Filed 7/31/12 In re Faith E. CA2/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

In re FAITH E., a Person Coming Under the Juvenile Court Law.	B233967
THE PEOPLE, Plaintiff and Respondent, v. FAITH E., Defendant and Appellant.	(Los Angeles County Super. Ct. No. NJ25850)

APPEAL from a judgment of the Superior Court of Los Angeles County, John C. Lawson II, Judge. Reversed and remanded.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, Michael J. Wise and Mark Weber, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Faith E., a minor, appeals from the order of wardship (Welf. & Inst. Code, § 602) entered following her admissions she committed count 1 – second degree robbery (Pen. Code, § 211) and count 2 – attempted second degree robbery (Pen. Code, §§ 664, 211). The court ordered appellant placed home on probation. We reverse the judgment and remand the matter for further proceedings.

FACTUAL SUMMARY

The record reflects on October 27, 2010, appellant committed a strong-arm robbery and an attempted strong-arm robbery of two minors (counts 1 & 2, respectively) who were walking home from school. Appellant took $1.40 from one minor and tried to take an iPod from the other.

ISSUES

Appellant claims the judgment must be reversed because (1) she admitted the offenses on the condition the court would grant deferred entry of judgment (DEJ), but the court could not lawfully do so, and (2) the court erroneously failed to advise her of the direct consequences of her admissions.

DISCUSSION

The Judgment Must Be Reversed Because the Trial Court's Indicated Disposition Was Unauthorized and the Trial Court Erroneously Failed to Advise Appellant of a Direct Consequence of Her Admissions.

1. *Pertinent Facts.*

On April 11, 2011, the court called the case for adjudication. Appellant's counsel represented that another prosecutor had offered to dismiss count 1 if appellant admitted count 2 and agreed to be placed home on probation with 10 days of juvenile alternative work service. Appellant's counsel indicated appellant wished to accept the offer.

During the prosecutor's later taking of the admission, the prosecutor represented the parties agreed appellant would admit count 2 and the court would dismiss count 1 and place appellant home on probation with various conditions. Appellant acknowledged she wanted to do this. Appellant indicated she understood the maximum period of confinement would be three years. Appellant waived her constitutional rights, the

prosecutor explained certain consequences of the admission,[1] and appellant indicated she understood those consequences. Appellant acknowledged she was entering her admissions freely and voluntarily because she felt it was in her best interests. However, appellant did not then admit count 2.

Instead, after the prosecutor finished his inquiry and asked if the court wished to inquire further, the court asked, "Why not [Welfare and Institutions Code section] 790 for this child?" After appellant's counsel indicated another prosecutor had not proposed such a disposition, the court said, "Plead it open to both counts." The court later said, "if she pleads open, I'll make it 790." The issue of a continuance arose and the court commented, "I'm going to put it over for the 790 but she has to plead to both counts."

After appellant's counsel conferred with appellant, appellant's counsel indicated appellant would enter admissions. Appellant's counsel later stated, "She'll take the court's offer." The court asked, "Admit open to the court?" and appellant's counsel replied yes.

The court asked the prosecutor to resume taking admissions, stated appellant would admit both counts, and indicated the maximum period of confinement would be six years "with this open admission." The prosecutor resumed, reiterating what the court had indicated, and explaining to appellant that "rather than receiving the home on probation [as] I explained earlier, you are going to be given 790 which is an opportunity to get this case completely dismissed off your record which is the offer by the court."

Appellant indicated she understood and she later admitted both counts. Appellant's counsel joined in the waivers and concurred in the admissions. The court found appellant knowingly and intelligently waived her constitutional rights, understood the consequences of her admissions, and made her admissions freely and voluntarily.

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[1] In particular, the prosecutor explained appellant could serve additional time in custody if she violated probation or if she was on probation or parole in another case at the time of her admission in the present case. The prosecutor also explained the consequences of appellant's admission if she were not a United States citizen, and explained the court would require of her a DNA sample, restitution, and a restitution fine.

The court also found both counts were admitted as true, and appellant was a person described by Welfare and Institutions Code section 602. The court continued the case to May 9, 2011, for the dispositional hearing.

After April 11, 2011, but before May 9, 2011, appellant misbehaved. On May 9, 2011, the court, inter alia, ordered appellant detained. Appellant's counsel commented to the court, "[appellant] has a 790, she pled open to the court for a 790. It was your idea. You told me to talk to my client about it. She was coming for the dispo today." After discussions concerning appellant's misbehavior, the court continued the hearing to May 16, 2011.

On May 16, 2011, the court granted DEJ, imposed probation conditions, and indicated appellant's maximum period of confinement was five years eight months. After May 16, 2011, but before June 1, 2011, appellant again misbehaved. On June 1, 2011, the court stated, "790 is lifted." The court ordered appellant detained and continued the case to June 16, 2011, for a dispositional hearing.

On June 16, 2011, appellant's counsel indicated as follows. On April 11, 2011, appellant had been inclined to accept the People's offer because of the collateral consequences associated with count 1. On the latter date, the People were in the process of taking admissions from appellant when the court indicated it could grant DEJ. As of June 16, 2011, the People's April 11, 2011, plea bargain offer remained open. Appellant's counsel asked the court to allow appellant to withdraw her admissions "because there can't be a 790 on count 1."

The court asked what appellant's counsel meant by the above quoted comment. Appellant's counsel explained count 1 was a robbery, and robbery was an offense specified in Welfare and Institutions Code section 707, subdivision (b); therefore, the court could not legally grant DEJ "on that charge."

After the court expressed doubts about permitting appellant to return home, the court inquired whether the fact it could not legally have granted DEJ necessarily meant appellant could withdraw her admissions. Appellant's counsel indicated he needed to research the issue.

The court suggested a motion to withdraw an admission could be based on the absence of a knowing and intelligent waiver when the minor was unaware of the possible consequences of the admission. Appellant's counsel replied appellant was "aware" but "if it couldn't be imposed, then it shouldn't have been."

The court indicated it had been present on May 16, 2011. The court then stated, "There were open discussions, and the court gave his colloquy regarding what that admission would mean. [¶] You were present. You took the time to advise [appellant]."[2] Appellant's counsel indicated he had done so.

The court then stated, "The People also advised [appellant] of those possible consequences. The court did grant 790, although it appears it was false on the court's part, but the issue then comes to whether or not the waiver, was it not [knowing, intelligent, and voluntary]." Appellant's counsel replied, "I believe it was all of that." The court then stated, "So I think based on that, the court is going to deny the motion to withdraw the plea. The court is going to make the minor [a ward] of the court pursuant to 602 of the Welfare and Institutions Code." The court ordered appellant placed home on probation and ordered that the conditions imposed on May 16, 2011, were in full force and effect. Appellant's counsel later objected to the May 16, 2011, and June 16, 2011, dispositions, and the court noted the objections. We will present additional facts below.

b. *Analysis.*

(1) *Applicable Law.*

(a) *Welfare and Institutions Code Section 790.*

Welfare and Institutions Code section 790, et seq. were enacted in March 2000 as part of Proposition 21, The Gang Violence and Juvenile Crime Prevention Act of 1998. The sections provide that in lieu of jurisdictional and dispositional hearings, a minor may admit allegations contained in a Welfare and Institutions Code section 602 petition and waive time for the pronouncement of judgment. The court defers entry of judgment.

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[2] On April 11, 2011, appellant's counsel conferred with appellant before she made her admissions that day.

After the successful completion of a term of probation, on the motion of the prosecution and with a favorable recommendation from the probation department, the court is required to dismiss the charges. The arrest upon which the court deferred judgment is deemed never to have occurred, and any records of the juvenile court proceeding are sealed. (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1121-1122 (*Luis B.*).)

In order for the court to grant DEJ, a minor must be eligible under Welfare and Institutions Code section 790, subdivision (a). (*Luis B.*, *supra*, 142 Cal.App.4th at p. 1122.) Welfare and Institutions Code section 790, states, in relevant part, "(a) Notwithstanding . . . any . . . provision of law, this article shall apply whenever a case is before the juvenile court for a determination of whether a minor is a person described in Section 602 because of the commission of a felony offense, if all of the following circumstances apply: [¶] . . . [¶] (2) The offense charged is not one of the offenses enumerated in subdivision (b) of Section 707." Attempted robbery (count 2) is not an offense enumerated in Welfare and Institutions Code section 707, subdivision (b), but robbery (count 1) is an enumerated offense (Welf. & Inst. Code, § 707, subd. (b)(3)).

(b) *Dispositional Schemes and the Advisement of Consequences*.

There are three distinguishable dispositional schemes: an open plea, an indicated sentence, and a plea bargain. First, "An open plea is one under which the defendant is not offered any promises. [Citation.] In other words, the defendant 'plead[s] unconditionally, admitting all charges and exposing himself to the maximum possible sentence if the court later chose to impose it.' [Citation.]" (*People v. Cuevas* (2008) 44 Cal.4th 374, 381, fn. 4.)

Second, an indicated sentence is a trial court indication of the unbargained-for sentence that the court would impose whether the defendant pled guilty or went to trial, and that the court will, if a given set of facts is confirmed, impose in the exercise of its sentencing discretion upon a plea of guilty to all charges and upon an admission to all allegations. The validity of an indicated sentence does not depend upon prosecutorial agreement therewith. A guilty plea based on an indicated sentence is a conditional plea of guilty, i.e., a guilty plea entered on the condition the indicated sentence will be

imposed. (*People v. Feyrer* (2010) 48 Cal.4th 426, 434-435, fn. 6; *People v. Labora* (2010) 190 Cal.App.4th 907, 910, 916; *People v. Lopez* (1993) 21 Cal.App.4th 225, 230; *People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1264-1265, 1270-1271 *(Ramos)*; *People v. Superior Court* (*Felmann*) (1976) 59 Cal.App.3d 270, 276.)

Third, a plea bargain is a dispositional bargain between the parties and approved by the court. (*People v. Orin* (1975) 13 Cal.3d 937, 942.) We determine the nature of a dispositional scheme; the trial court's characterization of it is not controlling. (Cf. *Ramos, supra*, 235 Cal.App.3d at pp. 1264, 1266-1267.)

Finally, before taking a guilty plea, a trial court must advise the defendant of the direct consequences of the plea. Trial court error in failing to do so is waived absent timely objection by the defendant at or before sentencing. The plea may be set aside as a result of the trial court's error only upon a demonstration of prejudice, i.e., that it is more likely than not the defendant would not have pled guilty if the defendant had been properly advised. (*People v. Walker* (1991) 54 Cal.3d 1013, 1022-1023.) The above cases pertain to adult criminal proceedings but we see no reason not to apply the principles of these cases to the instant case, as the parties concede we may do with respect to plea bargaining. (See also *In re Michael B.* (1980) 28 Cal.3d 548, 553-554 [minor's right in juvenile court to advisement of consequences].)

(2) *Application of the Law to This Case.*

In the present case, the trial court told appellant to "[p]lead . . . open to both counts." However, this and similar comments by the court did not make appellant's April 11, 2011, admissions to counts 1 and 2 an open plea. Appellant did not plead unconditionally, and did not merely expose herself to the maximum possible disposition if the court later chose to impose it.

Instead, on April 11, 2011, the court stated, "if she pleads open, *I'll make it* 790." (Italics added.) After the prosecutor resumed taking the admissions at the court's request, the prosecutor told appellant, "you are going to be given 790." Accordingly, on May 16,

2011, the court granted diversion.[3] In sum, because the trial court on April 11, 2011, indicated that, upon appellant's admissions to counts 1 and 2, the court *would* grant DEJ, the dispositional scheme was not an open plea.

Nor was the dispositional scheme a plea bargain. The prosecutor *initially* made a plea bargain offer involving, inter alia, an admission to count 2 in return for the dismissal of count 1, but appellant never admitted count 2 in response to that offer and the court never approved any bargain arising therefrom. Proceedings pertaining to the plea bargain offer by the prosecutor ended when the court asked why Welfare and Institutions Code section 790 did not apply to appellant. Subsequent proceedings ensued with the goal the court would grant DEJ.

After the court asked about Welfare and Institutions Code section 790, the court stated, "if she pleads open, *I'll* make it 790." (Italics added.) Appellant's counsel indicated appellant would take the "court's" offer. After the prosecutor resumed taking the admissions at the court's request, the prosecutor told appellant, "you are going to be given 790 . . . which is the offer *by the court*." (Italics added.) Appellant subsequently admitted both counts. Her admissions were the juvenile equivalent of conditional pleas of guilty pursuant to an indicated sentence, i.e., they were conditional admissions pursuant to an indicated disposition.

Robbery is an offense enumerated in Welfare and Institutions Code section 707, subdivision (b)(3). Accordingly, the trial court could not grant DEJ as to that offense (count 1), a point respondent appears to concede. To the extent the trial court, as part of its April 11, 2011, indicated disposition, told appellant the court would grant DEJ as to count 1, the indicated disposition was unlawful and unauthorized, and the court could not grant DEJ as to that count.

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[3] The court and prosecutor told appellant during the taking of her admissions with respect to the granting of DEJ that her maximum confinement period would be six years. However, we believe the parties understood this would apply only if appellant failed to satisfactorily complete DEJ. When a defendant successfully completes DEJ, the court is required to dismiss the charges, in which case there would be no maximum confinement period.

Moreover, on April 11, 2011, the court asked, "Why not 790 for this child?" The court later stated, "[p]lead it open to both counts" and "if she pleads open, I'll make it 790." During the later advisement of consequences, the prosecutor stated to appellant, "you are going to be given 790 which is an opportunity to get this *case* completely dismissed off your record[.]" (Italics added.) The prosecutor asked whether appellant understood "that," and she replied yes. Appellant later entered her admissions to counts 1 and 2. The court did not in these comments expressly state it would grant DEJ only as to count 2; instead, the comments implied the court would grant DEJ as to both counts, and the entire case would be dismissed upon appellant's satisfactory completion of the DEJ program.

This is confirmed by the subsequent proceedings. After appellant's admissions, the court told appellant, "you are going to have to work for me if you want to get this *case* dismissed. I'm giving you an opportunity to get this *case* dismissed as if it never happened, . . ." (Italics added.) The court made similar comments later.

On May 16, 2011, appellant's counsel indicated to the court that he had advised appellant that even if she were "lucky enough to get the 790," the court could rescind a DEJ grant if she later misbehaved. The court indicated that that was true, then the court stated, "[e]specially if she admitted open to a second degree robbery as well as to a second degree attempted robbery. That means the maximum confinement time is five years, eight months." The court later indicated it would grant DEJ, and told appellant, "I'll give you an opportunity to get this *case* dismissed." (Italics added.) The court subsequently granted DEJ. On June 16, 2011, the court stated, "The court did grant 790, although it appears it was false on the court's part[.]"

The proceedings on April 11, 2011, after appellant made her admissions, as well as the proceedings on May 16, and June 16, 2011, confirm the indicated disposition was not a grant of DEJ as to count 2 only, but instead a grant of DEJ as to both counts, including dismissal of the entire case upon appellant's satisfactory completion of the DEJ program.

We conclude appellant entered her admissions to counts 1 and 2 pursuant to an indicated disposition the court would grant DEJ as to both counts, i.e., an indicated disposition that was unauthorized because count 1 was an offense enumerated in Welfare and Institutions Code section 707, subdivision (b).[4]

When a defendant pleads guilty pursuant to an indicated sentence which includes an unauthorized term, the trial court is unable to impose the indicated sentence and the defendant must be allowed to withdraw his or her guilty plea. (Cf. *Lopez, supra*, 21 Cal.App.4th at p. 228, 230-231, see *Felmann, supra,* 59 Cal.App.3d at p. 276.)

Respondent suggests appellant is estopped from attacking her "plea bargain" for a Welfare and Institutions Code section 790 disposition and no violation of her "plea agreement" occurred. However, estoppel is inapplicable because appellant's April 11, 2011, admissions did not constitute a plea bargain but were unbargained-for conditional admissions pursuant to an indicated disposition. Similarly, no plea "agreement" occurred. Finally, imposition of the indicated disposition was an unauthorized disposition, and an unauthorized disposition may be corrected at any time. (Cf. *People v. Huff* (1990) 223 Cal.App.3d 1100, 1106.)

The court also, on April 11, 2011, erroneously failed to advise appellant of the consequences of her admissions by failing to advise her that the indicated disposition was unauthorized because of count 1. The error was prejudicial because the court could not grant, and appellant could not receive the benefits of, DEJ, including, e.g., the sealing of records after successful completion of the program. Moreover, as the result of the error, appellant stood adjudicated of committing counts 1 and 2, although before the court

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[4] We note *Luis B.* stated, "After the successful completion of a term of probation, on the motion of the prosecution and with a positive recommendation from the probation department, the court is required to dismiss the *charges*." (*Luis B., supra*, 142 Cal.App.4th at p. 1122, italics added.)

began discussing DEJ, appellant was in the process of admitting count 2 and dismissing count 1 pursuant to the prosecutor's plea bargain offer.[5]

We will reverse the judgment, vacate appellant's admissions, and remand the matter for further proceedings. We express no opinion concerning what proceedings should occur following remand.

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[5] We reject respondent's argument appellant waived this issue. The "error is waived if not raised at or before sentencing." (*People v. Walker, supra*, 54 Cal.3d at p. 1023.) A juvenile court does not "sentence" a minor. (*In re J.M.* (2009) 170 Cal.App.4th 1253, 1256.) Instead, the court enters a dispositional order. On June 16, 2011, the court entered a dispositional order placing appellant home on probation. On that date, and before the court entered that order, appellant effectively objected the court could not grant DEJ because count 1 was an offense enumerated in Welfare and Institutions Code section 707, subdivision (b). Even if the issue were waived, we would reach it to forestall a claim of ineffective assistance of counsel. (See *People v. Turner* (1990) 50 Cal.3d 668, 708.) Moreover, we are mindful that on June 16, 2011, appellant's trial counsel indicated that appellant was "aware" of the possible consequences of her admission and that appellant's counsel "advise[d]" appellant. However, appellant's counsel did not explicitly identify the consequences to which he was referring. The court later commented the prosecutor "also advised [appellant] of those possible consequences." Those "possible consequences" were those specified in footnote 1, *ante*. These were standard possible consequences of an admission, and they did not include the possible consequence the indicated sentence included an unauthorized term. In other words, the record fails to demonstrate anyone advised appellant of *that* consequence. Appellant's counsel later conceded the "waiver" was knowing, intelligent, and voluntary. However, first, the only waiver that occurred prior to appellant's admissions on April 11, 2011, was a waiver of her constitutional rights. Second, the concession of appellant's trial counsel occurred in the context of a discussion about possible consequences that did not explicitly refer to an indicated sentence that included an unauthorized term.

DISPOSITION

The judgment (order placing appellant home on probation) is reversed, appellant's admissions that she committed the offenses alleged in counts 1 and 2 are vacated, and the matter is remanded to the trial court for further proceedings consistent with this opinion.

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KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.