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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

NICHOLAS HANKINS,

Defendant and Appellant.

B282545

(Los Angeles County
Super. Ct. No. TA141148)

APPEAL from a judgment of the Superior Court of Los Angeles County, Tammy Chung Ryu, Judge. Affirmed in part, reversed in part and remanded with directions.

Michele A. Douglass, 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 Nicholas Hankins appeals from the judgment following a negotiated plea of no contest to possession of cocaine while armed with a firearm and possession of a firearm by a felon. As part of that negotiated plea, defendant was to be sentenced to a total prison term of two years. When his plea was put on the record, defendant was advised that if he failed to appear at his sentencing hearing, he would be subject to the maximum sentence of six years, eight months. At defendant's request, the trial court set a future sentencing hearing date.

Defendant was in custody on a different case on the date of that sentencing hearing and failed to appear for sentencing. The trial court found that defendant's failure to appear was willful and imposed a four-year sentence instead of the two-year negotiated sentence.

Because we conclude that the trial court erred in finding that defendant's failure to appear was willful, we affirm the judgment of conviction, reverse the four year sentence, and remand for resentencing in conformity with the two-year negotiated sentence.

PROCEDURAL AND FACTUAL BACKGROUND

On August 29, 2016, defendant was charged with possession of a controlled substance (cocaine) while armed with a firearm (Health & Saf. Code § 11370.1, subd. (a)), and possession of a firearm by a felon (Pen. Code, § 29800, subd. (a) (the instant case). It was specially alleged that defendant had served two

prior prison terms within the meaning of Penal Code section 667.5, subdivision (b).¹

On December 10, 2016, defendant was arrested on criminal charges in the City of Norwalk (the Norwalk case). Defendant was released on bond and ordered to appear for arraignment in the Norwalk case on February 21, 2017.

On December 19, 2016, defendant appeared for a pretrial hearing in the instant case. The prosecutor informed the trial court of the negotiated plea, and the trial court asked if defendant was prepared to surrender that day. Defense counsel explained that defendant wished to remain out of custody to attend a family funeral and asked the trial court to continue the sentencing hearing to February 16, 2017. The prosecutor did not object, and the trial court stated, “That’s fine with the court. I’ll take a *Cruz*² waiver as well.”

Prior to taking the plea, the prosecutor advised defendant of his constitutional rights and the nature and consequences of the plea, which rights and consequences defendant stated he understood. The prosecutor further advised defendant, “this agreement is based upon your appearing as ordered on the

¹ Because the facts underlying these charges and allegations are not relevant to the issues on appeal, we do not describe them in our factual presentation.

² *People v. Cruz* (1988) 44 Cal.3d 1247, 1254, fn. 5. A *Cruz* waiver arises in the context of a negotiated guilty or nolo contendere plea, and refers to a defendant’s waiver of the protections of Penal Code section 1192.5, which provides in pertinent part, that when such a plea “is accepted by the prosecuting attorney in open court and is approved by the court, the defendant . . . cannot be sentenced on the plea to a punishment more severe than that specified in the plea.”

surrender date. If you fail to appear on the ordered date of surrender without good cause, this agreement will be set aside, and your plea will then be considered an open plea to the court possibly subjecting you to the maximum punishment which was six years, eight months.” Defendant stated he understood and agreed to that condition. The prosecutor then took defendant’s plea to the two felony charges. The trial court found that defendant’s plea was voluntary, knowing and intelligent, and scheduled a sentencing hearing.

The sentencing hearing was continued twice to March 9, 2017, when defendant failed to appear and a bench warrant was issued for his arrest. In the meantime, on February 21, 2017, Hankins failed to appear in the Norwalk case, and a bench warrant was issued in that case as well. As it turned out, on March 9, 2017, defendant was still in custody after being arrested on the Norwalk warrant.

On April 19, 2017, defendant appeared with counsel in the instant case. Defense counsel advised the trial court that defendant had not appeared for sentencing because he had been arrested on the bench warrant issued in the Norwalk case. The prosecutor argued defendant had thus violated his *Cruz* waiver by willfully failing to appear as ordered. Defense counsel countered that defendant had good cause for his failure to appear on March 9, 2017 because he was in custody on that date.

The trial court concluded that defendant did not have good cause for failing to appear. The trial court reasoned, “[Hankins] himself put—he caused that bench warrant to issue. If he had appeared in Norwalk on February 21st for arraignment on that information, then he would not have had a bench warrant issued. And he would have been able to come to this court on March 9th.

But he didn't. He disobeyed a court order. And that's what caused him to get arrested on a bench warrant. So that cannot constitute good cause for a defendant to fail to appear because he caused that situation himself. It's like getting picked up on a new case and being in custody. Because he was out on bond on that case. [¶] So [the] Court finds that there does not appear to be good cause for him to fail to appear on March 9th in this court."

The trial court sentenced defendant to a four-year state prison term—the upper term of four years for possession of cocaine while armed with a firearm and a concurrent term of two years for possession of a firearm by a felon.

Defendant filed a timely notice of appeal in which he checked the preprinted box indicating that his appeal was based on "the sentence or other matters occurring after the plea that do not affect the validity of the plea." The record does not contain a certificate of probable cause.

DISCUSSION

Defendant initially argued his sentence should be vacated, and he should be permitted to withdraw his plea because the *Cruz* waiver was invalid. He also argued that he had demonstrated good cause for failing to appear at the sentencing hearing, and the trial court therefore erred in finding that his nonappearance was willful.

In response to our request for supplemental briefing on whether his appeal should be dismissed for lack of a certificate of probable cause, defendant clarified he was not attacking the validity of the negotiated plea. In appellate counsel's own words: "Appellant here modifies his request for a remedy to delete the request to vacate the plea and asks that this court remand the

matter for resentencing consistent with the plea bargain: two years in prison, because the trial court erred in deciding appellate violated the *Cruz* waiver and imposing an increased sentence.”

Defendant’s appeal now distills to a single issue: Did the trial court err in finding that defendant’s failure to appear was willful? We observe that in the event we conclude the trial court erred, the People acknowledge the instant case should be remanded to the trial court for resentencing to a two-year term pursuant to the negotiated plea.³

Defendant does not state what standard of review applies to our consideration of whether the trial court erred in finding defendant’s failure to appear was willful. The People represent there is no case on point. The People advocate that our review is for abuse of discretion⁴ with factual determinations reviewed for substantial evidence⁵ by analogy to appellate review of an order

³ We also note the People conceded in part of their brief that “it appears the trial court erred in determining appellant had violated the terms of his release.” Later on, however, the People state that they agree with the trial court’s reasoning that had defendant appeared for his Norwalk hearing, he would not have been arrested on the bench warrant in that case, and therefore, defendant is to blame for being in custody on the date of his sentencing in this case.

⁴ Abuse of discretion is when the trial court “‘exceeds the bounds of reason, all of the circumstances before it being considered.’” (*Denham v. Superior Court (Marsh & Kidder)* (1970) 2 Cal.3d 557, 566.)

⁵ “‘When a trial court’s factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the

revoking probation. We assume for argument's sake that these standards of review govern here.

A defendant who pleads guilty or no contest may waive the right to be sentenced pursuant to the plea agreement, and can agree to a greater sentence as a sanction for engaging in certain behavior, such as failing to appear at a sentencing hearing. (*Cruz, supra*, 44 Cal.3d at p. 1254, fn. 5; *People v. Masloski* (2001) 25 Cal.4th 1212, 1219-1224.) If the defendant's conduct is willful, he violates the *Cruz* waiver and may receive a greater punishment; he may not withdraw his plea. (*Cruz*, at p. 1254, fn. 5; *Masloski*, at p. 1221.) "Willful" means the defendant knows what he is doing and intends to do it. (Pen. Code, § 7, subd. (1); *People v. Atkins* (2001) 25 Cal.4th 76, 85-86.) In the context of failing to appear, "the failure must be with the specific intent to evade the process of the court." (*People v. Forrester* (1994) 30 Cal.App.4th 1697, 1701.)

Here, it was uncontroverted that defendant was in custody in the Norwalk case at the time of his ordered sentencing in the instant case. The trial court in the instant case blamed defendant for his failure to appear in the instant case merely because defendant's incarceration was due to his failure to appear in the Norwalk case. According to the trial court, these

determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination.' " (*People v. Rabanales* (2008) 168 Cal.App.4th 494, 509.) " 'We do not reweigh or reinterpret the evidence; rather, we determine whether there is sufficient evidence to support the inference drawn by the trier of fact.' " (*Ibid.*)

facts demonstrated that defendant's failure to appear in the instant case was willful. We disagree.

Defendant was in custody in the Norwalk case. There was nothing in the record indicating why he did not appear for his Norwalk hearing. He could not have appeared for his sentencing in the instant case whether or not his intent was to evade sentencing. (See *People v. Cervantes* (2009) 175 Cal.App.4th 291, 293-295 [reversing the trial court's finding of a willful probation violation when at the time probation was granted, the trial court knew defendant was an undocumented alien and defendant was in custody of immigration officials at the time of his review hearing]; *Wantuch v. Davis* (1995) 32 Cal.App.4th 786, 795 [reversing trial court's dismissal of a legal malpractice action for failure to appear at a status conference because the plaintiff-prisoner was incarcerated at the time of the status conference].) For all these reasons, substantial evidence did not support the trial court's finding of willfulness, and the trial court erred in imposing a prison term in excess of the negotiated term. As the People have acknowledged, the appropriate remedy then is to reverse that sentence and remand for resentencing pursuant to the negotiated plea. We agree and do so.

DISPOSITION

The judgment of conviction is affirmed, but the sentence is reversed, and the matter is remanded for resentencing in accordance with this opinion.

BENDIX, J.*

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

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