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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.  
JESUS SANCHEZ ZEPEDA,  
Defendant and Appellant.

A107280  
(Mendocino County  
Super. Ct. No.  
SCUK-CRCR-04-60225-02)

The People filed criminal charges against appellant Jesus Sanchez Zepeda, who was 16 years old at the time of the alleged offenses, in the criminal division of the superior court, rather than in the juvenile division of the court. (Welf. & Inst. Code, § 707, subd. (d)(1).) Appellant pled no contest to assault with a deadly weapon and participation in criminal street gang activity and, in exchange for his plea, other charges were dismissed. (Pen. Code, §§ 186.22, subd. (a), 245, subd. (a)(1).) Appellant was advised of the maximum term of commitment under his plea, and the trial court sentenced appellant to three years and eight months in state prison, less than the maximum term. Appellant asked the court for a juvenile disposition instead of an adult prison commitment but the request was denied because the prosecutor refused to consent to a juvenile disposition. (Pen. Code, § 1170.19, subd. (a)(4).)

On appeal, appellant claims that Penal Code section 1170.19, subdivision (a)(4) is an unconstitutional violation of the separation of powers doctrine because it gives the prosecutor veto power over judicial sentencing. Appellant is correct. The California

Supreme Court has recently held that the challenged statute violates the separation of powers doctrine by “granting prosecutors the authority, *after* charges have been filed, to control the legislatively specified sentencing choices available to a court.” (*People v. Thomas* (April 18, 2005, S118052) \_\_\_ Cal.4<sup>th</sup> \_\_\_, italics in original.) Accordingly, we remand the case to permit exercise of the court’s full sentencing discretion.

## FACTS

According to police reports, on the evening of May 25, 2004, appellant started a fight with another young man in a Ukiah gas station and stabbed him in the chest and back. Appellant is a member of the Sureno gang, and the victim was associated with the rival Norteno gang. Appellant and the victim were wearing gang colors at the time of the fight, and appellant used gang epithets during the fight. A police search after the fight found gang paraphernalia in appellant’s home.

## DISCUSSION

An initiative measure, known as Proposition 21 and approved by the voters in 2000, broadened the power to prosecute juvenile offenders as adults. (*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 544-545.) As relevant here, a prosecutor may file certain criminal charges against a juvenile, 16 years of age or older, in the criminal division of the superior court, rather than the juvenile division of that court, without a prior adjudication by the juvenile court that the minor is unfit for disposition under the juvenile court law. (*Id.* at p. 545; Welf. & Inst. Code, § 707, subd. (d)(1).) Upon conviction, the juvenile is subject to the same sentence as an adult convicted of the identical offense. (Pen. Code, § 1170.17, subd. (a).) A court may order a juvenile disposition, in lieu of an adult sentence, “[s]ubject to the knowing and intelligent consent of both the prosecution and the person being sentenced,” and upon a judicial finding that “such an order would serve the best interests of justice, protection of the community, and

the person being sentenced.” (Pen. Code, § 1170.19, subd. (a)(4) [hereafter, section 1170.19].)<sup>1</sup>

On appeal, appellant claims that Penal Code section 1170.19 is an unconstitutional violation of the separation of powers doctrine because judicial sentencing is curtailed by the requirement that the prosecution consent to a juvenile disposition. The People contend that appellant waived this claim by entering a negotiated disposition in which he agreed to a prison term.

Appellant did not waive the claim. When entering the plea, appellant’s counsel said she would ask the prosecutor to consent to a juvenile disposition, and the trial court stated that any motions regarding juvenile disposition could be made later. At sentencing, the prosecutor said he denied the request for juvenile disposition, and the court responded that the matter would therefore remain in adult court for sentencing. In commenting on the matter, appellant’s counsel acknowledged that prosecutorial consent was required under the statute, and that the statute was presumed constitutional unless and until the statute was invalidated by the California Supreme Court, which had the matter under review. Defense counsel said: “Unfortunately, I’m stuck in the position of having to deal with [Proposition 21] having been found constitutional so far, so I have to defer until maybe the supreme court addresses that and issues a final ruling.” The trial court replied that “[u]nder our present law it is in the discretion of the district attorney’s office with this kind of a charge to file it directly in the adult court, which they did. That’s where they wish to keep it at this time. So we’ll proceed, then, with sentencing.” While appellant’s request for a juvenile disposition and challenge to the constitutionality of section 1170.19 were not forcefully stated, they were adequately presented to the trial court to prevent waiver of the claim.

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<sup>1</sup> A juvenile disposition is also subject to specified eligibility criteria. (*People v. Thomas, supra*, \_\_\_ Cal.4<sup>th</sup> \_\_\_; Pen. Code, § 1170.19, subd. (a)(1); Welf. & Inst. Code, § 1732.6.) Appellant’s eligibility has not been questioned on appeal. Any challenge to appellant’s eligibility for a juvenile disposition may be raised in the trial court.

Our Supreme Court has recently held that section 1170.19's requirement that "the criminal court must secure the prosecutor's consent before it can order a Youth Authority commitment violates the state Constitution's separation of powers doctrine." (*People v. Thomas, supra*, \_\_\_ Cal.4<sup>th</sup> \_\_\_.) Section 1170.19 is unconstitutional because it improperly "authorizes 'the exercise of a prosecutorial veto *after* the filing of criminal charges, when the criminal proceeding has already come within the aegis of the judicial branch.'" (*People v. Thomas, supra*, italics in original.) We must therefore remand the case to the trial court for exercise of its sentencing discretion, free of the prosecutorial veto.

As an aid to the trial court on remand, we also address appellant's separate claim that his punishment for both assault and gang activity is impermissible double punishment for the single criminal act of stabbing the victim. (Pen. Code, § 654.) The People correctly observe that appellant waived this claim. Acceptance of a plea bargain waives any claim that a component of the agreed sentence violates Penal Code section 654. (*People v. Hester* (2000) 22 Cal.4<sup>th</sup> 290, 294-295.) Here, the court advised appellant that the maximum sentence under his plea was four years and eight months. Appellant said he understood, and entered his plea of no contest. In exchange for his plea, a charge of attempted murder was dismissed. The court sentenced appellant to three years and eight months in prison.

Appellant may not both affirm a plea agreement, and renege on the agreed sentencing range. " 'When a defendant maintains that the trial court's sentence violates rules [like Penal Code § 654] which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.' " (*People v. Hester, supra*, 22 Cal.4<sup>th</sup> at p. 295.) Plainly put, "defendants are estopped from complaining of sentences to which they agreed." (*Ibid.*) Contrary to appellant's argument on appeal, the same waiver rule applies to both plea agreements for set terms and plea agreements with a maximum range of punishment. For example, in *People v. Jones* (1981) 124 Cal.App.3d 749, 752,

defendant agreed to a nine-year “top” in sentencing, and was sentenced to eight years and eight months. The court held that defendant’s plea bargain waived application of Penal Code section 654. (*Id.* at pp. 754-755.) Here, appellant agreed to a maximum term of four years and eight months in prison and was sentenced within the contemplated range, to three years and eight months. Appellant waived application of Penal Code section 654.

### DISPOSITION

The conviction is affirmed and the case is remanded to the trial court for resentencing. On remand, the trial court may order a juvenile disposition in lieu of the adult prison sentence “upon a finding that such an order would serve the best interests of justice, protection of the community, and the person being sentenced.” (Pen. Code, § 1170.19, subd. (a)(4).)

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Sepulveda, J.

We concur:

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Kay, P.J.

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Reardon, J.