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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

ALAN RAMON ALBOR,

Defendant and Appellant.

A133622

(Sonoma County  
Super. Ct. No. SCR-554448)

Defendant Alan Ramon Albor appeals from the order and judgment revoking his probation and executing the previously suspended prison sentence. Defendant's appellate counsel has raised no issues and asks this court for an independent review to determine whether there are any issues that would, if resolved favorably to defendant, result in reversal or modification of the judgment. (*People v. Kelly* (2006) 40 Cal.4th 106; *People v. Wende* (1979) 25 Cal.3d 436.) Defendant was notified of his right to file a supplemental brief, and has filed two supplemental letter briefs. Upon independent review of the record, we conclude no arguable issues are presented for review, and affirm the trial court's judgment.

**BACKGROUND**

The Sonoma County District Attorney initially charged Albor and a codefendant by felony complaint with attempted murder and assault of John Doe 1, attempted murder and assault of John Doe 2, and participation in a criminal street gang, based on an

incident on February 2, 2009, in which both victims were stabbed. (Pen. Code<sup>1</sup>, §§ 187, subd. (a), 664, 245, subd. (a)(1), 186.22, subd. (a).) The prosecutor filed an amended complaint a week later, adding two additional defendants. Following a multi-day preliminary examination, Albor filed a motion to dismiss the charges on the basis of insufficient evidence. The court denied the motion and held all defendants to answer.

The prosecutor then filed an information alleging the same five counts, but adding that the attempted murders of John Doe 1 and John Doe 2 were committed willfully, deliberately and with premeditation. Albor pleaded not guilty, and filed a section 995 motion to dismiss the information, which was denied.

Defendant filed a motion to traverse the search warrant and requested a hearing pursuant to *Franks v. Delaware* (1978) 438 U.S. 154 (*Franks*). Following a hearing, the court denied the motion. The prosecution filed a second amended information removing one of the defendants, and then offered the remaining defendants, including Albor, a “package deal” plea agreement, under which all defendants were required to admit counts 1 and 4 of the second amended information as well as admit the gang allegation as to count 1 or proceed to trial. The prosecutor orally amended count 1, attempted murder of John Doe 1, to strike the premeditation and deliberation clause. The prosecutor also orally amended count 4 to allege assault of John Doe 2 by means of force likely to cause grievous bodily injury, and to strike the deadly weapon allegation and gang enhancement. Defendant executed a written waiver of his constitutional rights and pleaded no contest to counts 1 and 4, and admitted the gang allegation as to count 1, pursuant to a plea agreement under which he could withdraw his plea if sentenced to more than 15 years.

The probation department filed a presentence report recommending an 18-year prison sentence. The court imposed the midterm of seven years for the attempted murder of John Doe 1, and one year for the assault of John Doe 2, to run consecutively. The court struck the punishment for the gang enhancement, suspended execution of the eight-year prison sentence, and granted defendant probation under certain conditions. One of

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

the conditions was that defendant successfully complete treatment at the Jericho Project, a one-year residential drug treatment program.

Defendant was released to the Jericho Project on April 28, 2011. The Jericho Project discharged him from its program on May 1, 2011, finding him incompatible with the program because he indicated he would not renounce his gang affiliation. Following a contested probation revocation hearing, the court found defendant had violated the terms of his probation.

On September 27, 2011, the trial court declined to reinstate probation, and ordered the previously suspended eight-year prison sentence executed. Defendant received 964 days of actual custody credits and 144 days of conduct credits. The court imposed a restitution fine of \$220, suspended an additional \$220 restitution fine unless his parole was later revoked. The court ordered defendant to pay \$70,000 in restitution to the Victim's Compensation Board and \$11,586 in restitution to John Doe 1, and restitution to John Doe 2 in an amount to be determined by the Victim's Compensation Board. The court granted defendant's request for a certificate of probable cause, and he filed a timely notice of appeal on October 31, 2011.<sup>2</sup>

### **DISCUSSION**

Defendant has raised four issues in his supplemental letter brief received May 7, 2012. He maintains the trial court erred in denying his motion to traverse the search warrant. He also claims the court erred in finding he violated the terms of his probation, and abused its discretion in refusing to reinstate probation. Lastly, he asserts his trial counsel was ineffective in not filing a notice of appeal and in his argument to the court regarding sentencing after his probation was revoked.

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<sup>2</sup> We note defendant asserts his counsel was ineffective in not filing a timely notice of appeal, apparently from his judgment of conviction. Even if this issue could be raised in this appeal from the order revoking his probation, there is nothing in the record indicating why counsel allegedly failed to act or that "counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory answer." (*People v. Cotton* (1991) 230 Cal.App.3d 1072, 1080.)

Defendant first contends the court erred in denying the motion to traverse the search warrant because the affidavit in support of the warrant contained “false and reckless” statements that one of the victims saw a white van at the scene of the crime, and that the affidavit was based on information from an anonymous caller when the time indicated on the record of the call appeared to be after the warrant was issued. This issue is not cognizable in this appeal from his probation revocation.<sup>3</sup> (See *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1421.)

Defendant also maintains the court erred in finding he violated probation because he did not indicate “in front of everyone at Jericho that I want to continue and remain an active gang member.” The record reflects that, contrary to defendant’s assertion on appeal and testimony at the revocation hearing, he told the director of the Jericho Project that “he didn’t think he would be able to do the program because he was an active gang member.” The director asked defendant “if he had meant former gang member, and Mr. Albor indicated no, active gang member, and that he intended to remain active.” Defendant testified the Jericho director asked him if he was a gang member, and he responded “technically yes because I’m in the [gang] module but I’m just not living that life anymore.” He denied saying he intended to remain active in the gang. The trial court found the testimony of the Jericho employee to be credible, and that defendant had violated the terms of his probation. The court’s finding that defendant violated his probation is amply supported by the record. (See *People v. Urke* (2011) 197 Cal.App.4th 766, 772 [standard of proof in revocation hearings is preponderance of the evidence].)

Defendant also asserts his counsel was ineffective in that his attorney allegedly told the court at the sentencing hearing following his probation violation, “ ‘Your honor I don[’]t think my client deserves a second chance.’ ” The record reflects his attorney actually said “I do think that Mr. Albor—not that he deserves another chance, but I think

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<sup>3</sup> Moreover, the record reveals the trial court held an evidentiary hearing pursuant to *Franks*, and made factual determinations, supported by substantial evidence, that the affidavit in support of the warrant contained “no misstatement by law enforcement.” (See *People v. Costello* (1988) 204 Cal.App.3d 431, 441.)

that another chance for him not only would obviously be a benefit to him, but I think would also be perhaps the more pragmatic thing to do in regard to the long-term safety for the community as well. [¶] . . . [¶] I’m asking the Court to still do some alternative to just a straight-up sentence on this.” The court noted defendant had already received the benefit of “a very aggressive plea bargain that your attorney was able to advocate for” and was given probation over the People’s objection, but nevertheless did not comply with the requirements of the Jericho program. In context, his counsel’s statement did not constitute ineffective assistance of counsel, but was part of his strategy to attempt to persuade the court defendant should get another chance despite being ejected from the Jericho program. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; see *People v. Brodit* (1998) 61 Cal.App.4th 1312, 1335 [“ ‘courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight’ ”].)

Defendant also claims he should have been given “another chance at probation.” The court acted well within its discretion in refusing to reinstate probation and imposing the previously suspended sentence. (*People v. Urke, supra*, 197 Cal.App.4th at p. 773 [granting and revoking probation are discretionary with the court].)

Our independent review of the record reveals no arguable issues.

#### **DISPOSITION**

The judgment and order revoking probation are affirmed.

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Banke, J.

We concur:

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Marchiano, P. J.

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Margulies, J.