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

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN ANTHONY RUSSELL,

Defendant and Appellant.

F070732

(Super. Ct. No. BF156554A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Steven M. Katz, Judge.

Tara K. Hoveland, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, and Eric L. Christoffersen, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Franson, J. and Smith, J.

Appellant Steven Anthony Russell appeals from his no contest plea to the charge of assault by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(4).) Appellant contends the trial court failed to properly inquire into the factual basis for his plea, resulting in a plea that was neither knowingly nor voluntarily made. Separately, appellant contends he received ineffective assistance of counsel at both the pleading and sentencing phases due to counsel's failure to ensure the charges he pled to were appropriately described. For the reasons set forth below, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On August 13, 2014, a complaint was filed alleging that on or about August 7, 2014, appellant unlawfully threatened "to commit a crime which would result in death or great bodily injury to another person, to wit: Nancy McMaster" in violation of Penal Code section 422. There were no further facts about the offense provided in the complaint.

Over the next two months, appellant negotiated and entered into a plea agreement. As a result, on September 22, 2014, the district attorney's office orally amended the complaint to add a second count, alleging a violation of Penal Code section 245, subdivision (a)(4). Appellant pled no contest to this charge in exchange for a three-year sentence and dismissal of the original count. Although appellant was represented by a public defender at his plea, his attorney of record was not present.

At the September 22, 2014 hearing, the district attorney's office explained the amended charge to appellant as an allegation "that on or about August 7th of [2014] [he] willfully and unlawfully committed an assault with force likely to produce great bodily injury on Nancy McMaster in violation of Penal Code [section] 245[, subdivision] (A)(4), a felony." The court asked counsel to "stipulate to a factual basis based on the police reports." Both the district attorney's office and appellant's counsel responded, "So stipulated." However, the actual police reports were not filed with the trial court and there is no indication they were provided to the court.

Appellant also signed a plea agreement and engaged in a plea colloquy with the trial court. In the colloquy, appellant confirmed he wished to plead guilty based on the specific sentence offered and the fact the plea would not constitute a strike. Appellant further confirmed he had “discussed the plea and its consequences” with his attorney and that he understood what he was pleading no contest to. Appellant also specifically confirmed he had reviewed, initialed, and understood the rights he waived in his plea agreement form. On that form, appellant initialed that he understood the charges against him “and the possible pleas and defenses to the charge(s)”; that he “had enough time to speak with [his] attorney regarding the strengths of the case against [him], any possible defenses that [he] may have, and the possible consequences of entering this plea”; that he may be ordered to pay restitution, and would be fined by the court; and that he was giving up his right to an “in-depth written probation report before sentencing,” among other rights. Appellant’s counsel also signed the form, confirming she had discussed appellant’s crimes, defenses, and the consequences of pleading with him, and stipulating there was a factual basis for the plea. Based on the agreement and colloquy, the trial court accepted appellant’s plea, found appellant guilty, and dismissed the original count.

Prior to sentencing, a “CDCR Short Report” was prepared and submitted. The report noted that a letter had been sent to Nancy McMaster and attempts had been made to reach her, but that no contact had been made. As a result, the report stated, “restitution will be recommended in an amount to be determined at this time.” The report also recommended a three-year sentence in line with the plea agreement. The report, however, contained no summary of facts supporting the offense.

On October 21, 2014, appellant was sentenced to a three-year term in line with his plea agreement. He was ordered, pursuant to Penal Code section 1202.4, subdivision (b), to pay the sum of \$8,283.40 to Nancy McMaster in restitution. And, in addition to other fines, he received a suspended fine of \$300 for restitution under Penal Code section 1202.45.

This appeal timely followed.

DISCUSSION

I. Alleged Violation of Penal Code Section 1192.5

Appellant argues the trial court failed to fulfill its duty under Penal Code section 1192.5 to satisfy itself that there was a factual basis for appellant's plea and, thus, failed to ensure appellant's plea was knowing and voluntary. We do not agree.

A. Standard of Review and Applicable Law

Under Penal Code section 1192.5, when a trial court accepts a plea of guilty or no contest, it shall "cause an inquiry to be made of the defendant to satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for the plea." (Pen. Code, § 1192.5, 3d par.) In doing so, "the trial court must garner information regarding the factual basis either from the defendant or defense counsel." (*People v. Holmes* (2004) 32 Cal.4th 432, 442 (*Holmes*)). "If the trial court inquires of defense counsel regarding the factual basis, counsel may stipulate to a particular document that provides an adequate factual basis, such as a complaint, police report, preliminary hearing transcript, probation report, grand jury transcript, or written plea agreement." (*Ibid.*) The trial court may also "satisfy its statutory duty by accepting a stipulation from counsel that a factual basis for the plea exists without also requiring counsel to recite facts or refer to a document in the record" provided that "the plea colloquy reveals that the defendant has discussed the elements of the crime and any defenses with his or her counsel and is satisfied with counsel's advice." (*People v. Palmer* (2013) 58 Cal.4th 110, 118 (*Palmer*)).

"[A] trial court possesses wide discretion in determining whether a sufficient factual basis exists for a guilty plea. The trial court's acceptance of the guilty plea, after pursuing an inquiry to satisfy itself that there is a factual basis for the plea, will be reversed only for abuse of discretion. [Citation.] A finding of error under this standard

will qualify as harmless where the contents of the record support a finding of a factual basis for the conditional plea.” (*Holmes, supra*, 32 Cal.4th at p. 443.)

B. The Trial Court Satisfied Its Statutory Duty

In this case, appellant stipulated to the existence of a factual basis for his plea and identified, but did not provide or discuss, a document supporting that stipulation. This stipulation is similar to that accepted in *Palmer*, where our Supreme Court held that the trial court satisfies its statutory duty under Penal Code section 1192.5 by accepting a stipulation from counsel, provided the record shows appellant discussed the elements of the crime and any defenses with his counsel and was satisfied with counsel’s advice. Here, as in *Palmer*, the record shows appellant engaged in the necessary discussion and was satisfied with counsel’s advice to plead guilty. Appellant expressly confirmed he had “discussed the plea and its consequences” with his attorney and that he understood what he was pleading no contest to. In addition, appellant’s plea agreement form showed both that he understood the charges against him “and the possible pleas and defenses to the charge(s)” and that he “had enough time to speak with [his] attorney regarding the strengths of the case against [him], any possible defenses that [he] may have, and the possible consequences of entering this plea.” While appellant contends there was no express statement that he discussed the elements of the crime with his attorney, the clear indication that appellant discussed the charges with counsel, understood what he was pleading to, discussed possible defenses, and had been granted sufficient time to discuss the strength of his case confirms the necessary safeguards exist to accept a stipulation to the factual basis for the plea.

Appellant argues further, however, that even if an inquiry was made, the ultimate plea was to a factual impossibility. In making this argument, appellant relies on the claim that it was erroneous to conclude a factual basis for the plea existed because the alleged victim was not present at the scene of the crime. But there is no evidence in the record supporting this argument. If there was an error of this nature, an objection should have

been made and, barring that, a motion to set aside the plea so that additional evidence could have been placed on the record in support of the allegation. Neither occurred and, as a result, we are left with a record that sufficiently shows the trial court complied with Penal Code section 1192.5, by seeking and receiving stipulations from both counsel that a factual basis for the plea was present. (Cf. *People v. Jerome* (1984) 160 Cal.App.3d 1087, 1093 (*Jerome*) [noting explicit conflict between age of victim in complaint and age required of victim in crime was shown in the record].)

II. Ineffective Assistance of Counsel

Alternatively, appellant argues he received ineffective assistance of counsel during the plea proceedings and at sentencing. Specifically, appellant identifies four interrelated failings, claiming “counsel failed to effectively represent appellant when she: (1) failed to include the name of the actual victim in the written plea agreement; (2) failed to object to include the name of the actual victim in the oral amendment of the complaint; (3) stipulated, rather than objected to the police reports as the factual basis of the no contest plea to assault against McMaster when those reports [did] not contain facts supporting an assault against McMaster; and (4) failed to object to restitution based on a dismissed count.” Each of these allegations share an underlying allegation that Ms. McMaster was not the victim of appellant’s crime. On the record properly before us, we find no error.

A. Standard of Review and Applicable Law

To establish ineffective assistance of counsel, appellant must show that counsel’s performance “fell below an objective standard of reasonableness,” and that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 694 (*Strickland*)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694.)

“Tactical errors are generally not deemed reversible; and counsel’s decisionmaking must be evaluated in the context of the available facts. [Citation.] To

the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we 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’” (*People v. Hart* (1999) 20 Cal.4th 546, 623-624 (*Hart*)). “In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to law.” (*Strickland, supra*, 466 U.S. at p. 694.)

B. Appellant Cannot Show Ineffective Assistance of Counsel on This Record

Each of appellant’s counsel’s alleged errors are tactical decisions related to the determination that appellant should plead guilty. In order to demonstrate ineffective assistance of counsel, then, appellant’s arguments must be “evaluated in the context of the available facts” regarding his decision to plead guilty. (*Hart, supra*, 20 Cal.4th at p. 623.) On the record properly before us on direct appeal, the facts do not indicate that appellant’s counsel’s performance fell below an objective standard of reasonableness. The prosecutor orally modified the complaint to allege that Ms. McMaster was the subject of appellant’s assault. Appellant pled guilty to this charge and stipulated to the existence of a factual basis. Appellant further waived the completion of a full probation report,¹ and inquired into proceeding immediately to sentencing. Nothing properly in the

¹ Under California Rule of Court, rule 4.411.5, subdivision (a)(2), this report would normally be required to include the “facts and circumstances of the crime and the defendant’s arrest, including information concerning any co-defendants and the status or disposition of their cases” and require that the “source of all such information” be stated. Notably, in the report submitted, there is no determination of the proper restitution amount. While the record appears devoid of any supplementation on this issue and the court awarded only \$300 under Penal Code section 1202.45 (which requires the fine under that statute match any amount awarded under Penal Code section 1202.4), the final restitution amount ordered was \$8,283.40. Although appellant suggests this amount corresponds to lost wages related to Ms. McMaster, we see no evidence of this in the record presented.

record before us shows that these tactical decisions were erroneous or predicated on false factual assumptions. Accordingly, appellant cannot demonstrate either that counsel's performance fell below an objective standard of reasonableness, or that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

III. Counsel's Remaining Requests

Prior to submitting his opening brief, appellant sought to supplement the record to include a copy of the police report supporting the parties' stipulation. We denied this request because appellant failed to demonstrate the report had been filed or lodged with the trial court. (Cal. Rules of Court, rules 8.155, 8.340.) Appellant has renewed this motion in his briefing, but failed to cure the previously noted basis for denial. Finding no evidence that the police report was filed or lodged with the trial court, we again deny appellant's request to augment the record.

Appellant also requests relief in accord with *Jerome, supra*, 160 Cal.App.3d 1087. In *Jerome*, the defendant appealed his conviction for oral copulation with a person under 14 years of age, following a guilty plea, because the victim was alleged in the complaint to be 15 years old. (*Id.* at p. 1093.) In that case, after finding the defendant could not proceed on a direct appeal of his guilty plea because he had failed to obtain a proper certificate of appeal, the appellate court converted the direct appeal to a writ of habeas corpus and reversed the conviction. (*Id.* at pp. 1094-1097.) However, the court was clear that this remedy was to be used only in "rare cases" where "the record shows without doubt that a defendant has pleaded guilty to a crime which he did not commit." (*Id.* at p. 1095.)

This is not a case where the record on appeal shows without a doubt that appellant has pleaded guilty to a crime which he did not commit. Because the relevant police report is not properly within the record before us on appeal, as we explained above, there is no indication of an error under the record properly presented here. While a petition for habeas corpus could include the police report as an attachment, and thereby place it

within the appellate record, we will not take the extraordinary step of converting a direct appeal into a habeas corpus petition where the record does not already contain the evidence necessary to support appellant's position and where the remedy of petitioning for a writ of habeas corpus remains a viable path to raising the alleged error. To the extent appellant believes the police report shows he pled to a crime it was impossible to commit, or was otherwise improperly sentenced,² he should file a writ of habeas corpus and request counsel be appointed to pursue the matter.

DISPOSITION

The judgment is affirmed.

² It is unclear, given the record and appellant's arguments, whether he contends the conviction itself is legally impossible under the facts, or whether there is merely a correctable clerical error in the naming of the victim that led to an impermissible restitution fine. Regardless, neither can be shown on the record properly before us on direct appeal.