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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. HAROLD BRITTON TIDWELL, Defendant and Appellant.	B277037 (Los Angeles County Super. Ct. No. YA091752)

APPEAL from a judgment of the Superior Court of Los Angeles County, Victor L. Wright, Judge. Affirmed.

Harold Britton Tidwell, in pro. per.; and A. William Bartz, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Harold Britton Tidwell (Tidwell) appeals from his 2016 conviction. We have reviewed the record, the briefing by Tidwell's appointed appellate counsel, and the supplemental briefing submitted by Tidwell himself. We affirm the judgment.

BACKGROUND

I. Tidwell's plea agreement

On December 23, 2014, the People filed a three-count felony complaint against Tidwell charging him with possession for sale of cocaine base (Health & Saf. Code, § 11351.5; count 1), possession of a forged driver's license (Pen. Code,[1] § 470b; count 2), and forgery of currency (§§ 476 & 473, subd. (b); count 3). The complaint further alleged that Tidwell had been previously convicted of a strike—that is, a conviction for a serious and violent felony as defined by sections 667, subdivision (d) and 1170.12, subdivision (b).

Initially, Tidwell pleaded not guilty. However, on May 11, 2015, the trial court, over the People's objection, made an open plea offer: if Tidwell changed his plea to nolo contendre and admitted that the special allegation of a prior serious/violent felony was true, the trial court would put over sentencing for one year provided Tidwell enrolled and completed a one-year program with the Second Chance Recovery Center. Tidwell, after conferring with his counsel, a public defender, accepted the court's offer.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

Under the terms of the plea, if Tidwell successfully completed the recovery program, he would be allowed to withdraw his plea to the cocaine possession and currency forgery counts and those counts would be dismissed; the remaining count (possession of a forged driver's license) would be reduced to a misdemeanor and Tidwell would be placed on summary probation.

However, if Tidwell failed to complete the recovery program, the trial court would sentence him to prison. More specifically, the court told Tidwell that if he "m[e]sse[d] up," it would "more likely than not . . . sentence him to four years in state prison," but cautioned him that the sentence could be as high as 16 years: "[I]f [Tidwell] picks up a new case or [the] court[ ] hears about some other behavior that is certainly violent or sexual or serious *in nature* the court would exercise its discretion and sentence him *up to 16 years in state prison*." (Italics added.) Later in the plea hearing, the trial court again advised Tidwell that if he failed to adhere to the terms of his plea he could face up to 16 years in prison: "You should understand if you do not return to court as ordered, it's possible that you could be sentenced to up to 16 years in this case. Do you understand that, sir?" Tidwell replied, "Yes, sir."[2]

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[2] The resulting minute order from the plea hearing indicates that Tidwell was advised at the hearing of "the possible consequences of a plea of guilty or nolo contendre, including the maximum penalty . . . and the possible legal

In connection with his plea, Tidwell initialed, signed, and dated a form entitled "Guilty Plea Form with Explanations and Waiver of Right—Felony." Section 1 of the plea form is devoted to the "charges and maximum term" Tidwell faced as a result of pleading guilty to the charged crimes and special allegations. The form indicates that the "aggregate maximum time of imprisonment" Tidwell faced was 16 years.[3] On that same page, under section 2, entitled "Plea Agreement," the form provides a place for the parties to indicate their agreement upon a prison sentence other than the aggregate maximum; that section of the form, however, was deliberately left blank. Section 2 also provides that Tidwell's failure to adhere to the terms of the plea agreement, "including failure to complete a drug education or treatment program, . . . may cause the court to send [him] to state prison for up to the 'Aggregate Maximum Time of Imprisonment specified in [section] 1." (Boldface omitted.) On the form's second page, under section 2.h, "Other Terms," there is the following handwritten statement: "Sentence put over 1 year. [Tidwell] to complete 1 yr outpatient program, with 2nd Chance Recovery Center. If [Tidwell] completes program = Ct 1 + 3 dismissed, Ct 2 reduced to misd +

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effects and maximum penalties incident to subsequent convictions for the same or similar offenses."

[3] There appears to be a minor error on the plea form in the calculation of Tidwell's aggregate maximum time of imprisonment—the correct total, as noted by the People at the plea hearing, is 14 years and eight months, not 16 years.

summary probation. If [Tidwell] violates + doesn't finish program within 1 yr = *4 yr state prison*." (Italics added.)

II. Tidwell's sentence

Tidwell failed to complete the outpatient treatment program and, in the fall of 2015, the People charged him in a new case (YA093247) (the new case) with the following three counts: (1) being in possession of methamphetamine and cocaine while armed with a loaded, operable firearm (Health & Saf. Code, § 11370.1, subd. (a)); (2) being a felon in possession of a firearm (§ 29800, subd. (a)(1)), and (3) possession of controlled substances for sale—methamphetamine and cocaine (Health & Saf. Code, 11351.5).[4]

On July 27, 2016, the trial court sentenced Tidwell. Before doing so, the court reviewed on the record the basic terms of the plea agreement: "it would be a four-year sentence . . . if [Tidwell] simply just messed up. But if [Tidwell] was involved in something else that results in charges, that the court believes are serious, that he would be sentenced to up to 16 years . . . ." Tidwell, represented by private counsel, did not object to or otherwise contest the accuracy of the trial court's characterization of the plea agreement.

Initially, the trial court indicated that, due to the nature of the new case pending against Tidwell, it would

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[4] The first count was dismissed due to the fact that the firearm in question, a shotgun, was not loaded.

sentence him to a term of eight years in state prison. Ultimately, however, the court sentenced Tidwell to an aggregate term of six years in prison, calculated as follows: with regard to count 1, the trial court sentenced Tidwell to the low term of three years, which was doubled to six years pursuant to the special allegation that he previously suffered a strike conviction; with regard to counts 2 and 3, the trial court sentenced Tidwell to the low term of 16 months on each count, which was doubled due to the prior strike conviction for a total of 32 months for each count; the sentences for counts 2 and 3 were to run concurrently with the sentence for count 1. In handing down the sentence, the trial court explained that while its "heart bleeds" for both Tidwell and his family, it was troubled by the charges in Tidwell's new case, especially the firearm charge. As a result of Tidwell's sentence, the People dismissed the new case.

III. Tidwell's appeal and writ petition

A. TIDWELL'S APPEAL

On August 2, 2016 Tidwell appealed from the trial court's sentence. On March 16, 2017, we appointed counsel to represent Tidwell. On May 5, 2017, after examining the record, Tidwell's appellate counsel filed an opening brief raising no issues and asking this court to independently review the record. On May 5, 2017, we advised Tidwell that he had 30 days in which to submit a supplemental brief addressing any contentions or issues he wished us to consider.

B. TIDWELL'S WRIT PETITION

On August 19, 2016, Tidwell filed below a petition for a writ of habeas corpus (writ 1) alleging that the trial court miscalculated his presentencing credits. At sentencing, the trial court awarded Tidwell 150 days actual custody credits, plus an additional 150 days for good time and work time credit, for a total of 300 days credit. In writ 1, Tidwell claimed that he was entitled to 390 days credit.

On August 23, 2016, Tidwell filed below another petition for a writ of habeas corpus (writ 2), alleging that his due process rights were violated because the guilty plea form only mentioned a sentence of four years if he failed to comply with the terms of his plea agreement.

In a written order dated February 22, 2017, the trial court addressed both petitions. With regard to writ 1, the trial court agreed that Tidwell was entitled to modified custody credits, but instead of increasing the amount of the credits, it reduced the total from 300 to 272. As to writ 2, the trial court denied the petition, because "[f]rom the entire record, it is clear [Tidwell] was fully advised of the consequences of his plea, and knowingly and voluntarily accepted the potential punishment of his open plea with the court. . . . Although the charges alleged in [the new case] may not qualify as a 'violent' or 'serious' felony pursuant to Penal Code sections 667.5(c) [and] 1192.7(c), respectively, [the trial court] acted within its discretion by determining they were violent or serious 'in nature.' "

On June 7, 2017, at or about the time his supplemental brief in his appeal was due, Tidwell filed a petition for writ of habeas corpus in this court regarding the order denying his writ petitions and requested that his appeal and petition be considered together since they addressed, in principal part, the same issue—that is, the disparity between what was purportedly memorialized in the guilty plea form (a four-year sentence) and the six-year sentence that was actually imposed. On July 6, 2017, we granted Tidwell's request. Given the timing of his writ petition, we deem it to be also his supplemental brief.

DISCUSSION

Tidwell advances two arguments as to why his sentence was improper. First, he argues that the trial court abused its discretion in sentencing him to six years in state prison, because the written plea agreement—the guilty plea form—only referenced a four-year sentence if he failed to abide by the agreement's terms. Second, Tidwell contends that even if the trial court had the discretion under the plea agreement to sentence him to six years, the trial court erred in doing so because neither of the charged crimes in the new case (felon in possession of a firearm and possession of a controlled substance for sale) "qualifies as serious or violent pursuant to Penal Code sect[ions] 1192.7(c) or 667.5(c)." We are not persuaded by either argument.

I. Tidwell's plea was an open plea, not a plea bargain

Relying on *People v. Toscano* (2004) 124 Cal.App.4th 340, 345, Tidwell contends his plea agreement was ambiguous with regard to the term of his sentence, and that, under contract principles, the ambiguity must be resolved in his favor—that is, the only permissible sentence was the four-sentence mentioned in the guilty plea form's "other terms" section. *Toscano* involved a written plea agreement which provided in part that " 'Defendant [and] Prosecution agree that Defendant shall have the right to a motion to strike prior.' " (*Id.* at p. 342, italics omitted.) The Court of Appeal held that this term of the plea agreement unambiguously permitted a motion to strike on any ground, rejecting the Attorney General's argument that the term was limited solely to a motion to strike the prior conviction under section 1385 pursuant to *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497. (*Toscano*, at p. 344.)

Tidwell's reliance on *People v. Toscano*, *supra*, 124 Cal.App.4th 340, is misplaced because that case involved a negotiated plea bargain, not an open plea, which is the form of the plea that is at issue here.

A. PLEA BARGAINS

Generally, a plea bargain is a negotiated settlement between the defendant and the prosecutor, where both parties receive a reciprocal benefit, which is approved by the court. (*People v. Segura* (2008) 44 Cal.4th 921, 929–930.) "A plea agreement 'is a tripartite agreement which requires the

consent of the defendant, the People and the court.' " (*People v. Feyrer* (2010) 48 Cal.4th 426, 436.) Only a prosecutor is authorized to negotiate a plea agreement, and a trial court may not substitute itself in the place of the prosecutor in the negotiation process or agree to a disposition over the objection of the prosecutor. (*Segura*, at p. 930.) " 'Acceptance of the agreement binds the court and the parties to the agreement.' " (*Feyrer*, at p. 437.) In other words, if a negotiated plea is accepted by the prosecutor and approved by the trial court, the defendant cannot be sentenced on the plea to a harsher punishment than that specified in the plea agreement. (§ 1192.5; *People v. Masloski* (2001) 25 Cal.4th 1212, 1217.) When, after a negotiated plea, a trial court imposes punishment significantly exceeding that to which the parties agreed, the defendant is entitled to relief. (*People v. Kim* (2011) 193 Cal.App.4th 1355, 1359, 1362.) In short, a negotiated plea bargain is like an enforceable contract, with the defendant pleading in exchange for assurances as to the length of his sentence (*People v. Blount* (2009) 175 Cal.App.4th 992, 997), and, as such, is interpreted like a contract.

B. OPEN PLEAS

An open plea, in contrast to a plea bargain, 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.' " (*People v. Cuevas* (2008) 44 Cal.4th 374, 381, fn. 4.)

In connection with an open plea, " 'the court may indicate "what sentence [it] will impose if a given set of facts is confirmed, irrespective of whether guilt is adjudicated at trial or admitted by plea." ' " (*People v. Clancey* (2013) 56 Cal.4th 562, 570.) An indicated sentence, however, is not a promise from the court. (*Id.* at p. 575.) By indicating a sentence, "the court has merely disclosed to the parties at an early stage—and to the extent possible—what the court views, on the record then available, as the appropriate sentence so that each party may make an informed decision." (*Ibid.*) Accordingly, if the factual predicate underlying an indicated sentence is disproved at trial, the court may withdraw that indicated sentence. (*Id.* at p. 576.) Furthermore, the court retains broad discretion to modify an indicated sentence even if its factual predicate is not disproved. (*Id.* at pp. 576–577.) In particular, "[t]he development of new information at sentencing may persuade the trial court that the sentence previously indicated is no longer appropriate for this defendant or these offenses. Or, after considering the available information more carefully, the trial court may likewise conclude that the indicated sentence is not appropriate." (*Id.* at p. 576.) Therefore, a court may sentence a defendant differently than an indicated sentence based on additional new information or a reexamination of the relevant circumstances. (*Ibid.*)

In *People v. Clancey*, *supra*, 56 Cal.4th 562, our highest court stated: "[A]n indicated sentence is *not* a promise that a particular sentence *will* ultimately be imposed at sentencing. *Nor does it divest a trial court of its ability to exercise its discretion at the sentencing hearing, whether based on the evidence and argument presented by the parties or on a more careful and refined judgment as to the appropriate sentence* . . . . [T]he utility of the indicated-sentence procedure . . . depends to a great extent on whether the record then before the court contains the information about the defendant and the defendant's offenses that is relevant to sentencing." (*Id.* at p. 576, first and third italics added.) Therefore, a trial court retains its "full discretion" at sentencing to select a fair and just punishment despite any previous indicated sentence. (*Ibid.*)

C. TIDWELL ACCEPTED AN OPEN PLEA OFFER

Here, Tidwell's plea was an open plea, not a plea bargain. The record states so plainly: 'The court will extend an open plea offer to Mr. Tidwell if he wishes to enter a plea today." The record accordingly indicates that the offer was not negotiated by or made with the approval of the People. In fact, the court's open plea offer was made over the People's objection and, as a result, the People did not sign the guilty plea form.

The record indicates further that it was a proper open plea offer—that is, the trial court did not bargain or negotiate the terms of the plea with Tidwell; instead, it offered him a "take it or leave it" arrangement, which

Tidwell freely accepted and appreciated. (See *People v. Clancey*, *supra*, 56 Cal.4th at pp. 575–576.) Nor did the trial court promise Tidwell that if he failed to abide by the terms of his plea he would be sentenced to only four years in prison. (See *id.* at p. 575.) In fact, the court went out of its way to stress that the four-year sentence was not guaranteed. The trial court repeatedly cautioned Tidwell that the four-year sentence was only an indicated sentence, that under the terms of the open plea the court retained its full discretion to sentence him to a longer or harsher sentence, including the maximum sentence. The record also makes clear that Tidwell, after discussing the matter with his counsel, unambiguously told the trial court that, by accepting the open plea, he accepted the risk of being sentenced up to the maximum term.

Accordingly, we reject Tidwell's argument that the trial court failed to abide by the purportedly finalized and negotiated terms of his plea. Instead, we hold that the four-sentence was an indicated sentence only and that, as a result, the trial court retained the discretion to sentence him to a prison term longer than four years.

D. THE SIX-YEAR SENTENCE WAS NOT AN ABUSE OF DISCRETION

"It is well established that the trial court has broad discretion when it comes to sentencing." (*People v. Groomes* (1993) 14 Cal.App.4th 84, 87.) A trial court's sentencing decision is reviewed for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

"The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.] . . . [A] trial court will abuse its discretion . . . if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. [Citations.] A failure to exercise discretion also may constitute an abuse of discretion." (*People v. Sandoval*, *supra*, 41 Cal.4th at pp. 847–848.)

When making sentencing decisions, a trial court has wide discretion in weighing aggravating and mitigating factors. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) The trial court may rely on any aggravating or mitigating circumstances reasonably related to its sentencing decision. (Cal. Rules of Court, rule 4.420(b).) A single valid aggravating factor justifies the upper term (*People v. Black* (2007) 41 Cal.4th 799, 815), and the trial court need not explain its reasons for rejecting alleged mitigating circumstances. (*Avalos*, at p. 1583.) We must affirm the trial court's sentencing choice unless it was arbitrary or irrational. (*Id*. at p. 1582.)

Here, we conclude that the trial court did not abuse its discretion in sentencing Tidwell to six years. The guilty plea form does not state that only serious and violent subsequent

crimes, as defined in sections 1192.7, subdivision (c)[5] and 667.5, subdivision (c),[6] would result in a sentence greater

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[5] Section 1192.7, subdivision (c) defines a "serious felony" as any of the following: "(1) Murder or voluntary manslaughter; (2) mayhem; (3) rape; (4) sodomy by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (5) oral copulation by force, violence, duress, menace, threat of great bodily injury, or fear of immediate and unlawful bodily injury on the victim or another person; (6) lewd or lascivious act on a child under 14 years of age; (7) any felony punishable by death or imprisonment in the state prison for life; (8) any felony in which the defendant personally inflicts great bodily injury on any person, other than an accomplice, or any felony in which the defendant personally uses a firearm; (9) attempted murder; (10) assault with intent to commit rape or robbery; (11) assault with a deadly weapon or instrument on a peace officer; (12) assault by a life prisoner on a noninmate; (13) assault with a deadly weapon by an inmate; (14) arson; (15) exploding a destructive device or any explosive with intent to injure; (16) exploding a destructive device or any explosive causing bodily injury, great bodily injury, or mayhem; (17) exploding a destructive device or any explosive with intent to murder; (18) any burglary of the first degree; (19) robbery or bank robbery; (20) kidnapping; (21) holding of a hostage by a person confined in a state prison; (22) attempt to commit a felony punishable by death or imprisonment in the state prison for life; (23) any felony in which the defendant personally used a dangerous or deadly weapon; (24) selling, furnishing, administering, giving, or offering to sell, furnish, administer, or give to a minor any heroin,

cocaine, phencyclidine (PCP), or any methamphetamine-related drug . . . ; (25) any violation of subdivision (a) of Section 289 where the act is accomplished against the victim's will by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person; (26) grand theft involving a firearm; (27) carjacking; (28) any felony offense, which would also constitute a felony violation of Section 186.22; (29) assault with the intent to commit mayhem, rape, sodomy, or oral copulation . . . ; (30) throwing acid or flammable substances . . . ; (31) assault with a deadly weapon, firearm, machinegun, assault weapon, or semiautomatic firearm or assault on a peace officer or firefighter . . . ; (32) assault with a deadly weapon against a public transit employee, custodial officer, or school employee . . . ; (33) discharge of a firearm at an inhabited dwelling, vehicle, or aircraft . . . ; (34) commission of rape or sexual penetration in concert with another person . . . ; (35) continuous sexual abuse of a child . . . ; (36) shooting from a vehicle . . . ; (37) intimidation of victims or witnesses . . . ; (38) criminal threats . . . ; (39) any attempt to commit a crime listed in this subdivision other than an assault; (40) any violation of Section 12022.53; (41) a violation of subdivision (b) or (c) of Section 11418; and (42) any conspiracy to commit an offense described in this subdivision."

[6] Section 667.5, subdivision (c) defines a "violent felony" as the following: murder or voluntary manslaughter; mayhem; rape; sodomy; oral copulation; a lewd or lascivious act; any felony punishable by death or imprisonment in the state prison for life; any felony in which the defendant "inflicts great bodily injury on any person other than an accomplice . . . or any felony in which the defendant uses a

than four years. In fact, the guilty plea form is silent with respect to this aspect of the plea offer.

At the plea hearing, the trial court did not limit its discretion to sentence Tidwell to a prison term greater than four years only to a circumstance where Tidwell committed a serious or violent crime, as those crimes are defined in sections 667.5 and 1192.7. Instead, the trial court stated that it reserved the right to sentence Tidwell up to 16 years in prison if Tidwell "picks up a new case or [the] court[ ] hears about some other behavior that is certainly violent or sexual or serious *in nature*." (Italics added.) The trial court did not define what would constitute aggravating behavior that was violent, sexual, or serious "in nature," and neither Tidwell nor his counsel ever asked the trial court to define those terms or otherwise provide greater clarification or guidance.

Certainly, the trial court never limited its sentencing discretion to a statutory definition of "serious" or "violent," or "sexual." Accordingly, we hold that the trial court's

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firearm which use has been charged and proved"; robbery; arson; sexual penetration; attempted murder; igniting an explosive device with intent to commit murder or maliciously exploding a device that causes death, mayhem, or bodily injury; kidnapping; assault with the intent to commit a felony; continuous sexual abuse of a child; carjacking; rape, spousal rape or sexual penetration with a foreign object; extortion; threats to witnesses; first degree burglary; and use of a weapon of mass destruction.

decision—to consider the charges in the new case (another drug charge and a gun charge) sufficient to justify a sentence greater than four years (but well below the maximum)—was neither irrational nor arbitrary. There was, in other words, no abuse of discretion in sentencing Tidwell to six years in prison, rather than four.

We have examined the entire record and are satisfied that Tidwell's appellate counsel fully complied with his responsibilities and that no arguable issues exist with respect to the sentence. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J.

LUI, J.