

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

CURTIS MOORE,

Defendant and Appellant.

A142097

(Alameda County
Super. Ct. Nos. 168416, 172288)

Defendant Curtis Moore appeals from the sentence imposed after entry of a negotiated plea. His counsel has raised no issues and asks this court for an independent review of the record 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; see *Smith v. Robbins* (2000) 528 U.S. 259.) Counsel has notified defendant that he can file a supplemental brief with the court. Although no supplemental brief has been received, defendant did attach a document to the notice of appeal explaining the grounds for his appeal. Upon independent review of the record, we conclude no arguable issues are presented for review, and affirm the judgment.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant's notice of appeal was filed in connection with two proceedings. He was charged in an information filed March 7, 2012, with one count of assault by means

likely to produce great bodily injury (Pen. Code,¹ § 245, subd. (a)(1)) and battery with serious bodily injury (§ 243, subd. (d)) (2012 proceeding). With respect to the assault charge, the information alleged that defendant had personally inflicted great bodily injury under circumstances involving domestic violence. (§ 12022.7, subd. (e).) In May 2012, defendant pleaded no contest to the assault charge and received a sentence of five years of formal probation.

In connection with a second incident, defendant was charged in an information filed August 23, 2013, with one count of assault with a semiautomatic firearm. (§ 245, subd. (b).) The information alleged defendant had personally used a firearm and inflicted great bodily injury. (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a), 12022.7, subd. (a).) The information also alleged defendant was on probation at the time he committed the offense, had eight prior convictions, including five serious felonies (§ 667, subd. (a)(1)), and had served seven separate prior prison terms (§ 667.5, subd. (b)). In January 2014, defendant executed a plea waiver stating he would plead no contest to the assault charge and admit two prior convictions and two prior prison terms, for an anticipated sentence of “15 @ 1/2 term.”²

At the plea hearing in January 2014, the prosecutor stated defendant “is going to be pleading guilty or no contest to a violation of Penal Code section 245[, subdivision] (b) as stated in Count 1 of the information for the low term of 3 years in state prison. [¶] He’s going to admit the fourth and fifth priors as 5 year priors and he’s going to admit the sixth and seventh priors as 1 year priors. Those priors will all run fully consecutive, so there will be a total of 15 years in the state prison that he will serve at 50 percent.” The trial court clarified with the prosecutor that the first two convictions would be

¹ All statutory references are to the Penal Code.

² The phrase “1/2 term” refers to the effect of section 2933.5. Had defendant been found to have inflicted great bodily injury and served at least two of the alleged prior prison terms, section 2933.5 would have disqualified him from earning sentence credit in prison. (*Id.*, subs. (a)(1), (2)(O).) His potential time served would therefore increase from half of the stated term to 85 percent. (*People v. Singleton* (2007) 155 Cal.App.4th 1332, 1336–1337.)

admitted as prior convictions under section 667, while the latter two convictions would be admitted as prior prison terms under section 667.5, subdivision (b), which impose five-year and one-year sentence enhancements, respectively. It was also agreed defendant's probation in the 2012 proceeding would be terminated. Defendant expressly acknowledged hearing and understanding the foregoing terms of the plea agreement. When asked if "that [is] how you want to take care of your case today," defendant answered, "Yes." Later in the proceeding, the court repeated the terms of the proposed sentence, and defendant again acknowledged understanding and consenting to them. Thereafter, defendant pleaded no contest to the assault charge and admitted the four prior convictions. He also admitted violating the terms of his probation in the 2012 proceeding.

Prior to sentencing, in March 2014, defendant made an unsuccessful *Marsden*³ motion to replace his appointed attorney.

At a brief sentencing hearing in April, the trial court imposed the sentence discussed at the plea hearing, for a total term of 15 years.⁴ Probation in the 2012 proceeding was revoked and terminated. At a separate hearing in May 2014, the court struck the remaining allegations in the information. The amended abstract of judgment accurately reflects the court's sentence.

DISCUSSION

Defendant has appealed both proceedings. In the statement attached to his notice of appeal, defendant contends, among other issues, that the sentence served in connection with the seventh prior conviction was not a valid basis for imposition of an enhancement

³ *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

⁴ The reporter's transcript of the sentencing hearing in the appellate record is incomplete. It is clear from the transcript that the trial judge imposed the agreed sentences on the first count, and the fourth and fifth priors, but the second page of the transcript, which presumably records the imposition of sentence on the sixth and seventh priors, is missing. We rely on the clerk's minutes of the sentencing hearing, which reflect imposition of the agreed sentence, for confirmation that the sentence found in the abstract of judgment was, in fact, imposed.

because the crime occurred in 1981, prior to the effective date of section 667, and he was given no sentencing credit for the time served in connection with the 2012 proceeding.

The time for appealing the judgment in the 2012 proceeding has long since passed. Further, in the absence of a certificate of probable cause, defendant is barred from appealing his plea proceeding, including the legality of the agreed sentence. (§ 1237.5; *People v. Cuevas* (2008) 44 Cal.4th 374, 384 [“Defendant received what he negotiated and agreed to under the plea agreement, and he must abide by the terms of the agreement.”].) There is no certificate of probable cause in the appellate record.

In any event, we find no grounds for appeal. There was a sufficient factual basis for defendant’s plea. At the preliminary hearing, a former roommate of defendant testified defendant threatened him with a nine-millimeter handgun and fired “four or five shots” at him as he ran away, one of which struck the roommate in the upper thigh. The plea proceeding was properly conducted, and we find no abuse of discretion in the trial judge’s denial of defendant’s *Marsden* motion, which was made after a full inquiry into the basis for defendant’s dissatisfaction. (See *People v. Mungia* (2008) 44 Cal.4th 1101, 1128.)

Finally, we see no error in the sentence, which was entirely consistent with the plea agreement. Although section 667 became effective in 1982, as defendant contends, the seventh conviction was used as a basis for an enhancement under section 667.5. That statute was passed in 1976. (Stats. 1976, ch. 1139, § 268, p. 5137.) Since the time served in connection with the 2012 proceeding was served in connection with an unrelated criminal proceeding, defendant was not entitled to have that time credited against his sentence in the later proceeding.

Finding no arguable issues that require further briefing, we affirm the judgment.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.