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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DERRICK TYRONE MYERS, Defendant and Appellant.	E036420 (Super.Ct.No. FSB041428) **OPINION**
In re DERRICK TYRONE MYERS on Habeas Corpus.	E037241 (Super.Ct.No. FSB041428)

APPEAL from the Superior Court of San Bernardino County. Douglas A. Fettel, Judge. Affirmed as modified.

ORIGINAL PROCEEDING: Petition for writ of habeas corpus. Douglas A. Fettel, Judge. Petition denied.

James R. Bostwick, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Quisteen S. Shum, Angela Borzachillo and Scott Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant pleaded guilty to petty theft with a prior theft-related conviction (Pen. Code, §§ 484, subd. (a), 666)[1] and robbery (§ 211). He also admitted that he had suffered a prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subd. (a)). Prior to imposition of the sentence, as agreed by the parties, the trial court orally modified defendant's sentence to 10 years and temporarily released defendant under a *Vargas*[2] waiver. Defendant was sentenced according to the written plea agreement, as modified and agreed by the parties, to 10 years in state prison. Defendant subsequently violated the terms of the *Vargas* waiver, and the trial court resentenced defendant to 11 years 4 months in state prison, in accordance with the original terms of the written plea agreement.

In his appeal, defendant contends, and the People agree, that his 11 year 4 month sentence should be reduced to 10 years, or in the alternative he should be permitted to withdraw his guilty plea, because the court modified his bargained-for and stipulated sentence, with the agreement of both parties.[3] As explained below, we agree with the parties; defendant's sentence should therefore be reduced to 10 years.

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] *People v. Vargas* (1990) 223 Cal.App.3d 1107 (*Vargas*).

[3] Defendant also filed a writ of habeas corpus simultaneously with this appeal.

In his petition for writ of habeas corpus, defendant claims his counsel was ineffective for (1) advising him to plead guilty to robbery, even though the circumstances of the offense did not constitute the crime of robbery, and (2) failing to inform the court that the maximum sentence in the written plea bargain had been orally modified and failing to inform defendant that good cause existed for moving to withdraw his guilty plea. We reject these contentions and deny defendant's petition for writ of habeas corpus, because defendant cannot demonstrate he was prejudiced by his counsel's actions.

I

FACTUAL AND PROCEDURAL BACKGROUND[4]

On October 13, 2003, a San Bernardino Rite Aid drug store security officer, Thomas Rhodes, detained defendant as he exited the store when an antitheft device located at the entrance activated. Rhodes noticed that defendant's waistband appeared "bulky" and asked defendant what he had. Defendant reached into his right rear pocket and removed two canisters of deodorant.

Defendant was escorted back into the store by Rhodes and the store manager, Olin Thrower. Once inside the store, Rhodes and Thrower told defendant to empty his pockets. Defendant reached into the front of his pants and removed six more canisters of deodorant. Defendant pleaded with Rhodes not to call the police. When defendant became agitated and tried to flee, Rhodes wrestled him to the ground and handcuffed

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[4] The factual background is taken from the preliminary hearing transcript and the police officer's report, which is contained in defendant's writ petition as exhibit A.

him. San Bernardino Police Officer Mary Yanez responded to the scene and took defendant into custody.

On November 20, 2003, an information was filed alleging that defendant had committed one count of petty theft with a prior theft-related conviction (§§ 484/666) and one count of second degree robbery (§ 211). The information further alleged that defendant had sustained a prior serious felony conviction (§§ 667, subd. (b)-(i), 1170.12, subd. (a)).

On January 9, 2004, defendant was represented by deputy public defender William Dole. On that day, defendant rejected a plea offer that would have allowed him to plead guilty to the petty theft with a prior charge, admit the strike prior, and serve 32 months in state prison. The robbery charge would have been dismissed. Defendant personally rejected the offer and claimed, "There was never a robbery." Defendant did not want to waive time, and the matter was set for trial.

On January 20, 2004, defendant, who was still represented by Attorney Dole, signed a plea agreement form, agreeing to plead guilty to all of the charges, including the robbery, and to admit the prior strike conviction. In return, he would receive a stipulated sentence of 11 years 4 four months in state prison; he would be released on a *Vargas* waiver, and upon his return to court, he would be resentenced, the robbery conviction would be dismissed, and he would serve 32 months in state prison.

The plea agreement form set forth defendant's constitutional rights, which defendant acknowledged and waived. He also indicated that he had consulted with his attorney, who had explained everything set forth in his declaration, and that he had

personally placed his initials in the appropriate boxes. Defendant signed the form, as did his attorney and the deputy district attorney.

On April 12, 2004, deputy public defender Steve Bremser appeared for Attorney Dole at the taking of the plea. The trial court reiterated defendant's constitutional rights. The court also reviewed the terms of the agreement, explaining to defendant that he would be sentenced to 11 years 4 months, but if he returned to court as ordered, he would be resentenced to 32 months, and the robbery charge would be dismissed. Defendant advised the court that he understood the terms. The court then warned defendant of the consequences of a failure to abide by the *Vargas* waiver. Defendant clearly stated that he understood the terms of the *Vargas* waiver and that he wanted to go ahead with the terms of his release.

Defendant then pleaded guilty to the petty theft with a prior theft-related conviction and robbery and admitted to the strike prior. The court set the resentencing for May 20, 2004. The court found that defendant "understandingly and intelligently" waived his constitutional rights and "personally and orally" entered into his plea of guilty, and that his plea was "free and voluntary." The court found a factual basis in the preliminary hearing transcript and that defendant waived a delay in sentencing. Before sentencing defendant, however, the court stated that it believed there was a section 654 problem because the robbery arose from the theft. The prosecutor, who was not the same prosecutor who had signed the plea agreement form, agreed with the court, as did defendant's counsel. The court stated that it was going to "round [] off" the sentence to 10 years. The court imposed a 10-year sentence, comprising the aggravated term of five years for the robbery, doubled pursuant to the strike prior, and two years for the petty

theft, doubled to four years, to run concurrent to the robbery conviction. The court thereafter released defendant on the *Vargas* waiver and ordered him to report to probation by the next day and to return to court on May 20, 2004, for resentencing, at which time the court would sentence defendant to 32 months in state prison. On that same day, defendant signed an "Agreement to Appear" on May 20, 2004.

Defendant did not appear for his resentencing on May 20, 2004, and the court issued a bench warrant for defendant's arrest. When defendant was eventually brought before the court on August 9, 2004, he was represented by Kyung Kim, a different deputy public defender than the one who represented him at the taking of the plea. Attorney Kim was presumably unaware that the court had orally modified the 11-year 4-month sentence to 10 years. The prosecutor advised the court that defendant had violated the terms of his release by failing to report to probation. After talking with defendant off the record, Attorney Kim informed the court that defendant wanted to admit the violation, which defendant did after waiving his right to a hearing on the matter. Hence, based on defendant's admission, the court stated that it was imposing the "heretofore imposed" sentence of "11 years, 4 months."

On August 10, 2004, defendant filed his notice of appeal.

On January 7, 2005, defendant's appellate counsel filed a petition for writ of habeas corpus and supporting exhibits (case No. E037241) on behalf of defendant. On January 11, 2005, this court informed the parties that defendant's writ petition would be considered with the appeal in case No. E036420 "for the sole purpose of determining whether an order to show cause should issue." Thereafter, on February 14, 2005, the People filed their informal response to defendant's petition for writ of habeas corpus.

II

DISCUSSION

A. *Defendant's Appeal*

Defendant contends, and the People agree, that because the trial court modified defendant's stipulated sentence, with the agreement of both parties, his current sentence of 11 years 4 months should be reduced to the modified 10-year sentence. We agree.

Section 1192.5 is the general plea bargaining statute. As relevant here, it provides: "Where the plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on the plea to a punishment more severe than that specified in the plea and the court may not proceed as to the plea other than as specified in the plea." Section 1192.5 further provides: "If the plea is not accepted by the prosecuting attorney and approved by the court, the plea shall be deemed withdrawn and the defendant may then enter the plea or pleas as would otherwise have been available."

Thus, where there is a plea bargain, the court may either approve the bargain and sentence the defendant as specified in the bargain, or not approve it and let the defendant enter a new plea. If it approves the bargain, the court effectively agrees to exercise its sentencing discretion in accord with the terms of the bargain. The defendant must be sentenced to the specified punishment if the plea is accepted by the prosecutor in open court and approved by the trial court.

When a guilty plea is entered in exchange for specified benefits, such as the dismissal of other counts or an agreed maximum punishment, both parties must abide by the terms of the agreement. (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.) A

disposition harsher than that agreed to by the court or the prosecution may not be imposed on a defendant. (*Santobello v. New York* (1971) 404 U.S. 257, 260-262.)

In the present matter, the trial court modified the written plea agreement at the time it took defendant's guilty plea, with the agreement of both parties. The court then imposed the modified sentence of 10 years. Specific performance is the appropriate remedy when it will fulfill the reasonable expectations of both parties, without holding the sentencing court to a disposition it thinks unsuitable under the circumstances of the particular case. (*People v. Walker*, *supra*, 54 Cal.3d at pp. 1024-1029; *People v. Mancheno* (1982) 32 Cal.3d 855, 860-861.) The record here reflects that apparently, at the time the trial court resentenced defendant almost four months later, it had forgotten it had modified the sentence that appeared in the written plea form, which was 11 years 4 months, to 10 years, with agreement from both parties. Reducing the sentence to 10 years will afford both parties the benefit of their bargain.

B. *Defendant's Petition for Writ of Habeas Corpus*

Defendant contends his trial counsel were ineffective for advising him to plead guilty to robbery when he did not commit a robbery and that he was prejudiced by this advice.[5]

"Plea bargaining and pleading are critical stages in the criminal process at which a defendant is entitled, under both the Sixth Amendment to the federal Constitution and

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[5] Defendant also claims that defense counsel was ineffective for failing to advise the court of the fact that the plea agreement was orally modified, reducing his sentence from11 years 4 months to 10 years. However, because defendant has raised this issue on direct appeal and this court has agreed with the parties that the court erred in resentencing defendant to 11 years 4 months, we need not address this issue.

article I, section 15 of the California Constitution, to the effective assistance of legal counsel. [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 239.) "It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea." (*In re Alvernaz* (1992) 2 Cal.4th 924, 934.)

In *Hill v. Lockhart* (1985) 474 U.S. 52, the Supreme Court held that the two-part test pronounced in *Strickland v. Washington* (1984) 466 U.S. 668 applies to challenges to guilty pleas based on ineffective assistance of counsel, noting the second part of that test is modified. (*Hill*, at pp. 58-59.) Under *Hill's* application of the *Strickland* test to those challenges to guilty pleas, a defendant has the burden to prove by a preponderance of the evidence that: (1) his or her counsel's representation fell below an objective standard of reasonableness under prevailing professional norms; and (2) he or she suffered prejudice from counsel's deficient performance, i.e., "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (*Hill*, at p. 59; see also *In re Resendiz*, *supra*, 25 Cal.4th at pp. 239, 248-254; *In re Alvernaz*, *supra*, 2 Cal.4th at p. 934; *People v. Dennis* (1998) 17 Cal.4th 468, 540-541; *People v. Williams* (1997) 16 Cal.4th 153, 214-215; *In re Avena* (1996) 12 Cal.4th 694, 721; *People v. Davis* (1995) 10 Cal.4th 463, 503.)

A defendant's assertion that he or she would not have pleaded guilty had the defendant received effective assistance of counsel "'must be corroborated independently by objective evidence.' [Citations.]" (*In re Resendiz, supra,* 25 Cal.4th at p. 253, quoting *In re Alvernaz, supra,* 2 Cal.4th at p. 938.) "A defendant's statement to that

effect is not sufficient. [T]here must be some objective showing." (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1140.)

In evaluating trial counsel's actions, "[a] court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.] Thus, a defendant must overcome the presumption that the challenged action might be considered sound trial strategy under the circumstances. [Citation.]" (*People v. Dennis*, *supra*, 17 Cal.4th 468, 541.) This requirement depends "not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases." (*McMann v. Richardson* (1970) 397 U.S. 759, 771.)

In the present matter, assuming without deciding that defendant did not commit a robbery and counsel erred by advising defendant to plead guilty to robbery, considering the record in this case, we conclude that he was not prejudiced by his counsel's purported deficient performance. Defendant has not presented any evidence showing there was a reasonable probability he would not have pleaded guilty had his counsel adequately performed. In fact, defendant does not assert as much.

Hill v. Lockhart, *supra*, 474 U.S. 52 is illustrative. In that case, the defendant petitioned for relief on the ground that he was given inadequate representation. He claimed counsel failed to advise him properly that, as a "second offender," he would serve one-half of his sentence before becoming eligible for parole. The defendant's petition to set aside his plea was denied by the court, because he had not stated in his habeas corpus petition that had he been correctly advised by counsel, he would have pleaded not guilty and insisted on going to trial. He also alleged no special circumstance

which would support a conclusion he had placed a particular emphasis on his parole eligibility in deciding whether to plead guilty. (*Id*. at p. 60.) Thus in *Hill* the failure of the defendant to make the assertion he would have acted differently absent the inadequate representation defeated the required showing at the onset. Likewise, defendant here has not declared in his petition that had he been correctly advised by his counsel, he would not have pleaded guilty.

The record also demonstrates that three months after advising the trial court of his belief that "[t]here never was a robbery," defendant nonetheless pleaded guilty to robbery. In addition, the record shows that defendant, who declares now that Attorney Dole informed him that the circumstances of the incident showed that it was not a robbery, voluntarily pleaded guilty to the crimes. Defendant admits that Attorney Dole discussed the plea agreement form with him. Although he now claims that he did not read the agreement before he initialed and signed the form and that the second attorney, Attorney Bremser, who was present at the time of the taking of the plea, did not explain his constitutional rights to him, these are nothing more than self-serving statements that contradict the record. At the time of the taking of the plea, defendant assured the trial court that he had indeed read, initialed, and signed the plea form. Further, the trial court reiterated defendant's constitutional rights during the taking of the plea, and defendant told the court that he understood those rights. Defendant also assured the trial court that no one had forced or threatened him into entering into the plea agreement, that no one had promised him anything besides what was indicated in the plea agreement, and that he was entering into the plea agreement on his own free will.

Defendant also asserts that defense counsel did not explain the *Vargas* waiver to him and that he did not know he would be convicted of robbery. However, he does not assert that he did not actually know what the *Vargas* waiver meant or that he was pleading guilty to robbery at the time of his guilty plea. Indeed, the trial court explained the *Vargas* waiver to defendant five times.[6] Defendant indicated that he wanted the *Vargas* waiver and that he understood the consequences of a violation of the *Vargas* waiver. Hence, regardless of whether Attorney Dole explained the *Vargas* waiver to defendant, the court's admonitions more than cured any omission.

In addition, as to defendant's assertion that he did not know he was pleading guilty to robbery, the trial court advised him of exactly that and what the penalty was before it accepted his plea. Defendant indicated that he was aware that he was pleading guilty to

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[6] One such colloquy was as follows:

"THE COURT: Holy mackerel. So you're going to plead to 16 months doubled, for a total of 32, huh? And that's what you're going to get if you come back?

"DEFENDANT MYERS: Yes, sir.

"THE COURT: Holy mackerel. Are you sure you want to do this?

"DEFENDANT MEYERS: I'll be here.

"THE COURT: That's not even the question. Let me tell you, I know your intentions are good. The question is you stub your toe, and you're going away for 11 years. Do you understand that?

"DEFENDANT MYERS: Yes, sir.

"THE COURT: Are you sure?

"DEFENDANT MYERS: Yes.

"THE COURT: I really don't like doing these *Vargas* waivers, because I tell you, I hold you to them, and I'm not going to have any excuses or w[h]ining or crying if, you know, you come back and have violated it. Okay. I just -- okay." (Italics added.)

robbery and that he knew what the maximum exposure would be. In addition, when the court asked defendant how he pleaded to the *charge of robbery*, he responded, "Guilty."

Furthermore, the declarations of Attorney Bremser and Attorney Kim that defendant presents to this court do not offer him any support. The record is sufficient to demonstrate that defendant pleaded guilty to robbery and petty theft with a prior and admitted the prior strike conviction knowingly, intelligently, and voluntarily.

There is no evidence that defendant "had reservations about the wisdom of entering the plea bargain . . . ." (*People v. Johnson* (1995) 36 Cal.App.4th 1351, 1358.) He did not claim that trial counsel coerced him into accepting a plea bargain. He did not demonstrate unhappiness with the plea by an attempt to withdraw the plea on other grounds before sentencing. (See *Id*. at p. 1358.) He merely claims that he asked his third counsel, Attorney Kim, who represented him at the sentencing hearing, about withdrawing his plea, and Attorney Kim stated, "It's not going to happen." In fact, Attorney Kim discussed with defendant his option of attempting to withdraw his plea and explained the process of withdrawing his plea.

Valid guilty pleas must be based upon a defendant's full awareness of the relevant circumstances and the likely consequences of his action. (*People v. McCary* (1985) 166 Cal.App.3d 1, 9.) "Pleas must be set aside if defendants are unduly influenced to accept a plea because their counsel is obviously not prepared to proceed [citation], or the defendants represented by counsel entered into the pleas as a result of fraud or duress. [Citations.]" (*In re Vargas*, *supra*, 83 Cal.App.4th at p. 1142.) Here, there was no such evidence. Hence, for the reasons stated previously, we also reject defendant's claim that

defense counsel was ineffective for failing to move the court to permit defendant to withdraw his plea.[7]

Under the teaching of *Hill v. Lockhart*, *supra*, 474 U.S. at pages 59-60 and *In re Resendiz*, *supra*, 25 Cal.4th at page 254, we find that defendant was not prejudiced by his counsel's purported errors. While defendant asserted he did not know that he would be pleading guilty to robbery, that he did not read the plea form, and that he had mental problems that affected his memory, he never stated that he would not have pleaded guilty if given competent advice. In addition, his assertions "'must be corroborated independently by objective evidence.' [Citations.]" (*Resendiz*, at p. 253.)

Based upon our examination of the entire record, defendant fails, ultimately, to persuade us that it is reasonably probable he would have foregone the outcome he obtained by pleading, and instead insisted on proceeding to trial, had trial counsel not purportedly misadvised him. (*In re Resendiz*, *supra*, 25 Cal.4th at p. 254.)

III

DISPOSITION

The judgment is hereby modified by reducing defendant's sentence to 10 years. The judgment as so modified is affirmed. The trial court is directed to amend the abstract of judgment and its minute order so as to reflect this modification and to forward a

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[7] We also note that defendant is foreclosed from arguing that counsel was ineffective for failing to move the court to withdraw the *Vargas* plea on the grounds that it was unauthorized or that the court should have set aside this plea in the exercise of its sound discretion. The procedure utilized in this case has generally been approved by appellate courts. (See, e.g., *People v. Masloski* (2001) 25 Cal.4th 1212, 1223-1223; *People v. Casillas* (1997) 60 Cal.App.4th 445, 446-447; *People v. Vargas*, *supra* 223 Cal.App.3d 1107.)

certified copy of the amended abstract of judgment to the Director of the Department of Corrections. (§§ 1213, 1216.)

The petition for writ of habeas corpus is denied.

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RICHLI
J.

We concur:

HOLLENHORST
Acting P.J.

GAUT
J.