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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

DELON MARCHEA JOHNSON,

Defendant and Appellant.

E055925

(Super.Ct.No. FBA900384)

OPINION

APPEAL from the Superior Court of San Bernardino County. Miriam I. Morton, Judge. Affirmed.

Johanna R. Pirko, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Delon Marchea Johnson pled guilty to one count of robbery (Pen. Code, § 211) and admitted that he had personally used a firearm (Pen. Code, § 12022.53, subd. (b)) in the commission of the crime. Defendant also admitted that he had suffered a prior strike conviction as a

juvenile. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).) In return, the remaining allegations were dismissed and, after the trial court denied defendant's motion to withdraw his guilty plea, defendant was sentenced to the stipulated term of 16 years in state prison with credit for time served. Defendant appeals, challenging the validity of his plea. We find no error and affirm the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND<sup>1</sup>

Between July 2008 and June 2009, defendant and, in some instances, a cohort committed six robberies with the use of a firearm at the same convenience store in the "Kramer's Junction" area of Barstow. The details of the robberies are as follows:

On July 29, 2008, two Black males entered the store and demanded an employee open the cash register and empty the cash into a plastic bag. One suspect was described as heavyset, about 6 feet 1 inch tall, weighing around 250 pounds, and wearing a black sweater and black mask. The other suspect was described as "thinner" and carrying a rifle with a wooden stock. The heavyset suspect took the money, about \$380, and both suspects fled. After the robbery, an officer found a \$10 bill on the ground between Highway 58 and the railroad tracks, north of the convenience store.

On January 30, 2009, about 4:30 a.m., a heavyset Black male armed with a shotgun, about six feet tall, and weighing 250 pounds, robbed the same convenience store. The suspect was wearing a ski mask, jeans, and a sweater. The suspect pointed the shotgun at an employee, who then gave the suspect all the money in the cash register,

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<sup>1</sup> The factual background is taken from the reporter's transcript of the preliminary hearing.

which was less than \$100. The suspect also robbed a customer who was standing at the counter. The customer described the suspect as a heavysset Black male, weighing about 250 pounds. After the robbery, the suspect fled north across Highway 58 toward the railroad tracks.

On February 17, 2009, about 8:00 p.m., two Black males robbed the same convenience store. One of the suspects was wearing a multicolored jacket or sweatshirt with a hood (referred to as a “hoody”). He weighed about 300 pounds and was armed with a shotgun. After the suspects stole approximately \$300 in cash and a “handful of cigars,” they fled northeast.

On May 24, 2009, around 9:30 p.m., a Black male, about 6 feet 3 inches tall, weighing approximately 300 pounds, and wearing a black hooded jacket with a purple rag covering his face, black pants, and black gloves robbed the same convenience store of \$500. The suspect was armed with a double barrel sawed-off shotgun. Police later found shoe tracks on the north side of Highway 58 leading across the railroad tracks.

On June 20, 2009, two Black males robbed the same convenience store of \$250 with the use of a shotgun. One of the suspects was described as heavysset, about 6 feet 3 inches tall, weighing 260 pounds, and armed with a double barrel shotgun. As the suspects were leaving, the armed heavysset suspect pointed the shotgun at a customer’s chest and demanded his money. The customer gave the suspect a dollar from his pocket. The suspects fled the store and crossed the railroad tracks, north of Highway 58. Police later discovered a set of footprints on the north side of Highway 58.

In June 2009, police searched a trailer in Kern County pursuant to a search warrant and found a multicolored hooded sweatshirt, similar to the one worn by the heavysset suspect in the February 17, 2009, robbery. A witness, who lived on the property, identified the heavysset suspect from the convenience store surveillance video as “DJ.”

On June 27, 2009, defendant’s foster mother reported that she had overheard defendant bragging to friends about committing five robberies at the convenience store with a shotgun and not being caught by the police. Defendant’s foster mother also indicated that she had seen the shotgun around the house; and that she had given the multicolored “hoody” to defendant as a Christmas present.

Defendant was eventually arrested. At the time of his arrest, defendant was 6 feet 1 inch tall and weighed 300 pounds. After waiving his constitutional rights, he admitted to committing four of the robberies between June 2008 and June 2009. He also admitted to using a shotgun in at least two of the robberies and a rifle pellet gun in the others. He explained that he would approach the convenience store from the railroad tracks north of the store and use the same path to flee.

Following a preliminary hearing, an information was filed charging defendant with six counts of robbery (Pen. Code, § 211) with the personal use of a firearm (Pen. Code, § 12022.53, subd. (b)). The information further alleged that defendant had suffered a prior juvenile adjudication that qualified as a strike. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

On October 12, 2011, pursuant to a plea agreement, defendant pled guilty to one count of robbery with the use of a firearm and admitted the prior strike conviction in

exchange for a stipulated 16-year sentence and the dismissal of the remaining charges. After directly examining defendant, the trial court found that defendant understood the nature and consequences of the plea and the offenses; that the plea was entered into freely and voluntarily; and that defendant knowingly and intelligently waived his rights.

On February 16, 2012, defendant filed a motion to withdraw his guilty plea based on the ground of ineffective counsel. Specifically, defendant alleged that counsel was ineffective in having him admit to the gun use enhancement because no gun was found. He further claimed counsel was ineffective in having him admit to the prior juvenile adjudication because the validity of using prior juvenile adjudications as strikes to double his sentence violated his constitutional rights, and the issue is “in flux in the Federal Courts.” The People subsequently filed their opposition.

A hearing on defendant’s motion to withdraw his guilty plea was held on February 27, 2012. At that time, defendant testified. Defendant claimed that he had informed his trial counsel to challenge the validity of his juvenile prior conviction, but counsel claimed he would make an argument to the court about it and later told him there was nothing he could do. On cross-examination, defendant acknowledged that after his trial counsel made an argument about the prior juvenile conviction, he made a choice to enter the plea. Following argument, the trial court denied defendant’s motion to withdraw his guilty plea.

Defendant was subsequently sentenced in accordance with his plea agreement and awarded credit for time served.

On March 20, 2012, defendant filed a notice of appeal, challenging the validity of the plea based on ineffective assistance of counsel. He also filed a request for a certificate of probable cause, which the trial court granted.

#### DISCUSSION

Defendant appealed and, upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case, a summary of the facts and potential arguable issues, and requesting this court undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, which he has done. In separate two-page letter briefs, defendant generally argues that the gun use enhancement should be dismissed because no gun was recovered; that his counsel was ineffective for having him admit to the prior juvenile adjudication; and that his trial counsel and the trial court were “against” him. Initially, we note “[e]very brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the court may treat it as waived, and pass it without consideration. [Citations.]’ [Citations.]” (*People v. Stanley* (1995) 10 Cal.4th 764, 793.) Here, defendant fails to make any legal argument or cite to any relevant authority in support of his claims. Thus, his contentions are waived. In any event, we reject defendant’s contentions on the merits.

“When a defendant pleads not guilty and is convicted as the result of a trial, in general any issue bearing on the determination of guilt and apparent from the record is

cognizable on appeal. (See [Pen. Code,] § 1237.) By contrast, when a defendant pleads guilty or no contest and is convicted without a trial, only limited issues are cognizable on appeal. A guilty plea admits every element of the charged offense and constitutes a conviction [citations], and consequently issues that concern the determination of guilt or innocence are not cognizable. [Citations.] Instead, appellate review is limited to issues that concern the ‘jurisdiction of the court or the legality of the proceedings, including the constitutional validity of the plea.’ [Citations.]” (*In re Chavez* (2003) 30 Cal.4th 643, 649.) The evidentiary or factual issues regarding the gun raised in defendant’s supplemental briefs concern the determination of guilt or innocence and are not cognizable on appeal.

We also reject defendant’s ineffective assistance of counsel claims. To prevail on a claim for ineffective assistance of counsel, a defendant must show that counsel’s performance fell below a standard of reasonable competence and that there is a reasonable probability the result would have been more favorable to the defense in the absence of counsel’s deficient performance. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; *People v. Dennis* (1998) 17 Cal.4th 468, 540-541.) Hence, an ineffective assistance of counsel claim has two components: deficient performance and prejudice. (*Strickland v. Washington*, at pp. 687-688, 693-694; *People v. Williams* (1997) 16 Cal.4th 153, 214-215.) If defendant fails to establish either component, his claim fails.

First, counsel was not deficient in having defendant admit to the prior juvenile adjudication since it qualified as a prior strike conviction. (*People v. Nguyen* (2009) 46 Cal.4th 1007, 1028 [“the absence of a constitutional or statutory right to jury trial under

the juvenile law does not, under *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466], preclude the use of a prior juvenile adjudication of criminal misconduct to enhance the maximum sentence for a subsequent adult felony offense by the same person”].)

And second, prior to pleading guilty, defendant acknowledged several times that he had gone over the terms of the plea agreement and the rights he was giving up with his attorney, and that he understood the plea agreement, his constitutional rights, and the consequences of pleading guilty. Defense counsel also agreed that defendant and counsel had discussed the plea agreement and defendant had understood what he was pleading guilty to and what he was giving up. Additionally, after directly examining defendant, the trial court found that defendant understood the nature and the consequences of the plea and the offenses; that the plea was entered into freely and voluntarily; and that defendant knowingly and intelligently waived his rights. Moreover, at the motion to withdraw his guilty plea, defendant admitted that he made a choice to enter the plea after his trial counsel made an argument about the prior juvenile adjudication.

Based on the above, we find that defense counsel did not render assistance below an objective standard of reasonableness under prevailing professional norms.

Furthermore, defendant cannot demonstrate that counsel’s alleged deficient representation prejudiced him, i.e., there is a reasonable probability that, but for counsel’s purported failings, defendant would have received a more favorable result. (*Strickland v. Washington*, *supra*, 466 U.S. at p. 687; *People v. Dennis*, *supra*, 17 Cal.4th at pp. 540-541.) In fact, had defendant failed to take the plea agreement, there is a reasonable probability that the outcome would have been far worse for defendant because he was

facing six robberies with the use of a firearm, the evidence against him was overwhelming, and he had confessed to four of the robberies, two with the use of a firearm.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we independently reviewed the record for potential error. We have now completed our independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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RAMIREZ

P. J.

We concur:

McKINSTER

J.

MILLER

J.