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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.

THEODORE P. OVERSTREET,

Defendant and Appellant.

E062863

(Super.Ct.No. RIF1315505)

OPINION

APPEAL from the Superior Court of Riverside County. Michael B. Donner, Judge. Affirmed.

Theodore P. Overstreet, in pro. per.; and Richard L. Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Pursuant to a negotiated plea agreement, defendant and appellant Theodore P. Overstreet pled guilty to felony elder abuse (Pen. Code, § 368, subd. (b)(1))¹ and

¹ All future statutory references are to the Penal Code unless otherwise stated.

admitted that he had suffered one prior strike conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)). In return, the remaining charges and enhancement allegations were dismissed and defendant was sentenced to a stipulated term of four years in state prison with credit for time served. Defendant appeals from the judgment, challenging the validity of the plea and admission as well as the sentence or other matters occurring after the plea. We find no error and affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On December 17, 2013, in the county of Riverside, defendant willfully and unlawfully, under circumstances likely to produce great bodily injury and death, caused an elder, to wit, his father, with knowledge that he was an elder, to suffer unjustifiable pain and mental suffering.

On December 19, 2013, a felony complaint was filed charging defendant with one count of felonious elder abuse (§ 368, subd. (b)(1)) and one count of false imprisonment of an elder (§ 368, subd. (f)). The complaint further alleged that defendant had suffered seven prior prison terms (§ 667.5, subd. (b)) and one prior strike conviction (§§ 667, subds. (c) & (e)(1), 1170.12, subd. (c)(1)).

On December 19, 2013, the trial court declared a doubt as to defendant's competency, and criminal proceedings were suspended. The following day, a doctor was appointed to examine defendant pursuant to section 1368.

On January 21, 2014, the parties stipulated that the court could make a determination of competency based on the psychologist's report. The court found defendant incompetent to stand trial and ordered him placed in a mental health facility. A second doctor was appointed to examine defendant regarding medication needs and placement.

On February 13, 2014, the court ordered defendant committed to either Liberty Healthcare Program or Patton State Hospital pursuant to section 1370. Defendant was placed at Liberty Healthcare in March 2014.

On June 13, 2014, defendant was returned to court based upon reports indicating defendant's competency had been restored. The parties stipulated that the court could make a competency determination based upon the psychologists' reports. The court found that defendant's competency had been restored pursuant to section 1372, and reinstated criminal proceedings.

On December 16, 2014, defendant brought a motion to substitute his counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Following a *Marsden* hearing, the trial court denied defendant's *Marsden* motion.

On January 14, 2015, prior to hearing testimony for the preliminary hearing, defendant entered into a negotiated plea. Defendant pled guilty to felonious elder abuse and admitted that he had suffered one prior strike conviction in exchange for a stipulated term of four years in state prison and dismissal of the remaining allegations. As part of his plea agreement, defendant waived his right to appeal. After directly examining

defendant, the trial court found that defendant understood the nature of the charges and the consequences of the plea; that the plea was entered into freely, voluntarily, knowingly, and intelligently; and that there was a factual basis for the plea. Defendant was thereafter immediately sentenced in accordance with his plea agreement and awarded presentence credit for time served.

Defendant subsequently filed a notice of appeal and several amended notices of appeal and requests for certificate of probable cause. On March 3 and 9, 2015, the trial court granted defendant's requests for certificate of probable cause.

II

DISCUSSION

After defendant appealed, 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 (*Wende*) 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 to conduct an independent review of the record.

We offered defendant an opportunity to file a personal supplemental brief, and he has done so. In his supplemental brief, defendant argues that (1) his plea was involuntary and coerced; (2) his trial counsel was ineffective in failing to defend and challenge his prior strike conviction; (3) the court abused its discretion in failing to strike his prior strike conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497

(*Romero*); and (4) his appellate counsel was ineffective for failing to address arguable issues on appeal. We reject defendant's contentions.

First, defendant waived his right to appeal from the conviction or sentence. Second, "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.'" (*In re Chavez* (2003) 30 Cal.4th 643, 649; see *People v. Hoffard* (1995) 10 Cal.4th 1170, 1178.) Examples of the type of claims preserved for appeal notwithstanding a plea of guilty that are relevant to this appeal include ineffective assistance of counsel and an involuntary or improperly induced plea. (See *In re Brown* (1973) 9 Cal.3d 679, 682 [ineffective assistance of counsel], superseded by statute on another point; *People v. DeVaughn* (1977) 18 Cal.3d 889, 896 [plea improperly induced].)

Third, the fact that defendant may have made the "best 'deal'" to avoid a greater punishment if he went to trial does not constitute coercion (*People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208 (*Huricks*)); a guilty plea does not become involuntary because a possible greater penalty may ensue. (*In re Cowans* (1970) 2 Cal.3d 733, 740.) We are not persuaded by defendant's after-the-fact, self-serving claim that he was coerced into accepting the plea. Trial counsel is required to advise his or her client of the

consequences of either going to trial or pleading guilty. The fact that a defendant may have been persuaded, or was reluctant, to accept a plea bargain does not demonstrate that the plea was involuntary. (*People v. Ravaux* (2006) 142 Cal.App.4th 914, 919; *People v. Hunt* (1985) 174 Cal.App.3d 95, 103; *People v. Urfer* (1979) 94 Cal.App.3d 887, 892.)

In other words, mere advice and persuasion by a defendant's own attorney does not suffice to vitiate the plea. (*People v. Evans* (1960) 185 Cal.App.2d 331, 334.)

Defendant's claim of coercion could properly be viewed as buyer's remorse. (See *Huricks, supra*, 32 Cal.App.4th at p. 1208 [“ [a] plea may not be withdrawn simply because the defendant has changed his mind.” ¶¶] . . . ¶¶] [Defendant's] claim that [he was pressured] into the plea is not enough to constitute duress. Nothing in the record indicates he was under any more or less pressure than every other defendant faced with serious felony charges and the offer of a plea bargain.”].)

Fourth, there is no evidence to suggest defendant's plea was involuntary, unintelligent, or not entered into knowingly. A plea, like any other waiver of constitutional rights, “may be accepted by the court only if knowing and intelligent—made with a full awareness of the nature of the right being waived and the consequences of the waiver. In addition, the waiver must be voluntary.” (*People v. Smith* (2003) 110 Cal.App.4th 492, 500; see *New York v. Hill* (2000) 528 U.S. 110, 114-118.) When a defendant elects to waive the fundamental constitutional rights that accompany a trial by pleading guilty “the record must reflect that the defendant did so knowingly and voluntarily—that is, he or she was advised of and elected to refrain from

exercising the fundamental rights in question.” (*People v. Collins* (2001) 26 Cal.4th 297, 308.) Under the governing test, a plea is valid “if the record affirmatively shows that it is voluntary and intelligent under the totality of the circumstances.” (*People v. Howard* (1992) 1 Cal.4th 1132, 1175.)

Here, the record affirmatively shows that the plea and admission were voluntary and intelligent. The record before us shows the trial court went through the plea form thoroughly with defendant, asking defendant if he understood his constitutional rights, whether his counsel had completely explained his legal and constitutional rights to him, and whether he waived his constitutional rights. The court further advised defendant of the penal consequences of his plea and admission, and defendant stated he understood those consequences. Defendant acknowledged that he had placed his initials on the change of plea form indicating he understood his rights and consequences of the plea and that he wished to waive his constitutional rights in order to plead guilty. Defendant responded in the negative when the court inquired whether defendant had any questions for the court or his trial counsel.

We also reject defendant’s claim that his trial counsel was ineffective for failing to challenge his prior strike conviction. To prevail on a claim of ineffective assistance of counsel, defendant must establish his counsel’s representation fell below an objective standard of reasonableness and there is a reasonable probability that, but for counsel’s deficient performance, the result of the proceedings would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687.) The record sheds no light on this

claim. “If the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged, an appellate claim of ineffective assistance of counsel must be rejected unless counsel was asked for an explanation and failed to provide one, or there simply could be no satisfactory explanation. [Citation.] Otherwise, the claim is more appropriately raised in a petition for writ of habeas corpus. [Citation.]” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211, citing *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Moreover, because defendant’s plea was an admission of culpability as to the charged offense as well as to the prior strike conviction, there was little reason for trial counsel to challenge his prior strike conviction. As previously noted, defendant’s admission of the allegation constitutes an admission that all of the elements of the charged prior offense are true. (*People v. Alfaro* (1986) 42 Cal.3d 627, 636, overruled on other grounds in *People v. Guerrero* (1988) 44 Cal.3d. 343, 356.) By pleading guilty, a defendant may not challenge the sufficiency of the evidence on appeal. (*People v. Suite* (1980) 101 Cal.App.3d 680, 689.)

Defendant’s claim that the court abused its discretion in failing to strike his prior strike conviction is also unmeritorious. Defendant admitted the truth of the prior strike conviction and never asked the court to strike it pursuant to *Romero*. The admission of the strike prior, and the doubling effect it would have on the stipulated sentence were integral parts of the plea agreement. By accepting the plea bargain and admitting the prior conviction, defendant waived any legal challenges to its validity or whether the trial

court abused its discretion in failing to strike it. The admission means there is no record of it for us to review. (*People v. LaJocies* (1981) 119 Cal.App.3d 947, 956-957.)

Finally, we reject defendant's claim that his appellate counsel was ineffective for failing to address arguable issues of merit. Failure of "appellate counsel to raise crucial assignments of error, which arguably might have resulted in a reversal" deprives an appellant of effective assistance of appellate counsel. (*In re Smith* (1970) 3 Cal.3d 192, 202.) However, the fact that appellate counsel followed the procedure set forth in *Wende* is insufficient, by itself, to show appellate counsel has been ineffective.

We have undertaken an examination of the entire record pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106 and *Wende, supra*, 25 Cal.3d 436, and we find no arguable error that would result in a disposition more favorable to defendant. Accordingly, defendant has also failed to meet his burden of proof on the issue of ineffective assistance of appellate counsel. Appellate counsel has complied fully with counsel's responsibilities, and the filing of a *Wende* brief was not unprofessional. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *Wende, supra*, 25 Cal.3d at p. 443.) Competent counsel has represented defendant on this appeal.

III
DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

CODRINGTON
J.