20CA0471 Peo v Webber 07-22-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 20CA0471
Mesa County District Court No. 13CR1310
Honorable Richard T. Gurley, Judge

The People of the State of Colorado,

Plaintiff-Appellee,

v.

Robyn Lee Webber,

Defendant-Appellant.

ORDER AFFIRMED, JUDGMENT AND SENTENCE VACATED, AND CASE REMANDED WITH DIRECTIONS

Division VII
Opinion by JUDGE PAWAR
Fox and Dunn, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced July 22, 2021

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¶ 1 Defendant, Robyn Lee Webber, appeals the trial court's order denying his Crim. P. 32(d) motion to withdraw his guilty plea before sentencing. We affirm the order, but we vacate the judgment and sentence and remand the case for further proceedings.

I. Background

¶ 2 The prosecution charged Webber with one count of vehicular eluding, one count of driving under the influence (DUI), two counts of driving under restraint, and four habitual criminal sentencing enhancers. The habitual criminal counts were based on Webber's prior felony convictions from July 25, 1997 (count 5), June 25, 1999 (count 6), October 27, 2006 (count 7), and August 6, 2007 (count 8).

¶ 3 In 2014, in exchange for the dismissal of the remaining counts, Webber pleaded guilty to vehicular eluding, DUI, and two of the habitual criminal sentencing enhancers (counts 5 and 6). In the plea agreement, the parties stipulated that Webber would be sentenced to nine years in prison, but if Webber successfully completed a treatment program, the prosecutor would consider a stipulated sentence of six years in prison.

¶ 4 After the providency hearing, the court set a review date to give Webber time to enter the treatment program before sentencing. However, Webber was never admitted into the treatment program, and he failed to appear for sentencing. About four and a half years later, Webber was arrested on an outstanding warrant.

¶ 5 Defense counsel filed a Crim. P. 32(d) motion to withdraw Webber's guilty plea. Counsel argued that Webber's guilty plea was not voluntary because the plea agreement called for an illegal sentence — that is, the court did not have the authority to reduce the sentence from nine to six years given that the operative habitual criminal statute required a nine-year sentence.

¶ 6 Before the hearing on the Crim. P. 32(d) motion, Webber requested that he be allowed to represent himself, and the court granted his request. At an evidentiary hearing, Webber told the court that he wanted to withdraw the guilty plea because it was made under duress as his dad was in poor health at the time, he was under stress, he thought the only possible remedy was signing the plea deal, and he did not understand the elements of the charges.

¶ 7 The trial court denied the Crim. P. 32(d) motion, finding that (1) the plea was knowing, voluntary, and intelligent; and (2) the providency hearing transcript contradicted Webber's claim. The court then sentenced Webber under the little habitual criminal statute to nine years in prison.

¶ 8 On appeal, Webber argues that his sentence is illegal because he did not commit the prior felonies underlying the two habitual criminal counts within ten years of the current offense. This is the only illegal sentence argument Webber raises on appeal, and therefore the only one we address. *See People v. Brooks*, 250 P.3d 771, 772 (Colo. App. 2010) (Arguments made in a Crim. P. 35 motion but not specifically reasserted on appeal are abandoned.).

II. The Sentence is Illegal

¶ 9 We may review Webber's argument that his sentence is illegal for the first time on appeal because a court "may correct a sentence that was not authorized by law . . . at any time." Crim. P. 35(a); *see also People v. Torres*, 141 P.3d 931, 936 (Colo. App. 2006) ("A defendant may contend that a sentence is illegal for the first time on appeal.").

¶ 10 We review the legality of a defendant's sentence de novo. *See People v. Bassford*, 2014 COA 15, ¶ 20. In our review, we consider the statutory scheme in effect at the time the defendant committed the offense. *See People v. Wolfe*, 213 P.3d 1035, 1036 (Colo. App. 2009). "Sentences that are inconsistent with the statutory scheme outlined by the legislature are illegal." *People v Rockwell*, 125 P.3d 410, 414 (Colo. 2005).

¶ 11 Webber pleaded guilty to vehicular eluding, a class 5 felony, and two habitual criminal sentencing enhancers. *See* § 18-9-116.5(2)(a), C.R.S. 2020. When Webber committed the vehicular eluding offense on October 26, 2013, the presumptive sentencing range for a class 5 felony was one to three years. *See* § 18-1.3-401(1)(a)(V)(A), C.R.S. 2020. However, under the little habitual criminal statute, the court was required to impose a sentence that was three times the maximum in the presumptive range — in this case, nine years — if Webber had been twice convicted of a felony "within ten years of the date of the commission of the said offense." § 18-1.3-801(1.5)(a), C.R.S. 2020.

¶ 12 The prosecution concedes, and we agree, that the sentence imposed on the vehicular eluding count is illegal. The court

imposed the nine-year sentence based on Webber's prior convictions that entered on July 25, 1997, and June 25, 1999. Because those convictions did not occur within ten years of the date that Webber committed the current offense on October 26, 2013, the court erred in relying on them to sentence Webber under the little habitual criminal statute. For this reason, we conclude that Webber's nine-year sentence is illegal.

III. Remedy

¶ 13 Having concluded that the sentence is illegal, we must determine the appropriate remedy. Webber argues that we should vacate his guilty plea and sentence and remand the case for the trial court to reinstate the charges. Again, we agree.

¶ 14 The nature of the illegality of a sentence determines whether the illegal sentence can be corrected by resentencing a defendant or by vacating the judgment of conviction. *See People v. Fritz*, 2014 COA 108, ¶ 14. If a plea agreement includes a provision for an illegal sentence, a guilty plea must be vacated if the illegal sentence was "an integral part of the plea agreement that materially induce[d] a defendant to plead guilty." *Id.* at ¶ 15.

¶ 15 In determining whether the illegal sentence materially induced the defendant to plead guilty, we employ an "objective reasonable person test" — that is, we ascertain the "meaning a reasonable person would have attached [to the plea agreement] under the circumstances." *Id.* (quoting *Craig v. People*, 986 P.2d 951, 961 (Colo. 1999)). A defendant is entitled to withdraw his guilty plea only if the illegal sentence or promise materially induced him to plead guilty. *See id.* "The interpretation of a plea agreement is a question of law that we review de novo." *Id.* at ¶ 13.

¶ 16 We conclude that a reasonable person would have been materially induced to plead guilty based on the promise that he would be sentenced under the less severe little habitual criminal statute when he faced a sentence under the big habitual criminal statute. Recall that Webber was originally charged with one count of vehicular eluding and four habitual criminal counts. Unlike the little habitual criminal statute, there is no time limit on the prior felony convictions under the big habitual criminal statute. *See* § 18-1.3-801(2)(a)(I)(A). So, if Webber had been convicted of at least three of the habitual criminal counts, the court would have been

required to impose a prison sentence of four times the maximum in the presumptive range — twelve years. *See id.*

¶ 17 Under these circumstances, a reasonable person would have been induced to plead guilty to avoid an additional three years in prison. *Compare Chae v. People*, 780 P.2d 481, 487 (Colo. 1989) (concluding that the sentencing recommendation against imprisonment was an integral part of the plea agreement and the basis for the defendant's plea), *with Fritz*, ¶ 18 (concluding that a reasonable person "would not have been materially induced to plead guilty by the mandatory parole provision, but by the probation provision and the dismissal of the other charges against him" because he would not have served any term of parole if the court had not revoked his probation).

¶ 18 In reaching this conclusion, we disagree with the prosecution's reliance on *People v. Mazzarelli*, 2019 CO 71. The holding in *Mazzarelli* was "limited to situations in which the trial court (1) rejects a sentence concession (2) after accepting the defendant's guilty plea." *Id.* at ¶ 1 n.1. Here, the trial court accepted the sentencing concession and sentenced Webber under the little habitual criminal statute. Thus, *Mazzarelli* is inapposite.

¶ 19 We therefore vacate Webber's guilty plea and sentence and remand the case for reinstatement of the original charges. *See People v. Martinez*, 751 P.2d 660, 660-61 (Colo. App. 1987) (concluding that the appropriate remedy was to vacate the guilty plea and reinstate the original charges to avoid giving the defendant the benefit of avoiding a sentence under the big habitual criminal statute where the court had sentenced the defendant under the little habitual criminal statute even though his prior convictions exceeded the ten-year time limitation).

IV. Conclusion

¶ 20 The order is affirmed, Webber's guilty plea and sentence are vacated, and the case is remanded for reinstatement of the original charges against Webber.

JUDGE FOX and JUDGE DUNN concur.