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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.

AORRELL L. BURRELL, JR.,

Defendant and Appellant.

A143729

(Marin County
Super. Ct. No. SC189454A)

Aorrell L. Burrell, Jr. was sentenced to an aggregate term of 26 years in state prison after entering guilty pleas, pursuant to a plea bargain, to rape, forcible oral copulation, and dissuading a witness from reporting a crime. The victim was Burrell's 14-year old daughter.

Burrell's appointed appellate counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) (see *Anders v. California* (1967) 386 U.S. 738 (*Anders*)), in which he raises no issue for appeal and asks this court for an independent review of the record. (See also *People v. Kelly* (2006) 40 Cal.4th 106, 124.) Counsel attests that Burrell was advised of his right to file a supplemental brief, but he has not exercised that right.

We have examined the entire record in accordance with *Wende*. We agree with counsel that no arguable issue exists on appeal and affirm.

BACKGROUND¹

On June 22, 2014, Burrell picked up his 14-year-old daughter and took her to his apartment in San Rafael, California. She was to spend the night at Burrell's residence, and her mother was to pick her up the next day. She went to rest on Burrell's bed, where she sleeps when she spends the night with Burrell, who would sleep on a couch in the living room. While she rested there, Burrell entered the bedroom and initiated a discussion about his daughter's sexual experience. Sometime later, after his daughter went to sleep, Burrell entered the bedroom again. He forced his daughter's legs apart and penetrated her vagina with his fingers. He pulled off her underwear and got on top of her, forcibly penetrating her with his penis. Among other acts, Burrell orally copulated her vagina and again penetrated her with his fingers and penis. The next morning, Burrell resumed sex acts with his daughter, again penetrating her vagina with his fingers and penis and orally copulating her. On at least two occasions, Burrell told his daughter not to tell anyone and made her promise not to do so.

On June 27, 2014, the People filed a complaint charging Burrell with six counts of rape by a foreign object on a minor 14 years of age or older (§ 289, subd. (a)(1)(C)) (counts 1, 2, 5, 9, 12, 15); five counts of rape (§ 261, subd. (a)(2)) (counts 3, 6, 10, 13, 14); two counts of forcible oral copulation on a minor 14 years of age or older (§ 288a, subd. (c)(2)(C)) (counts 4, 11); sexual battery by restraint (§ 243.4, subd. (a)) (count 7); dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1)) (count 8); and child endangerment (§ 273a, subd. (a)) (count 16). The complaint alleged one prior serious or violent felony conviction (the prior strike) (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)) and two prior convictions within the meaning of section 1203, subd. (e)(4). On July 11, 2014, Burrell entered pleas of not guilty to all counts and denied the prior convictions.

On September 30, 2014, pursuant to a plea bargain, Burrell pleaded guilty to counts 3, 4 and 8 after the court informed him of his legal and constitutional rights. As to

¹ The factual background concerning the crimes with which Burrell was charged is taken from the probation report.

each count, Burrell admitted the prior strike conviction. The remaining counts were dismissed on the People's motion with a *Harvey* waiver.² The court advised Burrell that he would have to register as a sex offender for life and that the period of parole would be 10 years.

Prior to entering his guilty pleas, Burrell signed a felony plea form and waiver of constitutional rights. The plea form provided for a sentence of 26 years in state prison and a 10-year no-contact order listing Burrell's daughter as the protected party. The form also advised Burrell of his constitutional rights, the requirement for registration as a sex offender, and the parole period of 10 years. The plea form was incorporated by reference into the plea proceedings at which defense counsel and the prosecutor stipulated to a factual basis for the pleas.

The trial court found that Burrell knowingly, intelligently and voluntarily waived his constitutional rights and that there was a factual basis for Burrell's pleas based on stipulation of counsel and the record on file. The trial court accepted Burrell's pleas and found him guilty.

On October 23, 2014, Burrell made a *Marsden* motion to discharge his appointed counsel.³ The trial court held an in camera hearing on the motion and denied it. At the hearing, Burrell indicated his belief that defense counsel should have negotiated a better plea bargain on his behalf, did not properly investigate his case, did not tell him about the no-contact order, erred in advising him about the term of parole, and was biased against his case. Defense counsel responded concerning negotiations with the prosecutor, his interviews with the witnesses whose names Burrell had provided, and information he had given Burrell.

² Under *People v. Harvey* (1979) 25 Cal.3d 754, the facts of charges dismissed in a plea bargain may not be used for purposes of aggravating or enhancing a defendant's sentence "in the absence of any contrary agreement." (*Id.* at p. 758.) A *Harvey* waiver allows the trial court to consider the facts of dismissed counts in sentencing.

³ Under *People v. Marsden* (1970) 2 Cal.3d 118, a defendant who moves for replacement of his appointed counsel must be afforded the opportunity to explain why he has not been adequately represented by counsel.

On October 24, 2014, the trial court sentenced Burrell to an aggregate term of 26 years in state prison: the upper term of 10 years on count 4 (the principal term), doubled to 20 years because of the prior strike; a consecutive term of 3 years, doubled to 6 years, on count 3; and a concurrent term of 2 years, doubled to 4 years, on count 8. The court imposed a 10-year criminal protective order, requiring no contact between Burrell and his daughter. The court also imposed fines and assessments: a \$300 fine (§ 290.3); a \$5,000 restitution fine (§ 1202.4, subd. (b)); a separate \$5,000 fine, suspended unless parole was revoked (§ 1202.45, subd. (a)); a \$120 court operations assessment (§ 1465.8, subd. (a)(1)); and a \$90 criminal conviction fee (Govt. Code, § 70373). The court ordered Burrell to submit to HIV testing (§ 1202.1) and to register for life as a sex offender (§ 290). Burrell received credit for 142 days in custody.

Burrell timely filed a notice of appeal on December 2, 2014. On the notice of appeal form, Burrell indicated that he challenged the denial of his *Marsden* motion, contending that the issues he stated at the hearing on the motion affected the validity and voluntariness of his plea.

DISCUSSION

Burrell’s appellate counsel represents that the opening brief is filed in accordance with *Wende*. The *Wende* court held: “We conclude that *Anders* requires the court to conduct a review of the entire record whenever appointed counsel submits a brief which raises no specific issues or describes the appeal as frivolous.” (*Wende, supra*, 25 Cal.3d at p. 441.)

We have reviewed the record, including the transcript of the hearing on Burrell’s *Marsden* motion, in accordance with our obligations under *Wende* and *Anders*, and we find no arguable issues on appeal.

DISPOSITION

The judgment is affirmed.

STEWART, J.

We concur.

KLINE, P.J.

RICHMAN, J.