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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT PAUL MILNER,

Defendant and Appellant.

C069683

(Super. Ct. No. 10F6232)

Defendant Robert Paul Milner pleaded no contest to possession of a controlled substance and admitted a prior strike in exchange for a stipulated sentence of 32 months in state prison that would increase to six years if he failed to appear for sentencing. He failed to appear and the trial court imposed the six-year sentence.

Defendant's ensuing appeal is subject to the principles of *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) and *People v. Kelly* (2006) 40 Cal.4th 106, 110. In accordance with the latter, we will provide a summary of the offenses and the proceedings in the trial court.

Defendant was charged by information with possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)—count 1) and misdemeanor possession of a syringe without a permit (Bus. & Prof. Code, former § 4140 [repealed eff. Jan. 1, 2012]—count 2). The information alleged that defendant had suffered three prior convictions, including one conviction for corporal injury to a cohabitant with great bodily injury and two convictions for burglary, all of which qualified as strikes. (Pen. Code, §§ 273.5/12202.7, 459, 667, subds. (b)-(i), 1170.12.)¹

Preliminary Hearing

According to the evidence adduced at the preliminary hearing, in the early morning of August 7, 2010, Anderson Police Officer Tyler Finch observed and followed a vehicle that was traveling substantially over the speed limit. Defendant was driving, and had a passenger. The vehicle stopped in a parking lot and both occupants got out; Finch asked if he could speak to them. Finch observed that defendant had red, watery eyes. Finch asked if defendant had been drinking and conducted a brief DUI investigation of defendant. Defendant denied being on parole or probation or having outstanding warrants, but his passenger said he believed he might have misdemeanor warrants. Finch confirmed the warrants with dispatch and began to issue

¹ Undesignated statutory references are to the Penal Code sections in effect at the time of defendant's various convictions.

the passenger a citation. Finch also requested and received defendant's driver's license, which Finch held onto until after defendant was arrested. While Finch and defendant were conversing, three other officers and a sergeant arrived on the scene, each in a separate patrol car. Officer Stephen Harper asked defendant's consent to search the vehicle, which defendant gave. Officer Harper's K-9 partner detected a baggie of suspected methamphetamine in the passenger door and alerted to the center console, where the officers found needles and more suspected methamphetamine. Defendant was then arrested and taken into custody.

Motion to Suppress and Stipulated Sentence

After the trial court denied defendant's motion to suppress evidence (§ 1538.5), defendant pleaded no contest to count 1 and admitted the prior strike for corporal injury to a cohabitant with great bodily injury; the court dismissed count 2. Defendant's stipulated state prison term was 32 months, with the understanding that if he failed to appear for sentencing on June 16, 2011, the term would increase to six years.

Defendant failed to appear for sentencing on June 16, 2011.

On October 12, 2011, the trial court sentenced defendant to six years in prison (the upper term on count 1, doubled because of the strike). The court imposed a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)); a suspended \$200 restitution fine (*id.*, § 1202.45); a \$40 court security fee (*id.*, § 1465.8, subd. (a)(1)); a \$30 criminal conviction assessment (Gov. Code,

§ 70373); and a \$190 laboratory fee (consisting of \$50 pursuant to Health & Saf. Code, § 11372.5, subd. (a); \$50 pursuant to Pen. Code, § 1464; \$10 pursuant to Pen. Code, § 1465.7; \$5 pursuant to Gov. Code, § 76104.6; \$15 pursuant to Gov. Code, § 76104.7; \$25 pursuant to Gov. Code, § 70372, subd. (a)(1); and \$35 pursuant to Gov. Code, § 76000, subd. (a)(1)). The court awarded defendant six days of presentence custody credit (four days of actual credit and two days of conduct credit).

Appeal

Defendant appeals. We appointed counsel to represent him on appeal. Counsel filed an opening brief that sets forth the facts of the case and requests this court to review the record and determine whether there are any arguable issues on appeal. (*Wende, supra*, 25 Cal.3d 436.)² Defendant was advised by counsel of the right to file a supplemental brief within 30 days of the date of filing of the opening brief.

Defendant filed a supplemental brief challenging the denial of his suppression motion and asserting that he is constitutionally entitled to two additional days of presentence

² Defendant's appellate counsel also asks us, "[a]s part of the *Wende* review," to "consider whether [defendant] was entitled to day-for-day conduct credit." *Wende* reminds appellate attorneys that they have a "professional responsibility to conscientiously review the record *and argue all issues that are arguable.*" (*Wende, supra*, 25 Cal.3d at p. 442, italics added.) It is not an appropriate use of the *Wende* procedure to file a brief that suggests an arguable issue exists but fail to argue it. We shall consider that issue, however, because defendant raises it in his supplemental brief.

conduct credit on grounds of equal protection. His first contention fails because he does not cite to the record or to authority. (*Amato v. Mercury Casualty Co.* (1993) 18 Cal.App.4th 1784, 1794; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) His second contention fails because he admitted a strike prior involving a "serious felony" (the personal infliction of great bodily injury on a nonaccomplice—§ 1192.7, subd. (c)(8)), making him ineligible for additional conduct credit.

Having undertaken an examination of the entire record, we find no arguable error that would result in a disposition more favorable to defendant. However, we have observed errors in the abstract of judgment that must be corrected.

Corrections to Abstract of Judgment

First, the trial court stated at sentencing (as correctly shown in the sentencing minute order) that defendant's six-year term was calculated by imposing the three-year upper term for his offense and then doubling it for his prior strike, but the abstract of judgment erroneously represents defendant's six-year term as the upper term for his offense and fails to mention the strike. Second, the trial court stated at sentencing (as correctly shown in the sentencing minute order) that defendant's total criminal laboratory fee assessment was \$190, but the abstract of judgment erroneously represents this fee as \$50. Therefore, we will order the trial court to prepare a corrected abstract of judgment.

DISPOSITION

The judgment is affirmed. The matter is remanded to the trial court with directions to prepare a corrected abstract of judgment in accordance with this opinion and to forward a certified copy thereof to the Department of Corrections and Rehabilitation.

BUTZ, J.

We concur:

HULL, Acting P. J.

MAURO, J.