Filed 12/9/14 P. v. Estrada CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. VICENTE ESTRADA, Defendant and Appellant.	B255073 (Los Angeles County Super. Ct. No. VA124010)

APPEAL from a judgment of the Superior Court of Los Angeles County. Yvonne T. Sanchez, Judge. Reversed with directions.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Jonathan J. Kline and Jonathan M. Krauss, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Vicente Estrada appeals from the judgment entered following a plea of nolo contendere to a single count of committing a forcible lewd act upon a child under the age of 14, in violation of Penal Code section 288, subdivision (b)(1).

Defendant contends the trial court abused its discretion by denying his motion to withdraw his plea, which was based upon newly discovered evidence. We agree. The trial court denied the motion because it erroneously believed the proposed testimony was inadmissible hearsay and that defendant had made unspecified "admissions" that were not presented to, or described for, the court. Accordingly, we reverse and remand for reconsideration of defendant's motion.

BACKGROUND

Defendant was initially charged with two counts of committing a lewd act upon a child under the age of 14, in violation of Penal Code section 288, subdivision (a).[1] However, after the victim, Angie L.,[2] testified to additional acts at the preliminary hearing, the prosecutor filed a five-count information on December 18, 2012, alleging, in addition to the two section 288, subdivision (a) counts, oral copulation of a child under 14 (§ 269, subd. (a)(4)), and two counts of committing a forcible lewd act upon a child under the age of 14 (§ 288, subd. (b)(1)).

On August 7, 2013, defendant entered into a negotiated plea agreement, pursuant to which he pleaded nolo contendere to a single count of violating section 288, subdivision (b)(1) and waived all of his presentence credits up to the date of the plea in exchange for an 8-year prison sentence.

On December 5, 2013, before defendant was sentenced, he filed a written motion to withdraw his plea on the ground it "was entered as a result of mistake, ignorance, inadvertence or some other factor that demonstrates overreaching." Attached to the

---

[1] Undesignated statutory references are to the Penal Code.

[2] Angie was the daughter of defendant's housekeeper and a friend of defendant's daughter.

motion were a letter from Victor G. and a declaration by defense counsel explaining he had received Victor's letter after entry of the plea. Victor's letter stated he had known defendant's family for a few years and had known Angie for about a year because they went to the same school and were Facebook friends. Victor said he spent time at defendant's home during the summer and noticed how sad defendant's daughters were. He "decided to meet with Angie after [defendant] accepted a plea deal." They met at a Starbucks, but Angie was in a hurry. Victor related, "As we were leaving I was very nervous but I asked her if [defendant] really touched her. She looked at me and said yes! I asked where and how? She laughed and asked why? I said if the topic made her unsafe let's talk about something else. In a laughing way she said that [defendant] never touched her. Her mom made her say that, but she doesn't care, I can tell whoever I want." Victor was angry and wanted to call the police, but instead called defendant's daughter, who told him to write a letter to defendant's attorney. Victor included his phone number and e-mail address in his letter.

The prosecutor opposed the motion, arguing "a subsequently discovered exculpatory witness" was not a ground for withdrawing a plea.

At the hearing on the motion, defense counsel informed the court that Victor was present to testify "if the court wants to hear from him." Counsel also explained the history of the proceedings and stated, "Had I known what the victim's position was and what actually happened that she actually told people that [defendant] never actually touched her, I would have never plead that case. We were very close to go[ing] to trial on it because of some other issues that I thought that the victim had with credibility. [¶] Had I known that she has told people that, 'You know what, that he really hasn't touched me and other people made me do it,' I would not have advised him to take this plea. I would have gone to trial. I would have taken the chance." The prosecutor continued to argue that "subsequently discovered evidence to disprove what he is . . . just isn't relevant to this motion."

The trial court asked, "Were there certain admissions that the People had as well?" The prosecutor replied, "Yes, there certainly were." Defense counsel acknowledged, "There were admissions." The court asked defense counsel, "So you have a witness that will claim to say that someone else said, a hearsay statement?" Defense counsel described the gist of Victor's proposed testimony. Without testimony from Victor, the court denied the motion, stating, "[T]he defendant has failed to make a showing of good cause to withdraw the plea, has failed to produce clear and convincing evidence and therefore has failed to meet their burden."

In accordance with the plea agreement, the court then sentenced defendant to prison for 8 years. It granted his request for a certificate of probable cause to appeal (§ 1237.5), and defendant filed the instant appeal.

DISCUSSION

Defendant contends the trial court abused its discretion by denying his motion to withdraw his plea. He argues, "[T]he court focused on a meaningless factor, namely whether there was evidence of guilt beyond the testimony of the complaining witness, and not on whether [defendant] entered his plea based on mistake or ignorance or some other factor which, by the time of judgment, no longer supported the plea." He further argues, "Given that the new evidence, which could be seen as an admission of perjury by the complaining witness, was strong if the trier of fact could be convinced that the statement was serious and true, it clearly undermined the basis for [defendant's] initial acceptance of a plea agreement."

1. The law regarding motions to withdraw guilty pleas

In pertinent part, section 1018 provides, "On application of the defendant at any time before judgment . . . , the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted. . . . This section shall be liberally construed to effect these objects and to promote justice."

Cases construing section 1018 have held that good cause for withdrawing a guilty plea includes mistake, ignorance, inadvertence, duress, ineffective assistance of counsel,

or any other factor overcoming the free exercise of judgment. (*People v. Cruz* (1974) 12 Cal.3d 562, 566; *People v. Breslin* (2012) 205 Cal.App.4th 1409, 1416 (*Breslin*); *People v. Johnson* (1995) 36 Cal.App.4th 1351, 1356; *People v. Sandoval* (2006) 140 Cal.App.4th 111, 123.) The defendant has the burden of showing good cause, i.e., that he or she pleaded guilty or nolo contendere through mistake, ignorance, etc., by clear and convincing evidence. (*Cruz*, at p. 566; *People v. Barteau* (1970) 10 Cal.App.3d 483, 486.) No authority requires a defendant to show that he or she is not guilty in order to withdraw his or her plea.

On appeal, the trial court's ruling is reviewed for abuse of discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.) A reviewing court must adopt factual findings by the trial court that are supported by substantial evidence. (*Ibid.*)

"Notwithstanding defendant's burden of producing clear and convincing evidence that a guilty plea was not the product of a knowing, intelligent and voluntary decision, and notwithstanding the deference to be afforded the trial court's resolution of credibility conflicts, this court should not rubberstamp a decision of the trial court when the totality of the circumstances indicates the court's discretion has been abused." (*People v. Harvey* (1984) 151 Cal.App.3d 660, 667 (*Harvey*).) "'[T]he test of abuse in such circumstances is whether after consideration of all relevant factors there was good cause shown for granting the motion and whether justice would be promoted thereby.'" (*Ibid.*) "'"[T]he withdrawal of a plea of guilty should not be denied in any case where it is in the least evident that the ends of justice would be subserved by permitting the defendant to plead not guilty instead; and it has been held that the least surprise or influence causing a defendant to plead guilty when he has any defense at all should be sufficient cause to permit a change of plea from guilty to not guilty."' [Citations.]" (*People v. Ramirez* (2006) 141 Cal.App.4th 1501, 1507.)

2. Newly discovered evidence may constitute good cause for withdrawing a guilty plea

In the trial court and on appeal, the People contend that the discovery of new evidence supporting a defense cannot constitute good cause for withdrawing a guilty plea. There is, however, no authority excluding newly discovered evidence as a form of "good cause" for withdrawing a plea. Indeed, the case upon which the Attorney General relies for this proposition, *Breslin*, *supra*, 205 Cal.App.4th 1409, expressly acknowledged the possibility of newly discovered evidence as a valid ground for withdrawing a plea. (*Id.* at pp. 1417–1418.)

Appellate courts have reversed denials of motions to withdraw a guilty plea where the defendant was unaware, at the time he or she pleaded, of evidence supporting a potentially meritorious defense. In *Harvey*, *supra,* 151 Cal.App.3d 660, the defendant moved to withdraw her plea after discovering that a psychiatrist retained by the defense had opined she was incapable of premeditating, deliberating, or harboring malice aforethought. The psychiatrist had communicated her opinion to defense counsel before the defendant pleaded, but counsel did not inform the defendant of the psychiatrist's opinion. (*Id.* at pp. 665–666.) The appellate court reversed the trial court's denial of defendant's motion to withdraw her guilty plea, stating, "Defendant cannot be said to have bargained away her right to have a trier of fact evaluate [the psychiatrist's] testimony when she did not know what that testimony would be. . . . [¶] . . . Even assuming defendant did have knowledge of the consequences of her plea, it is clear from the record that she did not have knowledge of a defense, not only potentially meritorious, but absolutely critical to her case. Thus we conclude that, under all the circumstances of this case, the trial court abused its discretion in denying defendant's motion to withdraw her guilty plea." (*Id*. at pp. 670–671.)

In *Ramirez, supra,* 141 Cal.App.4th 1501, the defendant moved to set aside his plea of nolo contendere to charges of armed robbery and evading arrest after defense counsel discovered a supplemental police report setting forth a statement by the

defendant's neighbor that tended to exculpate defendant with respect to carjacking charges that had been dismissed as part of his plea agreement, but not on the charges to which defendant had pleaded. (*Id.* at pp. 1504–1505.) The defendant argued "his ignorance of the second report materially affected his decision to accept the plea agreement," in that he believed "'there was no favorable evidence to my case, that I had no way to fight my case, that I would lose the case and that I could get over 20 years in prison.'" Whereas, "[i]n reality, the police had identified a witness who could testify in [the defendant's] favor as to the carjacking charges." (*Id.* at p. 1507.)

The appellate court in *Ramirez* concluded the defendant had made a sufficient showing of good cause to withdraw his plea, and the trial court had abused its discretion by denying the motion. The court stated, "Although the most favorable information went to charges that were ultimately dismissed, the report still altered [the defendant's] potential custody exposure." (*Ramirez, supra*, 141 Cal.App.4th at p. 1507.) Although Ramirez still faced a "significant sentence" on the other charges, "the potential elimination of the carjacking charges and strikes would have altered plea negotiations." (*Ibid*.) The court continued, "Here, [the defendant] has established by clear and convincing evidence that the prosecution's withholding of favorable evidence affected his judgment in entering his plea, rendering the waiver of rights involuntary. The fact that the new information did not uncontrovertibly exonerate [the defendant] is beside the point. The supplemental report identified new defense witnesses, potentially reduced [the defendant's] custody exposure, and provided possible defenses to several charges, thereby casting the case against him in an entirely different light. [The defendant] suffered prejudice by his ignorance because earlier discovery of the report would have affected his decision to enter a plea before the preliminary hearing. In contrast, if the plea is vacated, the People would suffer little or no prejudice. The case was at an early stage, and the People have made no showing that witnesses have become unavailable or their memories have faded." (*Id.* at pp. 1507–1508.)

Although the prosecution in *Ramirez* had violated its duty to disclose the partially exculpatory supplemental police report, the appellate court's conclusion that the trial court abused its discretion by denying the motion to withdraw the guilty plea was based upon Ramirez's ignorance of the report and the effect that had upon his decisionmaking process and the voluntariness of his waiver of rights in conjunction with his guilty plea, not upon the prosecutor's misconduct. *Ramirez* thus presents an example of withdrawal of a guilty plea on the basis of newly discovered evidence.

In *Breslin*, *supra*, 205 Cal.App.4th 1409, upon which the Attorney General relies, the defendant was charged with domestic violence against her live-in boyfriend. The police observed the dried blood on the victim, and a roommate of the couple told the police he had seen blood running down the victim's neck when the victim used the roommate's phone to call the police. (*Id.* at p. 1413.) After Breslin entered a negotiated guilty plea, the victim provided a declaration to defense counsel stating he tripped, grabbed Breslin, and was injured when Breslin accidentally fell on top of him. He claimed he had previously gone to the prosecutor's office to explain this, but a receptionist had told him no one was available to speak to him. (*Id.* at p. 1414.) Breslin moved to withdraw her guilty plea on the ground her attorney's ineffective assistance in failing to interview the victim prevented her from making an intelligent and knowing decision about whether to waive her right to a jury trial. (*Id.* at p. 1415.)

The appellate court in *Breslin* affirmed the trial court's denial of Breslin's motion to withdraw her guilty plea. It noted, "The timing of the victim's eventual recantation is somewhat suspect." (*Breslin*, *supra*, 205 Cal.App.4th at p. 1416.) The court concluded, "Here, the trial court was right to view the victim's new statements with skepticism. The instant case was the third reported incident of alleged violence perpetrated by Breslin against this victim. Indeed, at the time of the incident there was a current emergency protective order against Breslin with the victim listed as the protected party. Further, even in his statement to investigator Cooke, the victim admitted that Breslin had been violent in the past." (*Id.* at p. 1417.) The court noted, however, "It might be a different

matter if there were actually persuasive, independent evidence the victim had committed perjury or if the prosecution had withheld critical evidence. But we emphasize that there is good reason to believe the victim's new account was the product of latent misgivings about Breslin facing criminal punishment. [¶] After evaluating the totality of the circumstances, the trial court acted well within its discretion in ruling that Breslin failed to meet her burden by clear and convincing evidence." (*Id.* at pp. 1417–1418.)

Thus, although Breslin's newly discovered evidence was deemed inadequate to require the trial court to allow her to withdraw her plea, the appellate court in *Breslin* acknowledged that under different circumstances, newly discovered evidence might provide good cause for withdrawal of a plea. In the present case, unlike *Breslin*, defendant had obtained newly discovered "independent evidence the victim had committed perjury." (*Breslin*, *supra*, 205 Cal.App.4th at p. 1417.) The newly discovered evidence here potentially constituted good cause for allowing defendant to withdraw his plea.

3. The trial court abused its discretion by denying defendant's motion to withdraw his plea of nolo contendere

It appears the trial court concluded defendant had made an insufficient showing of good cause for withdrawing his plea for two reasons: the new evidence was inadmissible hearsay and defendant had made "admissions." We conclude neither of these reasons was a sound basis for rejecting defendant's good cause showing, and the court's denial of the motion therefore was an abuse of discretion.

With respect to hearsay, the court erroneously failed to consider the nature and purpose of the newly discovered evidence. At the preliminary hearing, Angie testified that defendant repeatedly touched her inappropriately and orally copulated her. Victor's letter set forth an inconsistent statement by Angie, i.e., defendant had not touched her.[3]

---

[3] Although Victor's letter was itself inadmissible as hearsay, he was available to testify at the hearing on defendant's motion, and presumably at trial, thereby eliminating any hearsay problem. The trial court did not indicate its denial of defendant's motion

Had the case gone to trial and Angie again testified that defendant committed the acts underlying the charges, Victor's testimony that Angie said defendant had not touched her would not be hearsay evidence if introduced as impeachment evidence, that is, to show Angie had made a statement inconsistent with her testimony. (*People v. Archer* (2000) 82 Cal.App.4th 1380, 1391.) In addition, if Angie were asked about making the statement to Victor (Evid. Code, § 770), Victor's proposed testimony about Angie's denial that defendant had touched her would be admissible for its truth pursuant to Evidence Code section 1235. The trial court therefore erred by refusing to consider Victor's proposed testimony on the theory it was hearsay.

With respect to the trial court's reliance on defendant's admissions, the record before us does not contain evidence of any such admissions.[4] There were no references to any such admissions at the preliminary hearing, and the appellate record similarly is devoid of any admissions other than those inherent in the plea itself. The admissions inherent in a plea cannot be deemed a ground for denying a motion to withdraw the plea; otherwise section 1018 would be meaningless. The statements by the victim to Victor G. so conflict with a finding of guilt that they are significant notwithstanding whatever admissions defendant may have made.

We conclude the trial court abused its discretion by refusing to consider defendant's potentially exonerating new evidence in the erroneous belief it was inadmissible hearsay and by giving any weight to the existence of "admissions" that had not been presented to, or even described for, the court. We do not hold defendant's motion necessarily should have been granted, but only that the trial court's errors resulted in a failure to properly consider the merits of his motion.

---

was based on the form in which defendant presented the newly discovered evidence, i.e., a letter instead of a declaration.

[4] The Attorney General's brief contains a single passing reference—in argument—to a "written confession." This reference is not supported by the record and the prosecutor never referred to a written confession in the trial court.

On remand, a new hearing on the motion must be held. If Victor is available and willing to testify, the trial court should consider allowing him to testify at an evidentiary hearing.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court to reconsider defendant's motion to withdraw his nolo contendere plea and decide whether to conduct an evidentiary hearing on the motion, including taking testimony from Victor G.

NOT TO BE PUBLISHED.

MILLER, J.*****

We concur:

ROTHSCHILD, 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.