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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL JOSEPH CARVER,

Defendant and Appellant.

B239053

(Los Angeles County
Super. Ct. No. LA069061)

APPEAL from a judgment of the Superior Court of Los Angeles County, Leslie A. Dunn, Judge. Affirmed as modified with directions.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson, Blythe J. Leszkay, and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Daniel Joseph Carver, entered a no contest plea to a first degree robbery charge. (Pen. Code¹, §§ 211, 212.5, subd. (b).) The offense occurred on September 29, 2011. He also admitted two special allegations were true. He admitted a prior conviction allegation within the meaning of sections 667, subdivisions (b) through (i), and 1170.12 was true. And he admitted a section 667.5, subdivision (b) prior separate prison term allegation was true. Pursuant to a plea bargain, he was initially sentenced to five years in state prison. However, because the five-year sentence was unauthorized and defendant declined to withdraw his plea, he was later sentenced to six years in state prison. On appeal, after issuance of a probable cause certificate, defendant asserts the trial court erred insofar as it believed it had no power to structure a five-year sentence. We conclude the six-year sentence must be affirmed. We modify the judgment to impose additional penalties and a surcharge in connection with a local crime prevention programs fine. In all other respects, we affirm the judgment.

II. BACKGROUND

As noted above, pursuant to a plea agreement, the trial court initially sentenced defendant to five years in state prison. The sentence consisted of a low term of two years for the robbery, doubled (§§ 667, subds. (b)-(i), 1170.12), plus one year under section 667.5, subdivision (b). The trial court recalled the matter later the same day after discovering the sentence was illegal; the low term for first degree robbery is three, not two years. (§ 213, subd. (a)(1)(B); see, e.g., *People v. Jackson* (1981) 121 Cal.App.3d 862, 869.) Following a discussion on the record, counsel on both sides requested time to consider the matter. The trial court ruled, “The plea will stand, but not sentencing.”

¹ All further statutory references are to the Penal Code except where otherwise noted.

The parties returned two days later. The trial court inquired, “Have we worked out something?” Defendant’s trial counsel, Deputy Public Defender Tamar Toister, stated: “We have compromised, Your Honor. We are going to go with six years, which is low term, three years doubled. We are going [to] forget the one year prior, so it is going to be count 4, three years, doubled” The trial court then inquired whether defendant wanted to withdraw his plea: “Mr. Carver, knowing that you are now facing six years in state prison[,] do you still wish to have your plea stand? You do have the right to vacate it.” Defendant responded: “No, I made a deal. I will honor it.” Ms. Toister echoed defendant’s decision: “The answer is yes. He would like to have it stand.” The trial court subsequently sentenced defendant to six years in state prison. The sentence consisted of the low term of three years for first degree robbery, doubled pursuant to sections 667, subdivisions (b) through (i), and 1170.12.

III. DISCUSSION

A. The Six-Year Sentence

Defendant appeals after issuance of a probable cause certificate. Defendant concedes the trial court had jurisdiction to resentence him to six years in state prison. He contends, however, that the trial court erred insofar as it mistakenly believed it could not reconfigure the sentence to total five years. Defendant relies on a comment by the trial court when the illegality was first discovered and renegotiation of the plea deal was contemplated. The trial court stated, “The honorable thing to do would be to stand by the five year offer by reducing count 4 to second degree, or however [the District Attorney] wants to do it.” We disagree with defendant’s assertion.

The only sentence that could legally be imposed for first degree robbery was three years. (§ 213, subd. (a)(1)(B); see *People v. Jackson*, *supra*, 121 Cal.App.3d at pp. 868-869.) The originally agreed-upon two-year sentence for first degree robbery was not authorized by statute. As a result, the trial court had no power to approve the erroneously

negotiated plea. (*People v. Jackson, supra*, 121 Cal.App.3d at pp. 868-869; *In re Chamberlain* (1978) 78 Cal.App.3d 712, 717-719; see *In re Williams* (2000) 83 Cal.App.4th 936, 945 [“the trial court cannot approve a plea bargain that calls for an unlawful sentence”].) The trial court could not legally give defendant the benefit of the plea agreement. (*In re Williams, supra*, 83 Cal.App.4th at pp. 944-945; *People v. Jackson, supra*, 121 Cal.App.3d at p. 869.) As the Court of Appeal for this appellate district explained in *Jackson*, “The plea bargain must comply with the statutory mandated sentence and the trial court has no discretion to ‘make its own ad hoc adjustment to fit what it perceives as equity and justice.’” (*In re Chamberlain, [supra]*, 78 Cal.App.3d [at p.] 718.) This is so because the Legislature has the sole authority to determine the appropriate punishment for criminal behavior. (*People v. Tanner* (1979) 24 Cal.3d 514, 519, fn. 3.) . . . Even if a defendant, the prosecutor and the court agree on a sentence, the court cannot give effect to it if it is not authorized by law. (*People v. Harvey* (1980) 112 Cal.App.3d 132, 139.) . . . [A] defendant cannot enforce an illegal term of a plea bargain agreement.” (*People v. Jackson, supra*, 121 Cal.App.3d at p. 869; accord, *In re Williams, supra*, 83 Cal.App.4th at p. 944 [“A plea bargain that purports to authorize the court to exercise a power it does not have is unlawful and may not be enforced.”].) Defendant had no right to specific performance of the unauthorized five-year sentence. (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1362-1363; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1224; *In re Williams, supra*, 83 Cal.App.4th at pp. 944-945; *People v. Jackson, supra*, 121 Cal.App.3d at p. 869.)

Moreover, once the trial court discovered the illegality, defendant had two choices—he could withdraw his no contest plea or accept the three-year term authorized by section 213, subdivision (a)(1)(B). (*People v. Burns* (1993) 20 Cal.App.4th 1266, 1274; *People v. Jackson, supra*, 121 Cal.App.3d at pp. 868-869, 871.) Here, as noted above, defendant specifically declined to withdraw his plea. And he did so with knowledge he would receive a six-year sentence. Defendant did not interpose any objection when the trial court sentenced him to six years. (See *People v. Hester* (2000) 22 Cal.4th 290, 295 [defendant required to object to plea agreement to a specified

sentence violating section 654, subdivision (a)]; *People v. McClellan* (1993) 6 Cal.4th 367, 377 [absent objection, defendant waives claim trial court misadvised concerning consequences of plea].)

B. Local Crime Prevention Programs Fine

The trial court imposed a \$10 local crime prevention programs fine. (§ 1202.5, subd. (a); *People v. Crittle* (2007) 154 Cal.App.4th 368, 371.) We asked the parties to brief the question whether the fine is subject to additional penalties and a surcharge. The section 1202.5, subdivision (a) fine is subject to: a \$10 section 1464, subdivision (a)(1) state penalty; a \$7 Government Code section 76000, subdivision (a)(1) county penalty; a \$2 Government Code section 76000.5, subdivision (a)(1) emergency medical services penalty; a \$2 section 1465.7, subdivision (a) state surcharge; a \$3 state court construction penalty under former Government Code section 70372, subdivision (a)(1) (Stats. 2010, ch. 720, § 16, eff. Oct. 19, 2010; *People v. McCoy* (2007) 156 Cal.App.4th 1246, 1254); a Government Code section 76104.6, subdivision (a)(1) \$1 deoxyribonucleic acid penalty; and a \$3 state-only deoxyribonucleic acid penalty under former Government Code section 76104.7, subdivision (a) (Stats. 2011, ch. 36, § 16, eff. June 30, 2011). Thus, the total sum due is \$38 when, as here, the trial court imposes the full section 1202.5, subdivision (a) \$10 fine in Los Angeles County. (*People v. Knightbent* (2010) 186 Cal.App.4th 1105, 1109; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1528-1530.) The fine is subject to an ability to pay requirement. (§ 1202.5, subd. (a).) However, the increase in the total sum is minimal and defendant raised no objection to the \$10 fine. Thus, it is unnecessary to require an ability to pay hearing upon remittitur issuance. (*People v. Knightbent, supra*, 186 Cal.App.4th at pp. 1112-1113.) The judgment will be modified to include the amounts discussed above.

III. DISPOSITION

The judgment is modified to impose, in connection with the \$10 Penal Code section 1202.5, subdivision (a) local crime prevention programs fine, the following penalties and surcharge: a \$10 section 1464, subdivision (a)(1) state penalty; a \$7 Government Code section 76000, subdivision (a)(1) county penalty; a \$2 Government Code section 76000.5, subdivision (a)(1) emergency medical services penalty; a \$2 section 1465.7, subdivision (a) state surcharge; a \$3 state court construction penalty under former Government Code section 70372, subdivision (a)(1); a Government Code section 76104.6, subdivision (a)(1) \$1 deoxyribonucleic acid penalty; and a \$3 state-only deoxyribonucleic acid penalty under former Government Code section 76104.7, subdivision (a). In all other respects, the judgment is affirmed. Upon remittitur issuance, the clerk of the superior court is to prepare an amended abstract of judgment and deliver a copy to the Department of Corrections and Rehabilitation.

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TURNER, P.J.

We concur:

KRIEGLER, J.

FERNS, J.*

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