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

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT ALLEN SAVAGE,

Defendant and Appellant.

F062928

(Super. Ct. No. F10901602)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Ralph Nunez[†] and Jeffrey Bird, Judges.[‡]

Emry J. Allen, 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, Charles A. French and Clifford E. Zall, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Wiseman, Acting P.J., Levy, J., and Detjen, J.

† Retired Judge of the Fresno Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

‡ Judge Nunez presided over the plea hearing and Judge Bird presided over the sentencing hearing.

Appellant Robert Allen Savage was charged with two counts of making criminal threats (Pen. Code, § 422, counts 1 and 2)¹ and one count of misdemeanor exhibiting a deadly weapon (§ 471, subd. (a)(1), count 3). The information also alleged that Savage used a deadly and dangerous weapon in the commission of counts 1 and 2 (§12022, subd. (b)(1)), and that he had a prior strike conviction (§§ 667, subds. (b)-(i)), and had served three prior prison terms (§ 667.5, subd. (b)). After many continuances, Savage accepted the prosecution’s offer and pled no contest to counts 1 and 2, and admitted the prior strike, a weapons enhancement, and two of the prior prison term enhancements for a stipulated prison term of six years. The remaining allegations were dismissed. The court subsequently imposed the six-year prison term. Despite not having moved to withdraw his plea in the trial court, Savage appeals contending the judgment should be reversed because (1) his plea was coerced and (2) the record fails to show he affirmatively waived his constitutional rights. In addition, Savage contends he is entitled to additional custody credits. We find no merit to the contentions and affirm.

FACTS

Paulo Torres bought a set of drums from Savage for \$500. Later, Savage wanted the drums back and told Torres he had only loaned them to him. When Torres disagreed, Savage began “to antagonize” Torres and repeatedly threatened to kill him. Torres told Savage he would return the drums when Savage returned the money. On one occasion, Savage came by Torres’s place of business—a smog shop on Blackstone Avenue in Fresno—with a shovel handle and threatened to kill Torres. Savage left when Torres called the police. On another occasion, Savage came by, threatened to kill Torres and chased him with a knife until Torres grabbed a machete he kept in his shop and told Savage he was going to call the police. On the third occasion, Savage rode by on his bicycle and threw a hot cup of coffee into the shop where the customers were. Torres

1 Further statutory references are to the Penal Code.

chased Savage to his house and Savage was arrested. Savage frightened Torres because Torres believed Savage's emotional condition was "crazy kind of."

DISCUSSION

The Claimed Coerced Plea

Savage contends the judgment must be reversed and his case remanded to the trial court so he may withdraw his plea because it was coerced and invalid. He relies on the declaration he submitted with his request for a certificate of probable cause, which the trial court granted. According to Savage, the trial judge engaged in unlawful and unethical conduct when he met with counsel in chambers. The prosecutor told defense counsel he was not going to attempt to prove any prior convictions or strikes.

"Essentially, the D.A. stipulated to denying all special allegations and enhancements at trial and sentencing." Under the original information, Savage faced a 23-year prison term. Under the prosecution's stipulation, he faced only a four-year term.

Savage "was informed" the judge was not going to dismiss the special allegations or enhancements before trial, even upon a motion by the district attorney. And, defense counsel told him the information would be read to the jury, including the special allegations, and the jury would become prejudiced regarding the underlying charges. According to Savage, there were evidentiary problems regarding the special allegations and enhancements. "Nevertheless, that was the issue that the trial judge used in order to, (A) FORCE the D.A. to prove charges he did not intend to prove at trial, and (B) force defendant to plea no contest."

Savage concludes, "At sentencing, ... the judge was adamant in making sure defendant was advised he COULD — appeal.... It seems judicial error was 'intentionally' committed in order to get defendant 'off the streets' for a while, which is common. Why would the judge want to make sure the defendant could appeal the no contest plea? That is NOT normal. 'Reasonable suspicion,' or 'probable cause,' exists,

at least on one ground, to believe that the no contest plea was NOT FREELY AND — WILLINGLY made.”

Early in the criminal proceedings, Savage’s competency was questioned. The examiner concluded that Savage had a history of involuntary psychiatric hospitalizations and further observation was necessary to clarify his psychiatric diagnosis. However, Savage was competent to stand trial.

Analysis

Savage claims he is entitled to withdraw his plea because it was coerced by threats that if he did not accept the offered plea, the trial judge would inform the jury of his alleged prior convictions; he was denied effective assistance of counsel because defense counsel induced him to agree to the coerced plea; and the “record reveals improper participation by the trial court in the plea negotiations and agreement.” (Unnecessary capitalization omitted.) The People respond that Savage’s claims are not supported by competent evidence.

As a preliminary matter, Savage did not move to withdraw his plea pursuant to section 1018 in the trial court, but argues this court may grant relief because the record shows his plea was invalid. (*In re Leyva* (1970) 8 Cal.App.3d 404, 405-406.) He contends his declaration under penalty of perjury provides affirmative evidence that his plea was invalid on multiple grounds. We disagree.

Savage’s self-serving declaration, which is proffered for the truth of the statements within, consists of hearsay, conclusions, and opinions. As a general rule, an affidavit is not competent evidence even though made under oath. It is hearsay because there is no opportunity to cross-examine the affiant. (1 Witkin, Cal. Evidence (4th ed. 2000) Hearsay, § 298, p. 1006.) Because it is hearsay, Savage’s declaration is not affirmative evidence that his plea was invalid. (*Pajaro Valley Water Management Agency v. McGrath* (2005) 128 Cal.App.4th 1093, 1108.) As such, Savage has failed to present a case for relief.

In a related argument, Savage urges the court to exercise its discretion and treat his opening brief as a petition for writ of habeas corpus in the interests of judicial economy and “given the unusual posture of this case.” He also urges this court to issue an order to show cause and remand the matter to the superior court for an evidentiary hearing because the operative pleading has already been filed. (*People v. Segura* (2008) 44 Cal.4th 921, 928, fn. 4.) We decline to do so. In reviewing a petition for writ of habeas corpus, we presume the regularity of proceedings that resulted in the final judgment and the burden is on the petitioner to establish the contrary. (*People v. Duvall* (1995) 9 Cal.4th 464, 474.) Because the appellate record contains no competent evidence to support Savage’s claim that his plea was coerced and invalid, Savage has not shown he is entitled to relief.

Waiver of Constitutional Rights

Savage next contends the transcript does not affirmatively show he waived his rights to confrontation, a jury trial, and his privilege against self-incrimination. Thus, the judgment must be reversed for *Boykin-Tahl*² error. Respondent does not address this issue.

Again, we reject the claim because it is not supported by the record. First, Savage completed a “Felony Advisement, Waiver of Rights, and Plea Form.” The plea form advised Savage explicitly of each of the applicable constitutional rights and required that he waive each one by initialing eight separate boxes. Savage initialed each box and responded affirmatively to the court’s queries whether he had discussed the information on the form with counsel and whether he understood every item he initialed. He acknowledged he would be sentenced to six years in prison and would have two

² *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122 (“*Boykin/Tahl*”).

additional strikes on his record. He then entered his plea, which the court found to be knowingly, freely, and intelligently entered.

A validly executed plea form is sufficient to satisfy the dictates of *Boykin/Tahl*. (*In re Ibarra* (1983) 34 Cal.3d 277, 285-286.) Savage acknowledges the record contains his signed form “purporting to waive” his *Boykin-Tahl* rights. He submits, however, the totality of the circumstances, including those set forth in his declaration, do not demonstrate his plea and admissions were knowing, voluntary, and intelligent.

The totality of the circumstances include that Savage was no stranger to the criminal justice system. A defendant’s prior experience with the criminal justice system is relevant to whether he knowingly waived constitutional rights. (*Parke v. Raley* (1992) 506 U.S. 20, 37.) Savage’s prior convictions date back to 1988. Since then, he had acquired over a dozen convictions and at least that many parole violations. Savage’s prior experience with the criminal justice system, coupled with the plea form and his responses in open court, belie his claim that he entered his plea unaware of the constitutional rights he was waiving.

Additional Conduct Credits

Savage’s crimes were committed in 2010, before the effective date of the 2011 amendment to section 4019. He acknowledges that the amendment expressly applies only to defendants whose crimes were committed on or after October 1, 2011. (§ 4019, subd. (h).) Nevertheless, he contends equal protection principles entitle him to the amendment’s one-for-one conduct credit because there is no rational basis for distinguishing between defendants whose crimes were committed before and after the effective date of the statute. We rejected this claim in *People v. Ellis* (2012) 207 Cal.App.4th 1546, 1551-1552, and see no reason to revisit the issue here.

DISPOSITION

The judgment is affirmed.