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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRY KENT WILLIAMS,

Defendant and Appellant.

F062275

(Super. Ct. No. F10904220)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. James M. Petrucelli, Judge.

Robert L.S. Angres, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Jamie A. Scheidegger, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Cornell, J. and Kane, J.

INTRODUCTION

A jury convicted appellant Terry Kent Williams of possession of cocaine base; he admitted two prior strike convictions. In this appeal, Williams contends the trial court erred when it failed to conduct a hearing pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). He also contends (1) his sentence of 28 years to life constitutes cruel and unusual punishment, and (2) the evidence was insufficient to support the Penal Code section 1203.1b¹ fee of \$296.

Williams has forfeited any challenge to his sentence and the section 1203.1b fee for failure to object in the trial court. On his *Marsden* contention, we conclude the trial court did not err.

FACTUAL AND PROCEDURAL SUMMARY

On April 21, 2010, a search pursuant to a search warrant was conducted on a motel room in Fresno. Just after officers entered the room, an officer stationed outside saw Williams throw a plastic bag outside from the bathroom window. The officers inside the motel room placed Williams under arrest. The contents of the plastic bag were tested and determined to be 2.41 grams of cocaine base.

After his arrest, Williams gave a statement to law enforcement and denied throwing the bag out the window and denied he was selling cocaine. Williams admitted smoking cocaine earlier in the day.

On September 8, 2010, Williams was charged with possession of cocaine base. It also was alleged that he had suffered two prior convictions that constituted “strikes” and had served three prior prison terms. On October 29, 2010, a jury convicted Williams of possession of cocaine base.

On November 1, 2010, Williams admitted his prior convictions and prior prison terms. Prior to accepting his plea, the trial court went through each prior conviction and

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

each prior prison term, making sure Williams understood the nature of each allegation, understood his constitutional rights regarding the right to a trial and attendant rights on the allegations, and understood he was knowingly, voluntarily, and intelligently waiving his rights and admitting each allegation. Williams was represented by counsel at the time he admitted the allegations.

Subsequently, Williams sent a note to the trial court that stated, in relevant part:

“My intentions on 1-12-11 is to pull my plea back and take my priors to trial, on 10-30-10 I was under severe pressure and in a state of shock, my mind and thinking was zero.

“I was misinformed about everything. Because of that I will be asking to have a Marsden [sic] hearing at that time to remove my current [sic] attorney.”

On December 20, 2010, the trial court denied Williams’s request to “pull back” the plea.

At the January 12, 2011, hearing, Williams made a motion to continue the sentencing hearing. The stated purpose of the continuance was to obtain medical and other records, apparently to support a motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497. No mention was made by Williams of a request for a Marsden hearing, or that he wished new counsel. The trial court did ask Williams if he was waiving time for sentencing, to which he responded affirmatively. The trial court then asked, “Anything else?” Again, no mention was made of a need for new counsel or a Marsden hearing in response to the question. Ultimately, the trial court granted the continuance.

At the continued sentencing hearing on February 23, 2011, Williams renewed his request to withdraw his admissions on the prior convictions and prior prison terms. In denying the request, the trial court noted that it had “questioned Mr. Williams extensively and the Court found on numerous occasions that Mr. Williams had expressly, knowingly, understandably, and intelligently waived his constitutional rights” and that the waiver

was “freely and voluntarily made, with an understanding of the nature and consequences of the admission.”

Williams was sentenced to an aggregate term of 28 years to life. The trial court also imposed fines and fees, including a section 1203.1b fee of \$296.

DISCUSSION

Williams raises three issues in this appeal: (1) error in failing to conduct a *Marsden* hearing; (2) imposition of a term of imprisonment that constitutes cruel and unusual punishment; and (3) error in imposing a \$296 section 1203.1b fee. The *Marsden* issue we will address on the merits; the other two issues have been forfeited.

I. *Marsden* Hearing

The key question is whether Williams ever gave a “clear indication” that he wanted new counsel, which would have triggered the trial court’s obligation to conduct a *Marsden* hearing. (*People v. Sanchez* (2011) 53 Cal.4th 80, 90 (*Sanchez*.) We think not.

Williams sent a note to the trial court stating that he intended to withdraw his plea and seek a hearing on obtaining new counsel when he came to court on January 12, 2011. A *Marsden* hearing is not required unless “the defendant in some manner moves to discharge his current counsel.” (*People v. Lucky* (1988) 45 Cal.3d 259, 281.) Defendant did not move to discharge his attorney in his letter to the trial court. The letter Williams sent to the trial court, at most, indicated he intended to request a *Marsden* hearing at a future point in time. Consequently, the trial court was not obligated to conduct a *Marsden* hearing based on receipt of the letter from Williams.

When he in fact came to court on January 12, Williams made no mention of wanting new counsel. Despite multiple appearances in the trial court, Williams never raised the issue of wanting new counsel when he was present in court. Absent a specific request, or a clear indication from Williams that he wanted new counsel, the trial court was under no obligation to conduct a *Marsden* hearing. (*Sanchez, supra*, 53 Cal.4th at p. 90.)

It appears that Williams's letter to the trial court and subsequent motion to withdraw his plea were prompted by "buyer's remorse" or postplea apprehension regarding the anticipated sentence. However, "[p]ostplea apprehension (buyer's remorse) regarding the anticipated sentence ... is not sufficient to compel the exercise of judicial discretion to permit withdrawal of the plea of guilty. [Citation.]" (*People v. Knight* (1987) 194 Cal.App.3d 337, 344.)

II. Sentencing Issues Forfeited

Cruel and unusual punishment claim

Williams failed to object to his sentence on the grounds it constituted cruel and unusual punishment. For the first time in this appeal, Williams contends his sentence of 28 years to life constitutes cruel and/or unusual punishment within the meaning of the state and federal Constitutions. (Cal. Const., art. I, § 17; U.S. Const., 8th Amend.) The People argue the issue was not preserved for appellate review. We agree.

Claims of cruel and unusual punishment in violation of constitutional standards involve fact-specific determinations about the offense and the offender and must be raised in the trial court to avoid waiver. (*People v. Norman* (2003) 109 Cal.App.4th 221, 229; *People v. Kelley* (1997) 52 Cal.App.4th 568, 583 (*Kelley*); *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.) Although Williams urged the trial court to exercise its discretion to dismiss prior strikes, and in so doing argued that the sentence would otherwise be excessive or disproportionate, Williams never claimed the sentence would violate the constitutional prohibitions against cruel and/or unusual punishment. We conclude Williams has waived the issue and therefore his appeal on this ground fails. (*Kelley, supra*, 52 Cal.App.4th at p. 583.)

Nevertheless, even if Williams had preserved the issue, he would not have prevailed for the reasons briefly noted below. Therefore, we reject his claim of ineffective assistance of counsel for failing to raise the issue in the trial court.

Under the state constitutional standard, a prison sentence may constitute cruel and/or unusual punishment if it is “so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.” (*In re Lynch* (1972) 8 Cal.3d 410, 424.) Defendant has waived this argument by failing to raise it below. (*Kelley, supra*, 52 Cal.App.4th at p. 583.)

Especially relevant to this determination is an examination of the nature of the offense and the offender, ““with particular regard to the degree of danger both present to society.”” (*People v. Dillon* (1983) 34 Cal.3d 441, 479 (*Dillon*).) In assessing the nature of the offense, the trial court considers the totality of the circumstances surrounding the commission of the crime, including such factors as its motive, the way it was committed, the extent of the defendant’s involvement, and the consequences of his acts. (*Ibid.*) In analyzing the nature of the offender, a trial court should consider “the defendant’s individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind.” (*Ibid.*)

Williams argues that the sentence of 28 years to life is grossly disproportionate to the crime of possession of cocaine base. According to Williams, he is in need of treatment, not incarceration. In assessing a claim of cruel and unusual punishment, it is appropriate to give considerable weight to the fact that a defendant is a repeat offender who seemingly has not learned from past incarceration. (*People v. Stone* (1999) 75 Cal.App.4th 707, 715 [sentence of 25 years to life for drug conviction not cruel and unusual punishment given the defendant’s recidivism].) As we summarized in *People v. Cooper* (1996) 43 Cal.App.4th 815 at pages 823 through 824:

“Under the three strikes law, defendants are punished not just for their current offense but for their recidivism. Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses. (*Rummel v. Estelle* (1980) 445 U.S. 263, 284.) The primary goals of recidivist statutes are: ‘... to deter repeat offenders and, at some point in the life of one who repeatedly commits criminal offenses serious enough to be punished as felonies, to

segregate that person from the rest of society for an extended period of time. This segregation and its duration are based not merely on that person's most recent offense but also on the propensities he has demonstrated over a period of time during which he has been convicted of and sentenced for other crimes. Like the line dividing felony theft from petty larceny, the point at which a recidivist will be deemed to have demonstrated the necessary propensities and the amount of time that the recidivist will be isolated from society are matters largely within the discretion of the punishing jurisdiction.' (*Id.* at pp. 284-285.)"

Williams has two prior serious or violent felony convictions. In addition, between 1986 and the present offense, Williams was returned to custody for parole violations at least 10 times. Williams was 45 at the time he committed the current offense, with a record of criminal activity extending back nearly 30 years. Williams had prior convictions for robbery with use of a deadly weapon, attempted burglary, and transporting and selling a controlled substance. In light of this information, the sentence does not shock the conscience. (*Dillon, supra*, 34 Cal.3d at p. 479.)

In the federal context, a claim of cruel and unusual punishment is applicable to noncapital cases only in exceedingly rare or extreme cases involving sentences that are grossly disproportionate to the offense. (*Ewing v. California* (2003) 538 U.S. 11, 20, 30 (*Ewing*) (lead opn. of O'Connor, J.); *Lockyer v. Andrade* (2003) 538 U.S. 63, 73.)

In *Ewing*, the Supreme Court upheld a three strikes sentence, even when applied concerning a nonviolent third strike. The defendant had stolen three golf clubs worth \$1,200 as his third strike offense and was sentenced to 25 years to life. (*Ewing, supra*, 538 U.S. at p. 20.) The Supreme Court explained that the sentence did not constitute cruel and unusual punishment: "When the California Legislature enacted the three strikes law, it made a judgment that protecting the public safety requires incapacitating criminals who have already been convicted of at least one serious or violent crime. Nothing in the Eighth Amendment prohibits California from making that choice." (*Id.* at p. 25.) Further, the Supreme Court explained that the legislative goal of punishing recidivist offenders more harshly is justified: "In weighing the gravity of [the defendant's] offense,

we must place on the scales not only his current felony, but also his long history of felony recidivism. Any other approach would fail to accord proper deference to the policy judgments that find expression in the legislature's choice of sanctions. In imposing a three strikes sentence, the State's interest is not merely punishing the offense of conviction, or the 'triggering' offense: '[I]t is in addition the interest ... in dealing in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law.' [Citation.] To give full effect to the State's choice of this legitimate penological goal, our proportionality review of [the defendant's] sentence must take that goal into account." (*Id.* at p. 29.) The court concluded the defendant's sentence in that case "is justified by the State's public-safety interest in incapacitating and deterring recidivist felons, and amply supported by his own long, serious criminal record." (*Id.* at pp. 29- 30.)

Here, the sentence imposed on Williams did not constitute cruel and unusual punishment and defense counsel was not ineffective for failing to raise this issue in the trial court. (*People v. Jones* (1979) 96 Cal.App.3d 820, 827.)

Section 1203.1b fee

The probation report recommended a fee of \$296 as the probation report fee under section 1203.1b. During the sentencing hearing, the trial court imposed the recommended fee. Williams raised no objection to the fee at sentencing, although other portions of the probation report were objected to by Williams. Under these circumstances, failure to object in the trial court to the amount of the section 1203.1b fee constitutes a waiver of any objection for purposes of appeal. (*People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072.)

Williams's contention that waiver principles are inapplicable because he characterizes his contention as a sufficiency of the evidence challenge is incorrect. In *People v. Butler* (2003) 31 Cal.4th 1119, Justice Baxter's concurring opinion specifically noted that "despite our ruling today, it remains the case that *other* sentencing

determinations may not be challenged for the first time on appeal, even if the defendant claims that the resulting sentence is unsupported by the record.” (*Id.* at p. 1130 (conc. opn. of Baxter, J.).)

DISPOSITION

The judgment is affirmed.