Filed 10/23/18 P. v. Selden 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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

EDWARD LAMONT SELDEN,

Defendant and Appellant.

2d Crim. No. B286478
(Super. Ct. No. 14C-28722)
(San Luis Obispo County)

Edward Lamont Selden appeals from the trial court's postjudgment orders revoking probation and ordering execution of a previously suspended eight-year prison sentence. Appellant contends that, because the trial court denied his request for a continuance, he was deprived of his constitutional right to counsel at a critical stage of the proceeding. Here, the trial court got the "whiff" of a stall and "game playing" by appellant. It has the same odor on appeal. Nevertheless, appellant had the right to be represented by counsel who was "prepared" when ordered to prison. The error is not "structural" and we affirm.

Procedural Background

Appellant pleaded no contest to kidnapping. (Pen. Code, § 207, subd. (a).)[1] It was an aggravated case and appellant was fortunate that he was not immediately sentenced to prison. The trial court imposed an eight-year prison sentence, suspended its execution, and placed him on probation for five years. Appellant was expressly advised that any probation violation would result in the prison sentence being ordered into effect. The warning was as follows: "Are you prepared to accept that sword hanging over your head?" Appellant said, "Yes." He did not take this warning seriously.

One year later, appellant was arrested for resisting a peace officer and possession of cocaine for sale. He was released from custody. He did not report his arrest to the probation department.

Appellant was eventually taken into custody for violating probation. At the arraignment on the violation, he was represented by retained counsel. The probation violation hearing was continued several times, once on the People's motion and four times on appellant's motion.

In September 2017 appellant admitted that he had violated probation for two reasons: 1) possession of narcotics; and 2) failure to report his arrest to the probation department. Retained counsel requested that the court defer sentencing so appellant could marry his fiancée. The court continued sentencing for three weeks to October 11, 2017. Because of a delay in obtaining a marriage license, the court continued sentencing for another three weeks to November 1, 2017, "with the understanding he's going to be sentenced [on that date]."

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[1] All statutory references are to the Penal Code.

On November 1, 2017, retained counsel was relieved as counsel of record because of an alleged conflict of interest. On its own motion, the court again continued sentencing to November 15, 2017. Appellant indicated that he would retain new counsel.

On November 15, 2017, a Wednesday, appellant appeared with new attorney Patrick Fisher. Fisher said he had received former counsel's case file on the preceding Friday. On Tuesday he had met with appellant at the jail. Appellant wanted to retain Fisher, but "[h]e will need another week to complete that process." Fisher declared, "I'm making a courtesy appearance on his behalf today to request another week so he can finalize retaining."

The court announced, "I'm going to go forward with sentencing today." Fisher protested: "[Appellant] hasn't retained me." "I don't represent him."

The court appointed the public defender to represent appellant. The deputy public defender assigned to the case requested "a continuance . . . to review the file and see if there [are] any issues with the plea or with how it's gone at this point." She explained: "I just received this file from Mr. Fisher. I haven't had an opportunity to go through it."

The court denied the request for a continuance. It stated, "I believe at this stage of the proceedings that [appellant] is essentially doing everything he possibly can not to have the execution of sentence be imposed." Appellant personally protested, "I just feel that my right for counsel has been denied." The court ordered execution of the previously suspended eight-year prison sentence.

Depravation of The Right to Counsel

The trial court's statement is tantamount to findings of willful and intentional delay to thwart the timely administration of justice. Any denial of the right to be represented by retained counsel was due to appellat's own inaction in timely procuring new counsel. By appellant's theory the trial court was required to grant a fifth continuance with no assurance that appellant could raise the funds within the week requested. This is folly and allows a criminal defendant to control the superior court calendar.

Appellant claims that the denial of the deputy public defender's request for a continuance resulted in the "deprivation of the right to counsel at this critical stage of the proceedings [and] require[s] that the judgment be reversed." Appellant asserts, "[C]ounsel's 'representation' was merely perfunctory given her lack of preparation for the hearing inasmuch as she had been appointed only moments before the proceeding." In other words, counsel was ineffective because she did not have time to prepare for the sentencing hearing.

"A criminal defendant has a constitutional right to counsel at all critical stages of a criminal prosecution, including sentencing. [Citations.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 453.) "[T]he trial-level right to counsel, created by the Sixth Amendment and applied to the States through the Fourteenth Amendment, [citation], comprehends the right to effective assistance of counsel. [Citation.]" (*Evitts v. Lucey* (1985) 469 U.S. 387, 392.) To demonstrate ineffective assistance of counsel, a defendant "must . . . show prejudice flowing from counsel's performance or lack thereof. [Citations.]" (*In re Avena* (1996) 12 Cal.4th 694, 721.) Appellant has not shown that he was

prejudiced by the trial court's refusal to allow the deputy public defender time to prepare for the sentencing hearing.

"'The [United States Supreme] Court has uniformly found constitutional error without any showing of prejudice when counsel was either totally absent, or prevented from assisting the accused during a critical stage of the proceeding.' [Citation.]" (*In re Avena*, *supra*, 12 Cal.4th at p. 727, quoting from *United States v. Cronic* (1984) 466 U.S. 648, 659, fn. 25; see also *In re Visciotti* (1996) 14 Cal.4th 325, 353 ["Defendants have been relieved of the obligation to show prejudice only where counsel was either totally absent or was prevented from assisting the defendant at a critical stage"].)

The trial court should not have refused to grant a brief continuance. It prevented the deputy public defender from assisting appellant at a critical stage of the proceeding. The deputy public defender was not responsible for this turn of events.

What Could the Public Defender Do?

The question is: If the deputy public defender had been granted a continuance, how could she have assisted appellant at the sentencing hearing? In his opening brief appellant only contends: "Counsel at least needed time to discuss the matter further with her client, to determine whether there were any grounds for a motion to withdraw the plea or to seek a different sentence."[2]

The trial court could not have imposed a sentence different from the eight-year suspended sentence. "[I]f, as here, the court

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[2] Although not argued on appeal, there was the theoretical possibility of reinstatement of probation. But on this record, the theoretical claim is far-fetched. (See *ante*, p. 2.)

actually imposes sentence but suspends its *execution*, and the defendant does not challenge the sentence on appeal, but instead commences a probation period reflecting acceptance of that sentence, then the court lacks the power, at the precommitment stage (see § 1170, subd. (d)), to reduce the imposed sentence once it revokes probation." (*People v. Howard* (1997) 16 Cal.4th 1081, 1084.) "On revocation of probation, if the court previously had imposed sentence, the sentencing judge must order that exact sentence into effect [citations], subject to its possible recall under section 1170, subdivision (d), *after* defendant has been committed to custody." (*Id*. at p. 1088.)

We are left with appellant's claim that the deputy public defender "needed time to discuss the matter further with her client, to determine whether there were any grounds for a motion to withdraw the [no contest] plea" to kidnapping. For good cause shown, section 1018 permits a defendant to withdraw his plea "at any time *before* judgment." (Italics added.) Section 1018 was inapplicable here because judgment was pronounced when the court imposed an eight-year prison term and suspended its execution. (See § 1203.2, subd. (c) ["if the judgment has been pronounced and the execution thereof has been suspended, the court may revoke the suspension and order that the judgment shall be in full force and effect"].)

Thus, a motion to withdraw appellant's no contest plea would have been a postjudgment motion. "'With respect to postjudgment motions to withdraw a guilty plea, the courts have required a showing essentially identical to that required under Penal Code section 1018: "[W]here on account of duress, fraud, or other fact overreaching the free will and judgment of a defendant he is deprived of the right of a trial on the merits, the court in

which he was sentenced may after judgment and after the time for appeal has passed, *if a properly supported motion is seasonably made*, grant him the privilege of withdrawing his plea of guilty . . . . It should be noted, however . . . that this exceptional remedy applies . . . only upon a strong and convincing showing of the deprivation of legal rights by extrinsic causes." [Citation.] . . .' [Citation.] . . . 'As a general rule, a plea of guilty may be withdrawn "for mistake, ignorance or inadvertence or any other factor overreaching defendant's free and clear judgment." . . . ' [Citation.]" (*People v. Williams* (1998) 17 Cal.4th 148, 167.)

Appellant has not presented any possible justification for withdrawing his no contest plea. Nor has he shown that a motion to withdraw his plea would have been "seasonably made." (*People v. Williams*, *supra*, 17 Cal.4th at p. 167; see *People v. Castaneda* (1995) 37 Cal.App.4th 1612, 1618 ["the trial court may properly consider the defendant's delay in making his application, and if 'considerable time' has elapsed between the guilty plea and the motion to withdraw the plea, the burden is on the defendant to explain and justify the delay"].)

Appellant has failed to explain how the deputy public defender could have assisted him had the trial court granted a continuance. Appellant has not demonstrated this was a "structural error." (See *Arizona v. Fulminante* (1991) 499 U.S. 279, 309 [structural error exists where there has been a "total deprivation of the right to counsel at trial"].) He also has not demonstrated that he suffered prejudice because a continuance was denied for the deputy public defender to assist him. We do not reverse a judgment for an identical sentence to be reimposed. To do so would be an idle act and an exaltation of form over

substance. (See *People v. Coelho* (2001) 89 Cal.App.4th 861, 889-890.)

Disposition

The postjudgment orders are affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

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