney "about getting transcripts or appealing or whatever you wish." Howard agreed. The court continued, "All I'm concerned with I want to make sure that you want this deal and—" Howard interrupted the court and said she was "accepting the 16 months." The court explained that, in order for the court to enter her plea, Howard "ha[d] to waive certain rights," which the court stated was "what we are going through right now. So, just listen to [the prosecutor] and just answer his questions. Then you will have an opportunity to talk to your attorney after." Before continuing, the prosecutor apologized for his lack of clarity: "I said 'anything at all.' It's not a fault thing. You asked [about receiving copies of the preliminary hearing transcript]. It's fine. After this is all done, you can talk to your lawyer about whatever you need, transcripts, copies of things, whatever you need."

The court entered Howard's plea of no contest to possession of a firearm by a felon. After conferring with her attorney and receiving clarification from the court, Howard admitted she had suffered one prior felony conviction within the meaning of section 667.5, subdivision (b). The court told Howard that, although the People had alleged she had suffered two prior felony convictions, one of them had been reduced to a misdemeanor under Proposition 47 (§ 1170.18). Thus, the court stated that Howard's maximum prison sentence was four years, not five years. Howard informed the court she still wanted to accept the prosecutor's offer of a 16-month county jail sentence. Counsel for Howard stipulated to a factual basis for the plea.

Howard then told the court she had a question. "My question at hand is, it was told by him these items were hearsay. The security guard is an unsworn security guard, right, first and foremost." The court interrupted and prevented Howard from making any further statements about the underlying facts of the case and asked whether she wanted to "fight the case" or accept the offer of 16 months. Howard said she wanted to accept the offer but she also "wanted an attorney that was willing to fight for me. So after this, would I be granted an appellate attorney?" The court advised Howard that she had "the appellate rights that everybody else does." Howard replied, "Okay. I would like that right." The court told Howard, "And your attorney—I can't legally advise you, but your attorney can advise you regarding your appellate rights and what you can do from here." Howard again confirmed she was "accepting the 16 months." The court proceeded with the hearing and found Howard had knowingly, voluntarily, and intelligently waived her constitutional rights and entered her no contest plea and admission. Other than

conferring with his client and volunteering he would file a notice of appeal on Howard's behalf, counsel for Howard was virtually silent during the discussion among the court, the prosecutor, and Howard.

The trial court sentenced Howard in accordance with the plea agreement to a 16-month term to be served in county jail. The court awarded Howard presentence custody credits of 64 days and imposed statutory fines, fees, and assessments. The court dismissed the prior prison term allegations pursuant to the plea agreement.

At the conclusion of the hearing, Howard told the trial court she worked with children and wanted to know if there was a way to remove the conviction from her record. The court again advised Howard to discuss any appellate rights and issues with her attorney and suggested she look into expunging the conviction from her record. Howard answered that would not be possible because the conviction involved a gun. The court acknowledged Howard might not be successful, but noted she had successfully petitioned to reduce, and possibly expunge, her two prior felony drug convictions. The court suggested, "You can do the same thing. You can attempt to do the same thing with this conviction." Howard said she wanted to appeal the conviction.

C. *The Appeal*

Howard filed a timely notice of appeal on which she checked the preprinted box challenging "the validity of the plea or admission." The trial court granted Howard's request for a certificate of probable cause, which asserted her appointed counsel was constitutionally ineffective for, among other things,

failing to file a motion to suppress and make hearsay objections to the evidence against her.

We appointed counsel to represent Howard on appeal. After reviewing the record, counsel filed an opening brief raising no issues. (See *People v. Wende* (1979) 25 Cal.3d 436, 441-442.) After independently reviewing the record, we asked the parties to submit briefs on whether Howard is entitled to an opportunity to withdraw her no contest plea because the trial court and the prosecutor improperly induced her to plead no contest by misrepresenting the scope of her ability to appeal.

The parties submitted briefs in response to our request. Howard argues in her brief that her plea “was not knowing and intelligent” because she “was misrepresented about the consequences of her guilty plea.” Howard also argues that her plea was involuntary because it “was the result of misadvice and a promise [her] conviction could be appealed when it could not as a result of this plea.” The People argue Howard “was accurately advised that her [appellate] rights could be preserved, and she thereafter preserved such rights by filing a notice of appeal and securing a certificate of probable cause from the trial court.”

DISCUSSION

A. *The Governing Law*

“[W]hen a defendant pleads guilty or no contest and is convicted without a trial, only limited issues are cognizable on appeal. A guilty plea admits every element of the charged offense and constitutes a conviction [citations], and consequently issues that concern the determination of guilt or innocence are not cognizable. [Citations.] Instead, appellate review is limited to

issues that concern the ‘jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea.’” (*In re Chavez* (2003) 30 Cal.4th 643, 649.)² “The issuance of a certificate of probable cause pursuant to section 1237.5 does not operate to expand the grounds upon which an appeal may be taken as that section relates only to the “procedure in perfecting an appeal from a judgment based on a plea of guilty.”” (*People v. Voit* (2011) 200 Cal.App.4th 1353, 1364; see *People v. Palmer* (2013) 58 Cal.4th 110, 114 “[u]nder section 1237.5, a defendant may appeal from a conviction on a plea of guilty or no contest only on grounds going to the legality of the proceedings; such a plea precludes appellate consideration of issues related to guilt or innocence, including the sufficiency of the evidence to support the conviction”]; *People v. Kaanehe* (1977) 19 Cal.3d 1, 9 “[o]btaining a certificate of probable cause does not make cognizable those issues which have been waived by a plea of guilty”]; see also *People v. DeVaughn* (1977) 18 Cal.3d 889, 893 [“errors in failing to suppress the extrajudicial [incriminating] statements are not cognizable on appeal after guilty pleas, and . . . the trial court

² Section 1538.5, subdivision (m), which governs search and seizure issues, “constitutes an exception to the rule that all errors arising prior to entry of a guilty plea are waived, except those which question the jurisdiction or legality of the proceedings.” (*People v. Lilienthal* (1978) 22 Cal.3d 891, 897; see *People v. McNabb* (1991) 228 Cal.App.3d 462, 470 [“[o]ther than search and seizure issues specifically reviewable under section 1538.5, subdivision (m), all errors arising prior to entry of plea of guilty or nolo contendere are waived by the plea, except those based on “reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings””].)

could not bargain to preserve such issues on appeal by issuance of certificates of probable cause”].)

In contrast, an argument that the court or the prosecutor improperly induced the defendant to plead guilty or no contest challenges the legality of the proceedings resulting in the plea and is cognizable on appeal. (§ 1237.5; *People v. DeVaughn*, *supra*, 18 Cal.3d at p. 896.) “Where a defendant’s plea is “induced by misrepresentations of a fundamental nature,” such as a bargain that is beyond the power of the trial court, a judgment based upon the plea must be reversed.” (*People v. Hollins* (1993) 15 Cal.App.4th 567, 574.)

The trial court does not have the obligation to advise a defendant that his or her appellate rights after pleading guilty or no contest are limited. (See *People v. Bloom* (1989) 48 Cal.3d 1194, 1225, fn. 8 “[a] guilty plea ‘severely restricts the defendant’s right to appeal from the ensuing judgment’ [citation], yet this court has never suggested that a defendant indicating a willingness to enter a guilty plea should or must be advised of this consequence”]; *In re Chadwick C.* (1982) 137 Cal.App.3d 173, 180 [“there is no duty to advise of the section 1237.5 consequences of the plea”].) Nevertheless, if the trial court makes inaccurate or misleading statements about the defendant’s appellate rights, the defendant may be able to withdraw his or her plea. (See *People v. DeVaughn*, *supra*, 18 Cal.3d at p. 896 [a defendant may challenge a plea based on trial court’s illusory promise the defendant could appeal the court’s prior ruling that the defendant’s confession was voluntary]; *People v. Bowie* (1992) 11 Cal.App.4th 1263, 1266 “[a] plea or admission which is improperly induced by a trial court’s misrepresentation purporting to preserve for appeal issues waived by such plea or

admission may be attacked on appeal as invalid”]; *In re David G.* (1979) 93 Cal.App.3d 247, 255 [minor was entitled to withdraw his plea because it was based on his misunderstanding, shared by the court and the prosecutor, that an order denying a motion to suppress was appealable after the court had declared the minor a ward of the court].)³

B. *Howard’s Plea Was Induced by the Illusory Promise She Had Unrestricted Appellate Rights*

At the hearing, Howard raised concerns about, and expressed dissatisfaction over, how her attorney was handling her defense. She indicated to the trial court that her attorney was going to file or should have filed a motion to suppress and that statements by a security guard were inadmissible. Howard also asked for a copy of the preliminary hearing transcript. The trial court responded to Howard’s questions by asking her several times whether she wanted the court to relieve her attorney—a question Howard never answered and raising an issue the court never ruled on—and whether Howard wanted to accept the plea offer or proceed to trial. Each time Howard confirmed she wanted to accept the prosecutor’s offer of 16 months. In addition, the prosecutor advised Howard of her constitutional rights, which Howard waived, and advised Howard of the consequences of her plea, which Howard said she understood. Had this been the

³ The Legislature has since enacted Welfare and Institutions Code section 700.1, which provides for a motion in juvenile proceedings to suppress evidence obtained from an unlawful search or seizure, and section 800, which authorizes appellate review of a ruling on a motion to suppress “even if the judgment is predicated upon an admission of the allegations of the petition.” (See *In re Joseph B.* (1983) 34 Cal.3d 952, 957-958.)

entirety of the discussion, there might not be an issue about the validity of Howard's plea.

But there was more. Whenever Howard voiced her concerns over the handling of her defense, she also expressed a desire to appeal, which both the court and the prosecutor told her she could do. The prosecutor, acting on the court's behalf, informed Howard she could appeal "anything" and "all" she wanted to appeal. After the court accepted Howard's plea and her admission of the prior prison term allegations, but before the trial court found there was a factual basis for the plea, Howard asked about the admissibility of the security guard's statements. Howard's question prompted the trial court to advise her that she did not have to accept the prosecution's offer and had the right to proceed to trial. Howard said she wanted to accept the offer but also wanted an attorney who would "fight for" her, and she asked for appointed counsel on appeal. The court told Howard she would "have the appellate rights that everybody else does." Howard replied, "I would like that right."

The transcript of the hearing reflects that Howard had lost faith in her appointed counsel (who did not verbally participate in the hearing) and had decided to deal directly with the prosecutor and the court. And, while Howard said she wanted to accept the prosecutor's offer, she simultaneously made it clear she wanted to vindicate her belief that the evidence against her was unlawfully seized or otherwise inadmissible. Moreover, as Howard revealed to the trial court following the pronouncement of her sentence, her ultimate goal in prevailing on appeal was to continue working with children. Howard explained to the court that, because her prior drug-related convictions had either been reduced to misdemeanors or expunged, she was able to work with

children (although Howard never stated in what capacity). Howard also indicated she understood that, because the conviction in this case involved a gun, expungement was not likely. She therefore wanted the conviction “removed or something” by “do[ing] an appeal,” and both the court (“the appellate rights that everybody else does”) and the prosecutor (“you can appeal anything you want”) said she would be able to exercise her full appellate rights to attempt to achieve that goal.

Which was not really true. As the court and the prosecutor undoubtedly knew, Howard, by pleading no contest, would not be able to appeal all or anything she wanted, nor would she have the same appellate rights as “everybody else.” She would only have the same appellate rights as “everybody” who pleads guilty or no contest has, which is a much smaller set of rights than everybody has. Unlike everybody who does not plead guilty or no contest, Howard would not be able to pursue her stated purpose of contesting the admissibility of the evidence against her and challenging her conviction. (See *People v. Palmer*, *supra*, 58 Cal.4th at p. 114 [“a defendant may appeal from a conviction on a plea of guilty or no contest only on grounds going to the legality of the proceedings; such a plea precludes appellate consideration of issues related to guilt or innocence, including the sufficiency of the evidence to support the conviction”]; *People v. Voit*, *supra*, 200 Cal.App.4th at p. 1364 [“[i]ssues concerning the defendant’s guilt or innocence are not cognizable on appeal from a guilty plea”]; *People v. Thurman* (2007) 157 Cal.App.4th 36, 43 [because “[a] guilty plea “concedes that the prosecution possesses legally admissible evidence sufficient to prove defendant’s guilt beyond a reasonable doubt,”” it “waives any right to raise questions regarding the evidence, including its sufficiency or

admissibility”].) The statements the court and the prosecutor made to Howard as she was deciding whether to accept the plea offer advised Howard she would have rights that she would not have after the court entered her plea.

This case is not that different from *People v. Coleman* (1977) 72 Cal.App.3d 287, and perhaps an even stronger case for allowing the defendant to withdraw a plea of guilty or no contest. In *People v. Coleman*, the defendant agreed to plead guilty after adverse rulings on pretrial motions. Although his guilty plea precluded an appeal of these rulings, the defendant, “[w]ith the acquiescence of the prosecutor, . . . informed the court that the bargain included the preservation of [the defendant’s] right ‘to appeal the [rulings].’” (*Id.* at p. 292.) Rather than advising the defendant he would not be able to appeal the issues he intended to appeal, the trial court stated, “The record can indicate the representations you are making. As far as the legal effect of it, that will be up to the Court of Appeal.” (*Ibid.*) The Court of Appeal in *Coleman* held the defendant was entitled to the opportunity to withdraw his plea because it “was induced by a material mistake in which the trial court participated.” (*Id.* at p. 293.) Here, Howard’s no contest plea was induced by statements by the prosecutor (uncorrected by the court) and by the court that Howard could raise issues on appeal they probably knew she would not be able to raise.⁴ And here the trial court did not merely “participate” in a “material mistake” by failing to correct a misunderstanding, the court made an affirmative misstatement about Howard’s appellate rights.

⁴ Although the court and the prosecutor told Howard she should consult her attorney about her appellate rights, they did so only after the court had entered her plea.

Finally, the record shows a direct causal relationship between the statements by the court and the prosecutor and Howard's decision to plead no contest. (See *People v. Archer* (2014) 230 Cal.App.4th 693, 706 ["[a] defendant, on direct appeal or habeas, 'is entitled to relief based upon a trial court's misadvisement only if the defendant establishes that he or she was prejudiced by the misadvisement, i.e., that the defendant would not have entered the plea of guilty had the trial court given a proper advisement'"].) The record shows Howard wanted to fight, not fold, and she would not have pleaded no contest had the court and the prosecutor not assured her she could fight her conviction on appeal like "everybody else."

Howard was induced to plead no contest by court-sanctioned statements about her appellate rights that were inaccurate and misleading. Howard is entitled to an opportunity to withdraw her plea. (See *Ricki J. v. Superior Court* (2005) 128 Cal.App.4th 783, 792 ["[w]here a guilty plea (admission) has been improperly induced by unenforceable promises that issues have been preserved for appeal the defendant . . . is entitled to an opportunity to withdraw the plea"]; *People v. Hollins, supra*, 15 Cal.App.4th at pp. 574-575 [illusory promise that the defendant had the right to appeal ruling on a motion to dismiss under section 995 was an improper inducement for the defendant's plea and required remand to allow the defendant "an opportunity to reevaluate his guilty plea and withdraw that plea and proceed to trial if he so desires"]; *People v. Truman* (1992) 6 Cal.App.4th 1816, 1820 [defendant was entitled to "the opportunity to withdraw his plea because it was induced by the false promise of appellate review of the denial of his motion pursuant to Penal Code section 995"].)

DISPOSITION

The judgment is conditionally reversed and remanded with directions to allow Howard to make an appropriate motion, within 45 days of the issuance of the remittitur, to withdraw her no contest plea. If Howard files such a motion to withdraw her no contest plea, the trial court shall grant the motion and reinstate the charge and special allegations. If Howard does not file a motion to vacate her no contest plea, the judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J.

MENETREZ, J.*

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