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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.

DANIEL A. GOODMAN,

Defendant and Appellant.

A131674

(Solano County

Super. Ct. Nos. VCR 208837 & 196547

Defendant Daniel A. Goodman appeals from the judgment and sentence imposed following his entry of a no-contest plea on charges of false personation and receiving stolen property. Defendant's appellate counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and requests that we conduct an independent review of the record. Defendant was informed of his right to file a supplemental brief and did not file such a brief. (See *People v. Kelly* (2006) 40 Cal.4th 106, 124.) We have conducted the review requested by appellate counsel and, finding no arguable issues, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2010, the Solano County District Attorney (DA) filed a felony information in case number VCR196547, alleging that in March 2008 defendant committed false personation (count 1), in violation of Penal Code, section 529,¹ and

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

possessed methamphetamine (count 2), in violation Health and Safety Code, section 11377.

According to the probation report, the false personation charge arose from an incident on March 6, 2008, when Vallejo police officers responded to reports of a disturbance. Officers contacted defendant and asked if his name was "Danny." Defendant replied it was not, and then gave different names, birth dates and social security numbers that could not be verified by dispatch. After officers found identification for a person named E.K. in defendant's pocket, defendant told officers he was E.K. Defendant was taken into custody for providing false information. Police ran a photo-check on E.K. at the station, but the photograph that came back did not match defendant. When E.K. arrived at the station, he told police that he allowed defendant to stay in his house for several days but never gave defendant permission to possess or use his identification.

In September 2010, the DA filed a single-count, felony complaint in case number VCR208837, alleging that sometime between August 27 and August 31, 2010, defendant received a stolen Ford Bronco motor vehicle, in violation of section 496d, subdivision (a). Also, the complaint alleged that defendant committed the offense charged while released from custody on bail in case number VCR196547, within the meaning of section 12022.1. Further, the complaint alleged defendant failed to remain free of prison custody for five years following a prior prison term, within the meaning of section 667.5.

According to the probation report, this charge arose after defendant attempted to sell J.R. a used transmission from a Ford Bronco. On August 31, 2010, defendant dropped the transmission off in the driveway of J.R.'s house, and was supposed to return to sign a contract for the sale prepared by J.R. A couple of days later, two men, M.D. and L.S., contacted J.R. and told him they were awaiting payment for removing the transmission from the Bronco. They told J.R. where the Bronco was parked and gave him the VIN number. J.R. called the police. Police confirmed the Bronco had been reported stolen and subsequently recovered the vehicle. J.R. positively identified defendant as the person who attempted to sell him the Bronco transmission. M.D. and

L.S. positively identified defendant as the person they saw towing a Bronco with his tow truck who offered them \$100 each to remove the transmission.

On October 25, 2010, defendant appeared with counsel at the preliminary examination scheduled for case number VCR208837. Counsel for defendant announced defendant wished to enter a plea in both pending matters by admitting to false personation (count 1) in VCR196547, receiving stolen property as alleged in VCR208837, as well as the allegation he committed the latter offense while free on bail. In return, defendant would receive a suspended sentence of five years and eight months in state prison with immediate release on felony probation for a period of three years. Defendant acknowledged he read the waiver of rights and plea forms he had signed, and that he understood all the rights and consequences set forth therein. Defendant pleaded no contest to falsely personating E.K., in violation of section 529, no contest to receiving stolen property, in violation of 496d, subdivision (a), and no contest to the allegation he committed the latter offense while free on bail. Defense counsel stipulated there was a factual basis for the plea in the record. The DA dismissed remaining counts and allegations in both matters with a *Harvey* waiver.² Thereafter, the trial court found that defendant knowingly and intelligently waived his constitutional rights, accepted the plea, and found him guilty of the charges. Defendant was released on his own recognizance pending sentencing, and a sentencing hearing was set for December 7, 2010.

The record shows that defendant failed to appear for sentencing on December 7 and that in his absence the trial court issued a bench warrant for his arrest. On January 3, 2011, defendant appeared on the bench warrant and was remanded into custody. On January 19, 2011, defendant appeared for sentencing and the matter was continued upon his request to file a motion to withdraw his plea.

Defendant appeared with counsel at the continued sentencing hearing on February 15, 2011. Counsel for defendant informed the court defendant no longer wished to withdraw his plea and “would like to avail himself of the indicated sentence

² *People v. Harvey* (1979) 25 Cal.3d 754.

that the court gave him.” In case number VCR196547 (false personation in violation of section 529), the court denied probation and sentenced defendant to the low term of 16 months in state prison. In case number 208837 (receiving stolen property in violation of section 496d), the trial court imposed the low term of 16 months, to be served concurrently with the sentence imposed in VCR196547. An abstract of judgment reflecting the prison sentences imposed in the court’s oral pronouncement of judgment was filed on February 23, 2011. Defendant filed a timely notice of appeal on April 4, 2011. Following a hearing regarding custody credits, an amended abstract of judgment was entered on May 24, 2011.

DISCUSSION

One possible issue is whether defendant’s state prison sentence violated his plea agreement, which provided for a probationary sentence. Under section 1192.5, where a trial court has approved a plea agreement, the defendant cannot be sentenced “to a punishment more severe than that specified in the plea” and the court may not proceed as to the plea other than that specified in the plea.” (§ 1192.5.) If the trial court withdraws its approval of a plea, the defendant must be permitted to withdraw the plea. (*Ibid.*) Where, as here, a defendant does not appear for sentencing, the defendant does not lose his or her rights under section 1192.5. (*People v. Cruz* (1988) 44 Cal.3d 1247, 1251-1254 (*Cruz*.) Rather, a defendant’s failure to appear is a separate criminal offense under section 1320 (own recognizance release) and not a “breach” of the plea agreement. (See *Cruz, supra*, 44 Cal.3d at p. 1253.)

Nevertheless, a defendant can expressly waive his or her rights under section 1192.5, commonly called a “*Cruz* waiver,” as part of a plea bargain. (See *Cruz, supra*, 44 Cal.3d at p. 1254, fn. 5; see also *People v. Vargas* (2007) 148 Cal.App.4th 644, 646.) A *Cruz* waiver allows the trial court to withdraw its approval of a plea if a defendant willfully fails to appear for sentencing without allowing the defendant an opportunity to withdraw a guilty plea, provided that the defendant agreed to waive the protections of section 1192.5 when the trial court initially accepted the plea. (*People v. Masloski* (2001) 25 Cal.4th 1212, 1219.)

Here, defendant's signed waiver of rights, which the court accepted at the change-of-plea hearing, and which defendant acknowledged he had read and understood, contains a *Cruz* waiver stating, in bold type, "I understand the above promises are not binding if I fail to appear at any subsequent hearing, commit any crime prior to my judgment and sentencing, violate any terms of my release, or if placed on probation, violate any probation term." In all events, even the absence of a *Cruz* waiver in this case would be immaterial, because the record shows that at the sentencing hearing defendant told the court he did not wish to withdraw his plea and would rather "avail himself of the indicated sentence that the court gave him." Thus, the court's imposition of the low term of sixteen months imprisonment on each count, to be served concurrently, did not violate defendant's plea agreement.

Also, in the request for certificate of probable cause dated March 29, 2011 (attached to the notice of appeal filed April 4, 2011), defendant states that his guilty plea "was conditioned upon a grant of custody credits amounting to time served, for both cases, and was so stated on the record I would be released. . . . [¶] However, I remain in custody some 45 days later, with a release date of September 3, 2011. Therefore I am appealing the sentence, the credits as reported on the Abstract of Judgment (at least one case must have "0" days pretrial custody credits), and consider the error to be a breach of my plea agreement, making my plea agreement void, under the 5th and 14th Amendments to U.S. Constitution." It is unclear what issue defendant attempts to raise in his request for certificate of probable cause. To the extent it is an issue challenging the validity of the plea, such issue is not cognizable on appeal because the trial court did not grant the request for certificate of probable cause. (See *People v. Cuevas* (2008) 44 Cal.4th 374, 381 [certificate of probable cause required for any issue which "in substance [is] a challenge to the validity of [the] plea".]) To the extent defendant challenges the custody credits, the record demonstrates that after defendant filed his notice of appeal on April 4, 2011, the trial court held a hearing on custody credits and filed an amended abstract of judgment on May 24, 2011. In all events, the issue of custody credits is now

moot, because total credits in the amended abstract of judgment (488 days) equal the sentence imposed of sixteen months, meaning defendant has already been released.

Having conducted an independent review of the record, we find no arguable issues. Thus, having ensured defendant has received adequate and effective appellate review, we affirm the trial court's judgment. (*People v. Kelly, supra*, 40 Cal.4th at pp. 112–113; *People v. Wende, supra*, 25 Cal.3d 436.)

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

McGuinness, P. J.

Pollak, J.