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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. ERNEST JIM CHOI, Defendant and Appellant.	B272080 (Los Angeles County Super. Ct. No. BA437763)

APPEAL from a judgment of the Superior Court of Los Angeles County, Drew E. Edwards, Judge. Reversed with directions.

Stephen M. Hinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Ernest Jim Choi appeals from a judgment after he pleaded no contest to felony stalking (Pen. Code, § 646.9, subd. (a)) and admitted three prior convictions alleged under Penal Code section 667.5, subdivision (b), receiving a sentence of three years in exchange for his plea. Choi contends he did not enter into the plea agreement following an intelligent and knowing evaluation of the plea, because the trial court misadvised him about the maximum potential punishment that he faced from the charges.

We conclude Choi was misadvised when the trial court and prosecutor told him his maximum exposure was six years. The record indicates he served only one separate prior prison term, and was therefore subject to only a one-year sentence enhancement, not three years, and his maximum exposure was thus only four years. We further conclude Choi was prejudiced, because the misadvisement made the plea offer appear more attractive than it was in reality, and he agreed to the offer only with reservations. We therefore reverse and remand with directions.

BACKGROUND

In October 2015, Choi was charged with stalking Christine Y. According to preliminary hearing testimony, Choi contacted her many times over a period of several months, sending her multiple emails and letters and on several occasions trying to talk to her at her place of work and outside her home. On one afternoon in April 2015, he followed her car on his bicycle and repeatedly knocked on her window when she stopped in traffic. She called the police, and he continued to knock on the window and tried to get her to talk to him while she waited for police to arrive to arrest him.

Choi was charged with a single count of stalking. (Pen. Code, § 646.9, subd. (a).)[1] It was also alleged he had been convicted of several prior felonies, and had suffered three prior convictions: two convictions for possession of a controlled substance (Health & Saf. Code, § 11377), and one conviction for stalking (§ 646.9, subd. (a)).

Choi represented himself during much of the pretrial proceedings. At two pretrial hearings in January and February 2016, the trial court asked the prosecutor what Choi's maximum exposure was for the charges. At the first of those hearings, the prosecutor responded that Choi could be sentenced to six years. Choi questioned that amount, noting, "I don't believe, that's correct. You had me down in prison three times. It's three years plus one year prison prior." At the second hearing, the prosecutor said the maximum was either four years or six years. The court did not inquire into the prosecutor's calculation of the maximum sentence at either hearing, despite Choi questioning the six-year maximum at the January hearing. At the February hearing, Choi declined the prosecutor's offer of four years but counteroffered to plead guilty to a misdemeanor charge, which the prosecutor declined.

On the day of trial, after the case was reassigned to a different judge, the trial court stated it thought the prosecution's four-year offer was high and offered a three-year indicated sentence (consisting of the two-year middle term for the stalking offense and one year for one prison prior). Choi asked the court to strike the prison prior. The court agreed to do so but

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

continued to offer a three-year sentence, now based on the upper term for the stalking charge.

Choi initially agreed. The prosecutor began to take his plea, stating that the maximum punishment for the stalking charge and three prior convictions alleged pursuant to section 667.5, subdivision (b) was six years. Choi raised questions about his time in custody if he agreed to plead. That led to a discussion among Choi, the court, and the prosecutor in which the court twice reiterated that the maximum sentence was six years. Choi displayed substantial uncertainty about proceeding with the plea deal and sought a continuance to retain counsel, which the court denied. At that point, Choi rejected the plea deal and said he would take the case to trial. Rather than immediately beginning the trial, the court gave Choi 10 minutes to talk to his family, after which he agreed to the indicated sentence. Even then, Choi continued to show uncertainty about agreeing to the plea offer, including initially answering "no" to whether he was pleading freely and voluntarily.

Choi ultimately pleaded no contest to stalking. The prosecutor then asked, "As to the three prison priors pursuant to Penal Code section 667.5, the two convictions for Health and Safety Code section 11377, as well as the third conviction for Penal Code section 646.9, also a felony, do you admit those prior convictions?" Choi said he did.

The court sentenced Choi to the upper term of three years for stalking, to be served at 50 percent, noted that "Mr. Choi has also admitted three prison priors pursuant to Penal Code section 667.5(b)," and struck the punishment for those three prison priors. Choi was ordered to pay various fines and fees, and was awarded custody credits.

Choi timely appealed, and sought and obtained a certificate of probable cause.

DISCUSSION

Choi argues the trial court misadvised him about his maximum potential punishment, preventing him from entering into a knowing and intelligent plea. We agree.

For a plea of guilty or no contest to be valid, the defendant must agree to the plea freely and voluntarily. (*People v. Palmer* (2013) 58 Cal.4th 110, 112.) "A guilty plea cannot be accepted unless the court is satisfied defendant voluntarily entered into it with full understanding of the nature of the charges and the consequences of pleading guilty." (*People v. McCary* (1985) 166 Cal.App.3d 1, 9.) Thus, before accepting a plea, the trial court must advise the defendant of the direct consequences of conviction, including the permissible range of punishment. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.)

A defendant who establishes both error in advisement and resulting prejudice is entitled to withdraw a plea of guilty or no contest. (*Berman v. Cate* (2010) 187 Cal.App.4th 885, 900.) To establish prejudice, the defendant must show he or she would not have agreed to the plea if properly advised. (*In re Moser* (1993) 6 Cal.4th 342, 352, citing *People v. Walker* (1991) 54 Cal.3d 1013, 1019-1020.)

Misadvisement

The trial court misadvised Choi about the range of punishment for the charged offenses. He previously had been convicted twice of possession of a controlled substance (Health & Saf. Code, § 11377), with conviction dates of November 21, 2012, and April 24, 2013, and once of stalking (§ 646.9, subd. (a)), with a conviction date of August 1, 2013. The probation officer's report

reveals that he was originally sentenced to probation for the two possession convictions, but probation was revoked in August 2013, when he was convicted and sentenced for the stalking conviction. At that time, he was sentenced to 16 months in state prison for each of the three convictions.[2]

Section 667.5, subdivision (b) provides that a one-year sentence enhancement shall be imposed "for each prior separate prison term" served by the defendant. (*People v. Grimes* (2016) 1 Cal.5th 698, 738-739.) A "'defendant who has served concurrent or consecutive prison sentences on various commitments is deemed to have served only one prior prison term for the purpose of the enhancement provisions of Penal Code section 667.5.'" (*Id.* at p. 739, citing *People v. James* (1980) 102 Cal.App.3d 728, 733.)

When the trial court made its plea offer, the prosecutor and the trial court advised Choi his maximum potential punishment was six years, based on a maximum term of three years for felony stalking (§§ 646.9, subd. (a), 18, subd. (a)), and one year each for three prior convictions alleged under section 667.5, subdivision (b), for a total of three years in sentence enhancements.

However, the record reveals that Choi served a single "separate prison term" for the three convictions, rather than three separate prison terms. Given that fact, he would have been subject to only a single one-year sentence enhancement, and the total maximum potential punishment would be four years. Accordingly, the court and the prosecutor erred in advising Choi that his maximum potential punishment was six years.

The Attorney General argues the record on appeal is insufficient to support Choi's claim that the trial court

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[2] He was released from custody in March 2014, indicating that he served the sentences concurrently.

misadvised him, because the record does not contain a prison log or prison packet. We conclude that a prison log or prison packet was unnecessary to create an adequate record for our review. The probation officer's report provides sufficient support for Choi's assertion that he served a single separate prison term. (Cal. Rules of Court, rule 8.320(b).)

The Attorney General further argues Choi cannot withdraw his plea because he admitted the prior prison term allegations. To the contrary, the record shows Choi did not admit to three prior prison terms. When Choi ultimately pleaded no contest to the stalking charge, the prosecutor next asked him, "As to the three prison priors pursuant to Penal Code section 667.5, the two convictions for Health and Safety Code section 11377, as well as the third conviction for Penal Code section 646.9, also a felony, do you admit those prior convictions?" Choi said he did. The prosecutor, however, failed to ask Choi to admit to three separate prior prison terms, and Choi did not do so. Instead, he admitted to the three prior convictions listed by the prosecutor.

Prejudice

Having concluded the trial court misadvised Choi about the maximum potential punishment, we further conclude the misadvisement prejudiced him. *People v. Johnson* (1995) 36 Cal.App.4th 1351 (*Johnson*) is instructive. There, the defendant pleaded no contest in exchange for a sentence of 20 years. However, his counsel miscalculated his potential maximum sentence as 38 years, when it was in fact no more than 27 years. (*Id.* at pp. 1354-1357.) The Court of Appeal concluded counsel's failure to advise the defendant correctly about his maximum potential sentence led him to believe he would cut his sentence almost by half, a strong inducement to plead. The court further

noted the defendant attempted to withdraw the plea on other grounds, showing he had reservations about the plea agreement. (*Id.* at p. 1358.)

Here, if the trial court and prosecutor had been correct that Choi's maximum sentence was six years, the three-year offer would have cut that number in half. But in reality the offer reduced the sentence by only one year. The resulting plea deal would have appeared less attractive absent the misadvisement.

Further, the record contains significant evidence that, as in *Johnson*, Choi had reservations about accepting the plea offer, even with the prosecutor and court repeatedly stating that the maximum sentence was six years. During a discussion of the amount of time Choi would actually serve in custody, the court asked if he wanted to proceed with the plea deal, and he stated, "Um, that changes things up for me." Shortly thereafter, he asked for a continuance to obtain counsel, which the court denied. When the court pressed him for a decision, Choi said, "I am going to take this to trial, Your Honor." The court then said it would give him an additional 10 minutes to talk to his family before starting the trial. After that break, he said he would take the court's indicated sentence.

As the prosecutor proceeded to take the plea, Choi continued to show ambivalence toward the agreement. When the prosecutor asked whether he was pleading freely and voluntarily, he initially said, "No." The prosecutor stated, "Sir, this isn't a joke." Choi responded, "Do you think going to state prison is a joke?" When the prosecutor again asked whether he was pleading freely and voluntarily, he responded, "Yes."

Thus, throughout the proceedings, Choi demonstrated he was disposed to reject the plea offer, before he ultimately

accepted it with reservations. Further, he made this decision without the benefit of counsel. His request for a continuance to obtain counsel suggests he felt insufficiently prepared to evaluate the court's offer.[3] Given that much of his concern revolved around the time he would serve, it is probable that if the trial court had correctly advised him that the maximum sentence was only one year greater than the plea offer, he would not have agreed to the plea. Under these specific circumstances, the court's failure to properly advise Choi disadvantaged him in making a voluntary and knowing plea.

Because we have concluded the court misadvised Choi and he was prejudiced thereby, he is entitled to relief. Choi has requested he be allowed to file a motion to withdraw his plea within 30 days of this opinion's becoming final. We will so order.

DISPOSITION

The judgment is reversed, and the case is remanded to the superior court with directions to properly advise Choi of the consequences of his plea and give him the opportunity to

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[3] At an earlier stage of the proceedings, Choi had questioned the prosecutor's statement that he was subject to three separate prior prison term enhancements, stating, "You had me down in prison three times. It's three years plus one year prison prior." Neither the court nor the prosecutor addressed his contention, let alone followed up to ensure that applying three enhancements was correct. If Choi had been represented by counsel at that time, we might conclude the evidence showed he was aware of the true extent of his exposure on the enhancements. But because he was not represented, the more natural conclusion is that, in the face of the court's and the prosecutor's failure to respond to his assertion that the sentence was wrong, Choi was led to believe he was incorrect about the applicable enhancements.

withdraw his plea. If Choi files a motion to withdraw his plea within 30 days of the finality of this opinion, the court is directed to vacate the plea and rearraign him for plea and to proceed to trial or make other appropriate dispositions. If Choi does not file such a motion within the time prescribed, the court is directed to reinstate the original judgment, which will stand affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.