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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALEXANDER LABASTIDA, Defendant and Appellant.	B269996 (Los Angeles County Super. Ct. No. BA437481)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ray G. Jurado, Judge. Reversed and remanded.

Heather L. Beugen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Stephanie A. Miyoshi and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

BACKGROUND

In a felony complaint, the District Attorney charged appellant in count one with dissuading a witness by force or threat (Pen. Code, § 136.1, subd. (c)(1)[1] and in count two with second degree robbery (§ 211). In connection with both counts, the complaint alleged that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(4) [count 1], § 186.22, subd. (b)(1)(C) [count 2]).

Prior to preliminary hearing, appellant pleaded no contest to the witness intimidation charge and admitted the corresponding gang enhancement, for an agreed upon disposition of nine years in the state prison (the high term of four years for the underlying charge, plus a consecutive five-year term for the gang enhancement).

During the plea colloquy, the prosecutor advised appellant that the offense he was pleading to was a "serious," rather than "violent" felony, and that he would be serving his nine-year term with eligibility for "half-time," or one for one, good conduct custody credits. By law, however, witness intimidation by force or fear, committed for the benefit of, at the direction of, or in association with a criminal street gang is, in fact, a "violent felony," subject to a 15 percent limitation on credits. (§ 667.5, subd. (c)(20).)

DISCUSSION

In his opening brief, appellant contends that he must be allowed to withdraw his plea because he bargained for a serious felony only, when by law he has been convicted of a violent

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[1] All further section references are to the Penal Code unless otherwise noted.

felony. He contends that this resulted in an unauthorized sentence, which can be vacated at any time, even after a no-contest plea. In response, the Attorney General argues that whether or not the sentence is unauthorized, it is the nine-year term appellant bargained for and he is therefore estopped from challenging it on appeal. In his reply brief, appellant finally expressly articulates the reason why the "serious" felony, "violent" felony distinction is critical: by law, a person convicted of a violent, rather than serious felony, is limited to a maximum of 15 percent good conduct credits. (§ 2933.1.) Appellant argues that the 15 percent limitation on his good conduct credits violates the express representation made by the prosecutor during the plea colloquy that he would be eligible for half-time, or one for one good conduct credits.

Since appellant expressly articulated the 15 percent limitation argument only in his reply brief, we invited the Attorney General to file a supplemental letter discussing whether or not that legal limitation violates a material part of the plea agreement, based upon the prosecutor's representations during the plea colloquy. The Attorney General concedes, and we agree, that it does and, therefore, that the judgment must be reversed and the case remanded so that appellant, if he wishes, may withdraw his plea.

Before we do so, we make one final observation. If appellant withdraws his plea, all original charges and allegations will be reinstated. Appellants exposure on count 1 is seven years to life (§ 186.22, subd. (b)(4)(C); his exposure on count 2, assuming section 654 does not apply, is a fully consecutive term of 15 years (high term of five years for the robbery plus a consecutive 10-year term for the gang enhancement). Both are

violent felonies so, if appellant is ultimately convicted of both counts and enhancements and sentenced to the maximum term, he will have to serve 85 percent of 22 years before he is even eligible for a parole hearing, and there is no guarantee that such a hearing would result in his release.

DISPOSITION

For the reasons stated above, the judgment is reversed and the case remanded so that appellant may decide whether or not to withdraw his plea. If he chooses to do so, the trial court must grant his request. If appellant withdraws his plea, all original charges and enhancements are reinstated.

SORTINO, J.*

We concur:

BIGELOW, P.J.

GRIMES, J.

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