

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL MARIAM,

Defendant and Appellant.

A134691

(San Francisco City & County
Super. Ct. No. 210511)

Defendant appeals from orders terminating probation as unsuccessful and transferring a prior condition of probation to a new probationary grant following a contested probation violation hearing. His appellate counsel filed an opening brief that raises no issues and asks this court for an independent review pursuant to *People v. Wende* (1979) 25 Cal.3d 436. Defendant was notified of his right to file a supplemental brief, but has not done so. After independent review, we conclude there are no arguable issues to brief and affirm the judgment. (See also *People v. Kelly* (2006) 40 Cal.4th 106, 124.)

PROCEDURAL BACKGROUND

In 2008, defendant was ordered by the family court to transfer custody of his daughter to the child's mother. He repeatedly failed to comply with that order and was eventually arrested. He was charged by felony complaint and later by information with child abduction. (Pen. Code § 278.5, subd. (a).)

On July 11, 2011, pursuant to a negotiated disposition, the prosecutor orally amended the information to add a second count of disturbing the peace, a misdemeanor.

(Pen. Code, § 415(2).) That same day, defendant pleaded no contest to the misdemeanor count and the felony count was dismissed. The court then suspended imposition of sentence and placed defendant on unsupervised probation for two years on the conditions, inter alia, that he attend an eight-hour parenting class and obey all laws.

Scarcely a month later, on August 4, 2011, defendant was arrested for committing a second degree burglary. (Pen. Code, § 459.) On August 10, 2011, a petition to revoke defendant's probation based on the new criminal charge was filed and defendant's probation was summarily revoked. The court granted defendant's request to hold the probation revocation hearing after trial in the criminal case.

In the criminal case, a motion to suppress evidence was heard and denied on September 7, 2011. Jury trial commenced on September 12, 2011. On September 15, 2011, the jury found defendant guilty of second degree burglary, possession of burglary tools, and possession of methamphetamine. (Pen. Code, §§ 459, 466; Health & Saf. Code, § 11377, subd. (a).) The charges were tried as misdemeanors. On October 13, 2011, the court suspended imposition of sentence and placed defendant on probation for three years on various terms and conditions, including an eight-hour parenting class, transferred from defendant's prior probation, with defendant's agreement.

On the same day, in the probation violation case, the court found that defendant had violated his probation. After transferring the parenting class condition to the new probationary grant, the court terminated the probation in the disturbing the peace matter.

Defendant originally appealed from both judgments to the appellate department of the San Francisco Superior Court. Thereafter, defendant abandoned his misdemeanor appeal in the disturbing the peace matter and filed an amended felony notice of appeal which was subsequently transferred to the Court of Appeal.¹ On June 26, 2012, the

¹ California Rules of Court, rule 8.304 provides in relevant part: “(a) Notice of appeal [¶] (1) To appeal from a judgment or an appealable order of the superior court in a felony case . . . the defendant or the People must file a notice of appeal in that superior court. . . . [¶] (2) As used in (1), ‘felony case’ means any criminal action in which a felony is charged, regardless of the outcome. A felony is ‘charged’ when an information or indictment accusing the defendant of a felony is filed A felony case includes an

appellate division of the superior court filed an opinion affirming the judgment in the burglary case. (*People v. Mariam* (Super. Ct. S.F. City and County, 2012, No. 7279).)²

FACTUAL BACKGROUND

Motion to Suppress

On August 4, 2011, San Francisco Police Officers Hennessey and Shakur received a call from dispatch that two men had been seen breaking into a silver car at Van Ness and Post, near the 24-Hour Fitness gym. One of the men was described as a Caucasian in his 30's with a Mohawk hairdo and the other was of unknown race with a bicycle. The officers met with the witness at the site of the vehicle break-in, confirmed the description, and requested that he “stay put so we could search the area for the suspects.” At Polk and Sutter, approximately one block north and one block east of the burgled vehicle, the officers saw two men, one with a Mohawk and the other with a bicycle. Codefendant Debord had the Mohawk and defendant had the bicycle. The officers detained the men, handcuffed them, and put them in a police vehicle for “a cold show” with the witness. The trial court found the detention lawful and denied the motion to suppress evidence.

Jury Trial

A patron of the 24-Hour Fitness gym parked his silver 2001 Nissan on Post Street near Van Ness and locked it at 12:15 a.m., then went into the gym to work out. When he returned to his car at 1:30 a.m. the passenger side window above the trunk had been broken. His blue tool kit, a black roadside emergency kit, and briefcase were missing from the trunk. Approximately five minutes later, a police officer arrived and “said they may have caught someone who broke into the car.” Soon thereafter, another officer

action in which the defendant is charged with: [¶] (A) A felony and a misdemeanor or infraction, but is convicted of only the misdemeanor or infraction”

² We take judicial notice of the appellate division’s opinion, attached as an exhibit to defendant’s *Wende* brief. (Evid. Code, § 452, subd. (d).)

arrived with the tool kit and emergency kit, which the car owner identified as his.³ He did not get his briefcase back.

In the meantime, a 911 caller⁴ had reported witnessing two persons breaking into a vehicle in front of the 24-Hour Fitness gym. He described one of the men as “on foot with a [M]ohawk, and the other was on a bicycle.” Four minutes after the dispatch call, two officers spotted two men who matched the description and detained them. Defendant was standing next to a silver BMX bicycle and codefendant Debord was carrying a black bag containing jumper cables and other automobile equipment and a blue tool kit. The briefcase was not recovered. The 911 caller was admonished that some suspects were being detained, but they might not be the suspects in question. The caller was then transported to the suspects’ location at the intersection of Polk and Sutter for a “cold show.” The caller first viewed Debord, whom he positively identified by his clothing and hair. The caller then viewed defendant. Although he did not recognize defendant, he did identify the bicycle and recognize defendant’s clothing, stature and light-skinned Black complexion.

During a booking search at the station, police discovered a window punch in defendant’s back pocket, as well as a small hammer tool and a screw driver in his backpack. Police also discovered a baggie containing a white crystal-like substance in defendant’s wallet. Subsequent testing established that the substance tested positive for methamphetamine and weighed 0.41 grams.

Defendant did not testify. Debord acknowledged that he was with defendant that night. He said he noticed a car with a broken window, but did not break it or reach inside the car. Being tipsy, he came upon two black bags on the sidewalk and took them, thinking they had been discarded. Defendant was disapproving.

³ At trial, the car owner identified Debord as an individual who greeted him just before he entered the gym.

⁴ The caller did not testify, but the 911 call was played for the jury.

DISCUSSION

We have reviewed the entire record. Because of defendant's plea of no contest to a violation of Penal Code section 415, we do not review any issue concerning the question of guilt. (*People v. Hunter* (2002) 100 Cal.App.4th 37, 42.)

Evidence obtained as a result of an illegal search or seizure may be considered by the court in determining whether probation has been violated, unless the police conduct was so egregious as to shock the conscience. (*People v. Fuller* (1983) 148 Cal.App.3d 257, 262.) In this case, we agree with the appellate department of the superior court, which concluded that defendant's detention was lawful. The subsequent discovery of burglary tools and methamphetamine flowed from valid booking and inventory searches. Accordingly, the police conduct did not shock the conscience, and the trial court did not err by considering the evidence seized by police in connection with the revocation of defendant's probation.

The evidence from the criminal trial was sufficient to prove by a preponderance of the evidence defendant had violated his probation by failing to obey all laws. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441.)

The trial court did not abuse its discretion in transferring a condition of defendant's prior probation—that he attend an eight-hour parenting class—to his new probation. That condition was related to his prior criminality. (*People v. Lent* (1975) 15 Cal.3d 481, 486, superseded on another ground by voter-enacted Proposition 8, as stated in *People v. Wheeler* (1992) 4 Cal.4th 284, 290–295; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1120–1121.)

We find no error in the proceedings.

DISPOSITION

The judgment is affirmed.

Marchiano, P.J.

We concur:

Dondero, J.

Banke, J.