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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID THOMAS BLOOD,

Defendant and Appellant.

D060503

(Super. Ct. Nos. SCD229120,
SCD226977)

APPEAL from a judgment of the Superior Court of San Diego County, Charles R. Gill, Judge. Affirmed.

On February 22, 2011, David Blood pled guilty to 12 felony counts (and related enhancements), and four misdemeanor counts as alleged in a consolidated information arising from two superior court cases: SCD229120 and SCD226977. Blood also admitted two prior serious felonies (Pen. Code,¹ § 667, subd. (a)(1)) and two prior strikes (§ 667, subds. (b)-(i)). The court agreed it would not impose a sentence greater than 48

¹ All subsequent statutory references are to the Penal Code unless otherwise specified.

years four months to life.² The district attorney made no plea bargain offer in the case, and appellant pled to the "face" of the complaint with no dismissal of any of the offenses, enhancements or allegations.

At sentencing on July 8, 2011, the court denied probation and dismissed the strike priors except as they applied to count 13 (assault with the intent to commit rape, § 220, subd. (a)). For count 13, the court imposed an indeterminate term of 25 years to life, plus a 10-year determinate term for the two prior serious felonies. It also imposed a consecutive determinate term of 13 years four months for the remaining felony counts and the two prior serious felonies. The total sentence was "48 years and 4 months to life." The court gave appellant credit for time served for the misdemeanor counts, and ordered him to pay victim restitution and various fines and fees.³

FACTUAL AND PROCEDURAL BACKGROUND

In April 2010, the district attorney filed the first superior court case against Blood (SDC226977). Blood was released on \$35,000 bail, but failed to appear for his preliminary hearing. He was remanded to custody and later released on \$75,000 bail. In August, while out of custody on bail, he committed the charges alleged in the second case (SCD229120) and bail was set at \$2 million. Blood was bound over in both cases

² The maximum sentence was 200 years to life plus 42 years.

³ The court did not set the amount of victim restitution but retained jurisdiction to do so.

following preliminary hearings conducted in November. On January 10, 2011, the court granted the district attorney's motion to consolidate the cases and the People filed a consolidated information setting forth the crimes, enhancements and prior felonies which Blood admitted on February 22, 2011.⁴

Counts 1 through 4

Blood pled guilty to four counts concerning Terry O'Donnell: grand theft of personal property (count 1, § 487, subd. (a)); diversion of construction funds over \$1,000 (count 2, § 484b); first degree burglary (count 3, §§ 459, 460); and contracting without a license (count 4, Bus. & Prof. Code, § 7028, subd. (a)).

At the preliminary hearing, O'Donnell testified that in August 2008, he entered into a contract with appellant to remodel his residence in Spring Valley for \$65,000 and gave Blood a down payment of \$6,850 to start the work. O'Donnell agreed he would pay Blood for work performed by subcontractors and Blood would pay the subcontractors. Blood asked him not to speak to the subcontractors. It was anticipated the job would be completed in about "two plus" months, but the work kept getting extended.

During the course of the remodel, O'Donnell made numerous requests that Blood provide invoices for labor services and materials, but found the process to obtain these

⁴ At arraignment on the consolidated information the court designated SCD229120 as the lead case and directed that no further pleadings be filed in SDC226977. For clarity, we note that although the cover page of the *Wende* brief filed on behalf of Blood references only the consolidated case number (SCD229120), it is clear from the substance of the brief that the appeal encompasses both cases and we have reviewed both cases for error.

receipts was "impossible." Eventually, O'Donnell "realized something was not right," and determined he was being overcharged, double-billed and charged for materials that were never purchased.

On March 19 and 20, 2009, Blood spent the night in O'Donnell's house without his permission and made \$780 in unauthorized phone calls to area code 900 numbers. When O'Donnell confronted Blood about this incident on the afternoon of March 20, Blood was "disheveled" and appeared to have "some kind of oil . . . all over his body." O'Donnell later determined a telephone and some pillows were missing from the house.

O'Donnell fired Blood in April 2009 after losing confidence in him and having paid him approximately \$197,000. Subcontractors completed the work on the house at a cost of approximately \$29,000. O'Donnell would not have hired Blood if he had known he was an unlicensed contractor.⁵

Counts 5 through 7

Blood pled guilty to three counts concerning Thomas Geairn: grand theft of personal property (count 5, § 487, subd. (a)); diversion of construction funds over \$1,000 (count 6, § 484b); and contracting without a license (count 7, Bus. & Prof. Code, § 7028, subd. (a)).

At the preliminary hearing, Geairn testified he hired Blood in April 2009 to do some concrete, grading, drainage and block wall work at his house in Spring Valley. He

⁵ An investigator for the Contractors State License Board testified that Blood was not a licensed contractor.

expected the work would be completed in approximately 30 days and, based on Blood's representations, thought he was a licensed contractor. Two months later, Geairn fired Blood upon learning he was unlicensed and he had charged him in excess of \$1,000 for materials that were not purchased. By that point Geairn had paid Blood about \$2,000 more than estimated and the work was not complete. Geairn hired another contractor at a cost of approximately \$12,000 to complete the work and to repair work that Blood had performed improperly.

Counts 8 through 11

Blood pled guilty to four counts and admitted an enhancement concerning Susan Arlin: first degree burglary, committed while a person other than an accomplice was present (count 8, §§ 459, 460, 667.5, subd. (c)(21)); grand theft of personal property (count 9, § 487, subd. (a)); diversion of construction funds over \$1,000 (count 10, § 484b); and contracting without a license (count 11, Bus. & Prof. Code, § 7028, subd. (a)).

At the preliminary hearing, Arlin testified she hired Blood in August 2009 to remodel her home, where she and her 90-year-old disabled father lived. Blood told her he was a licensed contractor. At Blood's request, she gave him \$1,400 for materials for a concrete deck but she never received the materials.

Arlin gave Blood permission to access the house while she was gone, but did not give him a key and told him she did not want anyone in her bedroom, stating it was "off limits." When she arrived home around 5:00 p.m. on September 15, her father told her

Blood had been in her bedroom all afternoon. Upon examining her bedroom, she noted there was an imprint on her bed as if "a person had been laying there." Later she determined a towel, lotion and hair conditioner were missing. When Arlin spoke with Blood about the incident, he admitted he had lain on her bed, but did not know what had happened to the missing items. In December she discovered these items in the attic of her garage.

Arlin fired Blood on October 19 after receiving bills showing unauthorized charges on September 15 for pay-for-view movies, including sexually explicit movies, and area code 900 phone calls.

Counts 12 through 16

Blood pled guilty to five crimes and admitted several enhancements arising from a series of incidents on August 11, 2010: first degree burglary, committed while a person other than an accomplice was present (victim Rebecca E, count 12, §§ 459, 460, 667.5, subd. (c)(21)); assault with an intent to commit rape (victim Danielle O, count 13, § 220, subd. (a)); making a criminal threat (victim Danielle O, count 14, § 422); possession of a controlled substance (count 15, Health & Saf. Code, § 11377, subd. (a)); and being under the influence of a controlled substance (count 16, Health & Saf. Code, § 11550, subd. (a)). Counts 12 through 15 were committed while Blood was released on bail. (§ 12022.1, subd. (b).)

At the preliminary hearing, San Diego police officer Patrick Laco testified that on August 11, 2010, at about 11:25 a.m. he responded to a " 'check the welfare' " call and

spoke with Blood's neighbor at her apartment. She told him that Blood had forced his way into her apartment, claiming he felt like he was having a heart attack, and tried to go into her bedroom. When he declined her offer to call paramedics, she escorted him out of the apartment and called the police. Blood was not wearing a shirt and had on shorts under a "sticky" towel. The officer went to Blood's apartment; he was not there, but the door was ajar. Inside, the officer saw a towel and a liquid substance that looked like semen.

On that same day at about 11:15 a.m., Rebecca E. testified she was cleaning her apartment when she noticed Blood standing in her living room in front of her closed front door. She and Blood were about five feet apart. Terrified, Rebecca started screaming and reached for her cell phone. Blood, who took some steps towards her, kept telling her to calm down. He then backed up and left through the front door.

About 30 minutes later, Danielle O. was alone walking her dog on trails below street level near the San Diego Zoo when she noticed Blood approach her. He passed her, turned around, and engaged in small talk with her for a few minutes. As Blood continued to ask Danielle questions she "started getting creeped out" and tried unsuccessfully to create some distance between the two of them. Danielle tried to shoo him away and headed towards the surrounding residential areas. As she reached the base of the stairs leading to the street, he grabbed her from behind, put her in a "bear hug," and said he was going to "cut" her. As she started screaming, he forced her to the ground and

while alongside of her, placed both hands on her neck. Blood told her to stop screaming and repeated he was going to cut her.

A jogger intervened and despite Blood's claim that "Everything is fine," Blood left the area. During the incident, Blood never asked Danielle for money or searched her pockets. Danielle thought she was going to be stabbed or raped.

Blood was arrested in a nearby alley by police officers responding to a series of radio calls about the incident. Blood was visibly agitated, sweating profusely, and showing signs of being under the influence of methamphetamine; a useable amount of the drug was found in his wallet.

Priors

Blood admitted he suffered a conviction for assault with intent to commit rape in 1985 (§ 220, Case No. CR72922) and a conviction for lewd act with a child under age 14 in 1989 (§ 288, subd. (a), Case No. CR107450). He also admitted these convictions constitute serious felony priors (§ 667, subd. (a)(1)) and strike priors (§ 667, subd. (b)-(i)).

Proceedings Following the Preliminary Hearing

On January 10, 2011, the court granted the district attorney's motion to consolidate the two superior court cases. It also denied Blood's request for substitute counsel after conducting a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118. On February 22, 2011, Judge Kerry Wells denied Blood's section 995 motion to dismiss count 12 (the burglary concerning Rebecca) and count 13 (the assault with intent to commit rape

concerning Danielle). Blood then entered his change of plea before Judge Wells; Judge Charles Gill sentenced Blood on July 8, 2011.

DISCUSSION

Appointed appellate counsel has filed a brief summarizing the proceedings below. Counsel presents no argument for reversal but asks that this court review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738, counsel refers to three possible but not arguable issues: (1) whether the trial court erred in denying appellant's motion for substitute counsel; (2) whether the plea agreement called for the court to impose an unauthorized sentence; (3) whether counsel provided constitutionally deficient representation in advising appellant of the consequence of his plea; and (3) whether the court abused its discretion in imposing the maximum stipulated sentence.

We granted Blood permission to file a brief on his own behalf. He has responded and raised five issues. We have reviewed these alleged errors and find they have no merit.

First, Blood claims he was "incompetent" when he entered his plea and thus his convictions must be set aside. The record does not support Blood's factual assertion his mental capabilities were somehow impaired. At the time Blood entered his change of plea, he signed a form acknowledging, under penalty of perjury, he was entering the plea "freely and voluntarily," and he was "sober and [his] judgment [was] not impaired." Likewise, when the court questioned Blood, he stated under oath he was feeling

"[c]ompletely clearheaded"; he did not feel pressured in any way to plead guilty; and he "fully" understood the consequences of his plea.

Second, in a related argument, Blood contends his conviction was illegal and he is entitled to a new trial because the court erred in failing to require him to undergo a psychological evaluation pursuant to sections 1368 and 1370. He also maintains counsel who represented him at trial and on appeal were ineffective for failing to request the court order a psychiatric evaluation. Blood suggests "he could be insane and mentally ill."

Blood misconstrues section 1368. Contrary to his claim, he was not entitled to a psychiatric examination to rule out the possibility he "could be" insane or mentally ill. Instead the section applies when facts arise during the course of criminal proceedings that create a "doubt . . . in the mind of the judge as to the mental competence of [a] defendant." (§ 1368, subd. (a).) Under such a circumstance the judge is required to set a hearing to determine the defendant's mental competency. (*People v. Welch* (1999) 20 Cal.4th 701, 737-738.) However, absent some indication of possible incompetency, the judge has no responsibility to order a competency evaluation, nor is defense counsel obligated to request one.

A defendant is incompetent if he or she is incapable of understanding the nature of the proceedings or of assisting in his or her defense. (*People v. Laudermilk* (1967) 67 Cal.2d 272, 283; *People v. Blair* (2005) 36 Cal.4th 686, 711.) Here, the only suggestion of any mental health issues occurred at sentencing. The probation report outlined Blood's substance abuse history, noting he had been drug free from ages 40 to 49, and mentioned

he was diagnosed as paranoid schizophrenic in 1989 while in state prison. His counsel argued Blood received inadequate treatment for his mental condition while in prison and maintained he currently needs treatment for substance abuse. Blood's father opined that following his son's prior prison sentence, he worked hard and was doing well, but relapsed into a condition he attributed to drug abuse and described as "almost like Jekyll and Hyde."⁶

There is nothing in the transcripts of the court hearings, including the *Marsden* hearing, the section 995 motion, the motion to consolidate, or the change of plea hearing to suggest Blood exhibited any behavior that called into question his ability to understand the proceedings or assist defense counsel. The mere existence of a mental disorder, with no showing that it is currently affecting the defendant's ability to understand the proceedings, is insufficient to trigger the competency hearing requirement. (*People v. Rogers* (2006) 39 Cal.4th 826, 846-848.) On this record, the facts referencing appellant's mental issues were insufficient to create a doubt as to his mental competency. There was no error based on an alleged failure to comply with sections 1368 and 1370.

Third, Blood argues his sentence was excessive and illegal. He appears to be arguing the "sent[encing] of 48 years" was improper because he was incompetent at

⁶ At a hearing on August 13, 2010, the court granted a request made by Blood's counsel that Blood be referred to the jail medical staff. The court inquired whether the issue was "[m]edical or psych" and was informed it was medical.

the time he entered the plea and the court violated section 1368. Having rejected these contentions as set forth above, this argument also fails.

Fourth, in a generalized attack, Blood maintains his appointed trial and appellate counsel "have failed to effectively" assist him in his defense, thus violating his Sixth Amendment rights. Defendants have a constitutional right to effective counsel in criminal cases. (*Gideon v. Wainwright* (1963) 372 U.S. 335.) The burden is on the defendant to prove he received ineffective assistance of counsel. (*People v. Fauber* (1992) 2 Cal.4th 792, 831.) To do so, the defendant must show counsel "failed to act in a manner to be expected of a reasonably competent attorney acting as a diligent advocate," and that counsel's failings prejudiced defendant. (*Ibid.*) Although Blood complains about his attorneys, he has failed to make even a prima facie showing he received ineffective representation. To the extent this claim (or any of Blood's other contentions) rests on evidence outside the appellate record, it must be raised, if at all, in a petition for writ of habeas corpus. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [where claim of ineffective assistance of counsel depends on matters outside the record, it "is more appropriately decided in a habeas corpus proceeding"].)

Fifth, Blood claims his appellate counsel erred because he filed a *Wende* brief stating there were no "appealable issues" and he requests that counsel be relieved. (Emphasis omitted.) The use of a *Wende* brief is recognized as a proper exercise of appellate counsel's duties and does not constitute error or support a request that counsel be relieved.

A review of the record pursuant to *People v. Wende, supra*, 25 Cal.3d 436 and *Anders v. California, supra*, 386 U.S. 738, including the possible issues referred to by appellate counsel and the issues Blood has presented, has disclosed no reasonably arguable appellate issues. Competent counsel has represented Blood on this appeal.

DISPOSITION

The judgment is affirmed.

HALLER, J.

WE CONCUR:

HUFFMAN, Acting P. J.

NARES, J.