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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.

GEORGE WILLIAM SCALLY,

Defendant and Appellant.

E063333

(Super.Ct.No. FSB1104558)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

George William Scally, in pro. per.; and Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant George William Scally appeals after the trial court denied his petition for resentencing under Penal Code section 1170.126, known as the Three

Strikes Reform Act of 2012 (Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012)).¹ Defendant filed a notice of appeal on April 7, 2015. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

On September 29, 2011, at around 10:15 a.m., Michael Avington walked into Advanced America, a check cashing store in Redlands. Stephanie Guerrero was working there at the time. After Guerrero explained to Avington the cash-advance process, Avington pulled out a gun and told Guerrero he was committing a robbery. He then told Guerrero to remove the money from her drawer and put it in his black, drawstring bag. After she did this, Avington told Guerrero to open a second drawer, which she did. Guerrero removed from the two drawers a total of \$350, which she put in Avington's black bag. The cash included three \$100 bills.

Avington next ordered Guerrero to go to the safe in the back of the store, open it, and remove its contents. Guerrero removed from the safe some money and a "bait bag," and placed them in Avington's black bag. The bait bag contained a prepaid Visa card, fake deposit slips, and \$100, consisting of 60 prerecorded \$1 bills and two prerecorded \$20 bills. After confirming there was nothing left in the safe, Avington ran out of the store. Guerrero hit the panic button and called 911.

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

² The factual background is taken from a prior opinion of this court. (*People v. Scally* (Jan. 28, 2014, E057024 [nonpub. opn.]) On our own motion, we take judicial notice of the prior opinion. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

The robbery was recorded on the Advanced America store's surveillance cameras, and the video was shown to the jury. During the trial, Guerrero identified Avington as the person who robbed her.

Cheryl Slaton testified that, at around 10:00 a.m. on the day of the robbery, she was at the Stater Bros. shopping plaza where the Advanced America store was located. Slaton saw a black SUV with a handicap license plate parked along the curb, nearby. The engine was running and the driver's window was open. Slaton noticed the driver was a Black male with cornrows in his hair. Slaton heard someone running and looked toward the SUV. She saw a person dive into the backseat of the SUV. The SUV then sped away, behind the Stater Bros. market. A surveillance video from behind the Stater Bros. market showed a black SUV driving behind the store at 10:14 a.m.

Slaton wrote down the license plate number of the SUV on her cell phone (69847ZP). The number was slightly different from defendant's SUV license plate number (6984ZDP). At a photographic lineup, Slaton identified defendant as the driver of the SUV, but was unable to identify him in court.

After the robbery, at around 6:50 p.m., Redlands police officers spotted a black SUV with a handicap license plate. The car was registered to an individual with the last name of Scally. The license plate number (6984ZDP) was similar to the number Slaton had written down. About an hour later, the police stopped the SUV. Defendant, whose hair was braided, was in the front passenger's seat. Avington was in the rear right passenger seat. Rachelle Scally was in the driver's seat. The police searched defendant and found him in possession of \$424.03, which included six \$20 bills and three \$100

bills. One of the \$20 bills matched the serial number of one of the prerecorded \$20 bills from the bait bag.

The police searched defendant's apartment in Redlands and found a black nylon overnight bag containing clothing that matched the description of the clothing Avington was seen wearing during the robbery. The bag also contained a revolver, bullets, the Visa card taken during the robbery, a deposit bag from Advanced America, and \$341 in cash. Sixty of the \$1 bills from the black nylon bag matched the serial numbers on the bait money.

On July 16, 2012, a jury convicted defendant of one count of second degree robbery. (§ 211.) A trial court found that he had suffered one prior serious felony conviction (§ 667, subd. (a)(1)), and two prior strike convictions (§§ 1170.12, subds. (a)-(d) & 667, subds. (b)-(i)). The court denied defendant's motion to strike the prior strike convictions, pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. The court then sentenced defendant to 30 years to life, comprised of 25 years to life for the current crime, plus five years for the prior serious felony conviction.

On January 20, 2015, defendant filed a petition for writ of habeas corpus, in propria persona, based on the Three Strikes Reform Act of 2012 (Proposition 36). In the same petition, he also challenged his conviction based on "suggestive identification." The trial court deemed the habeas corpus writ to be a petition for recall of sentence under section 1170.126. The court denied the petition since defendant's current conviction was for the serious felony of robbery (§ 211), which made him ineligible for resentencing. (§§ 1170.126, subd. (e)(1) & 1192.7, subd. (c)(19).)

Defendant filed a notice of appeal.

ANALYSIS

This court appointed counsel to represent defendant on appeal. 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 and identifying two potential arguable issues: (1) whether the court properly determined that defendant was ineligible for resentencing under section 1170.126; and (2) whether this court may treat this appeal as a writ of mandate and/or remand the case to the trial court for consideration of defendant's remaining claim regarding the alleged suggestive identification.

Defendant was offered an opportunity to file a personal supplemental brief, which he has done. He filed a handwritten brief raising the following claims: (1) he received ineffective assistance of counsel (IAC) when his trial counsel failed to suppress the six-pack photographic lineup; (2) his trial counsel was ineffective in failing to investigate other defenses for his case like the "unconsciousness defense," as defendant suffered from epileptic seizures at the time of the current crime; (3) his trial counsel failed to object to defendant's admission to his prior strike convictions; (4) the prosecution failed to produce any evidence to prove the elements of aiding and abetting; (5) the prosecution failed to produce any evidence of his criminal intent; and (6) defendant's appellate counsel was ineffective, since she "refuse[d] to file for ineffective assistance on [his] trial attorney, the suggestive identification or [his] charged offense of aiding and abetting."

We first note that defendant filed a notice of appeal based on the court's finding that he was ineligible for resentencing under section 1170.126. The issues raised in his

brief have no bearing on whether he was eligible for resentencing under Proposition 36. The court properly found that he was ineligible, since his current conviction was for the serious felony of robbery (§ 211). (§§ 1170.126, subd. (e)(1) & 1192.7, subd. (c)(19).)

In any event, defendant's claims of insufficiency of the evidence and IAC fail. In order to establish a claim of IAC, a defendant must demonstrate that "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540-541.) Hence, an IAC claim has two components: deficient performance and prejudice. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217.) If defendant fails to establish either component, his claim fails.

There was more than sufficient evidence here to support defendant's conviction of second degree robbery. "One who stays in an automobile and enables those who are robbing to make a successful 'getaway' is as much a principal and aids and abets the crime as completely as though he were present and assisted in the actual taking of the property." (*People v. Silva* (1956) 143 Cal.App.2d 162, 169.) The evidence showed that, on the morning of September 29, 2011, Avington robbed a cashier at an Advanced America store. He escaped from the store with \$350 in cash, plus a "bait bag," which the cashier put in Avington's bag. The bait bag contained a prepaid Visa card, fake deposit slips, and \$100, consisting of 60 prerecorded \$1 bills and two prerecorded \$20 bills.

Cheryl Slaton saw a black SUV with a handicap license plate in a parking lot. The engine was running, and the driver's window was open. Slaton noticed the driver was a Black male with cornrows in his hair. She then saw a person run and dive into the backseat of the SUV, which then sped away. Slaton wrote down the license plate number of the SUV on her cell phone (69847ZP). The number was only slightly different from defendant's license plate number (6984ZDP). At around 6:50 p.m. that same day, police officers spotted a black SUV with a handicap license plate. The license plate number (6984ZDP) was similar to the number Slaton had written down. About an hour later, the police stopped the SUV. Defendant was in the front passenger's seat. Avington was in the rear right passenger seat. The police searched defendant and found him in possession of \$424.03, which included six \$20 bills and three \$100 bills. One of the \$20 bills matched the serial number of one of the prerecorded \$20 bills from the bait bag.

The police subsequently searched defendant's apartment and found a black bag containing clothing matching the description of clothing Avington was seen wearing during the robbery. The bag also contained a revolver, bullets, the Visa card taken during the robbery, an Advanced America deposit bag, and \$341 in cash. Sixty of the \$1 bills matched the serial numbers on the bait money.

Moreover, the evidence here was sufficient to support defendant's conviction, even without the evidence of the photographic lineup, which defendant claims consisted of "suggestive identification." Furthermore, in light of the evidence, there is no reasonable probability that, but for counsel's alleged failings, defendant would have obtained a more favorable result.

Under *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the record and find no arguable issues.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
J.

We concur:

RAMIREZ
P. J.

CODRINGTON
J.