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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.

CLYDE DELL ANDERSON,

Defendant and Appellant.

A134921

(Contra Costa County
Super. Ct. No. 05-111445-3)

I. INTRODUCTION

After a jury trial, appellant was convicted of two counts; the first a violation of Penal Code section 12021, subdivision (a)(1),¹ being a felon in possession of a firearm, and the second for resisting arrest. (§ 148.) The court also found an allegation that appellant had a prior strike to be true. (§ 667, subds. (b)-(i).) The trial court sentenced him to a total prison term of 32 months on the first count, and a concurrent term of six months on the second. Appellant filed a timely notice of appeal and, pursuant to *People v. Wende* (1979) 25 Cal.3d 436, asks this court to examine the record and determine if there are any issues deserving of further briefing. We have done so, find none, and hence affirm appellant's conviction and the sentence imposed.

¹ All subsequent statutory references are to the Penal Code.

II. FACTUAL AND PROCEDURAL BACKGROUND

Shortly after 10 p.m. on the night of July 30, 2011,² Officer Dwanyne Collard of the Hercules Police Department was dispatched to a Shell gasoline station in that city “to investigate a potential crime.” Another officer, Sergeant Thomas Koeppe, arrived at that location “shortly after” Collard. Collard testified that, when he arrived, he saw three Black males standing in front of the Shell station. He motioned for them to approach him and, initially, all three did. One of the three Collard identified as appellant, who was initially the third in line approaching him, then “turned and began to run.” Officer Koeppe “gave chase” and caught appellant after he had run about 20 feet. Appellant then “turned around and squared off” with Koeppe. More specifically, he started “moving his arms around” when Koeppe was trying to grab them. Both officers then “got a hold of” appellant, and told him “over and over” to “stop resisting.” Collard eventually had to strike appellant’s upper leg five to seven times with a flashlight, and then struck his upper back with his closed fist in an attempt to get him to stop resisting. During the struggle, Collard saw the “butt end” of a gun in appellant’s right front pocket. Collard grabbed the gun, which was a .38 caliber revolver, and was then able to restrain and handcuff appellant. In Collard’s opinion, the revolver was fully functioning when he secured it from appellant, although the cylinder release subsequently broke off when Collard was trying to remove the gun’s cylinder. Indeed, a live round was found inside the gun.

Appellant was taken to the Hercules police station, read his *Miranda* rights, and then interviewed on video. In that interview, he told the police that he had tried to run away because “he had an illegal firearm” and that he “found it in Hercules.”

On October 6, appellant was arraigned on one count of violating section 12021, subdivision (a)(1), and one count of violating section 69 (resisting an executive officer by threats or violence). The information also alleged that appellant had a prior strike

² Unless otherwise stated, all further dates noted are in 2011.

pursuant to sections 667, subdivisions (b)-(i), and 1170.12. That strike was a December 4, 2008, Alameda County conviction for robbery.³

Appellant's trial began on November 30 and concluded the following day, December 1. The only witnesses who testified were Officer Collard and Sergeant Koepe. Appellant waived a trial on the issue of his prior conviction. On December 1,⁴ the jury found appellant guilty on the first count and also on the lesser-included offense of resisting arrest (§ 148) on the second count. In so doing, according to the record before us, they deliberated for a little over three hours.

On February 24, 2012,⁵ the trial court denied appellant's application to have his prior "strike" struck and, thus, also denied his request for probation. The court sentenced him to the low term of 16 months on count 1, doubled pursuant to section 667, subdivisions (b) through (i), and to a concurrent term of six months on the lesser-included offense of resisting arrest in the second count, for a total sentence of 32 months. Via a later correction to the record, appellant was given 210 days of custody credits and 104 days of conduct credits.

Appellant filed a timely notice of appeal on March 7, 2012.⁶

III. DISCUSSION

In his *Wende* brief to us, appellant suggests there are three items in the record that "might arguably support the appeal," citing *Anders v. California* (1967) 386 U.S. 738, 744. The first is whether the trial court abused its discretion "in refusing to strike the prior conviction pursuant to section 1385 and *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497? If so, did the trial court abuse its discretion in refusing to grant probation?"

³ Appellant had also been previously convicted for petty theft and misdemeanor commercial burglary.

⁴ Misstated in appellant's *Wende* brief as being on January 22.

⁵ Misstated in appellant's *Wende* brief as February 14, 2012.

⁶ Misstated in appellant's *Wende* brief as March 7, 2011.

The answer to this question is rather straightforward. Our Supreme Court has made clear that “[w]hile a court must explain its reasons for striking a prior [citations], no similar requirement applies when the court declines to strike a prior.” (*In re Large* (2007) 41 Cal.4th 538, 550 (*Large*)). Quoting from its earlier decision in *People v. Carmony* (2004) 33 Cal.4th 367, 376 (*Carmony*), the court then added: “ ‘The absence of such a requirement merely reflects the legislative presumption that a court acts properly whenever it sentences a defendant in accordance with the three strikes law.’ ” (*Large, supra*, 41 Cal.4th at p. 550.)

However, notwithstanding this rule, here the trial court *did* carefully consider, and then explain, why it was ruling the way it did on appellant’s request to strike the prior. After hearing argument from counsel, as well as statements by appellant and his mother, the court said that the decision it had to make was “among the toughest decisions that I have to make in these circumstances.” But, after summarizing the factors in favor of and those against striking the prior, it concluded that it should not strike it. It stated: “The main concern that I have is that when someone is convicted of a violent crime such as attempted robbery and [a] serious crime by definition, but it’s violent conduct, is placed on felony probation and is told that you are not permitted to carry a firearm for the rest of your life because you are a felon and while on felony and misdemeanor probation you carry a gun around, I do understand that many people feel the need for self-protection. However, we try a lot of murder cases here because people are carrying guns for self-protection and something goes wrong and somebody ends up dead. And it’s simply not an acceptable risk for society for people who have been convicted of violent crimes to carry guns. [Appellant’s] strike is relatively recent. It’s a serious felony strike and the current conduct is serious. [¶] So I don’t believe its appropriate to strike the strike. And that is a difficult decision for me for reasons I have stated.”

Especially under the law as stated in *Carmony* and *Large*, the trial court clearly did not err in concluding not to strike appellant’s prior serious felony conviction, i.e., his prior strike. And, under those circumstances, it clearly did not err in declining to grant appellant probation.

The second question posed in appellant's *Wende* brief is: "Did the trial court err in granting appellant's request to instruct on the lesser included offense of section 148."

Presumably, what this question really means is: did appellant's trial counsel give him ineffective assistance by requesting such an instruction. But no matter how the question is worded, the answer is clearly "no." First of all, there was no prejudice in terms of the sentence imposed on appellant by the trial court because of his conviction on this lesser-included offense, because the trial court made appellant's sentence on this count run concurrently with his sentence on the much more serious first count, i.e., the violation of section 12021, subdivision (a)(1), being a felon in possession of a firearm. Second, the testimony of both Officer Collard and Sergeant Koeppe made clear that appellant had indeed resisted arrest. Third, and probably most importantly, if appellant's trial counsel had not requested such an instruction (a request opposed by the prosecution) and the trial court had not given it, under the factual circumstances detailed in the testimony of the two police witnesses the jury could have well found appellant to also be guilty of the crime charged in the second count, i.e., a violation of section 69. The trial court clearly did not abuse its discretion in concluding that "a rational juror in this case based on this evidence could conclude that the defendant resisted arrest without the use of force or violence. . . . It's up to the jury to conclude whether the defendant resisted by force or violence."

Clearly, appellant was benefited, and not harmed, by the giving of the lesser-included offense instruction involving section 148, a simple resisting arrest charge.

Appellant's third question in his *Wende* brief is: "Did trial counsel offer ineffective assistance of counsel in violation of the Sixth Amendment in agreeing to stipulate that the police officers 'were lawfully performing their duties when they attempted to detain the defendant?' "

The answer to this question is also, and equally clearly, in the negative. Both of the Hercules police officers who testified (and, again, there was no other testimony, and none presented by appellant) stated that they had been dispatched to the Shell station "to investigate a potential crime." At no point was there any inquiry as to what the "potential

crime” was. However, Officer Collard stated that, when approached at night at a gasoline station in Hercules by the officers, the trio of men they saw standing there did what they were asked to do, i.e., approach the officers and then “sit on the curb.” But then appellant turned and clearly attempted to flee from the officers, and was then apprehended and detained. Appellant’s trial counsel, a Contra Costa County Deputy Public Defender, rather clearly did not believe there was any reason to question the “potential crime” testimony of both officers, because there was no cross-examination of either of them on that subject. We see no possible ineffective assistance of counsel in the stipulation entered into by both counsel on the subject of the officers’ lawful performance of their duties.

We have examined the record provided us—a full record, including the two-day trial transcript—and find no other issues deserving of further briefing.

IV. DISPOSITION

The judgment, including the sentence imposed, is affirmed.

Haerle, J.

We concur:

Kline, P.J.

Richman, J.