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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE,

Plaintiff and Respondent,

v.

ORVILLE JOSEPH MURPHY,

Defendant and Appellant.

C070436

(Super. Ct. Nos. 11F4677,
11F5587, 11F6773)

Defendant Orville Joseph Murphy pleaded guilty, in three separate cases, to transportation of methadone, failure to appear, and possession for sale of methamphetamine, and admitted a prior strike in two of the cases. Sentenced to an aggregate term of seven years four months, he appeals. He contends his trial counsel was ineffective for failure to join in the prosecutor's suggested alternative sentence and the trial court improperly imposed a \$200 base fine pursuant to Penal Code section 672.¹ We vacate the \$200 fine and remand for further proceedings.

¹ Undesignated statutory references are to the Penal Code.

BACKGROUND

We dispense with a recitation of the facts underlying defendant's offenses as they are immaterial to the resolution of the issues on appeal.

On August 16, 2011, defendant was charged in Shasta County Superior Court case No. 11F4677 with transportation of methamphetamine, possession of methamphetamine, transportation of methadone, possession of methadone, and possession of an injecting/smoking device. It was further alleged that defendant had a prior strike conviction and that he had been released on bail at the time of the current offenses.

On September 16, 2011, defendant was charged in Shasta County Superior Court case No. 11F5587 with failing to appear. It was also alleged that defendant had a prior strike conviction and that he had been released on bail at the time of the current offenses.

On November 30, 2011, defendant was charged in Shasta County Superior Court case No. 11F6773 with possession of marijuana for sale, possession of methamphetamine, possession for sale of methamphetamine, possession of an injection/smoking device, illegal use or possession of tear gas, illegal possession of a stun gun, sale or transportation of methamphetamine, and sale or transportation of marijuana. It was further alleged that defendant had a prior strike conviction and that he had been released on bail on three pending cases at the time of the current offenses.

On December 20, 2011, defendant pleaded guilty as follows: in case No. 11F4677 to transportation of methadone (Health & Saf. Code, § 11352, subd. (a)); in case No. 11F5587 to failure to appear (§ 1320, subd. (b)); and in case No. 11F6773 to possession for sale of methamphetamine (Health & Saf. Code, § 11378). He also admitted he had a prior strike conviction in case Nos. 11F4677 and 11F6773. (§ 1170.12.) In exchange for his plea, the remaining counts and allegations were dismissed and it was agreed he would receive a maximum sentence of 10 years.

Prior to sentencing, defendant moved the court to exercise its discretion to dismiss his prior strike pursuant to section 1385 and *People v. Superior Court (Romero)* (1996)

13 Cal.4th 497. The probation report summarized defendant's troubled childhood, marital problems, and substance abuse. Defendant and several witnesses testified they believed defendant would benefit from substance abuse treatment.

Defense counsel requested the trial court dismiss defendant's prior strike. The prosecutor opposed the motion, arguing there was not "any reason to strike the strike." The prosecutor then stated, "If the Court is inclined to strike the strike, I would ask for, essentially, a continuation of the sentencing for him to go into the [rehabilitation] program, see how that works out before the Court strikes the strike." The court responded, "I'm not inclined to strike the strike, but if you think that's an alternative" The prosecutor clarified it was not her request and she was requesting state prison. Defense counsel then argued that the rehabilitation program was the assistance defendant needed.

The trial court denied defendant's *Romero* motion and sentenced him to an aggregate term of seven years four months as follows: the lower term of three years, doubled to six years due to the strike, for transportation of methadone in case No. 11F4677; a consecutive one-third the middle term of eight months, doubled to 16 months due to the strike, for possession for sale of methamphetamine in case No. 11F6773; and a concurrent 16 months for failure to appear in case No. 11F5587. The trial court also imposed various fines and fees including a \$200 base fine (plus fees and assessments, bringing the total to \$760) in case No. 11F4677 and \$50 criminal lab fees (plus fees and assessments, bringing the totals to \$190) in both case No. 11F4677 and case No. 11F6733.

DISCUSSION

I

Defendant contends he received ineffective assistance of counsel because his trial counsel did not join the prosecutor's suggested alternative to a grant of defendant's *Romero* motion. We reject his contention.

To establish ineffective assistance of counsel, defendant must demonstrate that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 691-692 [80 L.Ed.2d 674, 693, 696]; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Where the defendant has failed to demonstrate prejudice, we need not determine whether counsel's performance was objectively deficient. (*Strickland v. Washington, supra*, 466 U.S. at p. 697.) "Generally, . . . prejudice must be affirmatively proved." (*People v. Ledesma, supra*, 43 Cal.3d at p. 217.) To demonstrate prejudice, defendant must show that " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*Id.* at pp. 218-219; *People v. Williams* (1997) 16 Cal.4th 153, 215.)

Here, defendant has not shown he would have had a reasonable probability of a different outcome if his trial counsel had joined in the prosecutor's suggestion. The prosecutor's suggested alternative was that, *if the trial court was inclined to grant defendant's Romero motion*, it instead continue the sentencing and first see how defendant fares in rehabilitation. The trial court responded that it was *not* inclined to grant the *Romero* motion. Thus, defendant's trial counsel's joinder or failure to join in the suggested alternative could have no impact in the result.

Furthermore, the suggested alternative was, in any event, presented to the trial court for consideration by the prosecutor. Therefore, the option was before the trial court, regardless of whether defendant's counsel agreed with, or joined in, the suggestion.² The trial court showed no inclination in considering the alternative but, if it

² We note that defendant's trial counsel was requesting a *grant* of the *Romero* motion, which is contrary to the prosecutor's suggestion that the court instead continue

had been interested, the alternative had been sufficiently presented for consideration. Thus, again, it is not reasonably probable defendant's trial counsel's failure to join in the suggested alternative affected the result.

Since defendant has not established prejudice, we reject his claim of ineffective assistance of counsel.

II

Defendant also contends the trial court erroneously imposed a \$200 base fine pursuant to section 672 on case No. 11F4677. He argues that, because the trial court imposed a \$50 criminal laboratory fee under Health and Safety Code section 11372.5 on that case, imposition of a section 672 base fine is barred. We find error on this record without reaching the merits of defendant's contention.

In contravention of its duty, the trial court did not identify the statutory authority under which the \$200 fine was being imposed. Defendant presumes the trial court intended the fine be based on section 672. His argument is based on the unsupported deduction that the trial court's intended statutory basis for the \$200 fine can be gleaned from the probation officer's report. Yet, contrary to defendant's repeated representations in his brief, the probation report did *not* recommend imposition of a \$200 fine under section 672 or any other provision.

The minute order does, however, purport to fill in all the omitted statutory authority for the imposed fines (including the amounts and authority for the accompanying fees and assessments). It is here that the record first states that the \$200 fine was imposed pursuant to section 672.

Almost a decade ago, in *People v. High* (2004) 119 Cal.App.4th 1192, we directed the trial court to "separately list, with the statutory basis, all fines, fees and penalties

the sentencing, including the defendant's motion, to first determine whether defendant was successful in rehabilitation.

imposed on each count” explaining, “[a]lthough we recognize that a detailed recitation of all the fees, fines and penalties on the record may be tedious, California law does not authorize shortcuts.” (*Id.* at pp. 1200-1201.) The clerk’s minute order simply digests or summarizes the trial court’s judgment. The trial court’s failure to identify the statutory basis for the \$200 base fine left the clerk to speculate as to the appropriate section. The section the clerk inserted, however, was legally incorrect.

Section 672 states: “Upon a conviction for any crime punishable by imprisonment in any jail or prison, in relation to which no fine is herein prescribed, the court may impose a fine on the offender not exceeding one thousand dollars (\$1,000) in cases of misdemeanors or ten thousand dollars (\$10,000) in cases of felonies, in addition to the imprisonment prescribed.” As explained in *People v. Breazell* (2002) 104 Cal.App.4th 298, 304, section 672 is intended to provide a fine for offenses for which no other statute imposes a fine -- including non-Penal Code statutes.

Health and Safety Code section 11372, subdivision (a) provides: “In addition to the term of imprisonment provided by law for persons convicted of violating [Health and Safety Code] Section 11350, 11351, 11351.5, 11352, 11353, 11355, 11359, 11360, or 11361, the trial court may impose a fine not exceeding twenty thousand dollars (\$20,000) for each offense. In no event shall a fine be levied in lieu of or in substitution for the term of imprisonment provided by law for any of these offenses.”

Defendant was convicted in case No. 11F4677 of violating Health and Safety Code section 11352. Thus, because Health and Safety Code section 11372 prescribes a fine for defendant’s offense, the section 672 fine is not appropriate.

DISPOSITION

The \$200 fine in case No. 11F4677 is vacated and the matter remanded for the trial court to determine whether to impose a fine pursuant to Health and Safety Code

section 11372 in accordance with this opinion. In all other respects, the judgment is affirmed.

_____NICHOLSON_____, J.

We concur:

_____RAYE_____, P. J.

_____BUTZ_____, J.