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

THE PEOPLE,

Plaintiff and Respondent,

v.

ARTHUR RAY LITTLEFIELD,

Defendant and Appellant.

F062793

(Super. Ct. No. F10906103)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. D. Tyler Tharpe, Judge.

Allan E. Junker, under appointment by the Court of Appeal, for Defendant and Appellant.

Office of the State Attorney General, Sacramento, California, for Plaintiff and Respondent.

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

STATEMENT OF THE CASE

On April 18, 2011, defendant Arthur Ray Littlefield was charged in a consolidated amended complaint with possession of methamphetamine (Health & Saf. Code,¹ § 11377, subd. (a); count 1), possession of Vicodin (§ 11350, subd. (a); count 2), driving under the influence of alcohol or drugs (Veh. Code, § 23152, subd. (a); count 3), possession of 28.5 grams or less of marijuana (§ 11357, subd. (b); count 4), possession of marijuana for sale (§ 11359; count 5), and possession of concentrated cannabis (§ 11357, subd. (a); count 6). It was further alleged defendant had served two prior prison terms (Pen. Code, § 667.5, subd. (b)) and that, when he committed counts 5 and 6, he was released from custody on bail or own recognizance (*id.*, § 12022.1).

On April 18, 2011, the parties entered into a plea agreement. Defendant waived his constitutional rights pursuant to *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122. The court advised defendant of the consequences of admitting the allegations, including that, although the maximum exposure was five years eight months in prison, the plea agreement was for a sentence of four years eight months. The parties stipulated to a factual basis for the pleas, and the police reports were incorporated into the record. Defendant then pled guilty to counts 1, 3, and 5, and admitted the Penal Code section 12022.1 enhancement. Upon the People's motion, counts 2, 4, and 6, the prior prison term allegations, and a "trailing" misdemeanor case, were dismissed. The court found defendant knowingly and intelligently waived his rights, the pleas were freely and voluntarily made, and there was a factual basis for the pleas.

On May 11, 2011, the trial court sentenced defendant to prison for the middle term of two years on count 5, a consecutive term of eight months (one-third the middle term) on count 1, and a consecutive term of two years on the Penal Code section 12022.1

¹ Further statutory references are to the Health and Safety Code unless otherwise stated.

enhancement, for a total aggregate term of four years eight months.² The court awarded custody credits, and ordered defendant to pay various fees and fines. Defendant filed a timely notice of appeal. His requests for issuance of a certificate of probable cause (Pen. Code, § 1237.5), made in conjunction with his notice of appeal and, later, by appellate counsel, were denied.

FACTS³

On August 18, 2010, Fresno police officers found defendant unconscious behind the steering wheel of his car. The car was partly in the intersection of Fresno and Sierra Streets; its engine was running and it was in drive, but defendant's foot was on the brake. Defendant had a marijuana cigarette in his hand, and a strong odor of marijuana emanated from the vehicle. When roused, defendant appeared disoriented and confused. He showed officers what he said was his marijuana card, but the card appeared fraudulent. Defendant admitted smoking marijuana earlier in the day and said he had taken a Vicodin around noontime. A number of prescription pills, as well as marijuana and various sums of cash, were found in the car. Defendant showed physical signs of being under the influence, and was unable to complete various sobriety tests. Following his arrest, defendant discarded methamphetamine in the patrol car.

On March 19, 2011, Clovis police officers noticed defendant driving somewhat erratically, and determined he was on parole and had a suspended driver's license. A vehicle stop revealed a strong odor of marijuana emanating from the vehicle's interior. Defendant stated he had a medical marijuana card, but not with him. A roll of cash was found in defendant's pocket, and a large plastic sandwich bag and smaller plastic baggies containing marijuana were found in the vehicle. One of the bags contained hashish or

² Defendant was given credit for time served on count 3, a misdemeanor.

³ The facts are derived from the police reports that supplied the factual basis for defendant's pleas.

concentrated marijuana. Also found in the car were prescription pills. Text messages on a cellular telephone in the car showed defendant was attempting to buy or sell marijuana. In some of the messages, defendant referenced selling prescription medications.

APPELLATE COURT REVIEW

Defendant's appointed appellate counsel has filed an opening brief that summarizes the pertinent facts, raises no issues, and requests this court to review the record independently. (*People v. Wende* (1979) 25 Cal.3d 436.) The opening brief also includes the declaration of appellate counsel stating defendant was advised he could file his own brief with this court. By letter dated January 9, 2012, we invited defendant to submit additional briefing.

Defendant replied with two letters, contending appellate counsel was ineffective for failing to pursue a claim of ineffective assistance of trial counsel, who in turn was ineffective for failing to (1) advise defendant of possible defenses to the charges prior to the change of plea, and (2) attack the validity of law enforcement officers' review — *prior* to defendant's arrest — of the text messages contained in the cellular telephone.

The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) "Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (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; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687-694.)

"If the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance 'unless counsel was asked for an

explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’ [Citation.]” (*People v. Kipp* (1998) 18 Cal.4th 349, 367.) In other words, “in assessing a Sixth Amendment attack on trial counsel’s adequacy mounted on *direct appeal*, competency is *presumed* unless the record *affirmatively* excludes a rational basis for the trial attorney’s choice. [Citations.]” (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1260, original italics.)

Defendant’s claim of ineffective assistance of trial counsel fails with respect to the search of the cellular telephone, because a warrantless search of text messages is valid as being incident to a lawful custodial arrest. (*People v. Diaz* (2011) 51 Cal.4th 84, 88, 90-101.) Because here, probable cause to arrest defendant existed before the phone was searched, this is so even though the search preceded the formal arrest. (*People v. Ingle* (1960) 53 Cal.2d 407, 413; see *Sibron v. New York* (1968) 392 U.S. 40, 62-63, 67.)

Defendant’s claim that trial counsel was ineffective for failing to advise defendant of possible valid defenses to the drug possession charges — specifically those under the Compassionate Use Act of 1996 (§ 11362.5) and the Medical Marijuana Program (§ 11362.7 et seq.) — cannot be assessed on the record on appeal. Accordingly it should be presented by way of a petition for writ of habeas corpus. (See *In re Hochberg* (1970) 2 Cal.3d 870, 875, disapproved on another ground in *In re Fields* (1990) 51 Cal.3d 1063, 1070, fn. 3; *People v. Everett* (1986) 186 Cal.App.3d 274, 279, disapproved on another ground in *People v. Mendez* (1999) 19 Cal.4th 1084, 1097-1098 & fns. 7-9.)⁴

⁴ Nothing in the record suggests the issue should be deemed waived. (See, e.g., *People v. Orozco* (2010) 180 Cal.App.4th 1279, 1285; cf. *People v. Marlin* (2004) 124 Cal.App.4th 559, 567.)

Defendant alleges he filed such a petition in the trial court, but it was denied on the ground the issues could have been resolved on direct appeal. If defendant’s representation is accurate, the trial court erred. Denial of the effective assistance of counsel is an error that is not waived by a guilty plea. (*People v. Kaanehe* (1977) 19 Cal.3d 1, 9, fn. 5.) Because defendant’s ineffective assistance claim in essence challenged the validity of his guilty plea, he was required to obtain a certificate of

Defendant's claim of ineffective assistance of appellate counsel fails because the record does not establish deficient performance by appellate counsel.

After independent review of the record, we have concluded there are no reasonably arguable legal or factual issues *on appeal*.

DISPOSITION

The judgment is affirmed.

probable cause from the trial court in order to raise the issue on appeal. (Pen. Code, § 1237.5; see *People v. Stubbs* (1998) 61 Cal.App.4th 243, 244-245.) Here, however, defendant's claim was based on matters outside the record on appeal; moreover, the trial court denied his requests for a probable cause certificate, even though defendant asserted, inter alia, that trial counsel failed to advise him of possible defenses to the charges and that he would not have pled guilty had he been aware of those defenses. Although the general rule is that habeas corpus cannot serve as a substitute for appeal (*In re Dixon* (1953) 41 Cal.2d 756, 759; accord, *In re Clark* (1993) 5 Cal.4th 750, 765), that procedural bar does not apply to claims of ineffective assistance of trial counsel (*In re Robbins* (1998) 18 Cal.4th 770, 814, fn. 34; accord, *People v. Michaels* (2002) 28 Cal.4th 486, 526, fn. 6), especially where, as here, defendant was effectively prevented from raising the issue on appeal.