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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. CHARLES ADAM HOUK, Defendant and Appellant.	C052937 (Super. Ct. No. CM024233)

Defendant Charles Adam Houk pled no contest to first degree murder (Pen. Code, § 187), and guilty to attempted murder (Pen. Code, §§ 187, 664) and admitted to personal discharge of a firearm for the murder count (Pen. Code, § 12022.53, subd. (c)(2)). The trial court sentenced him to 59 years to life.

On appeal, defendant contends the trial court should have allowed him to withdraw his plea and that his upper term sentence for attempted murder violates *Blakely v. Washington*

(2004) 542 U.S. 296 [159 L.Ed.2d 403] (*Blakely*). We affirm the judgment.

BACKGROUND

The facts of defendant's crimes are not relevant to his appeal, and are briefly summarized from the probation report. On the night of September 14-15, 2005, defendant, who was a passenger in a vehicle driven by Joseph Snow, shot Snow in the head several times, killing him. Defendant pulled Snow out of the vehicle and left him at an intersection in Oroville. He eventually admitted to the police that he killed Snow.

On another occasion, defendant and codefendant attacked another man, hitting him in the head several times with a baseball bat and shoving his head into a wall. Defendant also urged codefendant to stab the victim with a knife.

DISCUSSION

I

Defendant contends the trial court should have allowed him to withdraw his pleas of no contest and guilty.

Defendant initialed and signed a change of plea form. Under the terms of the bargain, defendant would plead guilty to first degree murder and attempted murder in exchange for the prosecution dismissing the remaining charges, special allegations, and enhancements, subject to a *Harvey*[1] waiver.

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[1] *People v. Harvey* (1979) 25 Cal.3d 754, 758.

Defendant initialed a statement that the plea was not induced by any promises or representations other than the dismissal of the remaining charges, allegations, and enhancements.

At the plea colloquy, defendant admitted to discussing the facts and circumstances of the case with his attorney. He admitted going over the plea form, initialing it, and signing the form. When asked if he had enough time to talk to his lawyer, defendant replied: "Yes I did. I understand that, regardless of what I plead, in the end I am going to do life anyways; so I am willing to go ahead, accept this deal that I was offered."

Defendant subsequently moved to withdraw his plea. At the hearing on the change of plea motion, defendant's ex-wife, her father, and stepmother all testified that the ex-wife told defendant's attorney to go to trial and reject the prosecution's offer.

Defendant testified that on the day of his plea, counsel told him of the prosecution's offer, and defendant replied that he wanted to go to trial because he was not guilty. Counsel then told defendant he could get the death penalty if he went to trial. Just before counsel told him of the possible death sentence, he told defendant that his ex-wife wanted him to take the deal and plead guilty.

According to defendant, plea negotiations started early in the morning, and throughout the day defendant repeatedly told

counsel he wanted to take the case to trial. However, in the afternoon counsel told defendant that his family wanted him to take the deal and if he did not, defendant could get the death penalty.

Defendant testified that his family's concern about him getting the death penalty was one factor behind his decision to accept the prosecution's offer. Defendant also believed he should plead guilty because the public defender's office was representing the prosecution rather than his own interests.

Stephen King, defendant's counsel during the plea negotiations,[2] also testified. He acknowledged receiving an offer letter from the district attorney[3] and discussing it with defendant. King and defendant probably discussed the offer twice before the day defendant accepted it.

King never told defendant the prosecution would seek the death penalty if the prosecution's offer was rejected. He did explain to defendant that the death penalty was an option, as the prosecution could dismiss the case and refile the charges,

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[2] Citing a conflict of interest, King withdrew from representing defendant after the plea but before the motion to set aside the plea. The trial court determined the conflict had no bearing on the effective assistance of counsel, and defendant does not challenge this ruling.

[3] This was the offer that defendant eventually accepted, pleading guilty to first degree murder with a personal use of a firearm enhancement and attempted murder, with a potential sentence of 59 years to life.

but that the prosecutor told him his office would not seek the death penalty in this case. King did not believe there was a threat of the case being refiled with capital charges, but he felt it was his duty to explain all of the possibilities to defendant.

King testified to discussing the benefits of pleading guilty with defendant and his ex-wife, namely that the codefendant, the ex-wife's son and defendant's stepson, would see defendant "standing up and being responsible for his acts." In King's initial discussions with defendant's ex-wife and her family on the day of the plea, he got the impression they thought the deal would be good for the codefendant. By the afternoon, King spoke more with defendant's ex-wife, and told defendant "that his family either did not want him to take the deal, or they didn't like the deal, something to that effect; and this went back--there were numerous trips back and forth, and this went on for quite some time, and the discussions between [*sic*] Mr. Houk, [the prosecutor] and the family, at least on one or two occasions."

King promised defendant's ex-wife that he would not let defendant plead guilty unless he was convinced that the facts, the proof, and defendant's desire to plead guilty were all true. Counsel also told her that he would not let defendant plead guilty unless he thought the plea was an intelligent and

informed decision. (RT 47) King thought defendant's plea was knowing, intelligent, and voluntary.

Defendant contends the evidence supports a finding that defendant was misled by counsel and he therefore did not understand what he was doing when he made his plea. The contention is not supported by the record.

Upon a showing of good cause based on clear and convincing evidence, a court may permit a defendant to withdraw his guilty plea before judgment has been entered. (Pen. Code, § 1018.) "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.]" (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) "'[A] plea may not be withdrawn simply because the defendant has changed his mind.' [Citation]." (*Ibid*.)

The court's determination whether to permit a defendant to withdraw a guilty plea is discretionary, and its ruling will not be disturbed on appeal absent a showing of abuse of discretion. (*People v. Mickens* (1995) 38 Cal.App.4th 1557, 1561.) An abuse of discretion occurs when the court "exercises discretion in an arbitrary, capricious or patently absurd manner resulting in a manifest miscarriage of justice. [Citation.]" (*People v. Shaw* (1998) 64 Cal.App.4th 492, 496.) "[A] reviewing court must

adopt the trial court's factual findings if substantial evidence supports them." (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.)

In denying defendant's motion to withdraw the plea, the trial court found "no over-reaching, no deception, no failure to communicate information to [defendant] by Mr. King. There is no undue pressure. There is no coercion." Defendant's claim revolves around a conflict between the testimony of defendant and King. The trial court resolved the conflict in favor of King, and nothing in the record supports our second-guessing the trial court's finding that counsel was more credible than the client.

II

Citing *Blakely, supra*, 542 U.S. 296 [159 L.Ed.2d 403], defendant contends he was entitled to a jury trial on aggravating factors used by the court to impose the upper term sentence for attempted murder. Although the trial court erroneously relied on factors not found by a jury, we find the error to be harmless beyond a reasonable doubt.

In *Blakely*, the United States Supreme Court reiterated its holding in *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 [147 L.Ed.2d 435, 455] (*Apprendi*) that, "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" (*Blakely,*

supra, 542 U.S. at p. 301 [159 L. Ed. 2d at p. 412].) The statutory maximum is the greatest sentence the court can impose based on facts reflected in the jury's verdict or admitted by the defendant. (*Id*. at p. 303 [159 L.Ed.2d at p. 413].)

The contention that the procedure for determining upper term sentences violates the rule of *Apprendi* and *Blakely* was rejected by the California Supreme Court in *People v. Black* (2005) 35 Cal.4th 1238, 1244. However, *Black*'s holding that the judicial factfinding necessary to impose an upper term does not violate *Blakely* was recently overruled by the United States Supreme Court. (*Cunningham v. California* (2007) 549 U.S. ___, ___ [166 L.Ed.2d 856, 864] (*Cunningham*).)

Neither *Cunningham, Blakely,* nor *Apprendi* prevent the imposition of an upper term sentence under all circumstances. The rule of *Blakely* does not apply to the use of prior convictions to increase the penalty for a crime. (*Apprendi, supra*, 530 U.S. at p. 490 [147 L.Ed.2d at p. 455; *Cunningham, supra,* 549 U.S. at p. __ [166 L.Ed.2d at p. 869].) One valid aggravating factor is sufficient to expose defendant to the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433.)

The trial court relied on a valid aggravating factor when sentencing defendant. In imposing the upper term for attempted murder, the trial court relied on several factors, including defendant's "numerous" prior convictions. We are satisfied beyond a reasonable doubt that the trial court would have

imposed the upper term based on this factor alone. Therefore, any error in considering the facts that defendant had engaged in violent conduct, has a history of violence, and is a dangerous person was harmless. (See *Washington v. Recuenco* (2006) 548 U.S. ___, ___ [165 L.Ed.2d 466, 473, 476-477].)

DISPOSITION

The judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P.J.

RAYE, J.