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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JEFF PATRICK MCNEIL, Defendant and Appellant.	B276538 (Los Angeles County Super. Ct. No. MA058182)

APPEAL from a judgment of the Superior Court of Los Angeles County. Frank Tavelman, Judge. Affirmed.

James Koester, 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, Victoria B. Wilson and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

The trial court vacated a plea agreement entered into by Jeff McNeil, finding there was no meeting of the minds due to a mistake of law. We affirm.

PROCEDURAL BACKGROUND

McNeil was convicted of one count of voluntary manslaughter (Pen. Code, § 192)[1] in 2002 and sentenced to 11 years in state prison. While serving that sentence, he was convicted in 2006 of an in-prison offense, assault by prisoner (§ 4501), and sentenced to a five-year term to run consecutively to the 11-year term. After McNeil completed his prison term for the voluntary manslaughter conviction and had begun serving the five-year term on his assault conviction, he committed a second in-prison offense.

Facts Underlying the Crime

On May 11, 2012, McNeil hit a prison guard when the guard asked him to face the wall for a strip search because he suspected McNeil had contraband on his person. McNeil hit the guard in the face with his elbow and resisted the guard's attempts to subdue him. Other guards intervened, but McNeil continued to resist and escaped towards the day room, where he was contained and placed in handcuffs. A cell phone and a syringe were recovered from McNeil. The prison guard suffered a black eye along with cuts, abrasions, and contusions to his face, arms, and elbows. Another guard sustained bruising to his bicep and hand.

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[1] All further section references are to the Penal Code unless otherwise specified.

McNeil was charged with battery upon a peace officer (count 1; § 243, subd. (c)(2)); resisting an executive officer (counts 2-4; § 69); assault upon a police officer (count 5; § 245, subd. (c)); and possession of contraband (count 6; § 4573.6, subd. (a)). It was further alleged as to all counts that McNeil had suffered two prior convictions of a serious or violent felony (§§ 667, subd. (b)–(i) and 1170.12, subds. (a)–(d)), and he had served a prior conviction and prison term (§ 667.5, subd. (b)).

Plea Agreement

McNeil entered into a plea bargain under which he agreed to a sentence of nine years, eight months in exchange for a plea of no contest to counts 1, 3, and 6. McNeil also agreed to admit one of the prior strike allegations. The parties agreed the sentence would run consecutively to his current sentence. On February 22, 2016, the trial court informed McNeil of the rights he was waiving and McNeil indicated he fully understood the terms and consequences of his plea. The court approved it upon finding McNeil's plea was freely and voluntarily made. However, the sentence was not pronounced that day because there was some question about the calculation of presentence credits. Sentencing was continued to allow defense counsel to research the issue.

Sentencing

On March 7, 2016, prior to the case being called, McNeil's counsel provided the court and the prosecutor with two cases which interpret section 1170.1 to require an aggregated sentence for all in-prison offenses, regardless of when they occur *People v. McCart* (1982) 32 Cal.3d 338 (*McCart*) and *People v. Venegas* (1994) 25 Cal.App.4th 1731 (*Venegas*). Section 1170.1 calculates the aggregate term of imprisonment to be "the sum of the principal term, the subordinate term, and any additional term

imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1." (§ 1170.1, subd. (a).) The principal term is the greatest term of imprisonment imposed for any of the crimes, including any term imposed for applicable specific enhancements, while the subordinate terms consists of one-third of the middle term plus one-third of any applicable enhancements. (§ 1170.1, subd. (a).) By McNeil's calculation, his current term for assault would be designated the subordinate term and would be reduced from five years to two years, four months. (§ 1170.1, subds. (a) & (c).)

The prosecutor objected to any reduction in McNeil's sentence for his assault conviction; he understood the plea agreement to be nine years, eight months to be served after McNeil had completed the full five year sentence for a total sentence of 14 years, eight months. The parties referred to this sentencing scheme as "fully consecutive." The prosecutor asserted he would not have agreed to the plea otherwise. The People moved to enforce this understanding of the plea agreement or, alternatively, to vacate the agreement entirely.

McNeil argued a fully consecutive sentence would be unlawful and the plea agreement must be enforced subject to the requirements of section 1170.1, making the aggregate sentence for the two prison offenses no longer than 12 years. After considering the parties' written briefs and extensive oral arguments, the trial court agreed that section 1170.1 required an aggregate sentence comprised of a principal and subordinate term. Finding there had been a mistake a law regarding how to calculate the sentences for the two in-prison offenses, the trial court granted the People's motion and rescinded the plea agreement.

After the trial court's ruling, McNeil filed a writ petition seeking to enforce the plea bargain. We summarily denied it. The parties subsequently entered into a new plea agreement under which McNeil was sentenced to an aggregate term of 14 years, four months after pleading no contest to counts 1, 2, 3, and 6 and admitting to one prior strike allegation. Judgment was entered and McNeil obtained a certificate of probable cause to appeal.

This Appeal

On appeal, we assigned counsel to McNeil. McNeil's appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), requesting independent review of the record. The concurrence asked the parties to submit briefing on the following question: "Did the court improperly vacate the plea given that the plea's 'impact' on appellant's prior sentence was not within the purview of the current plea negotiations?"

In response, McNeil "concede[d] that the trial court's factual and legal finding that there was a mutual misunderstanding of law between the parties at the formation of the plea agreement is supported by substantial evidence and thus, the court did not err when it rescinded the plea agreement." Notwithstanding that concession, McNeil urged us to remand for the trial court to exercise its discretion under section 1192.5. Section 1192.5 permits a court to withdraw its approval of a plea bargain prior to pronouncement of judgment. According to McNeil, section 1192.5 presented a separate avenue for

unwinding the plea agreement of which the trial court was not aware. Thus, remand was necessary. [2]

The People agreed with McNeil that a finding of mutual mistake of law had been made which was supported by substantial evidence. Addressing McNeil's alternate argument, the People contended there is a presumption the court exercised that discretion. As a result, there was no need to remand.

The concurrence sought further briefing on whether the mistake was material to the plea. McNeil then asserted the mistake did not affect a material term of the plea bargain because it resulted in a two year difference in a 25-year prison term, or 10 percent of the total term, and the prosecutor admitted he did not consider the total length of incarceration when he agreed to the plea bargain. Thus, the plea should not have been vacated on this ground. The People argued the length of incarceration was a material term in any plea agreement, much less this plea agreement, which resulted in rescission precisely due to a disagreement on the length of McNeil's incarceration.

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[2] Because we affirm the judgment on separate grounds, discussed below, we need not address McNeil's argument that the trial court should have exercised its discretion under section 1192.5. In any event, the parties concede no mention of section 1192.5 was made to the trial court for this purpose and the trial court did not indicate it was aware of its authority under that section. Having failed to raise the issue at a time that would have allowed the trial court to correct any oversight, McNeil may not now assert this issue on appeal. (*See People v. Scott* (1994) 9 Cal.4th 331, 351-356.)

DISCUSSION

The trial court found there was a mistake of law which justified rescission of the plea agreement. In reaching this conclusion, the trial court declined to decide whether the mistake of law was mutual or unilateral, since the evidence pointed only to either of these two theories and no others. By the court's reasoning, it was unnecessary to make that determination as the result was the same: rescission of the plea bargain. We agree.

I. Applicable Law

A plea bargain is an agreement negotiated between the defendant and the People and approved by the trial court. (*People v. Superior Court (Sanchez)* (2014) 223 Cal.App.4th 567, 572.) Thus, a negotiated plea agreement is a form of contract, and it is interpreted according to general contract principles. (*People v. Shelton* (2006) 37 Cal.4th 759, 767.) " 'The mutual intention to which the courts give effect is determined by objective manifestations of the parties' intent, including the words used in the agreement, as well as extrinsic evidence of such objective matters as the surrounding circumstances under which the parties negotiated or entered into the contract; the object, nature and subject matter of the contract; and the subsequent conduct of the parties." (*Ibid.;* see Civ. Code, §§ 1635–1656, 1689.)

A contract may be rescinded "[i]f the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake . . . . " (Civ. Code, § 1689; *Sanchez, supra,* 223 Cal.App.4th at p. 572; *Hedging Concepts, Inc. v. First Alliance Mortgage Co.* (1996) 41 Cal.App.4th 1410, 1421 (*Hedging Concepts*).) Under the Civil Code, a mistake may be one of law or fact and may be mutual or unilateral. (Civ. Code, §§ 1576–1578.)

A mutual mistake of law is defined as "[a] misapprehension of the law by all parties, all supposing that they knew and understood it, and all making substantially the same mistake as to the law[.]" (Civ. Code, § 1578.) A unilateral mistake of law is defined as "[a] misapprehension of the law by one party, of which the others are aware at the time of contracting, but which they do not rectify." (*Ibid.*)

In *Sanchez,* a case involving similar facts, the parties mistakenly negotiated a sentence not authorized by law and the court unknowingly accepted the plea agreement. (*Sanchez, supra,* 223 Cal.App.4th at p. 570.) Two days before sentencing, however, the People advised the court that the negotiated sentence was unauthorized. Rather than vacate the plea, the trial court imposed a lesser sentence, which was lawful, over the People's objection. The People filed a petition for writ of mandate seeking to reverse the sentence. (*Id.* at p. 571.) The appellate court granted the petition, finding there had been a mutual mistake of law which required the plea to be vacated. (*Id.* at p. 577.)

II. Standard of Review

Because a plea bargain is subject to general contract principles, we employ the same standards of review applicable to cases involving the interpretation of contracts. (*People v. Paredes* (2008) 160 Cal.App.4th 496, 507 (*Paredes*).) "[T]he 'interpretation of a contract is subject to de novo review where the interpretation does not turn on the credibility of extrinsic evidence.' " (*People Ex Rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2003) 107 Cal.App.4th 516, 520, quoting *Morgan v. City of Los Angeles Bd. of Pension Comrs.* (2000) 85 Cal.App.4th 836, 843.) If the interpretation of a contract involves resolution of disputed facts or credibility

determinations, on the other hand, we review the trial court's findings for substantial evidence. (*Paredes, supra,* 160 Cal.App.4th at p. 507.) " 'However, extrinsic evidence is not admissible to ascribe a meaning to an agreement to which it is not reasonably susceptible. [Citation.]' " (*Ibid., quoting ASP Properties Group, L.P. v. Fard, Inc.* (2005) 133 Cal.App.4th 1257, 1267.)

Along with this standard of review, we also apply the well-established presumptions attendant to any review of a judgment. " ' "A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error." [Citation.]' [Citation.]" (*People v. Alvarez* (1996) 49 Cal.App.4th 679, 694.) "The orders of the trial court are presumed to be valid and defendant has the burden of providing a record adequate to support his arguments on appeal." (*People v. Malabag* (1997) 51 Cal.App.4th 1419, 1427.) Additionally, " ' "a trial court is presumed to have been aware of and followed the applicable law." ' " (*People v. Sullivan* (2007) 151 Cal.App.4th 524, 549; see Evid. Code, § 664.)

III. There Was a Mistake of Law

A. The Trial Court's Ruling

At sentencing, the prosecutor asserted he and defense counsel negotiated the plea agreement under a mutual mistake. The prosecutor stated defense counsel supplied the *McCart* and *Venegas* cases to him while "expressing some surprise himself in having just learned about the law . . . ." Defense counsel denied he harbored any misunderstandings, asserting he "negotiated a

deal knowing what the facts are, knowing what the law is, and making that deal on the law." At other points during the extensive argument, however, defense counsel was more ambiguous regarding whether he considered section 1170.1 at the time he negotiated the plea. When the court asked him why he brought up the *McCart* and *Venegas* cases if there was no confusion regarding the application of section 1170.1, defense counsel evaded, "I can't reconstruct my thinking in that moment."

The trial court acknowledged the challenge was "two-fold." "One is to make a determination whether or not there was a mistake of fact or a mistake of law." Citing to *Amin v. Superior Court* (2015) 237 Cal.App.4th 1392, the trial court held that a prosecutor may not rescind a plea agreement for a unilateral mistake of fact. However, the court noted that *Sanchez, supra,* 223 Cal.App.4th 567, allowed for withdrawal from the plea by the prosecution if the plea agreement was based on a mistake of law that is material to the agreement.

In finding there was a mistake of law such that there was no meeting of the minds, the trial court reasoned,

> "The distinguishing factor in *Sanchez* is that it was a mutual mistake of law. Here, what's being represented is that there's some dispute as to whether or not there was a mutual mistake of law. And, unfortunately, the plea in the transcript is not entirely clear to everyone's chagrin at this point. [¶] . . . [¶]
>
> "There do not appear to be cases on point that talk about a unilateral mistake of law either published or unpublished that I was able to find. So the closest would be the *Sanchez* court which talked about a mutual mistake, and given the state of the record about someone may have

to serve the entire term and get no conduct credits or there was some credit issue, the fact that the cases that were provided to the court three weeks after the entry of the plea, the *McCart* case and the *Venegas* case which both go to the issue of whether or not its full[y] consec[utive] rather than principal and subordinate terms certainly puts in the position when the court accepts the plea, the court also was not in a position to understand either the underlying facts or the mistake of law that was taking place as I didn't have the same position as the parties did.

"I fail to have an appropriate explanation, but some time has passed as to why those cases would be provided to the court absent there being some confusion on behalf of the defense in this case as well. Or in the alternative, there may have been a colloquy between the parties and simply [defense counsel] was citing those in support of his position based upon the People's misunderstanding of the law in this case. I don't know which way it was. But in my view, there was not a meeting of the minds here. It was a mistake of law."

B. Substantial Evidence Supports a Finding of Mistake of Law

The transcript makes clear that the trial court found a "mistake of law" justified rescission of the plea agreement under Civil Code section 1689. It provided alternate reasons for its finding, that is, there was evidence of either a unilateral mistake or a mutual mistake of law. In either case, the result was the same: a mistake of law resulting in rescission of the plea bargain. (Civ. Code, § 1689; *Sanchez, supra,* 223 Cal.App.4th at p. 572; *Hedging Concepts, supra,* 41 Cal.App.4th at p. 1421.)

Given the court's conclusion, there is no requirement that the trial court make an express finding as to whether it was a unilateral mistake or a mutual mistake of law. The parties did not seek more specific findings and substantial evidence supports the trial court's finding under either theory. Under these circumstances, any error resulting from the failure to make further findings is harmless. (*People v. Watson* (1956) 46 Cal.2d 818; see *People v. Casa Blanca Convalescent Homes, Inc.* (1984) 159 Cal.App.3d 509, 524.)

1. Substantial evidence supports a finding of mutual mistake.

McNeil concedes, and the People agree, that the trial court found there was a mutual mistake of law when the parties entered into the plea agreement. The parties further agree substantial evidence supports such a finding. McNeil's appellate counsel implicitly acknowledged this when he filed a *Wende* brief and then explicitly admitted it in supplemental briefing.

The parties are correct that the record provides substantial evidence of a mutual mistake. At the time the plea was entered, it was apparent no one understood that section 1170.1 would affect McNeil's five-year sentence for the in-prison assault.

The prosecutor submitted a declaration and advised the court in oral argument that he would never have agreed to a reduction of the five-year sentence. The court itself acknowledged, "at the time I accepted the plea, it was my understanding that offenses that occur while in state prison are full consec[utive] sentences." There was no mention of section 1170.1 and it was not brought to the trial court's or the People's attention by defense counsel until almost three weeks later.

During McNeil's plea, the trial court asked, "Do you understand this is mandatory consecutive time which means it's consecutive to any sentence you are currently serving." McNeil responded that he understood. At the time, McNeil was serving a five-year sentence for an in-prison offense. Although defense counsel insisted he would not have agreed to a fully consecutive sentence, the trial court appeared to disbelieve him when it asked why he brought up the two cases to the court three weeks later if he believed there to be no confusion. Defense counsel's conduct was particularly unusual given that sentencing was postponed for a question on conduct credits, not aggregate sentencing.

2. Substantial evidence supports a finding of unilateral mistake.

In addition, substantial evidence supports the finding of a unilateral mistake of law. There is no question the prosecutor did not know that section 1170.1, subdivision (c) would affect the plea agreement. Defense counsel's comments, on the other hand, could be interpreted to mean he knew about the requirement under section 1170.1, subdivision (c), was aware the prosecutor did not, and took advantage of the prosecutor's ignorance. By his own admission, defense counsel knew the deal was a "lucky break" for his client and he "grabbed it." When the court took the plea, it asked McNeil whether he understood the sentence would be "consecutive to any sentence you are currently serving." At no time during the colloquy did defense counsel interject to clarify what "consecutive" meant.

Three weeks later, just before the matter was called for sentencing and after the court had approved the plea agreement, he presented the court and the People with *McCart* and *Venegas*. If he truly believed the court and the prosecutor understood the

effect section 1170.1 would have on the total prison term, there would have been no need to bring those cases to their attention, particularly when the only open question was about conduct credits. From these facts, it is reasonable for the court to infer that defense counsel knew of section 1170.1's requirements, knew the prosecutor did not, and kept silent about it until the last moment, well after the plea had been approved. That is the definition of a unilateral mistake under Civil Code section 1578. (*Merced County Mut. Fire Ins. Co. v. State of California* (1991) 233 Cal.App.3d 765, 772 [rescission available when the unilateral mistake is known to the other contracting party and is encouraged or fostered by that party].)

The evidence supports either a finding of mutual mistake or unilateral mistake. No other theories are supported by the record. Accordingly, the trial court's failure to make a finding as to mutual or unilateral mistake is harmless because it is not reasonably probable McNeil would have received a more favorable result. (*Watson, supra,* 46 Cal.2d at p. 836; see *People v. Casa Blanca Convalescent Homes, supra,* 159 Cal.App.3d 509, 524 ["Even though a court fails to make a finding on a particular matter, if the judgment is otherwise supported, the omission to make such finding is harmless error unless the evidence is sufficient to sustain a finding in favor of the complaining party which would have the effect of countervailing or destroying other findings."].)

IV. The Mistake Was Material

During the sentencing hearing, the court noted that materiality was an element required for rescission under *Sanchez.* Thus, when it concluded there was a mistake of law which justified rescission of the plea agreement, the trial court

impliedly found the mistake to be material to the agreement. Substantial evidence supports the court's finding.

The length of imprisonment a defendant agrees to in exchange for a guilty plea and the dismissal of other counts goes to the "very heart" of a plea agreement. (*Sanchez, supra,* 223 Cal.App.4th at p. 574; *People v. Segura* (2008) 44 Cal.4th 921, 935.) During the plea negotiations, the prosecutor pressed for "more time" for McNeil and reminded defense counsel that McNeil was subject to Three Strikes and a 25 years-to-life sentence. On the other hand, defense counsel sought to minimize McNeil's sentence. It is axiomatic that the sentence would be a material term of the plea agreement.

The concurrence next asked the parties to brief the following question: " 'when the State negotiates a plea agreement with a defendant, is whether the defendant will fully serve a sentence for a prior conviction a "material" term of the plea agreement?' "

In a letter filed on August 23, 2017, McNeil admitted "[t]he term a defendant will serve is <u>invariably</u> a material term of a plea agreement contract. (Emphasis added.)" We completely agree. Plea bargains are struck between the prosecution and the defense every day; the term of the prison sentence is the most frequent point of contention and every day, much less every year, matters.

Notwithstanding this admission, McNeil alternatively argues the prison term was not material in this case because the difference between the fully consecutive term of 14 years, eight months and the section 1170.1 aggregated term of 12 years is only two years, eight months. By McNeil's calculation, this two years, eight months difference is only about a ten percent

reduction from his total sentence (including the 11-year sentence for voluntary manslaughter) or a 28 percent reduction from the fully consecutive 14 years, eight months term originally intended by the prosecutor (excluding the 11-year sentence). McNeil further argued the prosecutor admitted he did not consider which sentence McNeil was serving at the time of the plea.

We disagree these facts are sufficient to overcome the substantial evidence supporting the court's finding. First, the recalculation of McNeil's sentence for the in-prison assault from five years to two years, four months would have reduced that sentence by half. Second, the prosecutor insisted McNeil's sentence on the current offenses run fully consecutively to the prior prison term. That he did not consider which sentence McNeil was serving at that time is not an indication he was ambivalent to McNeil's total sentence.

We find no distinction between McNeil's sentence for the present offenses and his total sentence for both in-prison offenses. It is clear the prosecutor and McNeil were concerned about McNeil's total length of incarceration as well as his sentence for the present offenses. This is evident in the prosecutor's refusal to accept a shortened term on the assault conviction once he was alerted to the effect of section 1170.1. At the time of the plea negotiations, the prosecutor believed McNeil would serve the sentence "fully consecutive" to the sentence on the assault conviction with no reduction in time for the prior in-prison offense. The prosecutor knew a consecutive sentence was mandatory; the trial court expressly advised McNeil of that during the plea colloquy.

Defense counsel, on the other hand, acknowledged that the sentencing provision under section 1170.1 was an "extraordinary right" for his client. Substantial evidence supports the trial court's finding that whether McNeil served a "fully consecutive" sentence was a material term of the plea agreement.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

I concur:

GRIMES, J.

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RUBIN, J. -- CONCURRING:

I concur in the judgment.

RUBIN, J.