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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS WALTER CLARK,

Defendant and Appellant.

D061742

(Super. Ct. No. SCD230651)

APPEAL from a judgment of the Superior Court of San Diego County, Michael T. Smyth, Judge. Affirmed.

Thomas Walter Clark appeals the judgment following his guilty plea. Appointed appellate counsel filed a brief presenting no argument for reversal, but inviting this court to review the record for error in accordance with *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Clark filed a supplemental brief on his own behalf. After having reviewed the issues raised by Clark and independently reviewing the entire record for error as required by *Anders v. California* (1967) 386 U.S. 738 and *Wende*, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

After being charged in a 16-count information, Clark pled guilty to two counts of first degree robbery (Pen. Code, § 213, subd. (a)(1)(A))¹; one count of assault with semi-automatic firearm (§ 245, subd. (b)); and one count of false imprisonment (§§ 236, 237, subd. (a)). Clark further admitted a 1996 conviction that qualified both as a prior strike (§§ 667, subd. (a)(1), 1192.7, subd. (c)) and a serious prior felony (§§ 667, subds. (b)-(i), 1170.12).

The factual basis for the plea was that Clark: participated in the taking of personal property with the use of force and/or fear from another and, in committing the offense, personally used a firearm (count 1, 12022.53, subd. (b) enhancement); participated in the taking of personal property with the use of force and/or fear from another and, in committing the offense, personally used a firearm (count 2, § 12022.53, subd. (b) enhancement); committed an assault upon another with a semiautomatic firearm (count 6); and participated in the violation of another's personal liberty through use of force and/or fear and, in doing so, personally used a firearm (count 12, § 12022.5, subd. (a) enhancement). In accordance with the plea agreement, Clark was sentenced to the stipulated term of 45 years in prison. Clark was awarded 362 days of credit, comprised of 315 days actual credit and 47 days of section 2933.1 credit.

¹ Unless otherwise indicated, all further statutory references are to the Penal Code.

Clark obtained a certificate of probable cause from the trial court to pursue an appeal.

Clark filed an application with this court to file a late notice of appeal, which was granted. Clark's appeal was filed on May 25, 2012.

II

DISCUSSION

Appointed appellate counsel has filed a brief summarizing the facts and the proceedings in the trial court. Counsel presented no argument for reversal, but invited this court to review the record for error in accordance with *Wende, supra*, 25 Cal.3d 436. Pursuant to *Anders, supra*, 386 U.S. 738, counsel identified the following possible but not arguable issues: (1) "Is appellant's guilty plea constitutionally valid?"; (2) "Is there a proper factual basis for the plea?"; (3) "Was a personal waiver required from appellant when his attorney waived appellant's presence at any future restitution hearing," and "[w]as the waiver knowing and intelligent."

Pursuant to our invitation, Clark filed a supplemental brief. Clark "does not challenge the constitutional validity of his present guilty plea." Instead, he seeks to have this court review the legality of the plea bargain that he entered into in 1996, which formed the basis for the prior strike conviction and prior serious felony conviction allegations that Clark admitted in this case. Specifically, Clark asserts that his 1996 guilty plea was taken in violation of his *Boykin/Tahl* rights (*Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122). Clark contends appellate counsel herein

rendered ineffective assistance by filing a brief pursuant to *Wende, supra*, 25 Cal.3d 436, instead of filing a merits brief challenging the constitutional validity of his 1996 plea.

Clark's collateral attack on the constitutional validity of his 1996 plea bargain is beyond the scope of this appeal, as Clark did not make a motion in the trial court to strike the validity of the prior conviction allegations based on a defective plea but instead admitted the prior conviction allegations as part of his guilty plea in the current case. (See *People v. Allen* (1999) 21 Cal.4th 424, 443 [permitting motion to strike in trial court based on unconstitutionality of prior guilty plea].) The record also discloses no basis for a direct appeal premised on defense counsel's failure to make such a motion in the trial court. As we have determined Clark may not — in this appeal — collaterally attack the 1996 plea, we reject his argument that appellate counsel provided ineffective assistance by filing a brief pursuant to *Wende, supra*, 25 Cal.3d 436.

Clark has been adequately represented by counsel on this appeal.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.