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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRYSTAL R. NEFF,

Defendant and Appellant.

2d Crim. No. B289693
(Super. Ct. No. 2016042069)
(Ventura County)

Chrystal R. Neff appeals from the judgment after she pled no contest to selling or transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and driving under the influence of a drug (then-Veh. Code, § 23152, subd. (e)). She also admitted allegations that she suffered seven prior narcotics-related convictions (Health & Saf. Code, § 11370.2, subd. (c)) and served five prior prison terms (Pen. Code, § 667.5, subd. (b)). The trial court sentenced her to 10 years in county jail.

Neff contends, and the Attorney General concedes, that the Legislature's modification of Health and Safety Code

section 11370.2, subdivision (c), entitles her to resentencing. We agree. We vacate Neff's sentence and remand.

FACTUAL AND PROCEDURAL HISTORY

A Ventura police officer stopped Neff for driving under the influence. She had a methamphetamine pipe sticking out of her cleavage. She admitted she had recently used heroin, methamphetamine, and valium. The officer searched her vehicle and found methamphetamine, heroin, and a bottle containing a mixture of alprazolam, valium, carisoprodol, and oxycodone. Neff told the officer she was given the heroin to sell.

The prosecution charged Neff with selling or transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a); count 1), possession of methamphetamine for sale (Health & Saf. Code, § 11378; count 2), driving under the influence of a drug (then-Veh. Code, § 23152, subd. (e); count 3), possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a); count 4), possession of heroin (Health & Saf. Code, § 11350, subd. (a); count 5), possession of alprazolam (Health & Saf. Code, § 11375, subd. (b)(2); count 6), and possession of valium without a prescription (Bus. & Prof. Code, § 4060; count 7). The prosecution also alleged that Neff had seven prior narcotics-related convictions (Health & Saf. Code, § 11370.2, subd. (c)) and served five prior prison terms (Pen. Code, § 667.5, subd. (b)).

The trial court indicated it would sentence Neff to 10 years in county jail. Six years would be served in custody, with the remaining four on mandatory supervision. Neff then pled no contest to counts 1 and 3, and admitted the prior conviction and prior prison term allegations. The felony disposition statement

states that she could be sentenced to 31 years in jail for her convictions.

At sentencing, the prosecutor said he believed a 10-year felony jail sentence was appropriate. The trial court agreed. It imposed the low term of two years on count 1, a consecutive six years on two of the enhancements for Neff's prior convictions, a consecutive two years on two of the enhancements for her prior prison terms, and a concurrent six months on count 3. It struck the remaining enhancements, and granted the prosecutor's motion to dismiss the five remaining charges.

Three months later, the Legislature amended Health and Safety Code section 11370.2, subdivision (c). Its sentencing enhancement now applies only if a defendant's prior narcotics conviction was for a violation of Health and Safety Code section 11380. None of Neff's prior narcotics convictions was for such a violation.

DISCUSSION

Neff contends, and the Attorney General concedes, that the Legislature's January 2018 modification of Health and Safety Code section 11370.2, subdivision (c), entitles her to dismissal of the two enhancements imposed for her prior narcotics convictions. We agree. (*People v. Millan* (2018) 20 Cal.App.5th 450, 454-456.)

Neff claims we should modify her sentence to four years by striking the unauthorized enhancements. But Neff has no right to a lesser sentence; her only entitlement is to a sentence that does not include the enhancements. Her "attempt to reduce her aggregate prison term inappropriately treats sentencing as a technical game in which a wrong move by the judge would

necessitate [her] premature release into society.” (*People v. Stevens* (1988) 205 Cal.App.3d 1452, 1458.)

The Attorney General claims remand is required so the prosecution is not deprived of the benefit of the plea bargain. But there was no plea bargain here. (*People v. Lopez* (1993) 21 Cal.App.4th 225, 230.) Neff’s plea “resulted from an *indicated* sentence of [10] years.” (*Ibid.*) That the prosecutor agreed with the trial court’s indicated sentence does not render it a plea bargain. (See *People v. Clancey* (2013) 56 Cal.4th 562, 581-582 (*Clancey*) [parties may agree to or challenge an indicated sentence]; *People v. Avignone* (2017) 16 Cal.App.5th 1233, 1243 [prosecutor may agree or disagree with indicated sentence].)

A remand for resentencing is nevertheless required. An indicated sentence reflects “the trial court’s considered judgment as to the appropriate punishment in the case, regardless of whether [the] defendant is convicted by plea or at trial.” (*Clancey, supra*, 56 Cal.4th at p. 576.) If the defendant pleads guilty or no contest in response to the court’s indicated sentence, the court may fashion the appropriate punishment by exercising its discretion to impose the lower, middle, or upper terms of imprisonment; to run those terms concurrently or consecutively; to dismiss offenses or allegations; and to permit the defendant to serve part of the sentence on mandatory supervision. (*Id.* at pp. 579-580.)

When the trial court provided its indicated sentence, it did not state that Neff would receive a 10-year sentence on count 1. Instead, the court made several discretionary decisions to reach a 10-year aggregate sentence: It chose the low term on count 1, struck five of the narcotics enhancements and three of the prison priors, ordered the sentence on count 3 to run

concurrently, and granted the prosecutor's motion to dismiss the remaining charges. It also ordered Neff to serve four years of her sentence on mandatory supervision. Because the court exercised its discretion when it fashioned Neff's sentence, we can only speculate as to the sentence it would have imposed were the narcotics enhancements unauthorized at the time of sentencing. A remand for resentencing is therefore required. (*People v. Calderon* (1993) 20 Cal.App.4th 82, 88.) At resentencing, "the court [is] entitled to reconsider all of its sentencing choices, subject only to the limitation that [Neff may] not be sentenced to a greater aggregate term than the first sentence." (*People v. Savala* (1983) 147 Cal.App.3d 63, 69.)

DISPOSITION

Neff's sentence is vacated, and the case is remanded to the trial court with directions to strike the enhancements imposed pursuant to Health and Safety Code section 11370.2, subdivision (c), and to resentence Neff. The clerk of the court shall prepare an amended abstract of judgment to reflect the stricken enhancements and any additional changes made at resentencing, and forward it to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Bruce A. Young, Judge
Superior Court County of Ventura

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