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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.

DAVID LASHLEY HOLMES,

Defendant and Appellant.

B267197

(Los Angeles County
Super. Ct. No. MA064893)

APPEAL from a judgment of the Superior Court of Los Angeles County, Lisa Mangay Chung, Judge. Affirmed.

Michael Allen, 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, Assistant Attorney General, Steven E. Mercer and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

David Lashley Holmes (Holmes) entered a plea of no contest to 12 counts of burglary. He later moved to withdraw his plea, which the trial court denied. Holmes appeals the denial of his motion to withdraw. We affirm.

BACKGROUND

On January 6, 2015, Holmes was charged by information with 15 counts of first degree residential burglary and 11 counts of second degree commercial burglary that allegedly took place over a one-month span in late 2014. It also alleged that Holmes suffered a prior strike conviction. Holmes initially pled not guilty to all charges and trial was set for May 27, 2015.

On the trial date, the parties appeared in front of Judge Carlos Chung¹ and the possibility of a plea deal was discussed. These discussions were off the record and were not reported; however, the discussions were audio recorded.² Holmes's initial offer was 15 years. After the People countered with 54 years, defense counsel stated that he was "trying to get

¹ Judge Carlos Chung presided over this matter up and until the plea colloquy, at which point, he recused himself and Judge Lisa Chung presided. We will refer to each judge by their full name and title when necessary.

² The record on appeal has been augmented to include two recordings of these discussions (exhibit 1C, 2C), as well as transcriptions of those recordings (exhibits 1A, 2A, 1B, and 2B). There are two sets of transcripts, one provided by the court reporter (1A and 2A) and one provided by the district attorney's office (1B and 2B). For the sake of consistency and because the set of transcripts provided by the district attorney's office contains fewer instances of unintelligible words, the court will cite to that set of transcripts.

[Holmes] up to about 30 [years].” Judge Carlos Chung asked the prosecutor to consult with her supervisor to determine the People’s final offer before trial began. Judge Carlos Chung then addressed Holmes:

“Court: Mr. Holmes, you’re here for trial, and I’ve got about 65 jurors waiting, so I’m actually in a bit of a hurry to start your trial. But my desire to start this sooner than later is not what’s most important. What is most[] important is that justice happens in this case, and that you get a fair shake, all right?

“So right now, my understanding is that you’re facing almost 70 years, [68] . . . years four months.”

After the prosecutor conferred with her supervisor, she indicated that the People would not agree to anything less than 40 years at 85 percent. Judge Carlos Chung commented that 40 years was “still better than 54 years they originally offered” and “[t]hat sounds like the best offer he’s go[ing to] extend.”

Throughout these discussions, Judge Carlos Chung also allowed Holmes’s mother to assist him and to offer her input because she had “strong feelings” about the case. One major concern for her was the possibility that Holmes would face additional charges in a separate and unrelated matter involving unlawful sex with a 14-year-old girl, which was still under investigation. Holmes’s mother wanted a guarantee that he would not be charged with that crime if he agreed to accept the People’s offer of 40 years for the burglary charges. Defense counsel said he could not provide that guarantee.

Judge Carlos Chung stated that the other case was “separate and apart from this” case and that, even if Holmes was convicted at trial and the trial court sentenced him to “every single day” it could, the prosecutor “still might file it.” The trial

court repeated that, “even if [Holmes] went to trial and he lost,” and it maxed him out, the prosecutor might still file the separate charges. Judge Carlos Chung went on to indicate that neither he nor the prosecutor had any control over whether Holmes was charged with that separate crime and that it was likely being handled by a separate department within the district attorney’s office. Judge Carlos Chung reiterated that he did not want Holmes to “throw away this offer” based on the mistaken belief that the charges were linked. He then made similar comments directly to Holmes’s mother:

“So even if he went to trial and he lost, and I gave him the maximum, they still might file that. So right now whatever we do they may file that. So what your son may end up doing is rejecting an offer that your attorney negotiated and then still getting that on top of it. So he could get the worst of all worlds.

“What I will tell you is this, though, I’m actually very surprised the Head D.A. came down on the offer. Usually—I shouldn’t say—oftentimes what happens—because the defense will say, ‘Here’s a counteroffer,’ and oftentimes they’ll try to raise the offer. And I’ve seen that pretty regularly. The fact that he actually dropped 14 years is pretty good—I’m sorry, 10 years I think is what he tried.

“I know you’re frustrated about that other case, but none of us has control over that other case. No one can make any promises.

“So I don’t necessarily want him to throw away this offer just based on that, because no one can make any guarantees. Even if he went to trial[,] there’s no guarantee of what they’d do on that. Nothing will change that at all. Nothing will change it.”

After Judge Carlos Chung's statement, Holmes's mother told him, "Yeah, then take it. I say take it. You heard what he said. 40 or 60, it's up to you."

Judge Carlos Chung then directly addressed Holmes, "Mr. Holmes, I'm allowing your mom to help you out, but really, ultimately you have to live with this decision, so you have to decide, what would you like to do, sir?" After Holmes did not respond, Judge Carlos Chung stated: "What I will say is I'm—[in] a situation where they claim that 20 plus locations were burglarized? That's about as serious as you can get. Most judges would consider that, that that many places were burglarized. What would you like to do, Mr. Holmes?"

There was no audible response from Holmes, but his mother said to him, "Take the deal, David. Take it, please."

At that point, Judge Carlos Chung went back on the record, stated that there had been lengthy off-the-record discussions, and summarized the case as follows:

"The court: My understanding is that [20] plus separate locations were burglarized and the vast majority of them were first degree. The D.A.'s office offered something like [54] years. Defense countered with something in the low [30]s and the D.A. countered with [40] years. You would have to waive all your back time credit and you would get forty years.

"I understand that is what you would like to do. Is that right, sir?"

Holmes replied, "Yes."

Judge Carlos Chung then indicated that Judge Lisa Chung, would take the plea because his brother was the prosecutor who filed the case against Holmes that constituted the prior strike

and would factor into his sentence. After Judge Lisa Chung took the bench, she began the plea colloquy.

Judge Lisa Chung advised Holmes of his right to a trial by jury, his right to confront and cross-examine witnesses, his right to subpoena witnesses to testify in his defense, and his right against self-incrimination. She also advised Holmes of the nature of the charges against him, the burden on the prosecution to prove its case beyond a reasonable doubt; the consequences of a plea of guilty or no contest, including the maximum penalty, administrative sanctions, the possible legal effects on subsequent convictions for the same or similar offenses, and potential immigration consequences. Holmes stated that he was waiving his constitutional rights, that he was entering the plea freely and voluntarily, and affirmed that no one had threatened or forced him to do so.

Holmes pled no contest to 11 counts of residential burglary, including one “person present” allegation, and admitted the prior strike conviction. Judge Lisa Chung set Holmes’s sentencing for July 15, 2015.

At the sentencing hearing, Holmes moved to withdraw his plea. In support of his motion, he offered the following statement: “I just feel I wasn’t given a fair chance at all in anything that’s happened. I wasn’t properly represented at all. I feel like you guys rushed me to make a life-changing decision. And I feel like I have a way better opportunity in going to trial. I would rather fight than have you have me admit something I didn’t do. [¶] I feel like you used my mom as an influence because she was willing to tell me to take the deal as well.”

Judge Lisa Chung denied the motion and ruled as follows:

“The court: I think it’s apparent that [Holmes] clearly has a change of heart. I was the one that actually took the plea after Judge Carlos Chung had recused himself from taking the plea, concerning one of Mr. Holmes’ priors.

“I do recall his mother was in the audience. But part of that was to give him additional time to make sure he could make a decision.

“In reviewing the plea transcript, which I also have an independent memory on, there was a significant amount of time spent. He was advised of all his requisite constitutional rights, including the right to a jury trial. All the other rights.

“The court does not find clear and convincing evidence that he did not enter into this freely and voluntarily. He was explained all the consequences of it. Everything was set forth.

“So based on what I have heard there is no good cause and the motion to withdraw the plea is denied.” On September 3, 2015, Holmes filed this timely appeal, challenging the denial of his motion to withdraw his plea.

DISCUSSION

A court may permit a guilty or no contest plea to be withdrawn “for good cause shown.” (Pen. Code, § 1018.) “‘Good cause’ means mistake, ignorance, fraud, duress or any other factor that overcomes the exercise of free judgment.” (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 917.) It “does not include . . . ‘buyer’s remorse’ regarding [the] plea deal.” (*People v. Simmons* (2015) 233 Cal.App.4th 1458, 1466.) Nor does it mean “a simple change of mind.” (*People v. Lyons* (2009) 178 Cal.App.4th 1355, 1363.) The burden is on the defendant to show good cause by clear and convincing evidence. (*Ravaux*, at p. 917.)

Generally, we review the trial court's decision to deny a motion to withdraw for abuse of discretion and will uphold the ruling if it is supported by substantial evidence. (*People v. Dillard* (2017) 8 Cal.App.5th 657, 665.) However, the parties nonetheless disagree on which standard of review applies here. The People argue for an abuse of discretion standard while Holmes contends that we should review the record de novo. Holmes's position is that, because " 'an effective waiver of a federal constitutional right is governed by federal standards' " we are required to review the voluntariness and the factual basis of the plea de novo. But, we need not resolve this dispute here because, under either standard, Holmes has failed to meet his burden.

The thrust of Holmes's argument is that Judge Carlos Chung's involvement in the plea negotiations was coercive and vitiated the voluntariness of his plea. Holmes contends that a number of Judge Carlos Chung's statements were coercive, including his comments that he could receive the maximum sentence and that the People's offer of 40 years should not be thrown away.

However, we must consider these comments in the context in which they were made. Judge Carlos Chung discussed " 'maxing out' " Holmes in relation to what consequences a maximum sentence here would have on the separate investigation involving unlawful sex with a minor. Judge Carlos Chung wanted Holmes to understand that any result in the instant case, even the imposition of the harshest possible sentence, would have no bearing on whether the district attorney brought additional charges in that separate and unrelated case. In light of the fact that Holmes's mother wanted a guarantee of

just that, Judge Carlos Chung warned Holmes that his decision to accept or reject the plea could provide no such guarantee.

Moreover, the trial court has a duty to advise a defendant of the maximum possible sentence and a failure to do so may be good cause to allow the defendant to withdraw the plea.

(*People v. Archer* (2014) 230 Cal.App.4th 693, 696.) Holmes confuses improper judicial participation and coercion with the trial court's duty to ensure that Holmes was aware of the full extent of the consequences of his plea.

And, while courts have expressed strong reservations about judicial involvement in plea negotiations, there is no rule in California that forbids the trial court from participating.

(*People v. Weaver* (2004) 118 Cal.App.4th 131, 148.)

“The degree and manner of a judge's participation in plea negotiation, i.e., his or her role, varies among judges. Many judges prefer to stay out of the actual negotiating process and be brought into the matter once a bargain has been attained. Success depends entirely on the approach taken by the prosecution and defense representatives. Some judges feel that they should actively participate in the negotiations as a mediator, as one seeking to bring conflicting or antagonistic views together on a reasonable solution. Here a cautious approach may achieve more. The judge should maintain total neutrality and at the same time probe continually for a common meeting ground. Patience, tact, and persistence pay off in an increased number of dispositions.’” (*People v. Weaver, supra*, 118 Cal.App.4th at p. 148, quoting Cal. Judges Benchbook, Criminal Pretrial Proceedings (CJER 1991) § 2.11, pp. 87–88.)

Thus, the trial court must be cautious and not abandon its judicial role and “thrust[] itself to the center of the negotiation

process and make[] repeated comments that suggest a less-than-neutral attitude about the case or the defendant.” (*People v. Weaver*, *supra*, 118 Cal.App.4th at pp. 149–150.) To do so, puts “great pressure” on the defendant “to accede to the court’s wishes” (*ibid.*) and “most authorities recommend that [judicial participation] be kept to a minimum.” (*People v. Williams* (1969) 269 Cal.App.2d 879, 884.) That being said, “not every instance of judicial involvement in plea negotiations results in duress.” (*Weaver*, at pp. 149–150.)

Here, Judge Carlos Chung’s comments did not suggest a bias in favor of the prosecution. Nor did they imply that the evidence against Holmes was particularly strong or put undue pressure on Holmes to agree to the deal. Rather, the comments were to ensure that Holmes understood what he might be giving up if he held out for a guarantee that the separate charges would not be filed. To the extent Judge Carlos Chung indicated that the charges against Holmes were “about as serious as you get,” this was a fact as he was facing nearly a 70-year sentence. The trial court’s comments were not coercive and did not force Holmes to make a decision under duress.

The alleged time constraints imposed Holmes were not impliedly coercive. Judge Carlos Chung afforded Holmes an ample amount of time to negotiate and extended additional time for the People to offer a lesser sentence. Under this timeframe, Holmes was not “‘rushed’” to make a decision. (See *People v. Grey* (1990) 225 Cal.App.3d 1336, 1340 [defendant failed to show good cause for withdrawal of his guilty plea, even though he was given only five to 10 minutes to consider plea offer before he entered plea], disapproved on another ground in *In re Jordan* (1992) 4 Cal.4th 116, 130, fn. 8.)

The participation of Holmes's mother also did not vitiate the voluntariness of the plea. As both trial judges made clear, Holmes's mother was there to assist and to give Holmes additional time to make his decision. Judge Carlos Chung told Holmes that he alone would have to make the choice and, ultimately, live with that decision himself. Nothing in the record indicates that Holmes did not want his mother to participate in the negotiations. On the contrary, the record indicates that Holmes was actively looking to his mother at the beginning of the plea colloquy for her input on whether to accept the plea. It was only after the fact that Holmes claimed his mother's presence created undue pressure. In any event, her participation did not rise to the level which would tend to overcome Holmes's exercise of free judgment.

Finally, we find no issue with the plea colloquy itself or the denial of Holmes's motion to withdraw. Judge Lisa Chung fully considered Holmes's statement that he was rushed into entering his plea and that his mother improperly influenced him to plead guilty. However, when asked if anyone had pressured him into pleading guilty, Holmes replied, "No." Judge Lisa Chung also noted that Holmes's mother was present at the time of the plea, but that she did not pressure him into pleading guilty. Again, Judge Lisa Chung found that Holmes's mother was there for support and to give him more time to make his decision. His contention that he was coerced into taking the plea bargain has no evidentiary support in the record.

We find that on the record before us, Holmes has not met his burden to show by clear and convincing evidence that good cause exists to withdraw his plea.

DISPOSITION

The judgment is affirmed.
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DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.