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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL ACEDO,

Defendant and Appellant.

D060527

(Super. Ct. No. 227617)

APPEAL from a judgment of the Superior Court of San Diego County, Margie G. Woods, Judge. Affirmed.

This appeal is taken from a judgment of the superior court based on Daniel Acedo's guilty plea to one count of assault and proceeds in accordance with *People v. Wende* (1979) 25 Cal.3d. 436 (*Wende*). Finding no reasonably arguable appellate issue, we affirm the judgment.

**FACTUAL AND PROCEDURAL BACKGROUND**

While on probation for felony false imprisonment, Acedo was arrested and charged with one count each of assault with a deadly weapon and by means of force

likely to cause great bodily injury and battery with serious bodily injury, arising out of a drunken encounter during which he stabbed another man. Prior to trial, the prosecutor sought to exclude evidence of threatening statements the victim made to Acedo after being stabbed three times; the court, however, admitted this evidence during trial for impeachment purposes.

After both sides rested, the jury was unable to reach a verdict. The court denied Acedo's motion to dismiss the case against him under Penal Code section 1385, and Acedo agreed to plead guilty to simple assault (a nonstrike offense) in exchange for a dismissal of the remaining count and related enhancement allegations and a stipulated sentence for time served, followed by three years' probation, and the prosecution's agreement not to seek to revoke his existing probation based on the current offense.<sup>1</sup>

The plea agreement advised Acedo of his constitutional rights to a speedy trial by jury, to confront and cross-examine the witnesses against him, to remain silent and to present evidence in his defense, and he agreed to waive those rights. It also advised him that the penal consequences of his plea included: (1) a maximum sentence of four years, (2) a fine of up to \$10,000, (3) that his probation might be revoked, and (4) if he was not a U.S. citizen, that the plea might result in his deportation. The plea also included a waiver pursuant to *People v. Cruz* (1988) 44 Cal.3d 1247, 1254, fn. 5 (*Cruz*), which stated:

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<sup>1</sup> He also agreed to plead guilty, in a separate proceeding, to a misdemeanor charge of driving under the influence with a prior conviction for a similar offense, also with a time-served sentence.

"I understand that if pending sentencing I am arrested for or commit another crime, violate any condition of my release, or willfully fail to appear for my . . . sentencing hearing, the sentence portion of this agreement will be cancelled. I will be sentenced unconditionally, and I will not be allowed to withdraw my guilty . . . plea[]."

With the agreement of his counsel, Acedo entered into the plea and stipulated that the preliminary hearing transcript established the factual basis for the assault count. The court accepted the plea and, on the prosecutor's motion, dismissed the remaining charges and allegations. Because the probation report was not available at the time of the sentencing hearing, the court continued the hearing. Based on defense counsel's representation that Acedo had been reminded of his *Cruz* waiver and understood the consequences of violating its terms, the court released Acedo on his own recognizance, on condition that he meet with a probation officer within 48 hours, not have any contact with the stabbing victim, and not use alcohol or go to any establishment where alcohol was the primary item for sale. Acedo failed to appear, even after the court issued a bench warrant, but withheld it and continued the sentencing hearing, twice, to allow him to cure his noncompliance.

About three months later, Acedo was arrested on the bench warrant. At the sentencing hearing, the court invoked the *Cruz* waiver as a basis for imposing the upper term of four years on the assault count, with custody credits of 577 days (289 actual days plus conduct credits of 288 days). It ordered Acedo to pay a \$200 restitution fine, a \$200 parole revocation fine, suspended unless parole was later revoked, a \$30 court security fee, a \$30 critical need account fee and a \$154 criminal justice administration fee. The court revoked Acedo's probation on the false imprisonment charge, imposed a term of

eight months, to be served consecutive to the assault count; it awarded him 417 days of actual custody credits and ordered him to pay a \$200 restitution fine, reinstated the prior \$200 probation revocation restitution fine and imposed a \$200 parole revocation fine, suspended unless parole was later revoked.

Acedo filed a notice of appeal and unsuccessfully requested a certificate of probable cause to challenge his sentence. Based on the terms of his plea, the issues that can be raised on appeal are limited to matters occurring after the plea. (Pen. Code, § 1237.5; *People v. Panizzon* (1996) 13 Cal.4th 68, 74 [absent a certificate of probable cause, the only issues a defendant may raise on appeal are those relating to the denial of a motion to suppress evidence and to proceedings held subsequent to the plea to determine the degree of the crime and the sentence to be imposed].)

Acedo's appellate counsel has filed a brief indicating that he has been unable to identify any argument for reversal and asks this court to review the record for error as mandated by *People v. Wende, supra*, 25 Cal.3d 436. Pursuant to *Anders v. California* (1967) 386 U.S. 738 (*Anders*), counsel's brief identifies the following issues as possible, but not arguable, on appeal:

1. Was Acedo's guilty plea constitutionally valid?
2. Did the court abuse its discretion by invoking Acedo's *Cruz* waiver and imposing an upper-term sentence?

This court invited Acedo to file a supplemental brief on his own behalf and he has done so; in it he raises several issues, which are discussed below.

## DISCUSSION

1. Did the court rely on factual findings not found by a jury or admitted by him as a basis for imposing the upper-term sentence in violation of *Apprendi v. New Jersey* (2000) 530 U.S. 466 and its progeny?

The federal Constitution's Sixth and Fourteenth Amendments proscribe a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. (*Cunningham v. California* (2007) 549 U.S. 270 (*Cunningham*), citing *Apprendi v. New Jersey*, *supra*, 530 U.S. 466; *Ring v. Arizona* (2002) 536 U.S. 584; *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*); *United States v. Booker* (2005) 543 U.S. 220.) The "statutory maximum" is the maximum sentence the court may impose without making any additional factual findings. (*Blakely*, *supra*, 542 U.S. at pp. 303-304.)

Although the law in California prior to 2007 provided that a middle-term sentence was the statutory maximum (*People v. Black* (2007) 41 Cal.4th 799, 808-810 & fn. 2; former Pen. Code, § 1170, subd. (b)), the Legislature subsequently amended the Penal Code to specify that the statutory maximum was the upper term. (Pen. Code, § 1170, subd. (b); Stats. 2007, ch. 3, § 2, p. 5.) Thus, the court could impose an upper-term sentence without violating Acedo's constitutional rights to due process and a jury trial.

2. Did the court improperly rely on certain elements of the crime as a basis for imposing an upper-term sentence?

To avoid punishment based on dual use of the same facts, the court must find aggravating facts that are not elements of the offense in order to impose the upper term.

(Cal. Rules of Court, rule 4.420(d); *People v. Scott* (1994) 9 Cal.4th 331, 350.) Acedo complains that "[s]ome" of the factors relied on by the court in imposing his sentence were also elements of the crime; notably, however, he does not specify what factors those were.

Assuming, without deciding, that the court did rely in part on factors that were elements of the offense, "the existence of a single aggravating circumstance is legally sufficient to make the defendant eligible for the upper term." (*People v. Black, supra*, 41 Cal.4th at p. 813.) So long as the court found at least one aggravating factor that was not an element of the offense, it was entitled to impose the upper term. (*Ibid.*) It did so here, relying on the facts that the crime (simple assault) involved a weapon, violence and the threat of great bodily harm and that Acedo was on probation at the time he committed the attack. The court did not err in imposing an upper-term sentence based on these factors.

3. Did the court violate Acedo's plea agreement by sentencing him to prison without first giving him the opportunity to withdraw his plea?

Penal Code section 1192.5 governs a trial court's approval of a guilty plea to certain felony violations and prohibits a trial court that has approved a plea agreement from sentencing the defendant "to a punishment more severe than that specified in the plea" or "proceed[ing] as to the plea other than as specified in the plea." If the trial court withdraws its approval of a plea, the defendant must be permitted to withdraw the plea (*ibid.*), a right that is not forfeited by a defendant's failure to appear for sentencing. (*Cruz, supra*, 44 Cal.3d at pp. 1249, 1251-1254.) Where, however, a defendant executes a *Cruz* waiver as part of his plea bargain, he expressly waives his rights under Penal Code

section 1192.5; this allows the trial court to withdraw its approval of his plea, without the need to first provide him an opportunity to withdraw it, if he willfully fails to appear for sentencing. (*People v. Masloski* (2001) 25 Cal.4th 1212, 1219; see *Cruz, supra*, 44 Cal.3d at p. 1254, fn. 5.)

Here, Acedo does not dispute that he signed a *Cruz* waiver stating that, if he failed to appear, the court could sentence him "unconditionally" and he would "not be allowed to withdraw [his] guilty . . . plea[]." The court did not err in sentencing him without first providing an opportunity to withdraw his plea.

4. Did the court err in granting the prosecutor's pretrial motion in limine to exclude evidence of the victim's statements to Acedo at the time of the incident?

Acedo contends that the court erred in excluding evidence of the victim's statements to him on the ground that the evidence supported a defense of self-defense and that he suffered ineffective assistance from his trial counsel relating thereto. However, as noted above, Acedo cannot now challenge matters occurring prior to his plea, including the court's ruling on the prosecution's motion in limine at the earlier trial. (Pen. Code, § 1237.5; *People v. Panizzon, supra*, 13 Cal.4th at p. 74.) Moreover, Acedo is mistaken that the court excluded the evidence of the victim's statements. In fact, the court admitted the evidence, at defense counsel's urging and over the prosecutor's objection. For these reasons, Acedo's argument and his related ineffective assistant claim fail.

In addition to addressing Acedo's contentions, we have also reviewed the record in accordance with *Wende*, considered the *Anders* issues raised by counsel and not found

any reasonably arguable appellate issues. Acedo has been competently represented by counsel on this appeal.

DISPOSITION

The judgment is affirmed.

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HALLER, J.

WE CONCUR:

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BENKE, Acting P. J.

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HUFFMAN, J.