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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

GLENN LEWIS MERRIFIELD,

Defendant and Appellant.

A104413

(Sonoma County
Super. Ct. No. SCR-32409)

Glenn Lewis Merrifield was arrested on November 21, 2002 and charged with driving under the influence of alcohol. (Veh. Code, § 23152, subd. (a).) The DUI was charged as a felony offense due to Merrifield's prior conviction for driving under the influence and causing bodily injury to another person. (Veh. Code, §§ 23153, 23550.5.) The information further alleged Merrifield had suffered two prior prison convictions (Pen. Code, § 667.5)¹ and one prior strike conviction for robbery (§§ 211, 1170.12.) After signing a *Tahl* form waiving his constitutional rights,² Merrifield pleaded no contest to driving under the influence and admitted the 1996 driving under the influence conviction and the prior strike conviction. He then obtained a continuance of sentencing so he could file a motion to strike the prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. On October 9, 2003, the court denied the *Romero* motion

¹ All statutory references are to the Penal Code unless otherwise stated.

² *In re Tahl* (1969) 1 Cal.3d 122.

and sentenced Merrifield to the mid-term of two years, doubled to four years due to the prior conviction.

On appeal, Merrifield argues he is entitled to specific performance of a 32-month indicated sentence he had been promised by the trial court. Because it is impossible to tell from the record whether the plea was pursuant to an indicated sentence or a negotiated disposition, or whether Merrifield received what he bargained for in entering the plea, we agree the judgment must be reversed. We do not agree that specific enforcement is the appropriate remedy, however, and we remand with instructions that Merrifield be permitted to withdraw his plea.

DISCUSSION

I. Unclear Whether Plea Was Pursuant to Indicated Sentence or Plea Bargain

Both sides acknowledge this case “presents a hybrid of a ‘plea bargain’ and an ‘indicated sentence.’ ” Herein lies the problem. If the court promised an indicated sentence, it stated no reasons for departing from it; if the parties intended a traditional plea bargain with sentencing left to the court’s discretion, Merrifield was not advised of his right to withdraw the plea under section 1192.5.

In general, “plea bargaining” refers to “any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.” (§ 1192.7, subd. (b).) Under a plea bargain with the prosecutor, “ ‘the defendant agrees to plead guilty in order to obtain a reciprocal benefit, generally consisting of a less severe punishment than that which could result if he were convicted of all offenses charged.’ [Citation.] The process requires the consent of the prosecutor [citations], and the ‘traditional role of the [court] . . . is one of approving or disapproving’ the bargain ‘arrived at by counsel for defendant and the’ prosecutor [citation].” (*People v. Turner* (2004) 34 Cal.4th 406, 418.)

A plea offered in exchange for an indicated sentence from the court is different. “In an indicated sentence, a defendant admits all charges, including any special allegations and the trial court informs the defendant what sentence will be imposed. No ‘bargaining’ is involved because no charges are reduced. (*People v. Vessell* (1995) 36 Cal.App.4th 285, 296; *People v. Trausch* (1995) 36 Cal.App.4th 1239, 1247.) In contrast to plea bargains, no prosecutorial consent is required. (*People v. Superior Court (Ramos)* (1991) 235 Cal.App.3d 1261, 1271.)” (*People v. Allan* (1996) 49 Cal.App.4th 1507, 1516.) An indicated sentence is the court’s pronouncement of “ ‘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.’ [Citation.]” (*People v. Turner, supra*, 34 Cal.4th at p. 419.)

The record includes elements of both types of disposition. Merrifield initialed a paragraph of the *Tahl* form which stated, under the heading “Indicated Sentence,” “I understand that, although the Court has indicated a sentence, there is no agreement with the District Attorney’s Office and the Court will not decide what my sentence will be until it has read and considered a report from the probation office.” He did *not* initial paragraphs for an “Open Plea” (which stated no agreement or indication had been made as to sentence), or for a “Negotiated Disposition pursuant to PC 1192.5” (which stated the plea was part of a conditional agreement with the prosecution), nor did he initial the paragraph pertaining to charges that would be dismissed as a result of the plea. In addition, written on one section of the *Tahl* form was the statement: “Court indicates mitigated term of 32 months.” Taken alone, the *Tahl* form thus reflects that Merrifield pleaded no contest in exchange for an indicated sentence of 32 months—i.e., double the mitigated term for the offense.

Statements made by counsel and the court at the change of plea hearing, held the day after Merrifield signed the *Tahl* form, also suggest an indicated sentence was originally intended. At the change of plea hearing, defense counsel reminded the court of a discussion had earlier in chambers in which, “the Court had indicated a mitigated term, if at the time of sentencing the Court is not inclined to strike the strike and Mr. Merrifield is sent back to State Prison.” Counsel asked the court to confirm its notes of the off-record

discussion because the *Tahl* form stated the court “indicates [a] mitigated term of 32 months.” The court confirmed that its notes corresponded with counsel’s description and added its recollection that “although the People would probably object to the Court giving an indication, . . . I would be willing under *Romero* to strike the strike to make him eligible for a three-year prison sentence.” Taken in combination with the *Tahl* form, this exchange suggests the court indicated it would either grant a *Romero* motion to strike the prior conviction or, failing that, would sentence Merrifield to double the mitigated term for the DUI.³ Whether such an indication was made formally or not, or whether it was fully communicated to Merrifield, is unclear. To be sure, the record contains no declaration from the court promising Merrifield a specific sentence.

Other aspects of the case, however, bring Merrifield’s plea more within the traditional framework of a negotiated plea bargain. To obtain an indicated sentence, a defendant pleads guilty to all charges, such that “ ‘all that remains is the pronouncement of judgment and sentencing.’ [Citation.]” (*People v. Turner, supra*, 34 Cal.4th at p. 418; *People v. Vessell, supra*, 36 Cal.App.4th at p. 296.) Here, Merrifield did not plead to *all* charges. He did not admit the prior prison term enhancements, and the People moved to strike these allegations at the change of plea hearing.⁴

In addition, when Merrifield’s attorney argued the *Romero* motion at the sentencing hearing, she urged the court to strike the prior so that Merrifield would not face a *six*-year prison term for a mere DUI offense. Belying a suggestion that Merrifield was guaranteed a mitigated sentence of 32 months if the *Romero* motion were denied, counsel urged the trial court to grant the *Romero* motion so “[w]hat would have been a two-day jail sentence for any other person” would not “become[] a six-year prison term at 80 percent for Mr.

³ Of course, the “three-year” sentence mentioned by the trial court is *different* than the 32-month term indicated on the *Tahl* form. Apparently, the court was referring to the offense’s upper term of three years, which would have been the maximum punishment possible if Merrifield’s *Romero* motion were granted.

⁴ Although the plea was obviously not conditioned on this action, the prosecution also later agreed to forego filing charges after Merrifield was arrested for possession of methamphetamine. (Health & Saf. Code, §§ 11377, 11550.)

Merrifield,” and she stressed “six years for this offense is an excessive punishment.” These remarks were an indirect response to the presentence report, which recommended an aggravated sentence of six years imprisonment and made no mention of an indicated sentence. As to “plea negotiations,” the presentence report stated only that the previously alleged section 667.5 enhancements had been stricken.

After the trial court denied the *Romero* motion, defense counsel urged the court to “*consider* the mitigated term, because that would be double at 80 percent” and “the punishment should fit the crime.” (Italics added.) Counsel added, in a statement that plainly contradicts Merrifield’s present claim that he was promised an indicated sentence, “And I think that’s probably the best the Court could do.” The prosecutor also made no reference to an indicated sentence, noting instead, “We don’t see . . . any basis to select the mitigated term,” and offering to stipulate to a sentence of double the midterm (four years). Nor did the court mention an indicated sentence. While noting there were reasons to follow the probation department’s recommendation of an upper term, the court exercised its discretion to disregard those aggravating circumstances “as an act of mercy.”

On this record, the disposition that was intended—and promised to Merrifield—is far from clear. The *Tahl* form and portions of the change of plea hearing suggest an indicated sentence was intended at one time, but the parties also proceeded at times as if Merrifield’s plea were part of a negotiated agreement with the district attorney’s office—whereby the prosecution struck two enhancements that could have added two years to the prison term (see § 667.5, subdivision (b)) and, as with other plea agreements, the ultimate sentence was left to the judge’s discretion.

We need not speculate about the parameters of this bargain, however. If it is unclear to us, it was most likely unclear to Merrifield. Merrifield signed a waiver form stating the court had indicated he would receive a mitigated sentence of 32 months. This is the only indication in the record of a promise that was made to Merrifield in exchange for his no contest plea. When the trial court denied his *Romero* motion and decided to sentence Merrifield based on the midterm rather than the mitigated term, Merrifield should

have been admonished pursuant to section 1192.5 and given an opportunity to withdraw his plea.

In the context of a negotiated plea bargain, “[w]hether or not a defendant waives an objection to punishment exceeding the terms of the bargain by the failure to raise the point in some fashion at sentencing depends upon whether the trial court followed the requirements of section 1192.5.” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.)

Section 1192.5 provides that when a plea agreement is accepted by the prosecutor and approved by the court, the defendant must be informed that the agreement is not binding on the court and that, if the court withdraws its approval, the defendant will be permitted to withdraw the plea if he wishes to do so. If a defendant is so informed “and the defendant does not ask to withdraw the plea or otherwise object to the sentence, he has waived the right to complain of the sentence later.” (*People v. Walker, supra*, 54 Cal.3d at p. 1026.)

In the “hybrid” context this case presents of a plea bargain combined with an indicated sentence, the trial court should have admonished Merrifield that he had a right to withdraw his plea if the sentence exceeded his expectations. We cannot conclude Merrifield was adequately advised of this right by the *Tahl* form because he did not initial the section that included the section 1192.5 admonishment. At the change of plea hearing, Merrifield confirmed he had signed the *Tahl* form and had no questions about it, but he was never orally advised of his rights under section 1192.5 by the trial court or the attorneys.

II. Specific Performance Not Appropriate Remedy

Although these problems persuade us the conviction must be reversed, specific performance is not the appropriate remedy on remand. “The usual remedies for violation of a plea bargain are to allow defendant to withdraw the plea and go to trial on the original charges, or to specifically enforce the plea bargain. Courts find withdrawal of the plea to be the appropriate remedy when specifically enforcing the bargain would have limited the judge’s sentencing discretion in light of the development of additional information or changed circumstances between acceptance of the plea and sentencing.” (*People v. Mancheno* (1982) 32 Cal.3d 855, 860-861.) “California courts, however, generally

disfavor the remedy of specific enforcement of a failed plea bargain when ‘specifically enforcing the bargain [will limit] the judge’s sentencing discretion in light of the development of additional information or changed circumstances between acceptance of the plea and sentencing.’ [Citations.]” (*In re Alvernaz* (1992) 2 Cal.4th 924, 942.)

Specific performance of the bargain is particularly inappropriate in this case because it is unclear exactly *what* bargain the parties reached. (See *People v. Mancheno*, *supra*, 32 Cal.3d at p. 861 [specific performance is appropriate only “when it will implement the reasonable expectations of the parties without binding the trial judge to a disposition that he or she considers unsuitable”].) Moreover, specifically enforcing a

sentence of 32 months would improperly limit the trial court’s discretion to consider the new drug offenses Merrifield committed after this indicated sentence was announced. (*In re Alvernaz*, *supra*, 2 Cal.4th at p. 942; *People v. Mancheno*, *supra*, 32 Cal.3d at pp 860-861.) The appropriate remedy under the circumstances is withdrawal of the plea. (See *People v. Williams* (1998) 17 Cal.4th 148, 164; *People v. Olea* (1997) 59 Cal.App.4th 1289, 1298-1300.)

DISPOSITION

The judgment is reversed, and the case is remanded for resentencing. On remand, Merrifield shall be permitted to withdraw his plea of no contest and corresponding admissions.

McGuiness, P.J.

We concur:

Parrilli, J.

Pollak, J.