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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN LAMAR ASKEW,

Defendant and Appellant.

B270934

(Los Angeles County
Super. Ct. No. MA039230)

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

Paul Kleven, 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,
Shawn McGahey Webb and David W. Williams, Deputy Attorneys General,
for Plaintiff and Respondent.

Following revocation of probation imposed by a negotiated plea agreement, Jonathan Lamar Askew (defendant) was sentenced to eight months in state prison to run consecutively with the agreed upon term of 21 years from the prior case. Defendant then filed an appeal challenging the trial court's calculation of his presentence custody credits for both of his cases. Given gaps in the record, we remanded the matter to the trial court with directions. While on remand, defendant claimed his 21-year sentence from the prior case was unauthorized and filed a motion for modification of his sentence and requested that he be allowed to withdraw his plea based on that illegality. The trial court granted defendant's request to modify his sentence, but denied his request to withdraw his plea. Defendant now appeals the modified judgment contending the trial court exceeded its jurisdiction by altering the plea agreement without his consent, and violated his right to withdraw from the unlawful plea agreement. We affirm the judgment of conviction.

BACKGROUND¹

On August 21, 2007, the district attorney filed an information charging defendant with two counts of assault with a deadly weapon (knife) in violation of Penal Code section 245, subdivision (a)(1).² The information alleged with respect to both counts that defendant had caused great bodily injury within the meaning of section 12022.7, subdivision (a) and that he

¹ Portions of the procedural background are taken from this court's nonpublished opinion in defendant's prior appeal, *People v. Askew* (Sept. 28, 2015, B257800). We take judicial notice of this opinion. (Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

² All further statutory references are to the Penal Code.

committed the offenses for the benefit of a street gang within the meaning of section 186.22, subdivision (b)(1)(C). The information also stated both crimes were serious felonies under section 1192.7, subdivision (c).³

On May 23, 2008, defendant, who was self-represented, withdrew his not guilty pleas and entered into a plea bargain in which he pleaded nolo contendere with respect to both counts and admitted the great bodily injury and gang allegations in exchange for a 21-year suspended prison sentence and five years of formal probation, of which the first year would be served in jail.⁴ The 21-year sentence was comprised of the high term of four years for count 1, plus three years for the great bodily injury enhancement and 10 years for the gang enhancement on that count, and then an additional one year for count 2, which was one-third of the midterm, plus an additional three years for the great bodily injury enhancement on that count. The gang enhancement sentence for count 2 was imposed and stayed.

In August 2012, the district attorney alleged defendant had committed the crime of robbery in violation of section 211. The trial court revoked

³ The facts of defendant's criminal conduct are not material to his contentions on appeal.

⁴ The prosecution initially offered defendant a deal of a guilty plea to count 1, with an admission to the great bodily harm allegation, in exchange for seven years in state prison. Defendant made a counteroffer of a plea on all counts in exchange for one year in county jail and a suspended 21-year sentence. The prosecution rejected defendant's counteroffer, but made an alternative offer of a plea on all counts and a 21-year suspended sentence if defendant agreed to "waive his back time" and be sentenced to an additional year in county jail as a condition of probation. Defendant accepted the prosecution's alternative offer.

defendant's probation. After a jury trial, defendant was convicted of grand theft as a lesser included offense of robbery.

On July 21, 2014, the trial court sentenced defendant to 21 years and eight months in state prison, which was comprised of his agreed upon 21-year sentence in the prior case and eight months for the current case.

Thereafter, defendant filed an appeal on the grounds that he was denied the correct number of actual custody days when he was sentenced for both of his cases. Due to "gaps in the record," we remanded the matter to the trial court with directions.

Before the hearing on remand, defendant filed a motion for modification of sentence requesting the trial court to "reinstat[e] probation, or reduc[e] [his] prison term." He also sent a series of letters contending, among other things, that the imposition of both the great bodily injury and gang enhancement to count 1 in his prior case was contrary to *People v. Gonzales* (2009) 178 Cal.App.4th 1325 so that "proper corrections" to his sentence may be "necessary." Defendant further requested that "due to the illegal sentencing" he should be given the opportunity to withdraw his plea.

On February 4, 2016, the trial court held a hearing on the matter. In addition to resolving the presentence custody credits in the prior case, the trial court noted that "all sides have agreed" defendant should not have been sentenced to both the great bodily injury and gang enhancements in count 1 and reduced defendant's sentence to 16 years, compromised of the high term of four years for count 1, plus 10 years for the gang enhancement on that count, and then an additional one year for count 2, which was one-third of the midterm, plus an additional one year for the great bodily injury enhancement

on that count, which was also one-third of the midterm.⁵ The trial court then denied defendant's request to withdraw his plea, ruling "the remainder of [the] deal [was] very valid." On February 10, 2016, the abstract of judgment was amended to reflect the modified sentence.

On March 14, 2016, defendant filed a notice of appeal and request for certificate of probable cause on the grounds the trial court exceeded its jurisdiction by altering the plea agreement without his consent and violated his right to withdraw from the plea agreement which was unlawful.⁶ The trial court granted the certificate of probable cause.

CONTENTIONS

Defendant contends the trial court erred in denying his request to rescind the plea agreement. Relying on *People v. Superior Court (Sanchez)*

⁵ It appears the trial court reduced the great bodily injury enhancement sentence on count 2 based on section 1170.1, subdivision (a), which provides "when any person is convicted of two or more felonies . . . and a consecutive term of imprisonment is imposed . . . [t]he subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses."

⁶ On January 23, 2017, the People filed a motion to dismiss the appeal, which was deferred to the panel. The People contend we should construe defendant's request to withdraw his guilty plea as a writ of error *coram nobis* and then dismiss it because "his no contest plea was based on 'an error of law, which is not cognizable in a *coram nobis* proceeding.'" We decline to address this argument as we conclude defendant's claim is permissible on appeal. (*People v. Miller* (2012) 202 Cal.App.4th 1450, 1456 [finding cognizable an appeal from a motion to withdraw a guilty plea based on an authorized sentence made five years after defendant entered into a negotiated plea bargain].)

(2014) 223 Cal.App.4th 567 (*Sanchez*), defendant contends when a sentence agreed upon in a plea agreement is unauthorized, the trial court is required to “nullify the illegal plea bargain and place the parties in the position they were in prior to the plea bargain.” He also contends general contract principles entitle him to rescind the plea agreement because his consent was “entered into through a mutual mistake in law.” According to defendant, the “single object of the plea bargain was the term of imprisonment [he] was agreeing to in exchange for his plea, so if the agreement is considered to be an unlawful contract, or one impossible to perform, the entire agreement should be considered void”

The People contend defendant is estopped from challenging the plea agreement, citing *People v. Hester* (2000) 22 Cal.4th 290 (*Hester*).

DISCUSSION

The Trial Court Did Not Err in Denying Defendant’s Request to Rescind the Plea Agreement

“[T]he process of plea negotiation ‘contemplates an agreement negotiated by the People and the defendant and approved by the court. [Citations.]’” (*People v. Segura* (2008) 44 Cal.4th 921, 929-930.) ““When a guilty [or nolo contendere] plea is entered in exchange for specified benefits such as the dismissal of other counts or an agreed maximum punishment, both parties, including the state, must abide by the terms of the agreement.”” (*Id.* at pp. 930-931.) “Once the court has accepted the terms of the negotiated plea, “[it] lacks jurisdiction to alter the terms of a plea bargain so that it becomes more favorable to a defendant *unless, of course, the parties agree.*” [Citation.]” (*Id.* at p. 931, italics added.)

Here, as the trial court pointed out, “all sides . . . agreed” that the imposition of both the great bodily injury and gang enhancement to count 1

in defendant's prior case was unauthorized. (See *People v. Gonzalez* (2009) 178 Cal.App.4th 1325, 1331-1332 [concluding "subdivision (g) of [section 1170.1] prohibits the imposition of more than one enhancement 'for the infliction of great bodily injury on the same victim in the commission of a single offense'"].) Thus, given the consent by both parties, the trial court was well within its jurisdiction to modify the parties' plea agreement and correct the earlier unauthorized sentence. (*In re Renfrow* (2008) 164 Cal.App.4th 1251, 1256 ["an unauthorized sentence' is 'subject to judicial correction when it ultimately [comes] to the attention of the trial court or [reviewing] court'"].)

Defendant does not challenge the reduction of his sentence. Rather, the issue on appeal is whether defendant was entitled to rescind the plea agreement as a result of the unauthorized sentence. We agree with the People and conclude defendant is estopped from challenging the plea agreement to which he agreed and from which he benefited. The principles articulated in *Hester, supra*, 22 Cal.4th 290, are applicable to defendant's situation.

In *Hester*, in exchange for his plea to five substantial counts and a personal use allegation, the trial court sentenced the defendant to an agreed term of four years in state prison with concurrent three-year terms for other felonies and concurrent jail terms for the misdemeanor counts. (*Hester, supra*, 22 Cal.4th at p. 293.) On appeal, the defendant argued his sentence was unauthorized because the trial court failed to stay the three-year term on his assault charge in violation of section 654, which precluded "multiple punishments for a single act or indivisible course of conduct." (*Hester*, at p. 294.) The Court of Appeal found a sentencing error and modified the judgment to stay the three-year-term under section 654. (*Ibid.*) Our Supreme Court reversed, concluding a defendant is estopped from

challenging an unauthorized sentence when the defendant pled guilty in return for a specified sentence. (*Id.* at p. 295.) It explained: “Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did not lack *fundamental* jurisdiction.^[7] The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process.” (*Ibid.*)

Defendant here, by accepting the plea agreement, was able to avoid prosecution on two counts of assault with a deadly weapon with long prison sentences in exchange for one year in county jail and probation. As in *Hester*, having already received the benefit of his bargain, we conclude defendant is estopped from challenging his plea agreement on appeal. (*In re Griffin* (1967) 67 Cal.2d 343, 348 [“A litigant who has stipulated to a procedure in excess of jurisdiction may be estopped to question it when ‘[t]o hold otherwise would permit the parties to trifle with the courts.’”].)

Defendant cites *Sanchez, supra*, 223 Cal.App.4th 567, as authority that a plea agreement based on an unauthorized sentence must be nullified and the parties placed in the position they were prior to the plea agreement. In *Sanchez*, the parties entered into a plea agreement under which defendant agreed to plead no contest to one count of attempted murder in exchange for an indeterminate term of 25 years to life and dismissal of the other counts.

⁷ Fundamental jurisdiction is “described as ‘an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties.’” (*In re Reno* (2012) 55 Cal.4th 428, 478.) Here, there is no dispute the trial court had fundamental jurisdiction to sentence defendant.

(*Id.* at p. 570.) At sentencing, the trial court noted the 25-years-to-life term was unauthorized and, against the People’s objection, sentenced the defendant to the term allowed by law for attempted murder, which was life with the possibility of parole, effectively giving the defendant a minimum term of seven years rather than 25 years. (*Id.* at p. 571.) The Court of Appeal reversed, holding the “trial court erred by denying the People’s request to vacate the plea and by imposing a sentence other than what was bargained for.” (*Id.* at p. 577.) In so ruling, it concluded, “Because the parties were subject to a mistake of law, the People were entitled to rescind the agreement, which means that the trial court should have granted the prosecution’s request to vacate the plea bargain.” (*Id.* at p. 573.) Defendant’s reliance on *Sanchez* is misplaced.

In *Sanchez*, the issue on appeal was whether the trial court could *unilaterally* alter the terms of a plea agreement due to an authorized sentence. (*Sanchez, supra*, 223 Cal.App.4th at p. 572.) The Court of Appeal noted, “Once the trial court approves the plea bargain, it cannot change the agreement without the consent of the parties.” (*Id.* at p. 573.) Here, unlike *Sanchez*, the trial court modified the terms of the plea agreement with the *consent of both parties*. *Sanchez* also did not analyze the doctrine of estoppel and it is therefore distinguishable.

Accordingly, to permit defendant now to withdraw his guilty plea, where he has received the benefit of his bargain, would allow defendant “to trifle with the courts” (*Hester, supra*, 22 Cal.4th at p. 295.) Defendant is therefore estopped from challenging the plea agreement.⁸

⁸ Because defendant is estopped from challenging the plea agreement, we need not address whether general contract principles entitle defendant to rescind the plea agreement. We note that in *Sanchez*, the case relied on by

DISPOSITION

The judgment is affirmed.

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GOODMAN, J.*

We concur:

CHAVEZ, Acting P.J.

HOFFSTADT, J.

defendant, we observed “there is some authority that mutual mistake of law affords no basis for relief from the contract (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 272, p. 303).” (*Sanchez, supra*, 223 Cal.App.4th at p. 573, fn. 2.)

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