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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM P. MILLER, Defendant and Appellant.	B231365 (Los Angeles County Super. Ct. No. MA049065)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles A. Chung, Judge. Affirmed.

Cynthia A. Grimm, 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, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant William P. Miller appeals from the judgment of conviction, contending that the trial court erred in denying his motion to withdraw his plea of

no contest to charges of assault with a deadly weapon and felony hit and run driving. The trial court issued a certificate of probable cause pursuant to Penal Code section 1237.5.[1] We affirm.

BACKGROUND

Evidence

Because there was no trial, we, like the parties, take our summary of the evidence from the preliminary hearing transcript and probation report.

1. *The Preliminary Hearing*

The evidence at the preliminary hearing showed that on April 25, 2010, around 8:15 a.m., defendant was driving a stolen Honda automobile on Palm Vista Avenue in Palmdale. There were two passengers, William Jorgenson (seated in the front) and Rubi Garcia (seated in the back). Detective William Gordon spoke to Garcia, who told him that defendant saw a man, later identified as William Van Horn, walking on the sidewalk. Defendant said, "Is that Joe?" He then sped up, ran into Van Horn from behind, and drove off. A couple of blocks away, defendant exited the car and ran away, telling Garcia and Jorgensen to run.

Van Horn, who had stepped into the street to go around a car parked in the sidewalk, heard the rev of the engine just before he was struck from behind. When the Honda struck him, he rolled up and over the vehicle. Van Horn suffered serious injuries, including a ruptured ear drum, impaired vision, and a four-inch head fracture. He did not know defendant.

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[1] All undesignated section references are to the Penal Code.

On May 8, 2010, defendant was driving another stolen Honda vehicle when Officer David Shea attempted to make a traffic stop. Defendant fled in the vehicle. Officer Shea's pursuit lasted about three-and-a-half miles, during which defendant committed several traffic violations and narrowly avoided collisions. When he was apprehended, .42 grams of methamphetamine was found in his front pants pocket.

2. *The Probation Report*

According to the probation report, an off-duty police officer named Ramos (no first name given) heard the accident, saw Van Horn fall off the hood of the Honda, and saw the vehicle speed away. He pursued the Honda, which stopped in front of a residence, and ordered the occupants out. The passengers complied, but defendant fled and was not apprehended.

Jorgensen, the front passenger, told Deputy Molina (no first name given), who took Jorgensen into custody, that defendant asked, "Is that Joe?" Defendant then accelerated and drove into Van Horn. Garcia, the rear passenger, told Deputy Molina the same information.

At the time of the crimes, defendant was on parole and his driver's license was suspended.

Charges and No Contest Plea

Defendant was charged with attempted willful premeditated murder (§§ 664/187, count 1), assault with a deadly weapon (§ 245, subd. (a)(1), count 2), felony hit and run driving (Veh. Code, § 20001, subd. (a), count 3), grand theft auto (§ 487, subd. (d)(1), counts 4 and 5), evading an officer (Veh. Code, § 2800.2, subd. (a), count 6), and possession of a controlled substance (Health & Saf. Code,

§ 11377, subd. (a), count 7). In the counts charging attempted murder, assault with a deadly weapon, and hit and run driving, it was also alleged that defendant inflicted great bodily injury (§ 12022.7, subd. (a)). Further, six prior prison terms were alleged (§ 667.5, subd. (b)).

Represented by attorney Randy Short, who had also represented him at the preliminary hearing, defendant entered a negotiated disposition pursuant to which he pled no contest to the charges of assault with a deadly weapon and felony hit and run driving, admitted the great bodily injury allegation in the assault count, and admitted five of the prior prison term allegations. In exchange, he was to receive a sentence of 12 years in prison: the upper term of 4 years for assault with a deadly weapon (§ 245, subd. (a)(1)), a consecutive term of three years for the great bodily injury allegation in that count (§ 12022.7, subd. (a)), one year consecutive each for the five prison priors (§ 667.5, subd. (b)), and a concurrent term of 16 months (the low term) for hit and run driving (Veh. Code, § 20001, subd. (a)). The remaining charges and allegations would be dismissed.

Because defendant admitted the great bodily injury allegation attached to the charge of assault with a deadly weapon, that count became a violent felony (§ 667.5, subd. (c)(8)), meaning that defendant would accrue no more than fifteen percent worktime credit against his sentence (§ 2933.1, subd. (a)) as opposed to credit at 50 percent (§ 2933).

Motion to Withdraw the Plea

Before sentencing, defendant moved to withdraw his plea, represented by new counsel, Angela Berry-Jacoby. In his motion, he contended that Short, his former attorney, was ineffective for misadvising him on his likely exposure if he lost at trial. His reasoning was as follows. The evidence supporting the charges of

attempted murder and assault with a deadly weapon, as well as the great bodily injury allegation, was very weak. Therefore, convictions of those charges and a true finding on the great bodily injury allegation were unlikely, and the potential prison time for them should not have been considered in weighing whether to accept the 12-year offer. Rather, the likely potential exposure, based on the remaining charges and prior prison term allegations, was 11 years, 8 months, at 50 percent credit, making the 12-year offer "no 'bargain.'" Thus, attorney Short was ineffective in advising him regarding his likely exposure – that is, his exposure on the charges on which conviction was likely. Had he been properly advised, he would not have entered the plea.

In support of the motion, defendant filed a declaration in which he stated that attorney Short had advised him that aside from the charges of attempted premeditated murder and assault with a deadly weapon, his exposure was substantially higher than the 12-year offer, and that if convicted of hit and run driving "the court would give [him] 85%. He did not explain that the 85% only applied if the jury found the great bodily injury enhancement." He also stated that he "entered into a plea agreement without knowing [his] true exposure on the charges that we believed were probable convictions." Had he understood that his "incarceration time was much lower than what was represented . . . by [his] attorney, [he] would not have entered into a plea bargain."

In his motion, defendant also contended that good cause existed to withdraw his plea because neither the court nor counsel advised him that on a conviction of assault with a deadly weapon, his driver's license could be suspended. (Veh. Code, § 13210.)[2] In his declaration, he stated that he was not advised by the court

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[2] Vehicle Code section 13210 provides in relevant part: "In addition to the penalties set forth in subdivision (a) of Section 245 of the Penal Code, the court may order the

or his counsel that a conviction of assault with a deadly weapon could result in suspension of his driver's license. But he did not state that had he been properly advised, he would not have entered the plea.

Hearing on the Motion to Withdraw the Plea

At the hearing on the motion to withdraw the plea, both defendant and attorney Short testified. Defendant was represented by attorney Berry-Jacoby.

Defendant testified that attorney Short advised him that his maximum exposure was life in prison if convicted of all charges (the sentence for attempted premeditated murder is life with the possibility of parole (§ 664/187, subd. (a)). Initially, attorney Short said that conviction of attempted premeditated murder and assault with a deadly weapon was unlikely. According to defendant, shortly before he was offered a negotiated disposition, attorney Short told him that "they found out more evidence or something like that, that they could prove it. And I spoke with him back and forth about it. And he said that it wasn't worth the risk. . . . That I should enter this plea for this 12 years. . . . I told him that I didn't think it was a good idea. [Attorney Short] said . . . now that we are arguing over just a couple of years."

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suspension of the driving privilege of any operator of a motor vehicle who commits an assault as described in subdivision (a) of Section 245 of the Penal Code on . . . a pedestrian and the offense occurs on a highway. The suspension period authorized under this section for an assault commonly known as 'road rage,' shall be six months for a first offense and one year for a second or subsequent offense to commence, at the discretion of the court, either on the date of the person's conviction, or upon the person's release from confinement or imprisonment. The court may, in lieu of or in addition to the suspension of the driving privilege, order a person convicted under this section to complete a court-approved anger management or 'road rage' course, subsequent to the date of the current violation."

Defendant testified that "a big thing" they discussed was that "no matter what" defendant "would end up getting 85 percent" because "they [the prosecution] had that for sure" on all counts that contained the great bodily injury allegation. Defendant entered the plea because attorney Short made him believe that he would lose at trial at least on the charges of assault with a deadly weapon and hit and run driving, and that the great bodily injury allegation would "necessarily attach." Defendant believed that his attorney was coercing him into accepting the deal.

At the time of the crimes, defendant was driving on a suspended license, but he thought it would probably be reinstated. He had no discussions with his attorney that the Department of Motor Vehicles might act against his license based on a conviction of assault with a deadly weapon.

Attorney Short testified that he had many discussions with defendant regarding the charge of attempted premeditated murder and the lesser offense of unpremeditated attempted murder, as well as discussions about the other charges. He explained to defendant, among other things, that the charges of assault with a deadly weapon and hit and run driving were general intent crimes, whereas the great bodily injury allegation required specific intent.

Attorney Short reviewed with defendant the prosecution's evidence tending to prove specific intent. This evidence included statements by the passengers, Jorgensen and Garcia, that defendant asked, "Is that Joe?" just before revving the engine and striking Van Horn. It also included corroborating testimony by the off-duty police officer who witnessed the accident and from whom defendant fled when confronted, even though the passengers remained. Also, he discussed the evidence that defendant was driving a stolen car and that his fingerprints were found on the driver's side window.

Attorney Short explained that he made the standard request for discovery regarding Jorgensen and Garcia, and the prosecution complied. He could not recall precisely, but there were "maybe one or two things that possibly could be used for impeachment," including that Jorgensen possibly had a felony conviction. He also learned that Jorgensen was defendant's cousin, and Garcia was a friend of Jorgensen's to whom defendant was giving a ride. The prosecutor informed him that the passengers had been given immunity and would be available to testify, though attorney Short did not see the immunity agreements.

Defendant told attorney Short on one occasion, early in the case, that he did not believe that the passengers would appear in court. That was the only time defendant was willing to go to trial. At all other times he said he did not want to go to trial and wanted a good deal. Attorney Short explained that even if the witnesses did not appear, the prosecution could dismiss and refile the charges.

Attorney Short made an offer to the prosecutor of 12 years at 50 percent credit. The prosecution countered with 12 years at 15 percent credit. He discussed with defendant the difference between 50 percent credit and 85 percent credit depending on the charges.

According to attorney Short, defendant's testimony that he (defense counsel) told defendant that the great bodily injury allegation would necessarily be found true if defendant were convicted of felony hit and run driving was false. Defense counsel told defendant that if he were acquitted of attempted murder and assault with a deadly weapon, the jury would only find the great bodily injury allegation true on the felony hit and run charge as an "improper compromise."

Defense counsel conceded that he did not discuss with defendant any issues regarding possible action by the DMV.

Attorney Berry-Jacoby submitted on the evidence without argument. The prosecutor briefly argued that defendant's testimony was nothing more than "buyer's remorse." He also pointed out that the Vehicle Code section that was most applicable to the driving privilege consequence of defendant's conviction of assault with a deadly weapon was Vehicle Code section 13351.5, which requires the Department of Motor Vehicles to permanently revoke the driver's license of anyone convicted of assault with a deadly weapon using a motor vehicle.[3]

The trial court denied the motion, finding that attorney Short was "very credible" and that defendant suffered from buyer's remorse. The court found no fault with attorney Short's assessment of the evidence against defendant or advising him to enter the plea. With regard to the failure to advise defendant regarding the permanent revocation of his license, the court concluded: "I do not believe that the defendant would not have entered into this plea agreement had he known that his license would be revoked. That was certainly the least of his concern[s] in terms of everything that was going on."

Thereafter, defendant was sentenced to 12 years as provided in the plea agreement.

DISCUSSION

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[3] Vehicle Code section 13351.5 provides in relevant part:

"(a) Upon receipt of a duly certified abstract of the record of any court showing that a person has been convicted of a felony for a violation of Section 245 of the Penal Code and that a vehicle was found by the court to constitute the deadly weapon or instrument used to commit that offense, the department immediately shall revoke the privilege of that person to drive a motor vehicle.

"(b) The department shall not reinstate a privilege revoked under subdivision (a) under any circumstances."

Defendant contends that attorney Short, who represented him at the time of the plea, provided ineffective assistance of counsel, that such ineffectiveness constituted good cause to withdraw his plea, and that therefore the trial court erred in denying his motion to withdraw his plea. He also contends that attorney Berry-Jacoby, who represented him on the motion to withdraw the plea, provided ineffective assistance, and that such ineffectiveness requires a remand for a new hearing on the motion. Finally, he contends that he should be allowed to withdraw his plea, because the court did not advise him that his driver's license would be permanently revoked. We disagree with all contentions. We begin with the alleged deficiencies of attorney Short at the time of the plea.

A. *Attorney Short's Representation*

Section 1018 permits the withdrawal of a plea where a defendant shows good cause by clear and convincing evidence. (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1142.) Ineffective assistance of counsel at the time of the plea constitutes such good cause. (*People v. Johnson* (1995) 36 Cal.App.4th 1351, 1356.) "[W]here ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.) "'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome.'" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) Further, we review the denial of a motion to withdraw for an abuse of discretion. (*People v. Shaw* (1998) 64 Cal.App.4th 492, 495-496.)

Defendant alleges a host of failures by attorney Short. All are entirely meritless.

1. *Failure to Advise on Transferred Intent*

The prosecution's theory for the charge of premeditated attempted murder was that defendant intended to kill "Joe," but by mistake tried to kill Van Horn, believing that he was Joe. According to defendant, this theory is one of transferred intent – a doctrine that does not apply to attempted murder. (See *People v. Bland* (2002) 28 Cal.4th 313, 317 [where defendant shot at three persons, killing one and injuring two others, court held that "the [transferred intent] doctrine does not apply to an inchoate crime like attempted murder. A person who intends to kill only one is guilty of the attempted (or completed) murder of that one but not also of the attempted murder of others the person did not intend to kill."]) Defendant asserts that attorney Short was ineffective for not advising him that the theory of transferred intent would not apply to the charge of premeditated attempted murder. According to defendant, he would not have accepted the negotiated plea if he had known that the premeditated attempted murder charge could be dismissed.

Appellant is mistaken. The prosecution's theory of premeditated attempted murder did not rely on the transferred intent doctrine, but simply on mistaken identity. "Literally speaking, the 'mistaken identity' situation is not a case of transferred intent, because the target at which defendant actually aimed is the victim. In contrast, the 'bad aim' situation -- where a defendant aims at X and hits Y by mistake -- does require an actual transfer of intent." (*People v. Williams* (1980) 102 Cal.App.3d 1018, 1027, fn. 5.) Here, the evidence tended to prove that defendant intended to kill the man he saw walking on the sidewalk. He mistakenly thought that man was Joe, but that mistake had nothing to do with his liability for

premeditated attempted murder. "The mental state required for attempted murder is the intent to kill *a* human being, not a *particular* human being." (*People v. Stone* (2009) 46 Cal.4th 131, 134.) Because the doctrine of transferred intent had no application to the attempted premeditated murder charge, attorney Short was not ineffective in failing to advise defendant of the doctrine.

2. *Great Bodily Injury Allegation in Hit and Run Driving Count*

Defendant contends that attorney Short was incompetent for failing to advise him that the great bodily injury enhancement might not apply to the charge of felony hit and run driving. He is mistaken.

First, defendant bases this contention on the decision in *People v. Valdez* (2010) 189 Cal.App.4th 82, 84-85, 90 (*Valdez*), decided on October 12, 2010 after defendant's plea on September 1, 2010. *Valdez* held, for the first time, that a great bodily injury allegation may attach to a violation of Vehicle Code section 20001, subdivision (a), only if the injury suffered in the accident was caused or aggravated by the defendant's failure to stop and render assistance. (*Ibid.*) Because *Valdez* was decided after defendant's plea, trial counsel cannot be faulted for failing to anticipate the holding in *Valdez.*[4]

Second, in light of the paucity of the factual record on appeal, it cannot be determined whether Van Horn's injuries were or were not aggravated by defendant's flight and failure to render assistance. That issue was never explored,

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[4] At the preliminary hearing, trial counsel moved to dismiss the great bodily injury allegation alleged in the hit and run count, arguing that "I don't believe you can have a GBI allegation attached to the hit and run." The magistrate denied the motion. *Valdez* later rejected a blanket rule that a great bodily injury allegation cannot attach to a charge of hit and run driving, and held, as we have stated, above, such an allegation is proper if the injury suffered in the accident was caused or aggravated by the defendant's failure to stop and render assistance.

because *Valdez* was decided after the preliminary hearing and defendant's plea. Thus, the record on appeal is inadequate to determine the whether the test of *Valdez* could have been met at trial.

Finally, even if the great bodily injury allegation in the hit and run count could be not be proven at trial, the record shows that defendant still had a strong incentive to enter the plea. The great bodily injury allegation was also alleged in the counts charging attempted premeditated murder and assault with a deadly weapon. On the record presented, despite defendant's contention to the contrary, the evidence proving these charges – especially the assault with a deadly weapon -- was very strong. Defendant saw Van Horn walking on the sidewalk, and asked, "Is that Joe?" Before any response from the passengers, he revved the engine of the stolen Honda he was driving, and drove straight at Van Horn, striking him and causing serious injury. He then sped away, and when confronted by an off duty police officer who had followed the fleeing vehicle, he ran off while the two passengers remained.

On this evidence, a conviction of at least assault with a deadly weapon, and probably attempted murder, with a true finding on the great bodily injury allegation, was extremely likely. Thus, it was also highly probable that defendant would receive credit at 15 rather than 50 percent regardless of whether he was convicted of hit and run driving with the great bodily injury allegation found true.

Indeed, defendant testified that he entered the plea because attorney Short made him believe that he would lose at trial not simply on the charge of hit and run driving, but also on the charge of assault with a deadly weapon, and the great bodily injury allegation would attach to the latter count as well.

In short, it is not reasonably probable defendant would not have entered the plea if he had been advised that the great bodily injury allegation might not apply to the felony hit and run charge.

In a related contention, defendant contends that attorney Short was incompetent for misadvising him that the great bodily injury allegation required a finding of specific intent. Even assuming he was so advised (§ 12022.7 requires personal infliction of great bodily injury, but not specific intent to inflict injury), there is no evidence that such incorrect advice played any role in defendant's decision to accept the negotiated plea. Indeed, if anything, such advice would have been likely to induce defendant *not* to accept the disposition, on the mistaken assumption that the supposed requirement of specific intent made the great bodily injury allegation more difficult to prove than it actually was. Thus, it is not reasonably probable that if defendant had been properly advised, he would not have entered the plea.

3. *Trial Preparation*

Defendant contends that attorney Short was ineffective in failing to adequately prepare for trial in various ways. First, he asserts that attorney Short did not adequately investigate the background of the passengers. He is mistaken. Attorney Short explained that he made the standard request for discovery regarding Jorgensen and Garcia, and the prosecution complied. He could not recall precisely, but there were "maybe one or two things that possibly could be used for impeachment," including that Jorgensen possibly had a felony conviction. He also learned that Jorgensen was defendant's cousin, and Garcia was a friend of Jorgensen's to whom defendant was giving a ride. Defendant made no showing below that there was other pertinent information concerning the passengers that

attorney Short could have discovered, or how any such information would have resulted in defendant not entering the plea.

Defendant contends that attorney Short should have examined the passengers' immunity agreements. However, he presented no evidence that the immunity agreements were in any way improper or that the passengers would have been precluded from testifying.

Defendant contends that attorney Short was incompetent for failing to advise defendant that he might be able to contend in defense that he struck Van Horn by accident. The record contains no evidence that such a defense was available. To the contrary, all the evidence in this record demonstrates that defendant struck Van Horn with the vehicle intentionally.

Defendant contends that trial counsel was ineffective for failing to make a section 995 motion to dismiss the charge of premeditated attempted murder and the great bodily injury allegations in counts 1 through 3. However, the evidence at the preliminary hearing, showing that defendant intentionally drove the stolen Honda straight at Van Horn, mistakenly believing he was "Joe," and then fled, leaving Van Horn seriously injured, was sufficient to sustain the charges. Thus, it is not reasonably probable that if a section 995 motion had been made, the charge of premeditated attempted murder and the great bodily injury allegations would have been dismissed.

Defendant contends that he was coerced into accepting the negotiated disposition because trial counsel failed to adequately prepare for trial. But there is nothing in the record to show that counsel failed to act according to prevailing professional norms or, if he did, that defendant had any viable defense that might lead to acquittal on some charges and a lesser sentence than that provided in the negotiated disposition. Instead, he faced the risk of a much greater punishment.

4. *License Revocation*

Defendant contends that he is entitled to withdraw his plea, because attorney Short failed to advise him that pursuant to Vehicle Code section 13351.5, on conviction of assault with a deadly weapon using a vehicle, his driver's license would be permanently revoked. But as the trial court found, supported by substantial evidence, given the likelihood of conviction and potential sentence defendant could receive: "I do not believe that the defendant would not have entered into this plea agreement had he known that his license would be revoked. That was certainly the least of his concern[s] in terms of everything that was going on." Indeed, the immateriality of whether defendant's license might be permanently revoked is amply demonstrated by that fact that defendant was driving a stolen vehicle with a suspended license when he struck Van Horn and when he was apprehended in another stolen vehicle about two weeks later. Given that defendant was obviously willing to drive stolen vehicles without a currently operative license, it is unreasonable to believe that had he known his license would be permanently revoked, he would not have pled no contest to assault with a deadly weapon.

5. *Conclusion*

In sum, defendant failed to demonstrate that attorney Short was ineffective, and that any alleged deficiencies in representation were material to his decision to enter the plea.

B. *Attorney Berry-Jacoby*

Defendant also faults the performance of attorney Berry-Jacoby, who represented him on the motion to withdraw the plea. With the exception of inadequate trial preparation and failure to make a section 995 motion, he asserts against attorney Berry-Jacoby the same deficiencies he asserts against attorney Short. For the reasons already stated with respect to attorney Short, these allegations against attorney Berry-Jacoby are equally meritless. Defendant has failed to demonstrate that she acted below standard professional norms, and that, even assuming she was in some way ineffective, it is reasonably probable he would have prevailed on the motion to withdraw the plea.

C. *Court's Failure to Advise on License Revocation*

Defendant contends that his plea should be set aside, because the court failed to advise him of the mandatory permanent revocation of his driver's license. It is true that he was not so advised. However, as we have already explained with respect to attorney Short's failure to give such an advisement, it is not reasonably probable that if defendant had known of the revocation consequence, he would not have entered the plea. Therefore, he is not entitled to withdraw his plea on that ground. (*People v. Dakin* (1988) 200 Cal.App.3d 1026, 1033-1034.)

DISPOSITION

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.