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

THE PEOPLE,

Plaintiff and Respondent,

v.

SANTOS ARTURO MARTINEZ,

Defendant and Appellant.

F063415

(Super. Ct. No. 11CM1149)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Steven A. Torres, 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 Detjen, J.

STATEMENT OF THE CASE

On May 6, 2011, an information was filed in Kings County Superior Court, charging defendant Santos Arturo Martinez with driving under the influence of alcohol or drugs (DUI) (Veh. Code, § 23152, subd. (a); count 1), driving with a blood-alcohol content (BAC) of 0.08 percent or more (*id.*, subd. (b); count 2), and driving with a suspended or revoked license (*id.*, § 14601.2, subd. (a); count 3). As to counts 1 and 2, it was further alleged, pursuant to Vehicle Code section 23578, that defendant had a BAC of 0.15 percent or higher; and, pursuant to Vehicle Code sections 23550 and 23550.5, that he had suffered three prior DUI convictions within the preceding 10 years, making counts 1 and 2 felonies.

On May 19, 2011, a plea agreement was reached. 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 him of the consequences of pleading guilty, including that he faced a maximum sentence of three years in prison. The prosecutor set out the factual basis for defendant's plea, which was that on the date alleged, defendant was observed driving a motor vehicle in excess of the speed limit; upon being stopped for a traffic violation, he was found to be under the influence of alcohol; he took a test that resulted in a BAC reading of 0.15 percent; and it was determined he had three prior DUI convictions. Defendant and his attorney concurred with the factual basis as stated by the prosecutor.

Defendant pled guilty to count 2, admitted the Vehicle Code section 23578 allegation, and admitted having suffered the three prior DUI convictions alleged in the information. The court found the plea and admissions to have been knowingly, intelligently, and voluntarily given and, in accord with the plea agreement, dismissed counts 1 and 3.

On the date set for sentencing, the prosecutor announced that during preparation for sentencing, it was discovered defendant had suffered two prior "strike" convictions.

She asked leave to file an amended information to allege those convictions, with the understanding doing so would entitle defendant to withdraw his guilty plea. Over defense objection, the court allowed the amended information to be filed. In addition to what was contained in the original information, the amended information alleged that in 1997, defendant was convicted of robbery and attempted robbery in Los Angeles County Superior Court, and that both offenses were serious or violent felonies pursuant to Penal Code sections 667, subdivisions (b)-(i) and 1170.12, subdivisions (a)-(d). The court permitted defendant to reserve the right to withdraw his plea or demur to the amended information, in order to allow defense counsel to investigate the Los Angeles case and the prosecution's supporting documentation.

On August 4, 2011, the trial court explained to defendant that it had reviewed the documentation and determined the prior convictions constituted two strikes, even though defendant was sentenced concurrently on them. Because defendant had prior strike convictions, the "Three Strikes" law prevented the court from sentencing him as if those convictions did not exist, even though defendant had already pleaded guilty. The court further explained defendant had the right to withdraw his plea and go to trial, but he would be facing a sentence of 25 years to life if convicted. The court stated its willingness to erase one of the strikes for purposes of this proceeding, if defendant did not withdraw his plea, so that the maximum punishment defendant would face would be six years in prison.

Defense counsel stated defendant would admit the one strike and take the deal. The trial court noted defendant had never withdrawn his previous plea and admissions, but, out of an abundance of caution, retook defendant's waiver of his constitutional rights, advised defendant of the consequences of admitting the allegations, had the prosecutor again set out a factual basis in which defense counsel concurred, and stated it had itself reviewed the prior conviction packets. Defendant then pled guilty to count 2 of the amended information, admitted the BAC level and prior DUI conviction allegations,

and admitted having suffered a prior robbery conviction that constituted a strike. The court dismissed the attempted robbery conviction allegation in the interests of justice and because allowing it to move forward would result in a penalty that would be unduly harsh given the actions defendant took in this case, and it dismissed counts 1 and 3.

A probation officer's report having already been prepared, the parties agreed to immediate sentencing. The trial court stated its tentative sentence was to impose a two-year prison term, doubled to four years for the prior strike, and it set out the factors it considered in reaching that determination. The parties submitted the matter; the court adopted its tentative decision, awarded time credits, and ordered defendant to pay various fees and fines. With respect to another case in which defendant previously admitted violating probation, the court terminated probation, sentenced defendant to 365 days in custody to run concurrent to the prison sentence, and ordered the balance of any fees and fines converted to a civil judgment in that matter.

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

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 that defendant was advised he could file his own brief with this court. By letter dated January 3, 2012, we invited defendant to submit additional briefing. To date, he has not done so.

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

DISPOSITION

The judgment is affirmed.