Filed 7/16/18 P. v. Barajas CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ANA MARIE BARAJAS,

Defendant and Appellant.

2d Crim. No. B285340
(Super. Ct. No. 2015019473)
(Ventura County)

Ana Marie Barajas appeals from the judgment entered after she pleaded guilty to possession for sale of methamphetamine. (Health & Saf. Code, § 11378.) Before she pleaded guilty the trial court gave an indicated sentence, but she failed to appear on the date set for sentencing. When she appeared several months later, the trial court imposed a sentence requiring her to serve more time in custody and less time on mandatory supervision than the indicated sentence. Appellant claims that the trial court was required to impose the indicated sentence. We disagree and affirm.

Procedural History

The information charged appellant with a single count - possession for sale of methamphetamine. On March 10, 2017, defense counsel stated in open court: "I've spoken to my client, your Honor. She's inclined to accept the Court's *indicated* [sentence] from this morning, 16 months, 50/50. [¶] [¶] . . . Where she does eight [months in county jail] and the balance on mandatory supervision." (Italics added.) The court replied, "That's correct." Pursuant to Penal Code section 1170, subdivisions (h)(5)(A)-(B), the court had "discretion to commit [appellant] to county jail for a full term in custody, or to impose a hybrid or split sentence consisting of county jail followed by a period of mandatory supervision." (*People v. Catalan* (2014) 228 Cal.App.4th 173, 178.)

In taking appellant's plea, the prosecutor said, "[T]he Court has offered to sentence you to 16 months with a split sentence, eight months in [county jail], eight months on mandatory supervision . . . ; is that your understanding?" Appellant replied, "Yes."

Sentencing was set for April 11, 2017. Appellant failed to appear on that date, and a bench warrant was issued.

Appellant did not appear in court until August 30, 2017. Eight days later, she was sentenced. Because appellant had failed to appear for sentencing in April 2017, the prosecutor "urge[d] the Court to sentence [her] to a greater term than was previously discussed when she pled guilty to 16 months." The prosecutor recommended that she be sentenced to the two-year middle term.

Defense counsel objected to the imposition of a two-year term: "[T]his was a matter that was disposed of. It was a plea of

16 months split at the time that the plea was entered. I don't believe there was any kind of a top any higher than 16 months that had been agreed to and pled to by my client."

The trial court responded: "[I]t's pretty clear to me that she's not interested in following the Court's instructions when the Court gives her an order and so . . . she's going to spend a significant portion of [her sentence] in custody."

The court sentenced appellant to county jail for the lower term of 16 months. It ordered that she serve 14 months in custody and 2 months on mandatory supervision. Defense counsel did not object to the split between custodial time and mandatory supervision. He did not request that appellant be allowed to withdraw her guilty plea.

The Trial Court Did Not Breach a Plea Agreement

Appellant is seeking specific enforcement of the trial court's indicated sentence. She maintains that the imposed sentence is unlawful because "in sentencing [her] to a [custody] term in excess of that provided for in the plea agreement, the court breached that agreement." She contends that her sentence "should therefore be reversed, and the matter remanded for the lower court to resentence [her] to eight months in custody and eight months on [mandatory] supervision."

The trial court's indicated sentence is not a plea agreement that can be specifically enforced. There was no bargained-for sentence. Appellant entered a straight-up plea to the sole charged offense. "An indicated sentence . . . is not an attempt to induce a plea by offering the defendant a more lenient sentence than what could be obtained through plea negotiations with the prosecuting authority. When a trial court properly indicates a sentence, it has made no *promise* that the sentence will be

imposed. Rather, the court has merely disclosed to the parties at an early stage—and to the extent possible—what the court views, on the record then available, as the appropriate sentence so that each party may make an informed decision." (*People v. Clancey* (2013) 56 Cal.4th 562, 575.) "The development of new information at sentencing may persuade the trial court that the sentence previously indicated is no longer appropriate for this defendant or these offenses. . . . Thus, even when the trial court has indicated its sentence, the court retains its full discretion at the sentencing hearing to select a fair and just punishment." (*Id*. at p. 576.)

Appellant argues that, because she did not make a *Cruz* waiver, the trial court lacked the authority to increase her custody time from 8 to 14 months. "A '*Cruz* waiver' gives a trial court the power to 'withdraw its approval of the defendant's plea and impose a sentence in excess of the bargained-for term,' if the defendant willfully fails to appear for sentencing. [Citation.]" (*People v. Puente* (2008) 165 Cal.App.4th 1143, 1146, fn. 3; see also *People v. Masloski* (2001) 25 Cal.4th 1212, 1215, fn. 2.) A *Cruz* waiver must "be obtained at the time of the trial court's initial acceptance of the plea, and it must be knowing and intelligent." (*People v. Cruz* (1988) 44 Cal.3d 1247, 1254, fn. 5.) Without a *Cruz* waiver, a defendant must be permitted to withdraw his plea if the court intends to impose a sentence greater than the bargained-for term. (*Id*. at pp. 1249-1250, 1254.) A *Cruz* waiver was not necessary here because there was no plea bargain.

If the Trial Court Had Breached a Plea Agreement on Sentencing, Specific Enforcement Would Not Have Been an Available Remedy

"[A] trial court may not *bargain* with a defendant over the sentence to be imposed. [Citation.]" (*People v. Clancey*, *supra*, 56 Cal.4th at p. 575.) If appellant's guilty plea had been the product of improper judicial plea bargaining, appellant's remedy for the breach of the bargain would not have been specific enforcement of the bargain: "'To order *the court* to specifically perform—as distinct from a prosecutor who breaks a bargained-for promise—would "curtail [ ] the normal sentencing discretion of the trial judge . . . ." [Citation.]' [Citation.] Instead, defendant should be given the opportunity to withdraw his plea. [Citation.]" (*People v. Labora* (2010) 190 Cal.App.4th 907, 916.) Appellant has never requested that she be given the opportunity to withdraw her guilty plea.

Forfeiture

In any event, appellant forfeited her challenge to the trial court's readjustment of the split between custodial time and mandatory supervision. She objected only to the prosecutor's request that the court impose the two-year middle term. In *People v. Scott* (1994) 9 Cal.4th 331, 356, our Supreme Court held "that complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal."

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Ryan Wright, Judge

Superior Court County of Ventura

Jonathan B. Steiner, Executive Director, Richard B. Lennon, Staff Attorney for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven E. Mercer, Acting Supervising Deputy Attorney General, Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.