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

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO JOSEPH DIAZ,

Defendant and Appellant.

F065766

(Super. Ct. No. CRL006020)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Merced County. Ronald W. Hansen, Judge.

Francine R. Tone, 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 Levy, Acting P.J., Poochigian, J. and LaPorte, J.†

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

INTRODUCTION

On July 3, 2012, appellant, Francisco Joseph Diaz, was charged in a first amended information with two counts of attempted murder (Pen. Code, §§ 664 & 187, subd. (a), counts 1 & 2),¹ discharging a firearm at an inhabited dwelling house (§ 246, count 3), assault with a semiautomatic firearm (§ 245, subd. (b), count 4), and actively participating in a street gang with knowledge its members engage in a pattern of criminal gang activity (§ 186.22, subd. (a), count 5). Counts 1 through 4 alleged a gang enhancement. Counts 1 through 3 alleged a gun enhancement pursuant to section 12022.53, subd. (c). Count 4 alleged a gun enhancement pursuant to section 12022.5, subdivision (a).

On July 5, 2012, the parties reached a plea agreement. Appellant executed a felony advisement of rights, waiver, and plea form setting forth the terms of the agreement and the consequences of his plea. Appellant was advised of, and waived, his constitutional rights pursuant to *Boykin v. Alabama* (1969) 395 U.S. 238 and *In re Tahl* (1969) 1 Cal.3d 122 (*Boykin/Tahl*). Under the terms of the agreement, appellant faced a lid sentence of no more than 29 years in prison with the understanding that he would have to serve 85 percent of his sentence.

At the change of plea hearing on July 5, 2012, the trial court questioned appellant and determined that he discussed the matter with his counsel, reviewed the facts of his case, understood he would have to serve a substantial portion of his sentence before he would be eligible for parole, and intended to plead no contest. The court advised appellant that a plea of no contest was the same as a guilty plea. The court told appellant that the upper term on count 1 was 9 years and he faced a sentence of 20 years for the gun use enhancement for a total term of 29 years in which he would have to serve 85 percent

¹ Unless otherwise designated, all statutory references are to the Penal Code.

of the time, and his plea would result in a future serious felony conviction that would act as a strike.

The court advised appellant that he was subject to pay direct victim restitution. Appellant represented to the court that no one made any promise to him not represented in the plea form. Appellant informed the court that he read, initialed, and signed the plea form. Appellant understood he was waiving his constitutional rights. The court advised appellant of, and appellant waived, his *Boykin/Tahl* rights in open court. Appellant pled no contest to count 1 and admitted the gun use enhancement alleged pursuant to section 12022.53, subdivision (c). The court granted the prosecutor's motion to dismiss the remaining allegations.

A new defense attorney was appointed on August 9, 2012. The court granted a defense request for a continuance. Appellant filed a motion to withdraw his plea on August 17, 2012. Appellant attached a letter to the motion asserting that his original trial counsel, Christopher Caine, told him that accepting a sentence of 29 years was appellant's best course of action. Appellant also asserted that Mr. Caine compelled and pressured appellant, against his will, to accept the plea agreement.

Mr. Caine filed a declaration, attached to the prosecutor's response to appellant's motion, stating that he discussed the prosecutor's plea agreement with appellant and left it up for appellant to decide one way or the other. Mr. Caine denied telling appellant that accepting the plea agreement was the best course of action and that appellant made his choice free and voluntarily.

On August 21, 2012, the trial court denied appellant's motion to withdraw his plea. The court sentenced appellant to the upper term of 9 years for attempted murder and a consecutive term of 20 years for the gun use enhancement for a total prison term of 29 years. The court awarded custody credits of 391 days for time spent in custody, 58

days of conduct credits, and total custody credits of 449 days. The court ordered a restitution fine of \$6,960. Appellant did not obtain a certificate of probable cause.

Appellate counsel has filed a brief seeking independent review of the case by this court pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*).

FACTS

On July 8, 2011, Dina Ysazaga and Christian Dicochea were walking toward the vacant house in which they were staying. They saw appellant in the driveway. Dicochea and appellant had previous altercations. Dicochea had dropped out of the Sureño street gang and appellant was a member of the Norteño gang. While walking through the backyard of the house near a woodshed Ysazaga and Dicochea slept in, they saw appellant raise a firearm. Ysazaga and Dicochea ran toward the front of the house as appellant fired the gun twice.

Police investigators found a live round and a casing for a .22-caliber firearm on the grounds of the house. Ysazaga's backpack had a hole and a shampoo bottle in the backpack had an entry and exit hole consistent with a bullet.

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. (*Wende, supra*, 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 May 6, 2013, we invited appellant to submit additional briefing. To date, he has not replied.

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

DISPOSITION

The judgment is affirmed.