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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JUAN CARLOS VASQUEZ, Defendant and Appellant.	B270007 (Los Angeles County Super. Ct. Nos. VA139145 & BA419744)

APPEAL from judgments of the Superior Court of Los Angeles County, Olivia Rosales, Judge. Affirmed.

Steven A. Brody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, 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.

Appellant Juan Carlos Vasquez appeals from judgments entered following negotiated plea bargains in two cases. He contends the trial court committed error by imposing sentences that varied from the original terms of the plea bargains. We find no error and affirm.

PROCEDURAL SUMMARY

In case BA419744, appellant was charged on March 12, 2014, with one count of grand theft by embezzlement in violation of Penal Code section 487, subdivision (a).[1] Appellant pled guilty and, on October 21, 2014, he was sentenced to three years in state prison; execution of the sentence was suspended and he was placed on formal probation for three years on various conditions, including confinement of 180 days in county jail.

In case VA139145, appellant was charged on June 19, 2015, with felony domestic violence and misdemeanor cruelty to a child in violation of section 273.5, subdivision (a), and section 273a, subdivision (b). Appellant was arraigned on June 19, 2015, at which time he entered a plea of not guilty to both charges. At the arraignment, the court expressly ordered appellant to have no contact with Jasmin Solis and Yaretzi V., the two alleged victims. Because these two offenses occurred during appellant's period of probation in case BA419744, he was also charged with a violation of probation in that case.

On August 31, 2015, appellant appeared in court on both cases, and the parties entered into a plea bargain. They agreed that appellant would plead no contest to the felony domestic violence charge in case VA139145 and admit that he violated his probation in case BA419744; appellant would serve a total term

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1 All further statutory references are to the Penal Code.

of three years in state prison, consisting of his suspended three year prison term in case BA419744, and a concurrent two-year prison term in case VA139145. The parties also agreed that appellant would receive credit for the time he had spent in custody on both cases: 180 days in case BA419744, and 110 days since his arrest in case VA139145.

The court accepted the proposed agreement, and it was explained to appellant. Both orally and in writing, appellant was advised of the terms and consequences of the plea and his applicable constitutional rights, and appellant waived his rights and agreed to all terms. Appellant entered his plea of no contest to a violation of section 273.5, subdivision (a) in case VA139145, and he admitted a probation violation in case BA419744. Sentencing was continued, and a formal protective order was issued, directing appellant to have no contact with Jasmin Solis for 10 years.

Appellant appeared for sentencing on October 5, 2015. At the hearing, the court learned that appellant had violated the protective orders by sending two letters to Jasmin Solis, one on August 31, 2015 and another on September 14, 2015. Both letters violated the interim protective order entered on June 19, 2015, and the 10-year protective order entered on August 31, 2015. The court and counsel had a discussion about the letters off the record, and the proceedings were recessed so that defense counsel could speak with appellant.

When the court reconvened, appellant apologized for sending the letters, stating that he had been "a little emotional" and could not contain his emotions. Defense counsel referred to a discussion with appellant and stated that "he knows that he will be required to waive his back time in both [cases]." The court then announced that its initial intention was "to vacate the plea on admission and set this for a violation hearing, just set this for trial, the 273.5, the domestic violence charge, with the strike." But the court indicated it was willing to accept a proposal by defense counsel: "My understanding is your attorney has asked that if I would accept the plea and sentence you to the agreed-upon sentence, provided you waive the back time . . . ."

The trial court gave appellant the choice of withdrawing his plea or accepting the modification proposed by his attorney, stating: "Do you wish to -- you have a right to withdraw your plea since my initial indication was not to go along with this agreed-upon sentence. I would grant that and restore you back to the position that you were at; meaning, set it for trial or a violation hearing. Or you can agree to the agreed-upon sentence now, the amended and changed agreed-upon sentence. [¶] What do you wish to do, Mr. Vasquez?" Appellant promptly responded: "Proceed with the amended sentence."

The court then sentenced appellant to a three-year term in state prison for grand theft in case BA419744 and a concurrent two-year term for domestic violence in case VA139145, "with no pre-sentence custody credit pursuant to the amended agreement."

DISCUSSION

In his appeal, appellant challenges the modified sentences which removed the custody credits that were part of the original plea bargains. He asserts the trial court committed error by (1) failing to properly advise him of his right to withdraw his plea entered on August 31, 2015, as required by section 1192.5; and (2) failing to secure appellant's knowing and voluntary agreement to the terms of the modified sentence imposed on October 5, 2015.[2] In his reply brief, appellant has conceded that his first claim has no merit, because the court properly advised him of his right to withdraw the plea. As we shall explain, by conceding his first claim, appellant has effectively acknowledged that there was no error at all.

Section 1192.5 prohibits a court from imposing punishment that exceeds the terms of a plea bargain. It states in relevant part: "Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea."

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[2] Appellant filed an application for a certificate of probable cause to appeal as to his second claim, which was denied by the trial court. Appellant then filed a petition for writ of mandate in case No. B271607, and on April 27, 2016, we ordered the petition to be heard concurrently with this appeal. Having found no merit in appellant's arguments, we will issue a separate order denying the petition in case No. B271607.

Section 1192.5 nevertheless allows the court to reevaluate punishment before sentence is imposed; and if the court believes greater punishment is warranted, the defendant must be advised of the right to withdraw the plea. It states in relevant part: "If the court approves of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in that case, the defendant shall be permitted to withdraw his or her plea if he or she desires to do so."

It is well settled that a court has wide discretion to withdraw its approval of a plea agreement if it chooses to impose a more severe sentence. As our Supreme Court stated in *People v. Johnson* (1974) 10 Cal.3d 868, 873 (*Johnson*), "the court, upon sentencing, has broad discretion to withdraw its prior approval of a negotiated plea." The court's discretion has been described as a "near-plenary power" under section 1192.5. (*People v. Stringham* (1988) 206 Cal.App.3d 184, 195; see also, *People v. Daugherty* (1981) 123 Cal.App.3d 314, 321; *In re Eads* (1980) 102 Cal.App.3d 499, 503.) There is accordingly no question the trial court had authority to disapprove the terms of the August 31, 2015 plea bargain and consider a more severe sentence in light of appellant's violation of the protective orders. Appellant makes no suggestion to the contrary.

When a court concludes the original plea bargain is unacceptable and greater punishment is warranted, the court must announce its intention and give the defendant an opportunity to withdraw the plea. As our Supreme Court stated in *Johnson*, "We think it is sufficient, in such a case, to require

the court to provide defendant with an opportunity to withdraw his plea . . . ." (*Johnson*, *supra*, 10 Cal.3d at p. 873.) The trial court complied with this requirement at the hearing on October 5, 2015, by announcing that appellant had violated the earlier protective orders and giving appellant the choice of withdrawing his plea or accepting the sentence modification proposed by his attorney. The choice was described in clear terms, and appellant responded that he wished to "[p]roceed with the amended sentence." Appellant originally contended the court failed to properly advise him of his right to withdraw the plea, but he now concedes that the court fulfilled its responsibilities under section 1192.5 at the October 5, 2015 hearing.

Appellant nevertheless maintains that the court erred at the October 5, 2015 hearing by failing to provide him with a full advisement of his rights and a full inquiry of whether he freely and voluntarily agreed to the modified sentence proposed by his attorney. This contention is wrong, both as a matter of law and as a matter of fact.

Appellant's contention is wrong under the law because a full advisement and inquiry is not required when a court concludes the original plea bargain is unacceptable and greater punishment is warranted. Courts have consistently held that the court must simply announce its intention and give the defendant an opportunity to withdraw the plea. (See *Johnson*, *supra*, 10 Cal.3d at p. 873; *People v. Kim* (2011) 193 Cal.App.4th 1355, 1365-66; *In re Eads*, *supra*, 102 Cal.App.3d at p. 503; *People v. Pinon* (1973) 35 Cal.App.3d 120, 125; *People v. Ramos* (1972) 26 Cal.App.3d 108, 110-111.)

In making this argument, appellant is essentially demanding a replay of the advisement given to him upon entry of his plea and admission of his probation violation on August 31, 2015. There has been no challenge to the sufficiency of that advisement, and appellant has cited no authority requiring a readvisement upon the defendant's acceptance of a modified sentence. Before entry of a guilty or no contest plea, a defendant must be advised of the constitutional rights that are being waived, as well as the direct consequences of the plea. (See *People v. Panizzon* (1996) 13 Cal.4th 68, 80; *People v. Lytle* (1992) 10 Cal.App.4th 1, 4.) But there is no comparable requirement when an agreed sentence is modified -- particularly where the modification has been proposed by the defendant's own attorney, as in this case.

Appellant's contention is also factually wrong, because there was no indication that appellant was confused or uncertain or required further explanation during the hearing on October 5, 2015. Upon learning of appellant's letters in violation of the protective orders, the proceedings were recessed so that defense counsel could speak with appellant. When everyone returned, appellant apologized and his attorney referred to a discussion with appellant and stated that "he knows that he will be required to waive his back time in both [cases]." The court explained that it was inclined to vacate the plea, but would entertain defense counsel's proposal to waive back time credits. When the court gave appellant the straightforward choice of withdrawing the plea and going to trial, or accepting a modified sentence that waived his credits, appellant promptly responded: "Proceed with the amended sentence." Appellant did not give any indication of

confusion, uncertainty or any other condition requiring further explanation or confirmation.

There was no error by the trial court, but to the extent there was any error it was harmless. A defendant who has entered a plea after receiving inadequate or erroneous advice from the trial court must establish prejudice; specifically, a showing that the defendant would not have entered the plea if the court had given a proper advisement. (See *In re Moser* (1993) 6 Cal.4th 342, 352; *People v. Dillard* (2017) 8 Cal.App.5th 657, 665; *People v. Cates* (2009) 170 Cal.App.4th 545, 552.)

The record of proceedings on October 5, 2015, demonstrates no unwillingness or hesitancy in appellant's acceptance of the modified sentence proposed by his attorney and recited by the court. In addition, appellant later prepared an application for a certificate of probable cause to appeal, which demonstrates his full awareness of the circumstances surrounding the sentence modification. Appellant's application asserts his unhappiness with the modified sentence and his mistaken belief that the court "violated [his] civil rights by taking credit for time served." But the application also describes the proceedings on October 5, 2015, in considerable detail, and it shows that appellant was fully aware of the choices posed to him. Because appellant understood the proceedings and the available options and knowingly agreed to the modified sentence, there is no basis to conclude that he would have withdrawn the plea if a different advisement had been given. There accordingly was no prejudice.

DISPOSITION

The judgments in case Nos. VA139145 and BA419744 are affirmed.

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JOHNSON (MICHAEL), J.*

We concur:

LAVIN, Acting P. J.

ALDRICH, J. **

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

** Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.