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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

EDUARDO NAVAL,

Defendant and Appellant.

A130230

(San Francisco County
Super. Ct. No. 2244516)

In re EDUARDO NAVAL,

on Habeas Corpus.

A133809

(San Francisco County
Super. Ct. No. 2244516)

In *People v. Naval* (Jan. 21, 2010, A120826, 2010 Cal.App. Unpub. LEXIS 414, 2010 WL 196773) (*Naval I*), defendant and appellant Eduardo Naval (Naval) appealed the judgment and sentence imposed following his jury-trial convictions for continuous sexual abuse of his daughter while she was under fourteen years of age (Pen. Code, § 288.5),¹ threatening death or great bodily injury against his wife (§ 422), willfully dissuading his wife from testifying at trial (§ 136.1, subd. (c)(1)), and assault with a deadly weapon on this wife (§ 245, subd. (a)(1)). We reversed Naval's conviction for assault with a deadly weapon on his wife (§ 245, subd. (a)(1)), affirmed his convictions on the remaining counts and remanded the matter for resentencing.

¹ Further statutory references are to the Penal Code unless otherwise noted.

In case number A130230, Naval appeals the sentence imposed upon remand, contending the matter should again be remanded for a new sentencing hearing on the following grounds: (1) the trial court erred by failing in its mandatory duty to order an updated probation report before resentencing; (2) trial counsel’s failure to request an updated probation report amounted to ineffective assistance of counsel (IAC); and, (3) the court imposed consecutive sentences without being aware of its discretion to impose concurrent sentences.

In case number A133809, Naval petitions for habeas corpus relief on the grounds he received IAC on account of counsel’s failure to request an updated probation report and counsel’s failure to argue for a concurrent sentence.² We affirm the judgment and sentence and dismiss the petition for writ of habeas corpus.

FACTS AND PROCEDURAL BACKGROUND

Following remand in *Naval I*, the matter was subsequently set for resentencing on September 1, 2010.³ Defense counsel filed a sentencing memorandum in connection with the resentencing hearing. The memorandum states, “As to the correct calculation for a sentence based on the court’s previous determination, the defense and prosecution are in agreement.” The memorandum then sets forth a count-by-count calculation in tabular form for a prison sentence totaling 15 years, summarized as follows: Count 1 (§ 288.5 — continuous sexual abuse of daughter), mid-term, consecutive sentence, resulting in 12 years; Count 2 (§ 422 — threatening wife), mid-term, stayed under section 654, resulting in 0 years; Count 3 (§ 136.1 — dissuading a witness), mid term, concurrent sentence, resulting in 3 years; Count 4, disallowed, resulting in 0 years.

² At Naval’s request, we consolidated his petition for a writ of habeas corpus in case number A133809 with his appeal in case number A130230 and deferred determination of whether to issue an order to show cause until we considered the issues on the appeal.

³ We need not recite the facts underlying trial and conviction, described in detail in our opinion in *Naval I*, which we incorporate by reference herein. Also, we granted Naval’s unopposed motion for judicial notice of the record on appeal in *Naval I*.

Naval appeared at the sentencing hearing with counsel and a certified Tagalog interpreter. The court stated: “The court is prepared to resentence you, Mr. Naval, and have a new judgment based on the decision of the Court of Appeal, which would be nunc pro tunc to February 21, 2008.” Counsel affirmed there was no legal cause why sentence should not be pronounced and waived formal arraignment for pronouncement of judgment and sentence. The court stated it had reviewed and considered the Court of Appeal decision, defense counsel’s resentencing memorandum, as well as the reporter’s transcript of the original sentencing on February 21, 2008. The court stated it agreed with the recommended sentence presented by counsel. Neither counsel expressed a wish to be heard on the matter. The prosecutor commented, “I believe also, under [section] 1170.15, consecutive sentences are permitted.” The court noted the original probation report did not recommend probation, denied probation under section 1203.066, subdivision (a)(8), and imposed a sentence of 15 years in state prison on the same basis outlined in defense counsel’s sentencing memorandum. Naval filed a timely notice of appeal on October 27, 2010.

DISCUSSION

Based on the fact that he was originally sentenced in February 2008, Naval contends the trial court had a mandatory duty to order a supplemental probation report before resentencing him in September 2011. We disagree.

Naval acknowledges that his conviction for continuous sexual abuse of a minor under fourteen years of age was based on a jury finding of substantial sexual conduct, rendering him statutorily ineligible for probation, pursuant to section 1203.066, subdivision (a)(8). Because Naval was statutorily ineligible for probation, the trial court was not required to obtain a supplemental probation report prior to resentencing. (See *People v. Murray* (2012) 203 Cal.App.4th 277, 289 [“Because [defendant] was not eligible for probation, no supplemental probation report was required”]; *People v. Llamas* (1998) 67 Cal.App.4th 35, 39 [defendant was statutorily ineligible for probation due to prior violent felony, therefore probation report was discretionary]; *People v. Bullock* (1994) 26 Cal.App.4th 985, 989 [stating “the Legislature knows how to make a referral

for a probation report mandatory, and . . . [i]ts failure to do so when the defendant is not eligible for probation reflects a legislative decision that a report is not required in every instance]; *People v. Goldstein* (1990) 223 Cal.App.3d 465, 472 [trial court’s decision whether to obtain a probation report before sentencing was discretionary where defendant was ineligible for probation due to prior drug offense]; see also *People v. Johnson* (1999) 70 Cal.App.4th 1429, 1431–1432 [where defendant fails to request a supplemental probation report, voices no objection to proceeding with resentencing without a supplemental probation report, and states there is no legal cause why judgment cannot be imposed, the issue of requiring a supplemental probation report is waived because section 1203, subdivision (b)(4), which provides that supplemental probation reports cannot be waived unless stipulated to by both parties and the stipulation is either filed or orally stated in open court, applies only to persons eligible for probation].) In short, the trial court was not under a mandatory duty to order a supplemental probation report prior to resentencing Naval.

Alternatively, Naval asserts that if a supplemental probation report was not mandated, his trial counsel provided ineffective assistance of counsel (IAC) by failing to request one. A cognizable claim of ineffective assistance of counsel requires a showing “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) “[T]he performance inquiry must be whether counsel’s assistance was reasonable considering all the circumstances.” (*Id.* at p. 688.) To prevail on an ineffective assistance of counsel claim, a defendant must also establish counsel’s performance prejudiced his or her defense. (*Id.* at p. 687.) To establish prejudice, a defendant must demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694.) Because a defendant must prove both deficient performance and prejudice in order to prevail, courts may reject an ineffective assistance of counsel claim if it finds counsel’s performance was reasonable or the claimed error was not prejudicial. (*Id.* at

p. 687.) Here, Naval merely asserts there is a reasonable chance that if counsel had requested a supplemental probation report “it would have been favorable to appellant and have persuaded the court to impose a lesser sentence.” This bald assertion does not amount to a showing of prejudice. Accordingly, we reject his IAC claim.

Naval also contends the court was unaware it had discretion to impose a concurrent 3-year sentence on Count 3 (§ 136.1 — dissuading a witness) and erroneously believed that a consecutive sentence on that count was mandatory. We review the record with all intendments, and conflicts in the evidence, resolved in favor of the trial court’s judgment (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849), and presuming, in the absence of evidence to the contrary, that the trial court considered all relevant criteria (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 836) and knew and applied the correct statutory and case law (*People v. Jacobo* (1991) 230 Cal.App.3d 1416, 1430). In light of this standard, the record cannot support Naval’s assertion that the trial court imposed a consecutive sentence for the section 136.1 conviction upon the mistaken belief that such a sentence was mandatory.

First, and most obviously, the court nowhere explicitly states it imposed a mandatory consecutive sentence. Second, the court stated at the re-sentencing hearing that it had reviewed, among other things, the reporter’s transcript of the original sentencing on February 21, 2008. The reporter’s transcript of the original sentencing shows that defense counsel initially requested a probationary sentence, adding that if the court was “not willing to give him probation, . . . to reconsider that in the actual prison sentence that he is given. [¶] *Many of these items can be run concurrent. They are not by necessity consecutive.*” Counsel asked the court to “mitigate that sentence *in the ways that I’ve outlined.*” The court declined counsel’s request for concurrent sentences and instead imposed all sentences consecutively, with the exception of the sentence for the section 422 conviction (criminal threats), which the court stayed pursuant to section 654. The reporter’s transcript of the original sentence hearing demonstrates the trial court knew it could impose concurrent sentences on one or more of the convictions and declined to exercise its discretion to do so. Accordingly, there is no reason to think the

court imposed a consecutive sentence upon remand based upon a mistaken belief that such a sentence was mandatory.

In sum, the court did not have a mandatory duty to obtain a supplemental probation report prior to re-sentencing, Naval fails to show his counsel was ineffective for failing to request a supplemental probation report, and the court did not impose a consecutive sentence on the section 136.1 count in the mistaken belief that such a sentence was mandatory. Accordingly, in case number A130230, we affirm the judgment and sentence.

In case number A133809, Naval petitions for habeas corpus relief on several grounds. First, Naval reiterates the contention raised on appeal that the trial court failed to comply with a mandatory duty to obtain a supplemental probation report prior to re-sentencing. We reject that contention for the reasons stated above.

Next, Naval contends he received IAC because counsel failed to request a supplemental probation report. Naval asserts that a supplemental probation report would have shown that he had performed well in prison since the time of his original sentence. However, Naval does not show how that raises a reasonable probability the trial court would have imposed a lesser sentence. Accordingly, his IAC claim fails for failure to show prejudice. (See *Strickland v. Washington, supra*, 466 U.S. at p. 694 [to establish prejudice, a defendant must demonstrate that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is probability sufficient to undermine confidence in the outcome.”] (*Id.* at p. 694.)

Last, Naval contends he received IAC because counsel failed to argue for a concurrent 3-year sentence on count 3. Naval asserts there is a reasonable probability the court would have imposed a concurrent sentence on count 3 had counsel argued for it because, inter alia, he had no prior record, the experts believed he was unlikely to reoffend, and the court found that aggravating factors did not outweigh mitigating factors. However, all this information was before the court at the original sentencing hearing. Also, as noted above, trial counsel urged the court to impose concurrent sentences at that

time. The trial court, however, imposed all sentences consecutively for a total term of 18 years. Accordingly, it is highly improbable that upon remand, after the 3-year consecutive sentence on the assault count had been stricken, and with the conviction on count 2 stayed pursuant to section 654, the same judge would have been persuaded to impose a concurrent 3-year sentence on count 3, resulting in a drastic reduction from an original sentence of 18 years to one of 12 years, solely because Naval had performed well in prison in the meantime.

DISPOSITION

In case number A130230, the judgment and sentence are affirmed. In case number A133809, the petition for writ of habeas corpus is dismissed.

Jenkins, J.

We concur:

McGuinness, P. J.

Pollak, J.