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

THE PEOPLE,

Plaintiff and Respondent,

v.

YUSEF LAMONT PIERCE,

Defendant and Appellant.

F063064

(Super. Ct. No. F10903822)

**OPINION**

**THE COURT**\*

APPEAL from a judgment of the Superior Court of Fresno County. Jeffrey Bird, Commissioner.

John P. Dwyer, 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., Gomes, J., and Kane, J.

## FACTS AND PROCEEDINGS

On July 29, 2010, appellant, Yusef Lamont Pierce, was charged in a criminal complaint with four counts of second degree robbery involving different victims (Pen. Code, § 211, counts 1-4),<sup>1</sup> kidnapping (§ 209, subd. (b)(1), count 5), four counts of false imprisonment, again involving different victims (§ 236, counts 6-9), being a felon in possession of a firearm (§ 12021, subd. (a)(1), count 10), being a felon in possession of ammunition (§ 12316, subd. (b)(1), count 11), felony evasion of a peace officer while operating a motor vehicle (Veh. Code, § 2800.2, subd. (a), count 12), misdemeanor hit and run driving (Veh. Code, § 20002, subd. (a), count 13), and misdemeanor resisting arrest (§ 148, subd. (a)(1), count 14). Counts 1 through 5 alleged that appellant used a firearm within the meaning of section 12022.53, subdivision (b). Counts 6 through 9 alleged a gun use enhancement (§ 12022.5, subd. (a)). Appellant was also charged with a prior prison term enhancement (§ 667.5, subd. (b)).

On February 14, 2011, appellant entered into a plea agreement. Under the terms of the plea agreement, appellant would admit two robbery counts, the firearm allegation for each of those counts, and the prior prison term enhancement. Also under the terms of the agreement, appellant would receive a stipulated prison term of 19 years 4 months. Appellant executed a felony advisement of rights that set forth the terms of the plea agreement as well as a waiver of his rights pursuant to *Boykin/Tahl*.<sup>2</sup> The court advised appellant of, and appellant waived, his constitutional rights.<sup>3</sup> The parties stipulated to a

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<sup>1</sup> Unless otherwise designated, all statutory references are to the Penal Code.

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

<sup>3</sup> At the change of plea hearing, appellant's counsel, Mr. Salhab, told the court that it was a stipulated agreement but he was going to write a sentencing brief to the court asking for a lower sentence. Salhab acknowledged they may not have much wiggle room. Salhab advised appellant that he would serve 85 percent of his sentence.

factual basis for the plea.<sup>4</sup> Appellant pled no contest to two counts of second degree robbery and one count of felony evasion of a peace officer. Appellant admitted two violations of section 12022.53, subdivision (b) and the prior prison term enhancement. The remaining allegations were dismissed by the trial court upon the motion of the People.

Appellant filed a motion pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*) on March 4, 2011. The trial court conducted the *Marsden* hearing on March 14, 2011. Appellant explained to the court that he accepted the plea bargain because Mr. Salhab told him there was a good chance the court would reduce his sentence. Appellant felt he was put on the spot and did not have enough time to make a good decision. Appellant believed there was a difference between what the court told him at the change of plea hearing and what his counsel told him. Appellant believed his sentence of over 19 years was unreasonable. Appellant asserted that Salhab told him that white people were out to get him, they were unforgiving, and Salhab did not want to see appellant get a life sentence.

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<sup>4</sup> There was no preliminary hearing. According to the probation officer's report, at 10:33 p.m. on July 27, 2010, Baskin Robbins employee J. Harris was taking out the trash when appellant placed a gun at his back and forced Harris into the store. Pointing his gun, appellant ordered Harris and three other employees into the freezer. Appellant pointed his gun at Harris and asked where the safe was located. One of the employees pointed to the safe and appellant took several bags of cash. The employees called the police who located appellant. When an officer attempted to stop appellant, appellant tried to escape leading to a high speed chase. Appellant reached speeds of up to 100 miles per hour through the cities of Clovis and Fresno. Appellant also ran stop signs. Appellant crashed into a light pole. Officers retrieved \$1,484.13 in cash from appellant's vehicle.

Salhab responded that the original plea offer from the prosecution was for a 22-year stipulated sentence. Salhab worked from early on to reduce that offer but the prosecutor originally refused to reduce the offer. Salhab explained that the final plea bargain was the result of months of investigation and negotiation. Salhab and members of appellant's family watched a confession by appellant. Appellant was facing a sentence of 31 years to life. Salhab did consider filing a motion pursuant to *Miranda*,<sup>5</sup> but ultimately decided it would not be worth it.

Salhab visited appellant six times in jail, brought him the police reports, met with appellant's mother, and talked to both of appellant's parents numerous times on the phone. Salhab was willing to proceed to trial, but appellant decided not to and to enter into the plea bargain. Salhab discussed the case with his supervisor and a couple of other attorneys with whom he works. Given appellant's confession and the number of years he was facing, Salhab believed appellant did the right thing in entering into the plea bargain. Salhab did not believe this case had been rushed.

On March 21, 2011, the trial court denied the *Marsden* motion, but appointed new counsel, Mr. McKneely, to represent appellant. McKneely filed a motion for appellant to withdraw his plea on June 14, 2011. Appellant stated in his declaration that after hearing the prosecutor's offer of 19 years in prison, appellant asked Salhab to make a counteroffer. Appellant saw Salhab walk around the courtroom but did not see him talk to the prosecutor. Salhab then came back to appellant and told him the prosecutor would not change the offer. Appellant stated that Salhab said he would try to get the judge to lower the sentence a few years and that appellant did not understand what a stipulated sentence was when he executed the change of plea form. Had appellant understood the nature of a stipulated sentence, he would not have signed the change of plea form.

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<sup>5</sup> *Miranda v. Arizona* (1966) 384 U.S. 436.

After some continuances, McKneely informed the court on May 25, 2011, that appellant had signed a declaration and sought to have appellant's motion to withdraw his plea set for June 2011. On June 16, 2011, the motion was continued for two weeks. On June 30, 2011, McKneely stated that after talking to his client, appellant wished to withdraw his motion to withdraw his plea. The court noted that although it had denied appellant's *Marsden* motion, it appointed McKneely to give appellant an opportunity to discuss his long prison term with another attorney before deciding what to do. The court noted that appellant could still pursue his motion to withdraw his plea.

Appellant responded that he had discussed the matter with McKneely, he had an ample amount of time to consider the matter, and he and counsel felt that not pursuing the motion was the best decision for him and appellant was ready to be sentenced. The court sentenced appellant to the upper term of 5 years on count 1 plus an additional 10 years for the use of a gun (§ 12022.53, subd. (b)). The court sentenced appellant to a consecutive term of 1 year on count 2 plus a term of 3 years 4 months for using a gun. Appellant was given a concurrent sentence of 3 years on count 12. Appellant's total prison term was 19 years 4 months. The court granted appellant 340 days in custody credits plus 51 days of conduct credits for total custody credits of 391 days.

Appellant filed a timely notice of appeal and obtained a certificate of probable cause.

### **APPELLATE COURT REVIEW**

Appellant'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 indicating that appellant was advised he could file his own brief with this court. By letter on January 5, 2012, we invited appellant to submit additional briefing.

Appellant replied with a document challenging his legal representation by both Salhab and McKneely. Appellant asserts that McKneely did not investigate his assertions of misrepresentation by Salhab and did not want to know the details of appellant's case. Appellant claims he has evidence that the kidnap victim assisted him as part of an "inside job" and that the scope of the case against him would be different without the kidnapping allegations.

We view appellant's brief as a challenge to the adequacy of his trial counsel. The defendant has the burden of proving ineffective assistance of trial counsel. To prevail on a claim of ineffective assistance of trial counsel, the defendant must establish not only deficient performance, which is performance below an objective standard of reasonableness, but also prejudice. A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Tactical errors are generally not deemed reversible. Counsel's decisionmaking is evaluated in the context of the available facts. To the extent the record fails to disclose why counsel acted or failed to act in the manner challenged, appellate courts will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or, unless there simply could be no satisfactory explanation. Prejudice must be affirmatively proved. The record must affirmatively demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. (*People v. Maury* (2003) 30 Cal.4th 342, 389.) Attorneys are not expected to engage in tactics or to file motions which are futile. (*Id.* at p. 390; also see *People v. Mendoza* (2000) 24 Cal.4th 130, 166.)

Appellant's assertions regarding his attorneys are based on facts and details outside of the record on appeal. We note that appellant himself, after consultation with McKneely, on the record expressly withdrew his motion to withdraw his plea. Other than

his unsubstantiated assertion that his attorneys were ineffective, appellant has failed to affirmatively demonstrate any deficiency in his trial counsel's representation.

Appellant further failed to show any error in the trial court's imposition of sentence, which was a stipulated sentence under the terms of the plea agreement. Mr. Salhab explained to the trial court that he explained the consequences of the plea agreement to appellant prior to appellant accepting the bargain. We note that appellant entered into a plea agreement and received the benefit of the agreement. His sentence was no longer than the sentence indicated by the change of plea form, the parties, and the trial court.<sup>6</sup> Defendants cannot set aside their pleas merely because they change their minds or have buyer's remorse. (*In re Vargas* (2000) 83 Cal.App.4th 1125, 1143-1144; *People v. Knight* (1987) 194 Cal.App.3d 337, 344.) Finally, appellant asserts that he did not commit a kidnapping. The kidnapping allegation, however, was dismissed and appellant was not sentenced on that allegation.<sup>7</sup>

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

### **DISPOSITION**

The judgment is affirmed.

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<sup>6</sup> The prison realignment statute was made prospectively applicable to prisoners starting on October 1, 2011 (§ 1170, subd. (h)(6)). Appellant was sentenced on June 30, 2011, and the realignment statutes do not appear to be applicable to his case.

<sup>7</sup> Appellant also asserts that the trial court did not state its reasons for dismissing several of the allegations as required by section 1385. The clerk's minutes indicate that the remaining allegations were dismissed on the prosecutor's motion. Even if the trial court committed procedural error in failing to state its reasons for dismissing these allegations, appellant received the benefit of the plea bargain by the dismissal of these allegations and the procedural error, if any, was harmless.