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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN CHRISTOPHER FOSTER et al.,

Defendants and Appellants.

D060669

(Super. Ct. No. FSB802052)

APPEALS from judgments of the Superior Court of San Bernardino County, Kyle S. Brodie, Judge. Affirmed in part, reversed in part.

A jury found John Christopher Foster and Jerome Edwards (together defendants) guilty of multiple counts of forgery, identity theft, and offering a forged instrument for filing. They appealed and we affirmed the judgments, except as follows: (1) we reversed defendants' theft convictions for instructional error (Edwards counts 35, 36, 37 & 48; Foster count 48); (2) we ordered the trial court to determine presentence credits under amended Penal Code section 4019;

and (3) we ordered that the abstracts of judgment be corrected in certain respects. (*People v. John Christopher Foster et al.* (April 29, 2011, D056830) [nonpub. opn.] (*Foster I*.) The prosecution elected not to retry defendants on the reversed charges. As to Foster, the trial court dismissed count 48 and resentenced him to a total prison term of 9 years 8 months. As to Edwards, the trial court dismissed counts 35, 36, 37 and 48 and resentenced him to a total term of 17 years 8 months. Defendants again appeal.

Edwards contends the trial court erred when it denied his request to continue his sentencing hearing so that he could retain private counsel. He also asserts that the abstract of judgment was not corrected according to our opinion in *Foster I* and claims that the trial court made additional errors in the abstract of judgment after remand. The Attorney General concedes that the matter must be remanded for another sentencing hearing and agrees that the trial court failed to correct the abstract of judgment and made additional errors on remand.

Foster's appointed appellate counsel filed a brief summarizing the facts and proceedings below. He presented no argument for reversal, but asked this court to review the record for error as mandated by *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Our review of the record reveals errors in the abstract of judgment, but no reversible error. Accordingly, Foster's judgment is affirmed with directions.

DISCUSSION

I. Edwards's Appeal

A. Right to Obtain Retained Counsel

1. Facts

At the sentencing hearing following remand, Edwards told the trial court that he was making "a *Marsden* motion." (*People v. Marsden* (1970) 2 Cal.3d 118.) Outside the presence of the prosecutor, Edwards told the court that he had not spoken to his appointed counsel, Ron Powell, until that day, that he had attempted to have Powell relieved as his appointed counsel during trial, and had filed a complaint against Powell with the State Bar in order to get discovery from him. Edwards believed that Powell should be discharged based on Edwards's complaint to the State Bar. He also claimed that ineffective assistance by Powell at trial resulted in the reversal of some of the convictions. Edwards then begged the court to "let [him] hire private counsel" for the sentencing hearing.

After the court heard from Edwards and Powell, the following exchange occurred:

"THE DEFENDANT: I'm asking the court -- I'm moving the court to allow me to secure private counsel that has my interest at heart, because I can tell you as you well know, Mr. Powell doesn't.

"THE COURT: I don't know that.

"MR. POWELL: I take offense to that.

"THE COURT: Let me just --

"THE DEFENDANT: I take offense to being here.

"THE COURT: Look, Mr. Edwards, I don't expect you to be happy to be here. I don't expect you to necessarily love your lawyer. You don't have to like him. The constitution doesn't give you a right to a lawyer you like. The constitution gives you a right to a lawyer that represents you. I have no doubt Mr. Powell can do that. We're here for a sentencing hearing. I intend to go forward today. We don't have another lawyer here to represent you."

The trial court then denied Edwards's request to relieve counsel based on ineffective assistance. In the presence of the prosecutor, the parties discussed the appropriate sentence and the court resentenced Edwards.

2. Analysis

Due process of law includes the right to appear and defend with retained counsel of one's own choice (*People v. Byoune* (1966) 65 Cal.2d 345, 346) and a defendant is entitled to a reasonable continuance to enjoy that right (*People v. Courts* (1985) 37 Cal.3d 784, 789–791). Although a defendant has a constitutional right to retain an attorney of his choice, the right is not absolute and must be carefully balanced with "other values of substantial importance," such as the speedy determination of criminal charges. (*People v. Crovedi* (1966) 65 Cal.2d 199, 206–207.) In this regard, the right to counsel of one's choice may be forced to yield "when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case." (*Id.* at p. 208.) The defendant has the

burden of establishing an abuse of discretion in denying a request for a change of counsel and, absent such a showing, we will not substitute our opinion and divest the trial court of its discretionary power. (*People v. Murphy* (1973) 35 Cal.App.3d 905, 915.)

Here, Edwards asserts, the Attorney General concedes, and we agree, that the trial court abused its discretion in not granting Edwards's implied request to continue the sentencing hearing for the purpose of allowing him to appear with retained counsel. Edwards timely requested the opportunity to retain counsel at his first court appearance following issuance of the remittitur. Although Edwards erroneously requested a *Marsden* hearing, he clearly indicated to the court that he was dissatisfied with his appointed counsel and wanted the opportunity to retain counsel to represent him at the sentencing hearing. The trial court denied the "*Marsden* motion" and immediately sentenced Edwards without inquiring whether Edwards sought a continuance for the purpose of obtaining retained counsel. Additionally, the trial court's finding that Edwards had not established grounds to discharge appointed counsel was not relevant to the issue whether Edwards was entitled to a continuance of the sentencing hearing to retain counsel. Under these circumstances, Edwards's sentence must be reversed and the matter remanded for a third sentencing hearing to allow Edwards to appear with retained counsel.

B. Abstract of Judgment

In *Foster I*, we ordered that the abstract of judgment for Edwards be corrected to indicate (1) counts 7–13, 16 and 18 occurred in 2006, (2) counts 15, 28–45, and 48 occurred in 2007, (3) counts 46 and 47 occurred in 2008, and (4) the "\$50" court security fee is composed of a \$20 fee under Penal Code section 1465.8, and a \$30 court facilities assessment fee under Government Code section 70373. (*Foster I*, at p. 23.) Edwards asserts, the Attorney General concedes, and we agree, that the current abstract of judgment does not reflect any of the changes ordered in *Foster I*. Accordingly, we reorder the changes ordered in *Foster I*.

Edwards also notes that the abstract of judgment contains some new errors. First, paragraph 12 of the abstract states that the sentence was imposed "at initial sentencing hearing" (box 12a), whereas the sentence was actually imposed "at resentencing per decision on appeal" (box 12b). Second, paragraph 13 of the abstract states that Edwards was awarded 262 actual days plus 130 local conduct days, for a total of 392 days credit for time served, whereas the trial court awarded him 262 actual days plus 262 local conduct days, plus an additional 781 actual days in state prison, for a total of 1,305 days credit for time served. Third, paragraph 13 of the abstract states that sentence was pronounced on "07/31/09," whereas sentence was actually pronounced on September 20, 2011.

The Attorney General concedes these clerical errors and we order the abstract to be corrected. (*People v. Hong* (1998) 64 Cal.App.4th 1071, 1075–1076 [appellate court has inherent power to correct clerical errors and to order the abstract of judgment amended].)

II. *Foster's Appeal*

Foster's appointed counsel has filed a brief under *Wende* and *Anders v. California* (1967) 386 U.S. 738, listing as possible but not arguable issues, whether (1) the trial court erred by resentencing Foster in whole, rather than finding he needed only serve seven years and four months, representing his former ten year, four month state prison term less the three years that had been imposed for the count this court reversed, (2) Foster received ineffective assistance of counsel at sentencing because his original trial counsel never appeared and his newly appointed public defender was not prepared to argue the case, and (3) the trial court adequately specified the statutory basis for the fines and fees imposed, as previously ordered in *Foster I*. We granted Foster permission to file a brief on his own behalf. He has not responded.

In *Foster I*, we ordered that the abstract of judgment for Foster be corrected to indicate (1) counts 7–13, 16 and 18 occurred in 2006, (2) counts 15, 39, 40 and 48 occurred in 2007, and (3) the "\$50" court security fee is composed of a \$20 fee under Penal Code section 1465.8, and a \$30 court facilities assessment fee under Government Code section 70373. (*Foster I*, at p. 23.) The

current abstract of judgment does not reflect any of the changes ordered in *Foster I*. Accordingly, we reorder the changes ordered in *Foster I*.

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We have now concluded our independent review of the record and find no other arguable issues or errors that are cognizable in this appeal. Competent counsel has represented Foster on this appeal.

DISPOSITION

Edwards's sentence is reversed and the matter is remanded. Edwards shall have 30 days after the issuance of the remittitur to have retained counsel make an appearance and the trial court shall allow new counsel a reasonable opportunity to prepare for a new sentencing hearing. If Edwards does not obtain retained counsel, the sentence previously imposed shall be reinstated.

The abstract of judgment for Edwards is ordered corrected to indicate (1) counts 7–13, 16 and 18 occurred in 2006, (2) counts 15, 28–45, and 48 occurred in 2007, (3) counts 46 and 47 occurred in 2008, (4) the "\$50" court security fee is composed of a \$20 fee under Penal Code section 1465.8, and a

\$30 court facilities assessment fee under Government Code section 70373, (5) paragraph 12 of the abstract should be changed to indicate that the sentence was imposed "at resentencing per decision on appeal" (box 12b), (6) paragraph 13 of the abstract should be changed to indicate that Edwards was awarded 262 actual days plus 262 local conduct days, plus an additional 781 actual days in state prison, for a total of 1,305 days credit for time served, and (7) paragraph 13 of the abstract should be changed to indicate that the sentence was actually imposed on September 20, 2011.

After resentencing, the superior court is ordered to prepare an amended abstract of judgment showing these modifications and send them to the Department of Corrections. In all other respects, Edwards's judgment is affirmed.

The abstract of judgment for Foster is ordered corrected to indicate (1) counts 7–13, 16 and 18 occurred in 2006, (2) counts 15, 39, 40 and 48 occurred in 2007, (3) the "\$50" court security fee is composed of a \$20 fee under Penal Code section 1465.8, and a \$30 court facilities assessment fee under Government Code section 70373, (4) paragraph 12 of the abstract should be changed to indicate that the sentence was imposed "at resentencing per decision on appeal" (box 12b), and (5) paragraph 13 of the abstract should be changed to indicate that the sentence was actually imposed on September 13, 2011.

After resentencing, the superior court is ordered to prepare an amended abstract of judgment showing these modifications and send them to the Department of Corrections. In all other respects, Foster's judgment is affirmed.

MCINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

NARES, J.