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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JERRY WAYNE SOTELLO,

Defendant and Appellant.

F050202

(Super. Ct. Nos. 05CM4504 &
05CM4598)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge.

James F. Johnson, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Clayton S. Tanaka, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellant, Jerry Wayne Sotello, pled no contest in case No. 05CM4504 to vehicle theft (Veh. Code, § 10851, subd. (a)) and admitted allegations that he had a prior

*Before Vartabedian, A.P.J., Cornell, J., and Kane, J.

conviction within the meaning of the three strikes law (Pen. Code, § 667, subds.(b)-(i)). In case No. 05CM4598, Sotello pled no contest to possession of stolen property (Pen. Code, § 496, subd. (a)) and admitted allegations that he had a prior conviction within the meaning of the three strikes law. On appeal, Sotello contends the court: 1) violated the terms of his plea bargain; 2) erred in denying him counsel and a hearing with respect to his motion to withdraw his plea; and 3) committed *Blakely* error. We will affirm.

FACTS

On September 21, 2005, someone broke into a vacant apartment in Armona, California, and took several items that were to be installed in the apartment, including a bathroom mirror, a vanity, a bathroom towel rack, and a toilet seat. Later that day, Sotello returned the items to a Home Depot store for an in-store credit voucher.

On October 20, 2005, Kings County Sheriff's Deputy Scott Ward contacted Sotello at the Kings County Jail. Sotello told the deputy that the stolen items were given to him by an unknown Hispanic man who offered him \$50 to return them to the Home Depot store. Sotello believed the property was stolen because the Hispanic man did not return them himself (case No. 05CM4598).

On October 25, 2005, a Hanford police officer investigating a burglar alarm was informed by a man that he heard two men talking about "stealing things." The man left and returned shortly to tell the police officer that he was approached by a man who wanted to borrow a crowbar or bolt cutters for a quad (an all terrain vehicle) parked down the street that he wanted to take.

The officer saw Sotello next to the quad and attempted to contact him. Sotello ran, but was apprehended and placed under arrest. An examination of the quad disclosed that the ignition had been removed. The ignition was found on Sotello, who admitted that he attempted to take the quad (case No. 05CM4504).

On November 2, 2005, in case No. 05CM4504, Sotello pled guilty to vehicle theft and admitted the prior strike allegations in exchange for the dismissal of several other charges and a prior prison term enhancement.

On November 29, 2005, the court conducted a preliminary hearing in case No. 05CM4598.

Sotello's sentencing in case No. 05CM4504 was scheduled for November 30, 2005. However on that date defense counsel Michael Woodbury informed the court that Sotello apparently believed that his plea in case No. 05CM4504 resolved case No. 05CM4598. Defense counsel also asked to be relieved as counsel, stating that he had a conflict and could not make a motion to withdraw a plea for Sotello because he might be a necessary witness. Defense counsel further stated that although the resolution of case No 05CM4598 was not discussed on the record, Sotello was contending that defense counsel discussed it with him.

The court appointed attorney Brian Gupton to represent Sotello and continued the hearing until December 13, 2005. On that date, the court arraigned Sotello in case No. 05CM4598. After doing so, the court noted that case No. 05CM4504 had also been continued to that date for further proceedings regarding sentencing and a motion to withdraw the plea. Gupton then advised the court that he had spoken with attorney Woodbury regarding Sotello's request to withdraw his plea and he asked the court for a continuance to discuss the matter with Sotello in order to achieve some type of global resolution of both cases or possibly to file a motion to withdraw the plea.

On January 4, 2005, attorney Gupton advised the court that he had spoken with Sotello and reviewed the change of plea transcript and did not see any grounds for a motion to withdraw the plea. According to Gupton, Sotello wanted to withdraw his plea because he thought his plea bargain was a global settlement encompassing case No. 05CM4598 and that this was the only colorable grounds for a motion to withdraw the plea. However, defense counsel further stated that attorney Woodbury was not aware of case

No. 05CM4598 when Sotello entered his plea in case No. 05CM4504 and because of the foregoing circumstances he believed that any motion to the withdraw the plea would be frivolous.

The court then asked Sotello whether he had any basis for withdrawing his plea. Sotello replied that he thought the plea bargain encompassed case No. 05CM4598 because he was seen by some officers while in custody the morning he entered his plea and was told that he was going to have a case of burglary and receiving stolen property. Therefore, when he went to court that day he thought he was going to be arraigned on those charges. Sotello also told the court that he told attorney Woodbury on November 30, 2005, he wanted to withdraw his plea because Woodbury told Sotello he was facing 10 years, that that was the best deal he was going to get, and Woodbury did not give him most of the discovery. Sotello also complained that although attorney Gupton asked for a three-week continuance to speak with Sotello, Gupton had not contacted him until that morning when he spit in Sotello's face and yelled at him because Sotello wanted to withdraw his plea. Sotello also requested new counsel.

The court then conducted a *Marsden*¹ hearing. During the hearing, Sotello complained that although the court granted attorney Gupton a continuance so he could communicate with him, he had not done so until that morning and at that time Gupton screamed at him. Sotello also stated that he pled guilty because attorney Woodbury told him he could get 10 years, which was more than he could have actually gotten.

Attorney Gupton replied that he reviewed the change of plea transcript and that the transcript was clear that the consequences of Sotello's plea were clearly outlined and that case No. 05CM4504 was the only case discussed. He also stated that in talking to Sotello the only thing he told Gupton was that he was upset he was getting the maximum time on case No. 05CM4504 and he could have done just as well if he had gone to trial. Attorney

¹ *People v. Marsden* (1970) 2 Cal.3d 118.

Sotello reiterated that he did not see any “colorable grounds” for a motion to withdraw the plea.

At the conclusion of the hearing, the court denied the *Marsden* Motion. The court then stated that it agreed with defense counsel’s evaluation and that it too reviewed the change of plea transcript and did not see anything requiring defense counsel to file a motion to withdraw the plea.

On January 20, 2006, Sotello entered into a plea bargain providing that in exchange for Sotello’s guilty plea to possession of stolen property and admission of the prior strike allegations, the prosecutor agreed to dismiss the prior prison term enhancement and he would receive a stipulated term of four years, which would run concurrent to the term he received in case No. 05CM4504.

Sotello’s probation report disclosed that Sotello had four prior felony convictions and five prior misdemeanor convictions. He also committed many of his offenses while on felony or misdemeanor probation; he served two prior prison terms; and, he violated his parole on seven occasions.

On March 14, 2006, the court imposed the aggravated term of three years on Sotello’s vehicle theft conviction in case No. 05CM4504, doubled to six years because of Sotello’s prior strike conviction, and a consecutive term of 16 months (one-third the middle term of two years, i.e., eight months, on his possession of stolen property conviction in case No. 05CM4598, doubled to 16 months because of Sotello’s strike conviction). In imposing the upper term on the vehicle theft offense, the court found as aggravating circumstances that Sotello’s prior convictions were numerous and for violent offenses, Sotello served a prior prison term, and his performance on probation and parole had been unsatisfactory. The court also found that Sotello’s early plea in the proceedings was a mitigating circumstance.

DISCUSSION

The Consecutive Term

Sotello contends the court violated the terms of his plea bargain with respect to case No. 05CM4598 when it imposed a consecutive term on his conviction in that case. Respondent concedes and we agree.

“ ‘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, including the state, must abide by the terms of the agreement. The punishment may not significantly exceed that which the parties agreed upon. [¶] ‘ “[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” [Citation.] [¶] The Supreme Court has thus recognized that due process applies not only to the procedure of accepting the plea [citation], but that the requirements of due process attach also to implementation of the bargain itself. It necessarily follows that violation of the bargain by an officer of the state raises a constitutional right to some remedy.’ [Citations.] . . . ” (*People v. Walker* (1991) 54 Cal.3d 1013, 1024.)

Here, although Sotello’s plea bargain in case No. 05CM4598 provided for a concurrent four-year term on his possession of stolen property conviction in that case, the court imposed a consecutive 16-month term. Thus, it is clear that the court violated the terms of Sotello’s plea bargain in that case and we will modify the judgment accordingly.

The Motion to Withdraw the Plea

Sotello contends that the court denied him his federal constitutional right to due process by its failure to appoint counsel and conduct a hearing with respect to his motion to withdraw his plea. We disagree.

Penal Code section 1018 permits a plea of guilty to be withdrawn prior to judgment for good cause shown. It is the defendant’s burden to establish good cause by clear and convincing evidence. (*People v. Wharton* (1991) 53 Cal.3d 522, 585.) “Mistake, ignorance or any other factor overcoming the exercise of free judgment is good cause for withdrawal of a guilty plea.” (*People v. Cruz* (1974) 12 Cal.3d 562, 566.)

However, the defendant's change of mind, alone, does not constitute good cause for withdrawal of a guilty plea. (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) A guilty plea should not be set aside lightly, and finality of proceedings should be encouraged. (*People v. Hunt* (1985) 174 Cal.App.3d 95, 103.)

The withdrawal of a guilty plea is left to the sound discretion of the trial court. (*People v. Nance* (1991) 1 Cal.App.4th 1453, 1456.) Changing one's mind about pleading no contest is not good cause for withdrawal of his no contest plea. (*People v. Huricks, supra*, 32 Cal.App.4th at p. 1208.) Buyer's remorse is insufficient to compel a court to permit withdrawal of a plea. (*People v. Knight* (1987) 194 Cal.App.3d 337, 344.) A defendant can make a motion to withdraw a plea. (*People v. Brown* (1986) 179 Cal.App.3d 207.)

In *People v. Osorio* (1987) 194 Cal.App.3d 183, the defendant expressed a desire to withdraw his guilty plea. Defense counsel stated he could not "in good conscience," file a motion to withdraw the defendant's plea even though, according to counsel, there appeared to be favorable grounds for such a motion. (*Id.* at pp. 186, 188.) The court held that because there was a "colorable basis" for a motion to withdraw the plea, the judgment must be set aside for the limited purpose of permitting the defendant to make such a motion with counsel's assistance. (*Id.* at p. 189.)

In *Brown*, the defendant pled no contest to several counts of committing lewd acts upon a child with the use of force. (*People v. Brown, supra*, 179 Cal.App.3d at pp. 210-211.) At the sentencing hearing, the defendant's attorney informed the court defendant wanted to withdraw his plea; however, defense counsel represented there was no legal basis for such a motion. (*Id.* at p. 211.) The defendant addressed the court and stated he was not in the "right frame of mind" at the time of his plea because he had been shaken up by a death. The trial court even acknowledged that the defendant was emotional at the time of his plea. The appellate court held defense counsel had a duty to file the plea

withdrawal motion because it would not have been frivolous or compromised accepted ethical standards.

Here, Sotello's statements to the court indicate that he entered his plea in case No. 05CM4504 under the mistaken belief that it would resolve the charges in case No. 05CM4598. Sotello claimed his mistake resulted from two police officers meeting with him in jail to talk to him about the charges in case No. 05CM4504 and from defense counsel Woodbury's representation that his plea in case No. 05CM4598 would encompass both cases. However, attorney Gupton told the court that attorney Woodbury could not have told Sotello that his negotiated plea in case 05CM4504 encompassed the charges in case No. 05CM4598 because Woodbury was unaware that charges in that case had been filed against Sotello. Attorney Gupton further stated that after reviewing the transcript of the change of plea proceedings and interviewing Sotello and Attorney Woodbury, he concluded that there was no basis for filing a motion to withdraw plea on Sotello's behalf.

In *Brown* the court stated that “[d]efendant [is] entitled to have the motion [to withdraw plea] presented by his attorney of record.” (*People v. Brown, supra*, 179 Cal.App.3d at p. 215.) Sotello appears to interpret this sentence from *Brown* to require defense counsel to present a defendant's motion to withdraw whether or not defense counsel determines the motion to have merit. Not so. As noted above, the appellate court in *Brown* determined that the record there demonstrated that the motion was not frivolous. Additionally, the *Brown* court remanded the matter to allow the defendant to make a motion to withdraw his plea with the caveat that should defense counsel refuse to present the motion, the court should conduct a *Marsden* hearing to determine the basis of the conflict and whether to appoint substitute counsel to present the motion. (*Id.* at p. 216.)

In contrast, here, defense counsel determined after investigating the grounds for a motion to withdraw plea that there were no grounds for such a motion. Further, in *Brown*

the court specifically stated that it did not mean to “suggest that counsel is compelled to make a motion which, in counsel’s good faith opinion, is frivolous or when to do so would compromise accepted ethical standards. [Citations.]” (*Id.* at p. 216.)

Additionally, in contrast to *Brown*, the court here conducted a *Marsden* hearing in response to Sotello’s request for appointment of new counsel, where it allowed Sotello to air his complaints against defense counsel, none of which it found warranted the appointment of new counsel. Moreover, as noted by *Brown*, “It was improper to permit defendant to bring his motion in pro. per. while he was still represented by counsel and he had not waived his right to counsel. [Citation.]” (*Id.* at pp. 214-215.) Accordingly, we reject Sotello’s contention that the court erred when it denied his motion to withdraw his plea.

The Blakely Issue

In sentencing Sotello in case No. 05CM4598 to the aggravated term of three years on his vehicle theft conviction, the court stated, “. . . the circumstances in aggravation include a consideration of the defendant’s extensive record and violent offenses. He has a history of prior prison commitment and a history of violations of probation and parole.” Relying on *United States v. Booker* (2005) 543 U.S. 220, *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), and *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*), Sotello contends the trial court violated his Sixth Amendment right to trial by jury by imposing the upper term based on factors not admitted by him or found to be true by the jury beyond a reasonable doubt.

Prior to Sotello’s sentencing, the California Supreme Court undertook an extensive analysis of these cases and concluded that the imposition of an upper term sentence, as provided under California law, was constitutional. (*People v. Black* (2005) 35 Cal.4th 1238, 1244, 1254, 1261 (*Black*)). Recently, however, the United States Supreme Court overruled *Black* in part and held that California’s determinate sentencing law “violates *Apprendi*’s bright line rule: Except for 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.’ ” (*Cunningham v. California* (2007) 549 U.S. ____ [127 S.Ct. 856, 2007] (*Cunningham*).) The middle term prescribed under California law, not the upper term, is the relevant statutory maximum. (*Ibid.*)

Here, the court found an aggravating factor based on Sotello’s numerous convictions and juvenile adjudications, which included four prior felony convictions and five misdemeanor convictions. Further, although the court found that Sotello’s early plea in this matter was a mitigating circumstance, the mitigating effect of this circumstance was minimal because in exchange for his plea, he received a substantial benefit when the court dismissed two felony counts, three misdemeanor counts and a prior prison term enhancement. Thus, in view of the minimal mitigation in the instant case and the strength of the multiplicity of convictions factor, which the court could properly consider under *Cunningham*, we need not decide whether the court’s reliance on factors in addition to Sotello’s prior convictions constituted error under *Blakely* or *Cunningham*. Any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

DISPOSITION

The judgment is modified as follows: the consecutive 16-month term imposed on Sotello’s conviction for possession of stolen property in case No. 05CM4598 is converted to a four-year concurrent term as provided for in Sotello’s plea agreement in that case. The trial court is directed to prepare an abstract of judgment consistent with this opinion and to forward a certified copy to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.