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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

EARVIN FERGUSON,

Defendant and Appellant.

B276733

(Los Angeles County
Super. Ct. No. TA139611)

APPEAL from an order of the Superior Court of Los Angeles County. Laura Walton, Judge. Reversed and remanded.

Maggie Shrout, 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, Senior Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

As part of a plea bargain, defendant Earvin Ferguson agreed that he would appear for sentencing on a later date pursuant to a *Cruz*¹ waiver. However, between the entry of his plea and the date set for sentencing, defendant was taken into custody on another matter, and failed to appear at his sentencing hearing. Defendant contends the trial court abused its discretion, and violated his right to due process, when it found his failure to appear was willful, and imposed a sentence greater than the agreed upon disposition. We agree, and reverse and remand for further proceedings consistent with this opinion.

BACKGROUND

On May 4, 2016, defendant was charged by information with injuring a spouse or cohabitant and assault with a deadly weapon (Pen. Code, §§ 273.5, subd. (a), 245, subd. (a)(1)). It was also alleged that defendant inflicted great bodily injury and used a deadly or dangerous weapon (§§ 12022.7, subd. (e), 12022, subd. (b)(1)). Testimony at the preliminary hearing established that defendant struck his girlfriend on her head with a pistol, and then hit her in the head and stomach with a metal rod as she tried to escape.

On July 5, 2016, defendant pled no contest to one count of injuring a spouse or cohabitant (Pen. Code, § 273.5, subd. (a)) in exchange for 270 days in jail, five years probation, and dismissal of the remaining counts and allegations. Defendant, who was out of custody on bail, requested a future surrender date so he could attend a small claims hearing on July 7. The court set the date for sentencing on July 8, on the condition defendant enter a *Cruz* waiver. The court warned defendant that if he failed to appear

¹ *People v. Cruz* (1988) 44 Cal.3d 1247 (*Cruz*).

for sentencing, “your plea will stand. Instead of getting 270 days in county jail, I can sentence you up to the maximum, which will be 4 years in state prison.”

On July 7, 2016, the trial court granted defendant’s oral motion to postpone his surrender date and sentencing until July 18, 2016.

Defendant failed to appear at the July 18, 2016 hearing. Defense counsel informed the court that defendant was in custody on another matter, and the court trailed the hearing until July 19, ordering the sheriff’s department to transport defendant to court on that day.

At the continued sentencing hearing, the People sought imposition of the midterm of three years instead of the negotiated disposition of defendant’s plea, arguing that defendant was presently in custody on a domestic violence case against a different victim and had violated his *Cruz* waiver when he failed to appear for sentencing on July 18. Defendant objected that he was entitled to a hearing before the court increased his sentence, contending that his failure to appear was “not his fault” because he was in custody. Moreover, counsel had only just received the arrest report at the hearing, and had not yet had time to discuss the circumstances of the arrest with defendant.

The trial court concluded it did not need to hold a hearing, reasoning that “It was his own fault that he got arrested that he did not show up,” and imposed a sentence of three years in prison.

This timely appeal followed.

DISCUSSION

A defendant who pleads guilty or no contest may waive the right to be sentenced pursuant to the plea agreement by a *Cruz*

waiver, and can agree to a greater sentence as a sanction for engaging in certain behavior, such as failing to appear at the 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, may be subject to the increased penalty, and 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.)

The parties agree there is no evidence that defendant's failure to appear at his sentencing hearing was willful, and that defendant was entitled to a hearing to assess whether he willfully violated the terms of his release. (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 293-295 [no willful violation of probation for failure to appear at a hearing where the defendant was in custody of immigration officials]; *People v. Morris* (1979) 97 Cal.App.3d 358, 363-364 [discussing due process].) On the record before us, the trial court necessarily abused its discretion when it imposed a greater sentence based upon defendant's failure to appear when it was known he was in police custody, without evidence that he refused to be transported to court or engaged in some other conduct that prevented the sheriff's department from transporting him to court. (See, e.g., *People v. Butcher* (2016) 247 Cal.App.4th 310, 318.)

This does not mean, however, that defendant is correct when he argues that the appropriate remedy is specific performance of his plea agreement, or allowing him to withdraw

his plea. A trial court “always retains the discretion not to sentence in accordance with the terms of the plea, especially if it subsequently learns of facts or law that render the agreed sentence inappropriate.” (*People v. Akins* (2005) 128 Cal.App.4th 1376, 1385-1386.) Defendant’s subsequent arrest may persuade the court to not abide by the plea agreement, and to allow defendant to withdraw his plea. (*Ibid.*) Moreover, we do not know whether defendant violated his *Cruz* waiver, thereby justifying the imposition of a higher term. The trial court should be permitted to make these decisions in the first instance.

DISPOSITION

The order is reversed and the case is remanded for a new sentencing hearing in conformance with this opinion. The judgment of conviction stands.

GRIMES, J.

WE CONCUR:

RUBIN, Acting P.J.

FLIER, J.