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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. EDGAR MIER, Defendant and Appellant.	B278009 (Los Angeles County Super. Ct. No. MA068341)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa M. Chung, Judge. Affirmed with directions.

Charles E. Mullis, 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 J.

Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Edgar Mier appeals from a denial of his motion to withdraw a plea of guilty to driving with a 0.08 percent blood alcohol concentration and causing injury. He contends the trial court erred in denying his motion to withdraw his plea because there was no factual basis for the plea. Alternatively, he contends his trial counsel was ineffective in advising him to accept the plea agreement without waiting for the results of a blood alcohol test. For the reasons set forth below, we conclude that the trial court properly denied the motion and that trial counsel was not ineffective. Respondent asks this court to correct the minute order to properly reflect the trial court's oral pronouncement of sentence. We exercise our discretion to do so. Accordingly, we affirm the conviction and remand with directions to correct the minute order.

FACTUAL BACKGROUND & PROCEDURAL HISTORY[1]

On April 2, 2016, while driving northbound on Sierra Highway, appellant lost control of his pickup truck and hit a utility pole. As a result of the collision, appellant's passenger suffered a fractured clavicle. A California Highway Patrol officer who responded to the scene noticed that appellant had bloodshot and watery eyes, was unsteady and smelled of alcohol. Appellant admitted having had two beers. He performed poorly on his field sobriety tests, and two preliminary alcohol screening tests showed a blood alcohol concentration of 0.093 percent.[2]

Appellant was charged in a felony complaint with driving under the influence of alcohol causing bodily injury (Veh. Code, § 23153, subd. (a); count 1) and driving with a blood-alcohol concentration of 0.08 percent or higher causing bodily injury to another (Veh. Code, § 23153, subd. (b); count 2). It was further alleged that appellant personally inflicted great bodily injury (GBI) (Pen. Code, §12022.7, subd. (a)).

Subsequently, appellant waived his right to a preliminary hearing and accepted a plea agreement. In

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[1] Because appellant accepted a plea agreement before the preliminary hearing was held, the factual background is taken from the probation report.

[2] Appellant also submitted to a blood alcohol test, but the result was not available before he accepted the plea agreement.

exchange for pleading no contest to count 2, count 1 and the GBI allegation would be dismissed and appellant would be placed on formal probation for five years, with a 365-day term in county jail as a condition of probation. During the taking of the plea, defense counsel "stipulate[d] to a factual basis for the plea based upon the police reports provided in discovery."

Prior to sentencing, appellant substituted in new counsel and moved to withdraw his plea. In his motion, he argued that he had accepted the plea agreement on advice of his prior counsel. He was unaware that counsel had not received the results of the blood alcohol test or that preliminary alcohol screening devices have a margin of error of 0.02 percent. Thus, based on his result of 0.093 percent, his blood alcohol concentration could have been as low as 0.073 percent, which would have casted reasonable doubt on whether he was driving with blood alcohol concentration above 0.08 percent.

The district attorney's office filed a written opposition, arguing that no good cause was shown to permit appellant to withdraw his plea. It noted a nonstrike probationary offer was a "very good deal" for appellant. Moreover, because appellant was 19 years old at the time of the offense, he was subject to a lower blood alcohol concentration level -- 0.05 percent under Vehicle Code section 23140.[3] Finally, the

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[3] Vehicle Code section 23140, subdivision (b) provides: "A person may be found to be in violation of subdivision (a) if

opposition noted that the district attorney's office had "successfully tried and convicted any number of DUI Defendants using only [the preliminary alcohol screening] results in combination with other evidence of bad driving, such as traffic accident and poor performance on [field sobriety tests] of the kind that are present in this case."

The trial court denied appellant's motion, noting that appellant had been fully advised of his rights and had voluntarily waived them before entering his plea. It ruled appellant had failed to show good cause for withdrawing the plea. The court suspended imposition of sentence, and placed appellant on "five years' formal, or felony, probation . . . ."

DISCUSSION

Appellant contends his plea was invalid because (1) the trial court failed to "satisfy itself that there [was] a factual basis" for the plea, and (2) his trial counsel rendered ineffective assistance in advising him to take the plea before receiving the results of the blood alcohol test. We reject both contentions.

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the person was, at the time of driving, under the age of 21 years and under the influence of, or affected by, an alcoholic beverage regardless of whether a chemical test was made to determine that person's blood-alcohol concentration and if the trier of fact finds that the person had consumed an alcoholic beverage and was driving a vehicle while having a concentration of 0.05 percent or more, by weight, of alcohol in his or her blood."

Under Penal Code section 1192.5, before a trial court may approve a plea, it must "cause an inquiry to be made . . . that there is a factual basis for the plea." In *People v. Holmes* (2004) 32 Cal.4th 432, our Supreme Court explained that "in order for a court to accept a conditional plea, it must garner information regarding the factual basis for the plea from either defendant or defense counsel to comply with section 1192.5. . . . If the trial court inquires of defense counsel regarding the factual basis, it should request that defense counsel stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement. [Citation.]" (*Id.* at p. 436.) Here, defense counsel stipulated to "a factual basis for the plea based upon the police reports provided in discovery." The trial court thus complied with Penal Code section 1192.5. As there was a factual basis for the plea, there was no error in the court's denial of appellant's motion to withdraw the plea.

With respect to appellant's claim of ineffective assistance of trial counsel, we conclude counsel was not ineffective in advising appellant to accept the plea agreement. "'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.' [Citations.]" (*People v. Gamache* (2010) 48 Cal.4th 347, 391.) Appellant was facing a prison term of between 16 months and three years on either charged count (Pen. Code, § 18), plus an additional three years for the GBI enhancement (Pen. Code, § 12022.7, subd. (a)). In addition, a true finding on the GBI allegation would have rendered the crime a violent felony under Penal Code section 667.5, resulting in a "strike" conviction under the Three Strikes law. Finally, appellant did not dispute the contention that many defendants had been convicted for DUI offenses based on the same evidence present in this case, i.e., preliminary alcohol screening tests showing high blood-alcohol concentration, negligent driving resulting in an accident, and poor results on field sobriety tests. In light of the serious risks of a felony DUI conviction, defense counsel's advice to accept a nonstrike five-year probationary plea deal was objectively reasonable under prevailing professional norms. Accordingly, defense counsel was not ineffective. In sum, we reject appellant's challenges to the validity of his plea.

Finally, respondent requests that this court correct the minute order to conform to the oral pronouncement of sentence. During sentencing, the trial court placed appellant on "five years' formal, or felony, probation." However, the minute order reflects a three-year probation term. The general rule is that "a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error." (*People v.*

Mesa (1975) 14 Cal.3d 466, 471.) That presumption is further supported here where the record shows that when the parties discussed the terms of the plea agreement in open court, the prosecutor stated that "it will be a plea to count 2, for five years formal probation." Accordingly, we exercise our discretion to correct the minute order.

DISPOSITION

The minute order is amended to reflect the trial court's oral pronouncement of sentence, by correcting "for a period of 003 years" to "for a period of 005 years." As modified, the judgment is affirmed.

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MANELLA, J.

We concur:

EPSTEIN, P. J. COLLINS, J.