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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

SHOAIB KHALJI,

Defendant and Appellant.

C047212
(Super. Ct. No. TF31491A)

Pursuant to a negotiated plea agreement, defendant Shoaib Khalji pled no contest to first degree residential burglary. (Pen. Code, § 459.)¹ After the denial of defendant's motion to withdraw his plea, the trial court placed him on probation for five years and ordered him to serve 300 days in county jail. The court also ordered defendant to pay direct victim restitution in the amount of \$12,100 (the estimated value of the items reported stolen) plus an undetermined amount for a jewelry box and its contents.

¹ Undesignated statutory references are to the Penal Code.

The trial court issued a certificate of probable cause and defendant appeals, contending: (1) the trial court abused its discretion in denying his motion to withdraw his plea; (2) the trial court erred in not stopping the hearing on the motion to withdraw his plea and sua sponte conducting a *Marsden*² hearing; and (3) the direct victim restitution was improper because he was not specifically advised he would be ordered to pay it under the terms of the plea agreement. We shall affirm.

BACKGROUND

On February 18, 2004, the day this matter was set for a jury trial, defendant appeared with retained counsel and entered a plea of no contest to residential burglary. The trial court recited the terms of the plea agreement to defendant as follows:

"THE COURT: [¶] . . . [¶] "Mr. Khalji, this charge carries a maximum of six years in prison. The agreement is that I will not give you more than the low term, which is two years.

"Now, I've had an opportunity to discuss the facts of the case with your attorney and the district attorney, and I have indicated that based on what I had heard this is more than likely a probation case, not a prison case. However, if it turns out there are things that I don't know about, I still have the option of giving you the two years or low term in state prison.

"Is that your understanding of what we're doing today?"

² *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

"THE DEFENDANT: Yes.

"THE COURT: Other than what I have just said, has anyone made any threats or promises to get you to enter this plea?

"THE DEFENDANT: No.

"THE COURT: Have you had enough time to discuss your case with your attorney, including your constitutional rights, the elements of this charge, possible defenses that you have, and the consequences of your plea?

"THE DEFENDANT: Yes.

"THE COURT: Have you had enough time with her?

"THE DEFENDANT: Yes.

"THE COURT: Are there any questions that I can answer for you before we proceed?

"THE DEFENDANT: No.

"THE COURT: Now, as I indicated, the maximum is six years. The promise is that you will receive no more than two years, and you may receive probation. If you are placed on probation, that will be formal probation for a period of five years, and you can be ordered to serve up to a year in the county jail.

"Do you understand that?

"THE DEFENDANT: Yes."

After further advisements, including defendant's right to a jury trial, presentation of evidence, testify, and confront and cross-examine witnesses (and defendant expressly waiving those rights), the trial court asked defendant how he pled to residential burglary. Defendant replied, "No contest." The court then specifically asked, "You understand, sir, that a no

contest plea is the same as a guilty plea?" Defendant responded, "Yes."

The prosecutor placed the following factual statement on the record at the entry of plea: "On October 14, 2002, in the City of Tracy, . . . between the hours of 11:15 a.m. and 1:30 p.m., the victim, Jawid . . . Razawi['s] home was broken into. The subject entered the home by removing the screen and going through[,] then[,] an open window. Once inside the house, a number of electronics and jewelry [were] taken. The Tracy Police Department did an investigation. Several latent prints were recovered at the point of entry in an area that . . . we believe that only the person who broke into the house could have placed these fingerprints. Those fingerprints were tested both by the Tracy Police Department and by the Department of Justice and found to belong to the defendant."

The probation officer's presentence report recommending state prison was filed on March 16, 2004. Thereafter, defendant moved to withdraw his plea on the ground that he pled no contest "to avoid undue stress and hardship placed upon his immediate and extended family."

During defendant's presentation of evidence at the hearing, defendant, age 22, testified that he had been in this country since 1992 and has no problem with English. He pled to a misdemeanor two or three years earlier and was placed on informal probation. He had appeared in court over 20 times on the instant case.

In the few months preceding his no contest plea, defendant's mother's health was failing. His mother had collapsed during the change in plea hearing. His father had been ill and out of the country in Afghanistan. Defendant's counsel had contacted the probation officer and ascertained that the officer had no objection to defendant leaving the country to assist the United States government in Afghanistan. Defendant, however, had since found out that they would not accept his help because of his felony. Defendant had not seen his aunts or uncles for the past two years and could not attend his grandfather's funeral because there was a restraining order against him.

Defendant testified that when he entered his plea of no contest, it was his understanding he would avoid a prison sentence and his attorney told him the matter could be expunged after two and a half years. Defendant further testified that he had since been getting pressure from his family to withdraw his plea and prove his innocence. It was his understanding that no contest meant he had a chance to prove his innocence within the two and a half years. It was also his understanding that he would receive no kind of time at all. And although defendant remembered the court asking him if anyone had made any other promises and that he responded, "No," he testified there was a promise that he would do no time and that within two and a half years, the matter would be expunged. He got this understanding from his attorney. His attorney had originally told him he would receive no prison time but, when he later found out that

prison and jail were two different things, his attorney said he would do no time at all.

Defendant remembered some, but not all, of the pre-plea colloquy between him and the court. He did recall the court asking him if he understood that the promise was he would receive no more than two years and may receive probation and that if he received probation, he could be ordered to serve up to a year in county jail, and defendant did recall that he responded, "Yes." Defendant stated, however, that it was not his understanding at that time. Instead, his "understanding" was that he was in a very bad situation, his mother was dying outside, his father was in Afghanistan, his brothers and sisters worked at home, it was raining outside, and he had only 24 hours to "bring everyone in." He did not, however, explain this stress to the judge.

With respect to the court's advisement that a no contest plea is the same as a guilty plea, defendant did not specifically recall that advisement and explained that that was not his understanding. He explained that he was probably not listening to the judge at the time because he was concerned about his mother. He was not thinking properly; he just wanted to conclude the proceedings. Afterward, he asked his attorney if the pleas were the same thing and his attorney told him, "No, I would never have anybody plead guilty." Defendant's understanding of "no contest" was "not guilty."

There was also considerable testimony from several individuals regarding the merits of the underlying charge.

After hearing from counsel, the trial court denied the motion to withdraw the plea. The court explained that, while there were intense family issues and cultural nuances involved in the case, the court did not find that defendant was suffering from any stress that would override his judgment.

With respect to defendant's claims of misunderstanding, the trial court found: "He has testified that he believed there was no jail. The transcript is very clear that the Court informed him he could get up to two years in prison or up to a year in the county jail if he was granted probation. He testified he believed this would be dismissed after two and a half years. There is no indication in the plea transcript even though the Court did inquire whether any other promises or threats had been made to him. He indicates he would later have an opportunity to prove his innocence. I don't know where that has come from, that is no where [sic] in the record. And that he thought no contest meant not guilty, yet the Court specifically stated I would allow the defendant to withdraw his previously entered plea of not guilty and the Court advised him that no contest was the same as guilty.

"Mr. Khalji is a very articulate, obviously intelligent young man. I don't see anything that would make me believe that he is not capable of understanding."

DISCUSSION

I

Defendant's Motion to Withdraw His Plea

Defendant contends the trial court erred in denying his motion to withdraw the plea. He argues the motion should have been granted on the ground that he was confused or mistaken about the consequences of his plea.

Section 1018 provides, in pertinent part, "On application of the defendant at any time before judgment . . . the court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted."

"'[M]istake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea. But good cause must be shown by clear and convincing evidence.' [Citation.]" (*People v. Quesada* (1991) 230 Cal.App.3d 525, 538.) "[T]he granting of such a motion made by a defendant who entered his plea with counsel is discretionary with the court and we will not disturb the trial court's ruling in the absence of a clear demonstration of abuse of discretion." (*Ibid.*)

Defendant argues the trial court "applied an erroneous legal standard" because it focused on the advisements given to defendant by the court, rather than the alleged conversations defendant had with his counsel. We find no error in the trial court's analysis.

In a contested motion to withdraw a plea, the trial court is the trier of fact responsible for judging the credibility of

the witnesses or affiants. The court must resolve conflicting factual questions and draw the resulting inferences. (*People v. Caruso* (1959) 174 Cal.App.2d 624, 636.) Where two conflicting inferences may be drawn from the evidence, a reviewing court must accept the one supporting the trial court's order. (*People v. Harvey* (1984) 151 Cal.App.3d 660, 667.)

Here, the trial court did not believe defendant's testimony that he was confused or did not understand the terms of the plea agreement at the time he entered his plea. It matters not whether the trial court disbelieved defendant regarding the substance of the alleged conversations defendant had with his counsel or whether the trial court believed defendant understood the terms and consequences of his plea despite any conversations he may have had with counsel. The trial court was not required to accept defendant's claim that he was confused, particularly in light of the overwhelming evidence to the contrary.

Defendant specifically acknowledged that he understood the plea agreement was a maximum low term of two years in state prison or five years probation and up to 300 days in the county jail. Defendant specifically stated that no other promises were made to get him to enter his plea. Defendant specifically stated that he understood and gave up his rights to a public trial by judge or jury, to confront and cross-examine witnesses, to present evidence on his own behalf, to subpoena witnesses and testify on his own behalf. Defendant specifically acknowledged that he understood that by entering his plea, he was "in essence convicting [himself] by [his] own statement." After defendant

stated he understood and gave up those rights, the court stated it was "allow[ing] the defendant to withdraw his previously entered plea of not guilty" and defendant pled no contest. Defendant then stated he understood that "a no contest plea is the same as a guilty plea."

Moreover, the court's finding that defendant lacked credibility with respect to his claim that he misunderstood the terms and consequences of his plea is also supported by his written acknowledgment of his legal rights, which he signed over a year before entering his no contest plea. The written acknowledgment, entitled, "LEGAL RIGHTS OF A DEFENDANT CHARGED WITH A FELONY," expressly states: "(c) Nolo Contendre (No Contest) a nolo contendere plea has the same effect as a guilty plea and will be accepted by the court as a guilty plea." The form also states: "A felony conviction could result in a sentence to state prison." In bold type, the form cautioned, "DO NOT SIGN THIS STATEMENT UNLESS YOU FULLY UNDERSTAND IT." Defendant signed directly under that warning, indicating: "I represent to the court that I have read and fully understand the foregoing statement."

The trial court found defendant to be "a very articulate, obviously intelligent young man" who admittedly had no problem with English. The court did not abuse its discretion in rejecting defendant's claim that he was misinformed about the terms and consequences of his plea and denying the motion to withdraw the plea.

II

Failure to Conduct a Marsden Hearing

Defendant argues the trial court was required to initiate a hearing outside the presence of the prosecutor, as provided under *People v. Marsden, supra*, 2 Cal.3d 118, for requests to relieve appointed counsel, when he testified during the hearing on the motion to withdraw his plea that his attorney "misadvised him regarding his plea bargain and made inappropriate promises regarding the outcome of his case." We disagree.

Defendant was represented by retained, not appointed, counsel. The rights and procedures granted under *Marsden* do not apply to retained counsel. Unlike instances involving appointed counsel, a defendant who retains counsel may discharge his attorney for any reason, as long as it will not result in "significant prejudice" to the defendant and is "timely." (*People v. Lara* (2001) 86 Cal.App.4th 139, 152-153; *People v. Ortiz* (1990) 51 Cal.3d 975, 983-984.)

Moreover, even if *Marsden* did apply to retained counsel, a trial court has "no obligation to initiate the *Marsden* inquiry sua sponte. A trial court's duty to conduct the inquiry arises 'only when the defendant asserts directly or by implication that his counsel's performance has been so inadequate as to deny him his constitutional right to effective counsel.' [Citation.]" (*People v. Leonard* (2000) 78 Cal.App.4th 776, 787, italics omitted, quoting *People v. Molina* (1977) 74 Cal.App.3d 544, 549.) A request for substitution of counsel under *Marsden* must be clear and unequivocal. (*People v. Rivers* (1993) 20

Cal.App.4th 1040, 1051, fn. 7.) "Although no formal motion is necessary, there must be 'at least some clear indication by defendant that he wants a substitute attorney.' [Citation.]" (*People v. Mendoza* (2000) 24 Cal.4th 130, 157, quoting *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. 8.) Here, defendant never indicated he wanted a different attorney. Nor was there a direct assertion or a clear implication of performance so inadequate so as to be unconstitutionally ineffective, since the trial court did not believe, nor was it required to believe, that defendant had been misled by his counsel. Thus, the court had no duty to conduct a further inquiry.

III

Direct Victim Restitution

Finally, defendant contends the \$12,100 victim restitution order impermissibly exceeded the punishment specified in the plea agreement. Defendant appears to make two analytically distinct but related arguments: (1) he was not advised of the direct consequences of his plea; and (2) the plea agreement was violated. (See *People v. Walker* (1991) 54 Cal.3d 1013, 1020.) Accordingly, he argues the victim restitution must be stricken or, alternatively, he must be afforded the opportunity to withdraw his plea. We conclude the victim restitution was properly ordered.

Consequences of the Plea

The maximum possible penalty or range of punishment is a direct consequence of the plea of which the defendant must be advised. (See *Bunnell v. Superior Court* (1975) 13 Cal.3d 592,

605; *People v. Lytle* (1992) 10 Cal.App.4th 1,4.) Defendant argues the \$12,100 victim restitution order was improper because he was not advised prior to his no contest plea that he would be required to pay victim restitution. His contention, however, is belied by the record.

Although the trial court did not advise defendant direct victim restitution would be a consequence of his conviction immediately prior to accepting his no contest plea, defendant was informed of that consequence long before he entered the plea. On January 13, 2003, as we have noted, defendant signed the form entitled, "LEGAL RIGHTS OF A DEFENDANT CHARGED WITH A FELONY." That form expressly stated, "If you are granted probation, unless the court finds compelling or extraordinary circumstances to the contrary, you will be ordered to make restitution (pay damages) to the victim or restitution fund or do community service in lieu of payment." In bold type, the form cautioned, "DO NOT SIGN THIS STATEMENT UNLESS YOU FULLY UNDERSTAND IT." Defendant signed directly under that warning, indicating: "I represent to the court that I have read and fully understand the foregoing statement."

This written advisement was sufficient to advise defendant that direct victim restitution would be a consequence of his conviction in this case. Defendant was, in fact, granted probation. Since the court did not find any compelling or extraordinary reasons not to order the restitution, the court ordered the victim restitution as defendant was advised. The fact that defendant was not given the opportunity to do

community service in lieu of payment did not void the advisement.

Terms of the Plea Agreement

Generally, the trial court cannot significantly deviate from the terms of a plea agreement in imposing sentence without giving the defendant an opportunity to withdraw his plea. (*People v. Walker, supra*, 54 Cal.3d at pp. 1024-1025.) But "the circumstance that a statutorily mandated consequence of a guilty plea is not embodied specifically within the terms of a plea agreement does not signify that imposition of such a consequence constitutes a violation of the agreement." (*People v. McClellan* (1993) 6 Cal.4th 367, 381; cf. *In re Moser* (1993) 6 Cal.4th 342, 357.)

When a victim has suffered an economic loss as a result of a defendant's criminal conduct, the trial court must order full direct victim restitution unless it finds compelling and extraordinary circumstances for not doing so. (§ 1202.4, subd. (f).) "The victim's right to restitution is a constitutional right." (*People v. Valdez* (1994) 24 Cal.App.4th 1194, 1203; Cal. Const. art. I, § 28, subd. (b).) It may not properly be made the subject of negotiations. (*People v. Valdez, supra*, at p. 1203.)

The trial court properly ordered defendant to pay restitution to the victim even though defendant's plea bargain was silent on the point. (*People v. Valdez, supra*, 24 Cal.App.4th at pp. 1202-1203.) Thus, the order to pay \$12,100 in direct victim restitution does not constitute a violation of

the parties' plea agreement. (*Ibid.*; see also *People v. Campbell* (1994) 21 Cal.App.4th 825, 829-830.)

DISPOSITION

The judgment is affirmed.

SIMS, J.

We concur:

BLEASE, Acting P.J.

HULL, J.