Filed 12/20/06 P. v. Beswetherick CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. MARK DOUGLAS BESWETHERICK, Defendant and Appellant.	H029404 (Santa Clara County Super.Ct.No. CC320853)

Appellant pleaded no contest to attempted murder with a firearm enhancement, assault with a firearm, and exhibiting a weapon at a peace officer. (Pen. Code, §§ 664/187, 12022.5, subd. (a), 1203.06, 245, subd. (a)(2), 417.8.) Seven months later, through new counsel, he filed a motion to withdraw his plea. The trial court denied the motion and sentenced appellant to 21 years in state prison. Appellant contends that "the conditions under which he pleaded rendered his plea unconstitutional on several grounds." We affirm.

Background

Around midnight on July 11, 2003, appellant bought beer at a 7-11 market and remained in the store. The store clerk asked appellant to leave. Appellant refused at first but eventually left. Appellant returned and asked the clerk whether he was still upset about appellant not leaving earlier. The clerk asked appellant to leave. Appellant pulled

out a handgun, pointed it at the clerk, and said "I'll kill you." Appellant tried to pull the trigger but the gun failed to fire. The clerk jumped over the counter and fled yelling for help. A witness with the clerk saw appellant raise the gun towards them and cock it back with his right hand. The police arrived and met with the clerk. Appellant walked out of the store with the gun in his hand. The officer told him to put the gun down. Appellant said, "No, just shoot me" and pointed the gun at the officer. Appellant suffered gunshot wounds and was taken for medical treatment. His blood alcohol level was .24 percent.

On July 23, 2003, appellant was charged by complaint with one count of attempted murder of the clerk with an enhancing allegation for the personal use of a handgun, one count of assault with a firearm, and one count of exhibiting a firearm at a peace officer. Appellant's family arranged for him to be represented by Phil Pennypacker who retained Dr. Leonard Donk, a forensic psychologist, to review the police reports and medical records and interview appellant. Following surgery for his gunshot wounds, appellant was placed in a medically induced coma for weeks. Later, as appellant was recovering from his gunshot wounds in the jail infirmary, Pennypacker met with him.

On September 4, 2003, Pennypacker appeared with appellant for a bail reduction motion. In court, the prosecutor, Dana Overstreet, played a videotape of the events at the 7-11. Appellant watched as much of the video as he could. Later, appellant said that his view of the tape had been partially obstructed. Overstreet told Pennypacker that if the motion went forward she would file new charges, including three counts of attempted premeditated murder. After consulting with appellant, Pennypacker withdrew the bail reduction motion.

Appellant was arraigned on October 21, 2003, and shortly thereafter Pennypacker was appointed to the superior court. At Pennypacker's suggestion, Tony Christensen became involved with appellant's case. Christensen had been handling criminal cases since 1972 and had handled "mental defenses, capacity questions, insanity questions, [and] a number of mental health issues through the years."

Around this time, the jail medical staff provided appellant with Neurontin and Depakote for bipolarism and anxiety and Prozac for depression. He was also taking Vicodin for pain. Years earlier appellant had been diagnosed with bipolar disorder and had been prescribed medication but was non-compliant with this treatment. This time appellant felt that his anti-anxiety medication was not working and had it discontinued.

Appellant told Christensen that he had no memory of the events at the 7-11 or the hours leading up to them. In late October, Christensen met with appellant twice, gave him copies of the police reports, and talked to him about the videotape of the incident.

On November 4, 2003, Christensen made a special appearance with appellant while appellant's family finalized the arrangements to retain Christensen.[1] Christensen continued to discuss the case with appellant and with the district attorney. The district attorney told Christensen that the best offer she would consider for settlement would be for appellant to plead to the complaint and receive the maximum sentence of 21 years. Christensen knew that if a settlement was not reached, the prosecutor planned to pursue a grand jury indictment for multiple counts of attempted premeditated murder, which would expose appellant to multiple life terms if convicted.

On November 4, 2003 or, at the latest, November 7, Christensen talked to appellant about the prosecutor's position on the case. By then, Christensen had watched the videotape. He reviewed appellant's "gait, walkability, [and] his actions." He "wanted to see if there was any evidence that [he] could determine of delusions, of hallucinations, of any manifestations of that sort." He had listened to the audiotapes of the victim's statements, and read reports from the police, the defense investigator, and the laboratory.[2]

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[1] Appellant made one appearance without counsel during the transition in representation. At that appearance, the prosecutor told appellant to have his counsel call her as soon as possible.

[2] Particularly concerned about the premeditation issue, Christensen assessed the evidence this way: "Mark entered that store . . . . And during the conversation with the clerk there was some talk about hiccups. Ultimately the clerk got upset, the clerk found

Christensen also discussed the case with Dr. Donk and with a psychiatrist who had previously treated appellant for bipolarism.

Christensen discussed with appellant what he saw as mitigating circumstances in the case. Appellant was a 48-year-old software engineer with Hewlett Packard. Appellant's only criminal conviction was for driving under the influence in 1994. Appellant suffered from mental illness and was intoxicated at the time of the crime. The safety was on the gun and the gun did not discharge. Christensen met with the prosecutor on November 13 but the offer remained the same. Christensen conveyed this offer to appellant. He also told appellant that he should decide what he wanted to do by the next day because the prosecutor would then set the matter for a change of plea on Monday, November 17, 2003. The grand jury was scheduled to convene on November 18. Christensen explained to appellant that he could choose to accept the offer, which was to plead to the complaint as charged for a 21-year sentence, or to decline the offer, in which case the prosecutor would present the case to the grand jury and seek an indictment for multiple counts of premeditated attempted murder which could lead to multiple life terms. Appellant thought this offer was "very unfair and very unreasonable." Appellant

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Mark to be a nuisance and told Mark to leave. Mark got angry, started swearing and looked at the clerk and said, I'll kill you, you motherfucker. That's what Mark said before he left the store. About an hour and 45 minutes later after going and obtaining a gun and driving back to the store, having the wherewithal to do both of those, came back into the store, looked at the clerk and said, are you still mad at me? The clerk said, no. Mark then within a matter of seconds draws down with both hands on the clerk, who's cowering behind the counter, point blank at his forehead and pulls the trigger three times, according to the clerk. Mark then raises back up, walks over a distance for a few seconds, comes back and draws back down point blank within a manner of inches, pulls the trigger once again, and then walks around the counter and draws down on the clerk, according to what the clerk said in the police report, and the clerk then jumps over the counter and runs out of the store. [¶] In the meantime Mark had banged the gun on the counter, according to the clerk, as if the gun was jammed. And not only that, three shells are ejected in the store. Mark did not bring an unloaded gun into that store. He brought a loaded gun into that store and the video captures the two drawdowns point blank."

asked Christensen about the defense of diminished capacity and Christensen explained that that was "no longer a viable defense in California." According to appellant, Christensen did not discuss diminished actuality with him.

The next day, Christensen returned to the jail to talk to appellant. Appellant later said that he felt that his decision-making ability was compromised by the combination of the stress of making such an important decision, the process of recovering from his injuries, and his medication. Appellant considered that there was longevity in his family and that, if he accepted the offer, that he could serve the sentence and then "have another 10 or 15 years outside after that." He determined, "That's an acceptable result. It's certainly a lot better than life in prison." Appellant told Christensen that he would accept the offer.

On November 17, 2003, appellant appeared with Christensen who made his first general appearance and announced that the matter was ready for disposition. Christensen made a long statement to the court about the case. He said that he had "been involved in a very intense way with Mr. Beswetherick's case for the last three and a half weeks." He said, "I've reviewed each and every element with him, all possible defenses . . . ." The court conducted the plea voir dire, confirming that although appellant had consumed prescription medication neither appellant nor Christensen believed that this altered appellant's ability to understand the proceedings. Appellant confirmed that he had had the opportunity to fully discuss the case with Christensen, including possible defenses and the elements of the charges. Appellant pleaded no contest to the charges in the complaint.[3]

According to appellant, "A week [after his plea] when things had had a chance to sink in" he "realized" that this long prison term would be "awful." In January 2004, an

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[3] The following day, appellant testified before the grand jury which was investigating officer shootings.

attorney who had been contacted by appellant's family met with Christensen to discuss "the circumstances of the entry of the plea and the situation." That attorney "concluded there was nothing more that he felt he could do or would do." In February 2004, attorney Robert Lyons contacted Christensen. Appellant retained this new counsel and, on July 21, 2004, Lyons and Cindy Diamond substituted in for Christensen as appellant's counsel.[4] On July 30, 2004, Lyons filed a motion to withdraw appellant's no contest plea contending that appellant's medications "prevented him from being able to knowingly and intelligently make such an important decision in his case" and that appellant was denied due process and effective assistance of counsel because Christensen "could not adequately assess the case and possible defenses in a short period of time, and a threat by a prosecutor of new charges if a plea was not entered swiftly."

The hearing on appellant's motion to withdraw his plea took place October 15 and December 3, 2004, and April 15 and May 20, 2005, and the transcript of the hearing is well over 400 pages long. Christensen, appellant, Dr. Donk, Overstreet, and the psychiatrist who had treated appellant before his arrest all testified. Dr. Donk testified that after interviewing appellant for almost 20 hours and reviewing other materials, he concluded that appellant suffered from alcoholism and bipolar disease. A psychiatrist who had reviewed appellant's jail medical records testified that he thought that appellant may have been under-medicated for his bipolarism. The tendency to be impulsive is a symptom of an under-medicated bipolar patient.

On August 4, 2005, the trial court issued a four-page ruling and order denying appellant's motion to withdraw his plea. The court rejected appellant's arguments about the prosecutor's conduct and duress observing, "Being a defendant in a criminal matter is a very stressful position." The court rejected appellant's argument concerning his physical and mental ability to enter the plea. The court said, "The Court finds that the

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[4] Lyons and Diamond continue to represent appellant in this court.

defendant at the time he entered his plea was in full possession of his mental faculties. The defendant was bright, alert, responsive, and even testified that he considered the offer and knew his plea would avoid the possibility of a life sentence by entering an early plea. . . . The Court's personal observations of the defendant at the plea hearing clearly indicated the defendant was fully aware of the consequences of his plea. Again the defendant's own testimony clearly establishes to this Court that his mental and physical state was at the time of his plea did not interfere with his decision to enter a plea. [¶] The Court rejects defendant's argument that he was unable to make a waiver of his right to have a trial and enter a plea based on his physical or mental condition." The court rejected appellant's argument concerning Christensen's competence, saying, "This clearly is the defendant's weakest argument." The trial court sentenced appellant to nine years for attempted murder, 10 years for the gun enhancement, and one year each, consecutive, for the remaining charges for a total term of 21 years in prison.

Discussion

Penal Code section 1018 allows a trial court to grant a defendant's application to withdraw his or her plea of guilty or no contest before judgment. Good cause must be shown for such a withdrawal, based on clear and convincing evidence. (*People v. Cruz* (1974) 12 Cal.3d 562, 566.)

" 'When a defendant is represented by counsel, the grant or denial of an application to withdraw a plea is purely within the discretion of the trial court after consideration of all factors necessary to bring about a just result. [Citations.] . . .' 'Guilty pleas resulting from a bargain should not be set aside lightly and finality of proceedings should be encouraged.' [Citation.]" (*People v. Weaver* (2004) 118 Cal.App.4th 131, 146.) In determining facts,"the trial court is not bound by uncontradicted statements of the defendant." (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103.) The requisite "good cause" must comprise more than post-plea remorse: "To establish good cause, it must be shown that defendant was operating under mistake, ignorance, or any other factor

overcoming the exercise of his free judgment. [Citations.] Other factors overcoming defendant's free judgment include inadvertence, fraud or duress. [Citations.] However, '[a] plea may not be withdrawn simply because the defendant has changed his mind.' [Citation.]" (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) Once the trial court has made a good cause determination on the issue whether to permit withdrawal of a plea, a reviewing court will not disturb the decision unless abuse of discretion is clearly shown. (*People v. Fairbank, supra*, 16 Cal.4th at p. 1254.) Moreover, a reviewing court must defer to the trial court's factual findings if substantial evidence supports them. (*Ibid.*)

Appellant sweeps past this body of law concerning the withdrawal of pleas, declining even to cite to Penal Code section 1018 or the standard of review on appeal from the denial of a motion brought under it. Appellant contends that he "was not able to make a free and voluntary decision about whether or not to accept the deal, at the time he changed his pleas to *nolo contendere*; therefore his pleas were not free and voluntary and thus were unconstitutional." The voluntariness of a plea is a question of law reviewed *de novo*. (*Marshall v. Lonberger* (1983) 459 U.S. 422, 431; *People v. Vargas* (1993) 13 Cal.App.4th 1653, 1660.)

Appellant argues that at the time he entered his plea he was having a "mild manic episode, which rendered his plea involuntary as a matter of law." The trial court, having observed appellant at both the time of the plea and during the motion to withdraw the plea, found that "[appellant's] mental and physical state . . . at the time of his plea did not interfere with his decision to enter a plea." The judge's observations of a defendant at the time of the change of plea can be part of the substantial evidence supporting the conclusion that a defendant's plea change was voluntary. (*People v. Fairbank, supra*, 16 Cal.4th 1223, 1254.) Christensen, privy to far more extensive discussions of the case and having greater opportunity to evaluate appellant's mental state than the trial court did, was likewise certain that appellant's decision to plead no contest was free and voluntary. Nothing in the testimony of the doctors at the hearing would indicate that appellant's plea

was involuntary as a matter of law. Appellant may have been anxious, but that is appropriate for someone deciding to enter a plea to 21 years in prison.

Appellant contends, "Due to counsel's inadequate factual and legal research and ineffective representation, appellant was uninformed about the details of his case and his pleas were therefore not knowing and intelligent, and were thus unconstitutional." These bold and unsupportable accusations about the adequacy of trial counsel's representation do not persuade us that appellant's plea was not knowing and intelligent. Perhaps acknowledging the exceedingly high esteem the trial court obviously held for Christensen, appellant argues, "counsel's omissions are still a deprivation of appellant's rights when, as is likely here, they were the result of a hard working honest lawyer who was prevented from effectively representing his client through governmental interference."

Appellant focuses on the limited time he had to make a decision to plead to the charges in the complaint or face more serious charges. This is the situation in almost every case in which the prosecutor makes an offer. If anything, appellant had more time to confer with his attorney and more time to consider the offer than is usually the case.

Appellant asserts, "A video tape of the assault on the 7-11 clerk was played in court at appellant's bail hearing, when appellant was in court and presumably could see it, but he watched [it] from a wheelchair at a strange angle and did not have an opportunity to review the video in private while discussing it with his first attorney." Appellant complains that counsel "did not know that appellant was holding the gun in his hand which could not fire the gun properly, thus he could not inform appellant there was direct evidentiary support to the argument that appellant did not have an intent to kill." Appellant discussed the video with Christensen and had seen at least some of it. Very often the most favorable offers are made early on in the proceedings, sometimes before there has been time for any defense investigation at all. A criminal defendant does not

have to have seen every piece of evidence against him in order to make a voluntary, knowing, and intelligent decision to enter a plea.

Appellant argues that counsel "had not researched the law and had not thus determined that the actual mental state of a mentally ill or intoxicated person could be raised as a defense to a specific intent crime." Appellant's testimony concerning his discussions with Christensen of available defenses is, at best, cagey. There is simply no support in the record for the assertion that Christensen was unaware of what mental defenses could be raised when a specific intent crime is charged.

Appellant contends, "The cumulative effect of the time pressure imposed by the district attorney, and appellant's under-medicated mental illness, was to compound the constitutional errors affecting the plea proceedings." We find no errors in the plea proceedings to cumulate.

Appellant contends, "The sentence must be reversed because imposition of the aggravated term without a waiver violated appellant's Sixth Amendment right to a jury trial and his Fourth Amendment right to due process of law." Appellant acknowledges that the Supreme Court rejected this claim in *People v. Black* (2005) 35 Cal.4th 1238, but "makes this argument to preserve it for federal court review." We are bound to follow *Black*. (*Auto Equity Sales, Inc*. v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Disposition

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.