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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD MADISON BORDEN,

Defendant and Appellant.

A132685

(Alameda County
Super. Ct. No. CH50153)

Appellant Edward Madison Borden appeals from a judgment of conviction entered upon his plea of no contest to two counts of assault with a firearm and admissions of the use of a gun in the commission thereof (Pen. Code, § 245, subd. (a)(2), former § 12022.5, subd. (a)),¹ in return for a sentence not to exceed 11 years eight months and dismissal of all other charged offenses and enhancements. Pursuant to the negotiated plea agreement, appellant waived his rights to appeal and to be sentenced by the judge before whom he entered his plea. His court appointed attorney has filed a brief raising no legal issues and requesting this court to conduct an independent review of the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436.

PROCEEDINGS BELOW

On March 9, 2011 (all dates are in that year unless otherwise indicated) the Alameda County District Attorney filed an information charging appellant, then 17 years of age, as an adult (Welf. & Inst. Code, § 707, subd. (d)(1), (2)(B)), with two counts of

¹ All subsequent statutory references are to the Penal Code unless otherwise indicated.

attempted murder (§§ 187, subd. (a)/664) with the personal use of a firearm and the discharge thereof (former §§ 12022.5, subd. (a); 12022.53, subds. (b), (c) & (g)). Appellant was also charged with two counts of assault with a firearm (§ 245, subd. (a)(2)) with the personal use of a firearm (former § 12022.5, subd. (a)).

On April 6, pursuant to a negotiated disposition, and in return for a total sentence of 11 years eight months,² appellant withdrew his earlier not guilty plea and entered a new plea of no contest to the two counts of assault with a firearm (counts 2 & 4) and admitted the alleged gun use. On motion of the district attorney, the court dismissed the two counts charging appellant with attempted murder (counts 1 & 3) and struck the remaining allegations and enhancements. Pursuant to the plea agreement, appellant waived his rights to appeal and to be sentenced by Superior Court Judge Roy Hashimoto, who accepted the plea.

On July 1, when appellant appeared for sentencing before Superior Court Judge Stuart Hing, counsel and the court recognized that the agreed upon 11-year sentence resulted from a miscalculation. Appellant received five years for violating section 245, subdivision (a)(2), and four years for gun enhancement, plus a consecutive sentence of one year four months for the second violation of section 245, for a total of 11 years four months. The miscalculation arose from the imposition of five years for the first violation of section 245, subdivision (a)(2), as the maximum sentence that can be imposed for that offense is only four years. In order to conform the sentence to the plea agreement, Judge Hing imposed four years for count 2, plus a consecutive four-year term for the gun use enhancement, plus a consecutive one-third of the three-year midterm (one year) for count 4, plus one-third the term of four years (one year four months) for the use of a firearm. The total prison term imposed was thus 10 years four months, which was

² At a hearing before Judge Hashimoto on April 6, the district attorney described the agreed upon sentence as follows: “On the first 245, he will receive five years and then four years on the 12022.5 enhancement. [¶] On the second, he will receive one year, four months on the 245, one-third the mid-term as well as one-third the midterm on 1202.45 one year, four months. So there will be a total prison term of 11 years, eight months and because that is a serious and violent felony it will be served at 85 percent.”

one year four months less that the 11 years eight months described by the district attorney as the negotiated prison term, and agreed to by appellant's counsel, at the time appellant entered his plea.

FACTS

On February 9, 2010, Alameda County Sheriff's Deputies responded to an address in Hayward concerning a report that shots had been fired. Appellant's father, who called the deputies, told the deputies that his son had fired shots at neighbors and then returned home with his rifle. He was concerned his son might harm himself. The neighbors the father referred to were two brothers, Cedrick Morgan and Latriail Lipsey, who lived next door.

Two days earlier, the brothers and others in the neighborhood had engaged in a "verbal altercation" with appellant, in which Latriail aimed considerable "trash talk" at him. Latriail and Cedrick believed appellant had tried to "set up" a fight between Cedrick and another neighbor named "Didi." The night before the shooting, Latriail intended to fight appellant "fist to fist."

Cedrick testified at the preliminary hearing that, on the day of the shooting, appellant approached the car in which Cedrick and Latriail were sitting and knocked on the window. When Cedrick got out of the car to talk to him, appellant confronted him with a rifle. Seeing this, Latriail also got out of the car and said, "if you're going to shoot my brother, you're going to have to shoot me too." Believing appellant would not shoot, Cedrick told appellant, "if you is going to shoot me . . . then shoot me." Appellant stood there for about six or seven minutes saying, at one point, "I should just shoot you all." Nevertheless, continuing to talk and appearing "mad," appellant began walking away and put the rifle in his pants. During this time, Cedrick and Latriail took pictures of appellant with their cell phones and Cedrick kept telling him, "do what you're going to do." However, while about 40 or 50 feet away, appellant turned around and shot in the direction of the brothers, who were standing behind appellant's father's van. The two brothers then ran from the scene. No bullet hit the van behind which Cedrick and Latriail were standing at the time of the shots.

Latrail Lipsey remembered the events a little differently, testifying that after they were confronted by appellant, they “called him ‘sucka’ ” and said “he wasn’t going to shoot, and we got him on cameras and basically stuff like that.” Latrail agreed that while appellant was walking away he “was just laughing” at him and Cedrick was “talking trash” at him, saying “[h]e ain’t going to do nothing, so let’s just get back in the car.” The two were “not scared” of appellant and were “egging him on” despite the fact he was still holding his weapon. After appellant was gone, Cedrick and Latrail returned to Cedrick’s car and resumed trying to fix the radio.

In a few seconds, very unexpectedly, appellant started shooting in their direction from 20 or 25 feet away. The brothers then left the car and ran to the side of appellant’s father’s van, which was parked nearby. No bullet holes were found in the car or van. Latrail did not think appellant was trying to kill him and Cedrick when he first shot at them, but he did feel “threatened” when the shooting continued after they left the car.

At the time these events took place, appellant was 17 years of age.

DISCUSSION

Where, as here, an appellant has pled guilty or no contest to an offense, the scope of reviewable issues is restricted to matters based on constitutional, jurisdictional, or other grounds going to the legality of the proceedings leading to the plea; guilt or innocence are not included. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 895-896.)

Though a juvenile at the time of the charged offenses, appellant was statutorily eligible to be tried for those offenses as an adult.

Nothing in the record before us indicates appellant was mentally incompetent to stand trial or to understand the admonitions he received from the court prior to entering his plea, and thereupon enter a knowing and voluntary plea.

The admonitions give appellant at the time he entered his plea fully conformed with the requirements of *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122, and his waiver was knowing and voluntary.

The record contains a factual basis for the plea.

The sentence imposed is authorized by law.

Appellant was at all times represented by competent counsel who protected his rights and interests.

Our independent review having revealed no arguable issues that require further briefing, the judgment is affirmed.

Kline, P.J.

We concur:

Haerle, J.

Lambden, J.