Filed 9/5/12 P. v. Laiwala CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. SHAMSHA N. LAIWALA, Defendant and Appellant.	B233045 (Los Angeles County Super. Ct. No. BA359014)

P

APPEAL from the judgment of the Superior Court of Los Angeles County. Craig Richman, Judge. Affirmed.

Thien Huong Tran, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendant and appellant Shamsha N. Laiwala contends the court abused its discretion in denying both her motion to withdraw her guilty plea and her subsequent motion for reconsideration. We affirm.

BACKGROUND

Following a lengthy undercover operation by the Federal Bureau of Investigation and local law enforcement, a felony complaint was filed in state court on July 16, 2009, charging defendant with 11 felonies: two counts of false government documents activity (Pen. Code, § 113); one count of attempted false government documents activity (§§ 113, 664); five counts of filing false or forged instruments (§ 115, subd. (a)); and three counts of fraudulent computer access (§ 502, subd. (c)). Separate charges were filed in federal court (No. CR 08-1093 GHK).

The charges against defendant, and her two codefendants, Darryl Maxwell and Andrea Howard, stemmed from numerous contacts by an undercover agent with defendant at her place of business during the time period from December 2007 through April 2008. On several different occasions, defendant discussed with the undercover agent various options for buying fictitious documents, including drivers' licenses, Social Security numbers, birth certificates, vehicle registrations, and traffic school completion certificates. Defendant told the undercover agent he could purchase a birth certificate and Social Security number for $1500, and a traffic school completion certificate for $130. Codefendant Maxwell, an employee of the Department of Motor Vehicles (DMV), assisted defendant by processing false DMV test scores, and codefendant Howard assisted in obtaining false Social Security numbers.

After defendant's arrest and booking, she was released on her own recognizance. Defendant was represented in both state and federal court by Roger Rosen, a privately retained attorney. After initially pleading not guilty to all charges, defendant agreed to enter a plea of guilty to counts 5, 6, 9 and 10, in return for a dismissal of the remaining charges and a four-year prison term to run concurrently with any federal sentence imposed on the guilty plea entered in the federal case. The plea agreement with the state prosecutor included a condition that defendant could serve her time in a federal facility.

The plea agreement was placed on the record before the court on January 21, 2010, at the predisposition hearing. The court questioned defendant thoroughly, made the requisite admonitions, and obtained affirmative waivers from defendant. Attorney Rosen stipulated to a factual basis for the plea. The court found defendant to have knowingly, intelligently, and voluntarily entered her guilty plea.

Later the same day, defendant returned to court without her lawyer and tried to speak with the judge about withdrawing her guilty plea. Defendant was advised she should speak with her attorney first. Upon contacting Attorney Rosen, he advised defendant to obtain separate counsel to move to withdraw her plea since he had handled the plea agreement she now sought to withdraw. Attorney Dana Dorsett substituted in as counsel for defendant on March 10, 2010. Attorney Dorsett filed a motion to withdraw defendant's guilty pleas in both the state and federal courts. The state court motion was based in large part on the claim that the charges were legally defective. To the extent the motion purported to raise a claim that defense counsel failed to ask for an interpreter for the proceedings, that issue was unequivocally withdrawn at the hearing on the motion. The court held an evidentiary hearing over a period of several days at which Attorney Rosen, defendant, and several other individuals testified. Following argument, the court denied the motion.

Thereafter, Carol Ojo, a bar panel attorney, was appointed as defendant's new counsel. Attorney Ojo filed a motion for reconsideration of the denial of defendant's motion to withdraw her plea, essentially based on the same grounds originally stated. After entertaining argument, the motion for reconsideration was denied.

The court imposed sentence in conformance with the plea agreement. The court imposed the midterm of two years on count 5, identified as the base term, plus consecutive eight-month terms (one-third the midterm) on each of counts 6, 9 and 10, for a total of four years in state prison. To account for the day she was in custody being booked, the court awarded defendant one day of custody credit, and also imposed various fines. Defendant obtained a certificate of probable cause and timely filed this appeal.

DISCUSSION

Defendant contends the trial court abused its discretion by denying her motion to withdraw her guilty plea and her motion for reconsideration of that denial. The grant or denial of a motion to withdraw a guilty plea "lies within the trial court's sound discretion after consideration of all factors necessary to effectuate a just result; a reviewing court will not disturb its decision unless abuse is clearly demonstrated." (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103; accord, *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208 (*Huricks*).)

Penal Code section 1018 provides, in relevant part: "On application of the defendant at any time before judgment . . . the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." "Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. [Citations.] But good cause must be shown by clear and convincing evidence." (*People v. Cruz* (1974) 12 Cal.3d 562, 566; see also *People v. Nance* (1991) 1 Cal.App.4th 1453, 1457.)

Defendant argues she established good cause for withdrawal of her guilty plea based on her counsel's ineffective assistance during the plea process which prevented her from making a knowing, intelligent and voluntary plea. Specifically, defendant contends that Attorney Rosen provided ineffective assistance (1) in failing to research, analyze or explain to defendant that the charges in counts 5 and 6 under Penal Code section 502, subdivision (c) were defective as a matter of law; (2) in failing to research, analyze or explain to defendant that the charges in counts 9 and 10 under Penal Code section 115, subdivision (a) were defective as a matter of law; and (3) in failing to investigate and explain the availability of an entrapment defense.

"It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.) The criteria for evaluating a claim of ineffective assistance of counsel set forth in *Strickland v. Washington* (1984) 466 U.S. 668 have been applied to claims raised

in connection with a request to withdraw a plea. (See *Hill v. Lockhart* (1985) 474 U.S. 52, 58-59.) Our Supreme Court has explained that "in order successfully to challenge a guilty plea on the ground of ineffective assistance of counsel, a defendant must establish not only incompetent performance by counsel, but also a reasonable probability that, but for counsel's incompetence, the defendant would not have pleaded guilty and would have insisted on proceeding to trial." (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 934.) An attorney's performance is "deficient if the representation fell below an objective standard of reasonableness under prevailing professional norms." (*People v. Benavides* (2005) 35 Cal.4th 69, 93.)

We conclude defendant has failed to show she was denied effective assistance of counsel in entering her guilty plea, and that the trial court did not abuse its discretion in denying her motions to withdraw.

1. Counts 5 and 6 (Pen. Code, § 502)

Defendant argues that Attorney Rosen failed to act as a competent defense attorney in either recognizing the legal defects of the charges in counts 5 and 6, or in failing to explain to defendant the legal significance of the deficiencies in the pleading so that defendant could make a reasoned decision whether to accept the plea agreement.

Defendant was convicted pursuant to her plea bargain in counts 5 and 6 of violating Penal Code section 502, subdivision (c). That statute provides in pertinent part: "Except as provided in subdivision (h), any person who commits any of the following acts is guilty of a public offense: [¶] (1) Knowingly accesses and without permission alters, damages, deletes, destroys, or otherwise uses any . . . computer . . . in order to . . . devise or execute any scheme or artifice to defraud, deceive, or extort." Defendant was charged in counts 5 and 6 as an aider and abettor of codefendant Maxwell who, using his computer during working hours at the DMV, entered false test scores into the DMV computer system to assist defendant in their scheme to facilitate the issuance of fraudulent drivers' licenses.

Exhibit B to defendant's motion for reconsideration is a copy of a court order authorizing use of a pen register and other tracing devices in connection with the

undercover investigation of defendant and her codefendants. The summary of the undercover investigation submitted in support of the order shows that the dates of computer fraud identified in counts 5 and 6 (December 10 and 17, 2007) correspond to the dates the undercover agent was at a DMV office, per defendant's instruction, attempting to process a false driver's license application.

Defendant relies on *Chrisman v. City of Los Angeles* (2007) 155 Cal.App.4th 29 (*Chrisman*) and Penal Code section 502, subdivision (h)(1) to argue both counts are defective as a matter of law because the computer use was performed by codefendant Maxwell, a DMV employee. Subdivision (h)(1) provides: "Subdivision (c) does not apply to punish any acts which are committed by a person within the scope of his or her lawful employment. *For purposes of this section, a person acts within the scope of his or her employment when he or she performs acts which are reasonably necessary to the performance of his or her work assignment*." (Italics added.)

Defendant argues that codefendant Maxwell was using his work computer to enter the fraudulent DMV test scores, had not obtained access to the computer unlawfully, and therefore under the holding in *Chrisman* and the language of Penal Code section 502, subdivision (h)(1), his conduct was not criminal since it was performed within the course and scope of his lawful employment. As such, defendant could not be liable for aiding and abetting a noncriminal act. The contention is without merit.

" 'Statutes must be given a reasonable and common sense construction in accordance with the apparent purpose and intention of the lawmakers—one that is practical rather than technical, and that will lead to a wise policy rather than to mischief or absurdity.' [Citation.]" (*Bush v. Bright* (1968) 264 Cal.App.2d 788, 792; see also Civ. Code, § 3542 ["Interpretation must be reasonable."]; *People v. Weltsch* (1978) 84 Cal.App.3d 959, 964.) Penal Code section 502, subdivision (a) contains the following expression of legislative intent: "It is the intent of the Legislature in enacting this section to expand the degree of protection afforded to . . . governmental agencies from tampering, interference, damage, and unauthorized access to lawfully created computer data and computer systems. . . . [¶] The Legislature further finds and declares that

protection of the integrity of all types and forms of lawfully created computers, computer systems, and computer data is vital to the protection of the privacy of individuals as well as to the well-being of . . . governmental agencies, and others within this state that lawfully utilize those computers, computer systems, and data."

It cannot reasonably be argued that in enacting Penal Code section 502 (hereafter section 502) for the purpose, in part, of protecting the integrity of governmental databases and computers, the Legislature intended that public employees and their cohorts be protected from criminal prosecution for using their work computers to enter fraudulent data for private gain. Entering fraudulent DMV test scores in furtherance of a criminal scheme to fabricate fraudulent drivers' licenses plainly is not an act "reasonably necessary to the performance" of *any* DMV employee's work assignment. (§ 502, subd. (h)(1).)

Nor do we read *Chrisman* as condoning such an interpretation of section 502, subdivision (h)(1). In *Chrisman*, a police department filed administrative charges against one of its officers, seeking his termination for misuse of the officer's work computer, among other charges. (*Chrisman*, *supra*, 155 Cal.App.4th at p. 32.) The "gist" of the computer misuse charges, based on section 502, was that the officer, while on duty, had searched department databases on his work computer for information about friends and celebrities. (*Chrisman*, at p. 32.) There was no dispute the officer had no work-related purpose for the computer searches. *Chrisman* explained however that "scope of employment" in section 502, subdivision (h)(1) cannot be read so narrowly as to render an employee's conduct criminal under section 502 merely because the employer disapproved of it. (*Chrisman*, at pp. 36-37.) The officer's conduct was against department policy and could be described as misconduct, but there were no allegations the officer entered false information in furtherance of a larger scheme to create fraudulent government documents. The conduct at issue in *Chrisman* is not remotely comparable to the computer fraud at issue here.

2. Counts 9 and 10 (Pen. Code, § 115)

Defendant also contends Attorney Rosen failed to provide competent legal advice regarding the legal defects in felony counts 9 and 10. Defendant contends the conduct on which both counts were based could only be charged as violations of Vehicle Code section 20, a misdemeanor, and that the one-year statute of limitation on misdemeanors had expired at the time the felony complaint in this matter was filed on July 16, 2009.

Defendant's argument is premised on the *Williamson* rule, based on the Supreme Court's decision in *In re Williamson* (1954) 43 Cal.2d 651. "Under the *Williamson* rule, if a general statute includes the same conduct as a special statute, the court infers that the Legislature intended that conduct to be prosecuted exclusively under the special statute." (*People v. Murphy* (2011) 52 Cal.4th 81, 86 (*Murphy*).) " 'Typically the issue whether a special criminal statute supplants a more general criminal statute arises where the special statute is a misdemeanor and the prosecution has charged a felony under the general statute instead. [Citations.] Such prosecutions raise a genuine issue whether the defendant is being subjected to a greater punishment than specified by the Legislature, and the basic question for the court to determine is whether the Legislature intended that the more serious felony provisions would remain available in appropriate cases.' [Citation.]" (*Mitchell v. Superior Court* (1989) 49 Cal.3d 1230, 1250, fn. 14.)

The Supreme Court has explained that " '[t]he "special over the general" rule . . . does not apply . . . unless "each element of the 'general' statute corresponds to an element on the face of the 'specific' . . . statute" or "it appears from the entire context that a violation of the 'special' statute will necessarily or commonly result in a violation of the 'general' statute." ' [Citations.] The rule is not one of constitutional or statutory mandate, but serves as an aid to judicial interpretation when two statutes conflict." (*People v. Walker* (2002) 29 Cal.4th 577, 585-586 (*Walker*); see also *Murphy*, *supra*, 52 Cal.4th at pp. 86-87.)

In counts 9 and 10, defendant was charged with violating Penal Code section 115, subdivision (a), which provides: "(a) Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office

within this state, which instrument, if genuine, might be filed, registered, or recorded under any law of this state or of the United States, is guilty of a felony." Count 9 was based on the procurement and offering of a fraudulent driver's license application, and count 10 was based on a false vehicle transfer form and false smog, brake and lamp certificate.

Defendant contends her conduct could only lawfully be charged as a misdemeanor under Vehicle Code section 20, which reads: "It is unlawful to use a false or fictitious name, or to knowingly make any false statement or knowingly conceal any material fact in any document filed with the Department of Motor Vehicles or the Department of the California Highway Patrol." A violation of section 20 is denominated a misdemeanor by Vehicle Code section 40000.5. Defendant argues the *Williamson* rule applies because the subject matter of the two statutes overlap, with both statutes covering the filing of false documents at the DMV.

Neither test under the *Williamson* rule points to a conclusion that Vehicle Code section 20 was intended to supplant Penal Code section 115 in the prosecution of presenting forged documents to the DMV. Under the first test, each element of Penal Code section 115 does not correspond to an element of Vehicle Code section 20. (*Walker*, *supra*, 29 Cal.4th at p. 585.) Penal Code section 115 contains additional elements not contained in Vehicle Code section 20, including the act of "procuring" a forged instrument for filing in a public office.

The second test under the *Williamson* rule also does not point to a legislative intent to supplant Penal Code section 115. Viewing the entire context, it does not appear that a " ' "violation of the 'special' statute will necessarily or commonly result in a violation of the 'general' statute." ' [Citations.]" (*Walker*, *supra*, 29 Cal.4th at p. 585.) Vehicle Code section 20 can be violated by the omission of a material fact or the inclusion of a false fact in an otherwise genuine document. It can also be violated by the filing of a document that includes a fictitious name. None of these acts, without more, would result in the violation of Penal Code section 115, which requires the filing or recordation of a "false or forged instrument." (§ 115, subd. (a).)

Defendant cites *People v. Wood* (1958) 161 Cal.App.2d 24 (*Wood*) in support of her argument. *Wood* held that former Vehicle Code section 131, subdivision (d), the predecessor statute to Vehicle Code section 20, did supplant Penal Code section 115 for the type of conduct at issue there. (161 Cal.App.2d at p. 27.) The defendant in *Wood* was an automobile dealer who had included false dates of sale and false dates of nonoperation in forms filed with the DMV following vehicle sales. The reviewing court explained that such conduct clearly amounted to the filing of documents containing false statements, but did not amount to the presentation of a forged instrument. (*Id*. at pp. 27-28.)

In contrast, defendant here was charged with procuring and offering counterfeit driver's license applications and related documents for filing with the DMV, as part of a criminal enterprise fabricating false government identification documents. Nothing in the statutory schemes indicates a legislative intent to limit the penalty for such conduct to a misdemeanor. Indeed, other sections of the Vehicle Code and Penal Code provide for the filing of felony charges in connection with the possession and use of counterfeit and forged vehicle registrations and drivers' licenses. (E.g., Veh. Code, § 4463; Pen. Code, § 470a; see also *People v. Molina* (1992) 5 Cal.App.4th 221 [§ 20 of Veh. Code does not supplant filing of felony charges pursuant to perjury statute at Pen. Code, § 118 because driver's license application requires verification under oath].)

3. Entrapment Defense

Finally, defendant contends Attorney Rosen provided ineffective assistance by failing to investigate the possibility of an entrapment defense, which was essential to defendant making an intelligent decision as to whether she should accept a plea bargain. Defendant's argument hinges primarily on the fact that Attorney Rosen did not pay for certified transcripts of the undercover investigation tapes of conversations with defendant which showed some of her statements could be viewed as exculpatory.

However, defendant failed to establish, by clear and convincing evidence, that Attorney Rosen's investigation and explanation of available defenses fell below "an objective standard of reasonableness under prevailing professional norms." (*People v.*

Benavides, *supra*, 35 Cal.4th at p. 93.) Based on both Attorney Rosen's and defendant's testimony at the evidentiary hearing on the motion, Attorney Rosen and defendant listened to the tapes disclosed by the prosecutors, defendant was allowed to take them home to review, and they discussed, on multiple occasions, the discrepancies defendant noted in the uncertified transcription provided by the prosecution. Attorney Rosen stated he discussed an entrapment defense with defendant, including the problems with securing an instruction on that defense from the trial judge. Defendant in no way explains or provides authority for how such conduct is properly deemed ineffective assistance of counsel.

A defendant's change of heart about her decision to accept a plea bargain does not amount to good cause to withdraw a plea. (*Huricks*, *supra*, 32 Cal.App.4th at p. 1208.) We conclude defendant failed to establish good cause, by clear and convincing evidence, for withdrawal of her guilty plea. We see nothing more than a change of heart.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GRIMES, J.

WE CONCUR:

BIGELOW, P. J. SORTINO, J. *

---

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