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

THE PEOPLE,
Plaintiff and Respondent,
v.
THOMAS GEORGE CARSON,
Defendant and Appellant.

A107876

(Del Norte County
Super. Ct. No. CRF04-9183)

Appellant Thomas George Carson pled guilty to one count of first degree murder, five counts of attempted murder and one count of being an ex-felon in possession of a firearm. He also admitted two related firearm enhancements and two prior convictions. (See Pen. Code,¹ §§ 187, 664, 667, 667.5, subd. (b), 12021, 12022.53, subds. (c), (d).) After Carson’s motion to withdraw his guilty plea was denied, he was sentenced to 326 years to life in state prison. On appeal, he raises a scattershot of issues challenging the validity of his guilty plea.² We consider only one—whether the trial court erred by incorrectly advising him that a sentence of life imprisonment without possibility of parole was a possible sentence if he were

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

² Carson also filed a petition for habeas corpus raising many of the same issues. (No. A113023.)

convicted of the charges then pending against him. We find prejudicial error occurred rendering Carson's guilty plea involuntary and thus reverse his conviction.

I. FACTS³

On February 21, 2004,⁴ the Del Norte County Sheriff's Department learned that gunshots were being fired in a Klamath mobilehome park. When law enforcement officials from the sheriff's office, the California Highway Patrol and the National Park Service arrived on the scene, they came under fire. The gunman—later identified as appellant Thomas George Carson—was shooting a .22-caliber rifle from his trailer. After attempts to negotiate a surrender failed, the law enforcement officials returned fire. Carson suffered multiple gunshot wounds and surrendered to authorities. Shots apparently coming from Carson's trailer had struck and killed another mobilehome park resident, Daniel Sartuche.

Carson's injuries were serious enough that he was placed in the intensive care unit of a local hospital. He had surgery to remove one lobe of one of his lungs, several ribs, and tissue from the lung and chest wall. On March 4, he was released from the hospital and transported to Del Norte County jail.

On March 8, a complaint was filed charging Carson with one count of first degree murder, seven counts of attempted murder—five of them against peace officers⁵—and five counts of assault with a firearm on a peace officer. Each count was enhanced by a firearm use allegation. The complaint also alleged that Carson was guilty of one count of possession of a firearm by an ex-felon and had suffered several prior convictions. (See §§ 187, 245, subd. (d)(1), 664, 667, 667.5, subd. (b),

³ As there was no preliminary hearing or trial on the underlying facts, we rely on police and probation reports and our earlier mandamus decision for our statement of the underlying facts of this case. (*Carson v. Superior Court* (Feb. 23, 2005, A108761) [nonpub. opn.])

⁴ All subsequent dates refer to the 2004 calendar year unless otherwise indicated.

⁵ Four of the officers were with the county sheriff's office; one was a United States Department of Forestry Ranger.

12021, 12022.53, subds. (c), (d).) The complaint did not include any special circumstances allegations related to the first degree murder charge. At his arraignment, Carson pled not guilty to these charges. On May 4, Carson waived his right to a preliminary hearing.

On May 12, an information was filed charging him with one count of first degree murder, five counts of attempted murder and one count of possession of a firearm by an ex-felon. Six firearm use enhancements and two prior convictions were also alleged. (See §§ 187, 664, 667, 667.5, subd. (b), 12021, 12022.53, subds. (c), (d).) The information did not allege any special circumstances on the charge of first degree murder.

Two days later on May 14, Carson indicated his intention to plead guilty to all charges and admit all allegations in the seven-count information. The prosecution stated that the parties had made no sentencing agreement,⁶ but indicated that the maximum term that Carson could receive for the murder charge would be life imprisonment without possibility of parole, with a realistic expectation of a sentence of 25 years to life. The prosecutor and defense counsel stated that they had agreed that this would not be a death penalty case. Carson stated his understanding that he could be sentenced to 25 years to life or life imprisonment without possibility of parole for the murder. He told the trial court that he freely and voluntarily entered a guilty plea.

The trial court had some difficulty getting the parties to put the details of the plea negotiations on the record. In response to its questioning, the prosecutor first stated that no other charges or possible penalties were withheld from the information in consideration of the plea. When pressed, the prosecutor admitted—as he had already stated on the record—that the People had opted not to seek the death penalty.

⁶ The minutes of this proceeding state that sentences of life without possibility of parole for the murder charge, consecutive terms of 25 years to life for each attempted murder charge, and a consecutive six-year term for the firearm possession charge were conditions of the plea.

The trial court then asked Carson if knowing that he would not face the death penalty was a factor that led him to enter his guilty plea. Carson gave inconsistent answers to this question. First, he indicated that he knew nothing of the possibility of a death sentence. When the trial court asked again whether he understood that the prosecutor could seek the death penalty in this case, Carson's reply suggested that he had not been told such a sentence was possible until that hearing.

In an apparent attempt to clear up these inconsistencies, the trial court asked whether Carson understood that the prosecutor could have sought the death penalty but did not do so. The court added whether the defendant, knowing this, still freely and voluntarily entered into this plea? Carson replied that he did. The trial court explained that it asked these questions to be certain that Carson did not come back later to say that he really did not want to enter this plea, but felt he had to do so out of fear of this consequence. Carson agreed that he entered his plea freely and voluntarily, not because he was coerced by a sentence that the prosecutor might seek.

The trial court also advised Carson about his parole rights. The prosecutor noted that there would not likely be a parole period, because if Carson was ever released from prison, he would be on parole for life. Carson also stated that he understood he might be required to serve a life sentence without possibility of parole. Carson's trial counsel also agreed to the plea, stating that he had fully advised his client of his rights, any possible defenses, and the consequences of his plea. He believed that Carson entered this plea freely and voluntarily.

Carson then formally pled guilty to all seven counts and admitted all allegations charged in the May 12 information. He also admitted two prior convictions, one of which was a strike. The trial court conditionally accepted Carson's plea. The minutes of this proceeding recite that the trial court found that Carson made this admission after knowingly, intelligently, freely and voluntarily waiving his rights.

In June, the probation department recommended that Carson be sentenced on all seven offenses to a term of more than 246 years to life. The report suggested that

the 25-year to life term for first degree murder should be doubled because of Carson's prior strike conviction, with enhancements of 25 years to life for firearm use and an additional year for the second prior conviction enhancement. It also noted that Carson could be sentenced to consecutive terms of 25 years to life for each of the five attempted murder convictions as well as a six-year consecutive term for being an ex-felon in possession of a firearm. (See §§ 190, subd. (a), 664, 667.5, subd. (b), 12021, 12022.53, subds. (c), (d).)

Carson later advised the court that the probation department's summary of his guilty plea did not match his recollection of it. On July 1, Carson moved to withdraw his guilty plea. (See § 1018.) He also moved for a new trial on several grounds. His primary contentions centered on whether he was competent to enter the May 14 guilty plea and whether he understood that he might be sentenced to a total term in state prison exceeding a total sentence of 25 years to life because of enhancements and consecutive sentences. The trial court deemed the two motions to present a single issue.⁷

The trial court conducted a hearing on the motion. The prosecutor argued inter alia that the transcript of the plea hearing established that Carson knew that he faced multiple, consecutive life terms. The trial court agreed with this assessment of the record. Carson testified that he thought that the maximum term he would receive was a 25-year to life sentence, with all terms running concurrently. He told the trial court that he was surprised when he learned that these terms were to run consecutively, that some of the life terms were doubled, and that some life terms had extra years added on to them. He asked the trial court to allow him to withdraw his plea and go to trial.

On September 1, the trial court denied Carson's motion to withdraw his guilty plea. (See § 1018.) It found that he fully understood what he was doing on May 14.

⁷ Although the trial court does not appear to have formally denied the motion for new trial, it was denied by operation of law. (See Code Civ. Proc., §§ 657, 660.)

The trial court noted that, at that time, Carson had stated that he knew that he could be sentenced to a life sentence without possibility of parole for the murder charge. It found that because Carson knew that he might be committed to prison for life without possibility of parole, any concerns about whether he understood that he might actually be sentenced to a term longer than 25 years to life were overcome. The trial court concluded that Carson had simply changed his mind about the wisdom of entering a guilty plea. It ruled that Carson failed to meet his burden of proving by clear and convincing evidence of good cause to withdraw that plea.

The trial court also denied Carson's oral request for a certificate of probable cause to appeal. It found that a certificate of probable cause was not warranted because the defendant had done nothing more than contradict the clear statements he made on the record in May. (See § 1237.5.)

Eight days later, the trial court formally accepted Carson's May 14 guilty plea. Carson was sentenced to a total term of 326 years to life in state prison. The murder conviction resulted in a term of 76 years to life—the basic 25 years to life sentence was doubled because of the prior strike and enhanced by a consecutive 25 years to life for firearm use and an additional, consecutive year for his second prior conviction. For each of the five attempted murder convictions, Carson was given consecutive terms of 50 years to life—15 years to life doubled because of the prior strike and enhanced by a 20-year term for use of a firearm. The trial court imposed a six-year concurrent term for the offense of being an ex-felon in possession of a firearm.

On September 9, Carson filed a notice of appeal from the judgment. Presented with a written application for a certificate of probable cause to appeal, the trial court formally denied that request.⁸ (See § 1237.5.) In November, appellate counsel filed

⁸ This application asserted that Carson believed that his sentence would be 25 years to life and that he was confused because he suffered from chronic pain and mental illness. When Carson challenged the trial court's first refusal to issue a certificate of probable cause in his petition for mandate, we found that the trial court did not abuse its

a renewed application for a certificate of probable cause in the trial court, which was also denied.⁹ (*Carson v. Superior Court, supra*, A108761.)

In December, Carson petitioned this court for a writ of mandate to compel the trial court to issue a certificate of probable cause. We granted his petition for writ of mandate and ordered the trial court to issue a certificate of probable cause. Although we rejected his other grounds for mandate, we found that the plea transcript suggested that the trial court, the prosecutor and defense counsel may have been under the mistaken impression that life without possibility of parole was a possible sentence, despite the lack of any special circumstances allegation in the information. We found that this possibility raised sufficient concern that we ordered the trial court to issue a certificate of probable cause allowing us to consider this issue on appeal. (*Carson v. Superior Court, supra*, A108761.) In March 2005, the trial court vacated its September 2004 denial order and issued a certificate of probable cause.

II. CONSEQUENCES OF PLEA

On appeal, Carson contends that the trial court incorrectly advised him that life imprisonment without possibility of parole was within the range of possible punishment for the primary charge of first degree murder. (See U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, § 15; see also § 187.) In a guilty plea case, a defendant must be advised of the direct consequences of the plea, including the permissible range of punishments provided by statute. (*In re Moser* (1993) 6 Cal.4th 342, 351; *Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605; see *People v. Wright* (1987) 43 Cal.3d 487, 493, disapproved on another ground in *People v. Howard* (1992) 1 Cal.4th 1132, 1174-1178, cert. den. *sub nom. Howard v. California* (1992)

discretion in refusing his first request for a certificate of probable cause. (*Carson v. Superior Court, supra*, A108761.)

⁹ This renewed application for a certificate of probable cause formed the basis of our order to the trial court to issue a certificate of probable cause after Carson challenged the trial court's denial order in his writ of mandate. (*Carson v. Superior Court, supra*, A108761.)

506 U.S. 942.) The information charged Carson with first degree murder, but alleged no special circumstances.¹⁰ Thus, the *only possible penalty* for the charged offense was a state prison term of 25 years to life. Only if special circumstances had been alleged could the range of penalties have included the death penalty or a sentence of life imprisonment without possibility of parole. (See §§ 190, subd. (a), 190.2, subd. (a).)

Despite this, Carson was repeatedly and incorrectly advised at the plea hearing that life imprisonment without possibility of parole was a possible sentence for the charged first degree murder. The trial court told him so twice.¹¹ The prosecutor also stated as much. Carson’s defense counsel also seemed to believe that this was so—certainly, he never challenged statements made by the prosecutor and the trial court. Thus, the record of the plea hearing makes it clear that all court professionals operated under the mistaken assumption that life imprisonment without possibility of parole was within the possible range of sentences for Carson for the charged first degree murder without special circumstances.

Clearly, Carson was misadvised about the direct¹² penal consequences of his plea. The Attorney General admits as much.¹³ The only real dispute is whether or

¹⁰ The People contend that Carson could have been charged with special circumstances. Even if he could have been so charged, the fact remains that the prosecutor did not do so—not in the March 8 complaint nor in the May 12 information that formed the basis of Carson’s conviction. To rely on such an uncharged possibility to render the misadvisement harmless and uphold the conviction would violate Carson’s due process right to receive notice of the true charge against him—notice that is the “first and most universally recognized requirement of due process.” (*Smith v. O’Grady* (1941) 312 U.S. 329, 334; see also *Henderson v. Morgan* (1976) 426 U.S. 637, 645.)

¹¹ On September 1, the trial court continued to operate under its misunderstanding that this was a possible sentence when it relied on this fact inter alia to reject Carson’s motion to withdraw his guilty plea.

¹² The maximum punishment that could lawfully be imposed for a criminal offense is a direct consequence of a guilty plea. (*Torrey v. Estelle* (9th Cir. 1988) 842 F.2d 234, 236; see *People v. Moore* (1998) 69 Cal.App.4th 626, 630.)

not this error entitles Carson to withdraw the guilty plea underlying the judgment of conviction. Carson reasons that this error was a due process violation, entitling him to withdraw his plea without any consideration of prejudice. A guilty plea is valid only if it was made voluntarily, knowingly, and intelligently, with sufficient awareness of the relevant circumstances and likely consequences. (*Bradshaw v. Stumpf* (2005) 545 U.S. 175, ___ [162 L.Ed.2d 143, 153] [elements of charges]; *Henderson v. Morgan*, *supra*, 426 U.S. at pp. 644-645 & fn. 13; *Brady v. United States* (1970) 397 U.S. 742, 748; *Smith v. O'Grady*, *supra*, 312 U.S. at pp. 332-334; see *Machibroda v. United States* (1962) 368 U.S. 487, 493; *Kercheval v. United States* (1927) 274 U.S. 220, 223.) A guilty plea that is not knowingly or intelligently made is involuntary¹⁴ and cannot form the basis of a criminal conviction, consistent with due process. (See *Henderson v. Morgan*, *supra*, 426 U.S. at pp. 644-645; *Brady v. United States*, *supra*, 397 U.S. at pp. 747-748 & fn. 4; *McCarthy v. United States* (1969) 394 U.S. 459, 466; U.S. Const., 5th & 14th Amends.) These cases suggest that the error that Carson complains of is one of federal constitutional magnitude, warranting a reversal per se without regard to prejudice.¹⁵

The Attorney General counters that California case law requires that Carson demonstrate prejudice resulting from the misadvisement of the consequences of his

¹³ The People also argue that Carson waived this claim of error because he failed to raise it in his motion to set aside his guilty plea. (See *People v. McClellan* (1993) 6 Cal.4th 367, 377.) As we ordered the trial court to issue a certificate of probable cause on this ground, we will address the merits of it. (*Carson v. Superior Court*, *supra*, A108761.)

¹⁴ The issue of whether a guilty plea is voluntary is determined by considering the totality of the circumstances surrounding it. (*Brady v. United States*, *supra*, 397 U.S. at p. 749; see *People v. Marlow* (2004) 34 Cal.4th 131, 147, cert. den. *sub nom. Marlow v. California* (2005) 544 U.S. 953 [125 S.Ct. 1706]; *People v. Howard*, *supra*, 1 Cal.4th at pp. 1174-1177.)

¹⁵ Whether a defendant makes an effective waiver of federal constitutional rights is governed by federal law. (*Boykin v. Alabama* (1969) 395 U.S. 238, 243; *People v. Howard*, *supra*, 1 Cal.4th at p. 1175.)

plea in order to obtain a reversal. California courts have held that a criminal defendant's right to be advised of the range of possible punishment before entering a guilty plea is a judicially declared rule of criminal procedure rather than a constitutionally compelled rule. (*People v. Walker* (1991) 54 Cal.3d 1013, 1022; *People v. Wright, supra*, 43 Cal.3d at p. 495; *In re Ronald E.* (1977) 19 Cal.3d 315, 320-321, disapproved on another ground in *People v. Howard, supra*, 1 Cal.4th at pp. 1174-1178; *In re Yurko* (1974) 10 Cal.3d 857, 864; *People v. McMillion* (1992) 2 Cal.App.4th 1363, 1370; *People v. Hellgren* (1989) 208 Cal.App.3d 854, 858.) In such circumstances, the California Supreme Court requires that the error be prejudicial to the accused before the defendant is entitled to withdraw a guilty plea. (*People v. Walker, supra*, 54 Cal.3d at pp. 1022-1023; *In re Ronald E., supra*, 19 Cal.3d at pp. 320-321; see *In re Yurko, supra*, 10 Cal.3d at p. 864.) Under this analysis, we ask whether it is reasonably probable that the defendant might not have pled guilty if he had been correctly advised of the consequences of this decision before he entered his plea. (See *In re Moser, supra*, 6 Cal.4th at p. 352; *People v. McClellan, supra*, 6 Cal.4th at pp. 376, 378; *People v. Walker, supra*, 54 Cal.3d at p. 1023; see also *People v. Watson* (1956) 46 Cal.2d 818, 836, cert. den. *sub nom. Watson v. Teets* (1957) 355 U.S. 846.)

We find that we need not determine whether or not the error in this matter rose to the level of a constitutional violation. Even if we applied the lesser *Watson* test that the Attorney General suggests, we cannot find the error committed in this case was harmless. The first degree murder charge in the information exposed Carson to *one possible sentence*—a term of 25 years to life—before enhancement. (See §§ 190, subd. (a), 190.2, subd. (a).) Instead, Carson was led to believe that the trial court had discretion to impose that term *or* a more severe one—that of life imprisonment without possibility of parole. In fact, the sentence he was eligible to receive if he pled guilty to the first degree murder charge was *exactly* what he would have gotten if he went to trial and the People proved the charge set forth in the

information—25 years to life. In other words, there was *no possible benefit in sentence* to be gained from the guilty plea that Carson entered.

In such circumstances, is it reasonably probable that Carson might not have pled guilty if he had been advised of the true facts? (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) We conclude that it is reasonably probable that if he had known that his guilty plea would not result in any reduction of the lawful sentence that could have been imposed on the charges in the information, he might not have pled guilty.¹⁶ It follows that the plea was not knowingly and intelligently made. (See *Bradshaw v. Stumpf*, *supra*, 545 U.S. at p. ___ [162 L.Ed.2d at p. 153]; *Henderson v. Morgan*, *supra*, 426 U.S. at pp. 644-645 & fn. 13; *Brady v. United States*, *supra*, 397 U.S. at p. 748.) Carson's conviction based on the plea must be reversed.¹⁷

¹⁶ Under this prejudice analysis, the defendant must offer evidence that he or she would not have pled guilty if he or she had known the true consequences of the plea. (See *People v. McClellan*, *supra*, 6 Cal.4th at pp. 376-378.) The defendant may affirmatively attempt to show prejudice in a writ of habeas corpus. (*People v. Wright*, *supra*, 43 Cal.3d at p. 495 fn. 4; see, e.g., *In re Ronald E.*, *supra*, 19 Cal.3d at pp. 322-323, fn. 3.) Carson's declaration in his related petition for habeas corpus states that he would have gone to trial if he had known the sentence he actually received. We take judicial notice of the record in the petition for habeas corpus. (See Evid. Code, §§ 452, subd. (d)(1), 459, subd. (a).)

¹⁷ In light of this conclusion, we need not address the remaining issues raised in Carson's appeal. For the same reason, we conclude that no order to show cause need issue in the related habeas corpus matter, as that habeas corpus petition is now moot. We dismiss the related habeas corpus petition by separate order. (No. A113023.)

The judgment is reversed and the matter is remanded to the trial court with directions to vacate the plea, to rearraign Carson for plea, and to conduct further proceedings not inconsistent with this decision.

Reardon, Acting P.J.

We concur:

Sepulveda, J.

Rivera, J.