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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

WYRON JEROME OARD,

Defendant and Appellant.

G045880

(Super. Ct. No. 05CF0277)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Request for relief from default and an extension of time to file a supplemental brief. Request denied. Judgment affirmed.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent

* * *

One night, defendant Wyron Jerome Oard, a gang member, and three confederates who also belonged to criminal street gangs, broke into two residences, robbing the single occupant of one home and two of the occupants in the other home. All four perpetrators were jointly charged with, tried for, and found guilty of a series of crimes, including home invasion robbery, burglary, unlawfully taking a vehicle, and street terrorism. The jury also found true allegations the crimes other than street terrorism were committed for the benefit of, at the direction of, or in association with a criminal street gang. At the initial sentencing hearing, the trial court imposed a 47-years-to-life prison term on defendant, consisting of the 2-year midterm for the vehicle theft charge plus 3 additional years for the attached criminal street gang enhancement along with two consecutive 21-years-to-life terms for two of the robbery counts.

The defendants appealed. In a single opinion we affirmed their “convictions on all counts.” (*People v. Graham* (Jan. 30, 2009, G037997) [nonpub. opn.], p. 44.) However, finding several sentencing claims had merit, we vacated each defendant’s sentence and “remand[ed] the matter for resentencing.” (*Ibid.*)

Upon remand, the trial court imposed a 32-years-to-life sentence on defendant. It calculated this term by imposing a 2-year determinate sentence for his street terrorism conviction, plus consecutive 15-years-to-life sentences for two robbery counts. Defendant and two of his confederates appealed a second time. We again held defendants’ “convictions remain affirmed,” but finding the trial court violated Penal Code section 654 (all further statutory references are to this code) by sentencing them on both the street terrorism counts and the criminal street gang allegations attached to the robbery counts, we “vacated” their “sentences . . . and . . . remanded for resentencing.” (*People v. Graham* (Aug. 27, 2010, G042419) [nonpub. opn.], p. 4.)

After we issued the remittitur, the trial court held a third sentencing hearing. It imposed life terms on the three robbery convictions with consecutive 15-year

minimum terms to be served on two of the counts and a concurrent term on the third one. (§ 186.22, subd. (b)(4)(B).) As for defendant's vehicle theft, burglary, and street terrorism convictions, plus the enhancements related to these charges, the court imposed concurrent terms, which it then stayed under section 654.

In April 2011, defendant submitted a notice of appeal. Due to its untimeliness, the superior court clerk stamped it received but not filed. Defendant petitioned for a writ of habeas corpus seeking relief from the late filing of his appeal under the constructive filing doctrine. We granted the petition. (*In re Oard* (Sept. 30, 2011, G045617) [nonpub. opn.])

Thereafter, we appointed counsel to represent defendant in this appeal. Counsel filed a brief that set forth the facts of the case and the disposition. She did not argue against defendant but advised this court she had not found any issues to present on his behalf. (*People v. Kelly* (2006) 40 Cal.4th 106, 118-119; *People v. Wende* (1979) 25 Cal.3d 436, 441-442.) We gave defendant 30 days to file a supplemental brief on his own behalf. After that time period had expired, he filed a request for an extension of time to file the brief. We granted the request extending the time to May 1, 2012.

Defendant failed to file a supplemental brief by the latter date. After this matter was ordered submitted for decision, defendant presented a second request to extend the time to file his supplemental brief. In support of this request, he claims he wants to raise issues concerning "the ineffectiveness of my trial lawyer" and that he is "being double enhanced for a single case." To date, defendant has displayed a proclivity for failing to timely file pleadings and waiting to after the time to do so has passed before seeking relief. Even so, if he could identify the existence of arguably meritorious issues, we might be inclined to again grant him relief from his failure to timely file a supplemental brief. But here that is not the case.

His ineffective assistance of counsel claim is not cognizable in this appeal. In *People v. Deere* (1991) 53 Cal.3d 705, the Supreme Court rejected a “[c]laim[] of ineffective assistance [of counsel] at the guilt phase of trial” asserted in an appeal from the judgment entered after a retrial of the penalty phase of a capital murder prosecution. (*Id.* at p. 713.) “Contentions relating to the guilt phase were considered and rejected by this court in defendant’s first appeal. [Citation.] Although the judgment was reversed as to penalty, it was ‘affirmed in all other respects.’ [Citation.] Thus, only errors relating to the penalty phase retrial may be considered in this subsequent appeal. [Citations.]” (*Ibid.*; see also *People v. Jackson* (1973) 10 Cal.3d 265, 268 [where “judgment on the issue of guilt is final, . . . consideration of” ineffective assistance of counsel claim at trial’s guilt phase “is governed by the rules applicable to collateral relief”]; *People v. Murphy* (2001) 88 Cal.App.4th 392, 396-397 [“In an appeal following a limited remand, the scope of the issues before the court is determined by the remand order”].) We affirmed defendant’s guilt of the underlying offenses in the first appeal. The case was twice remanded solely for resentencing. Thus, defendant’s sole avenue for seeking relief for ineffective assistance of counsel is by a collateral attack on his conviction.

Defendant’s sentencing claim fares no better. He argues “[t]he crime for which I was found guilty . . . carries no life sentence, but the enhancement carries an alternate sentence of life with a 15 year minimum. If my actual crime does not carry a life sentence why am I being given two sep[a]rate life sentences with two sep[a]rate 15 year minimum parole dates? I see no such case where defendants are given double enhancements for robbery charges”

The obvious flaw in this contention is that defendant was not convicted of a mere robbery. Rather, the jury found him guilty of three counts of home invasion robbery with findings that he committed each of these offenses for the benefit of, at the direction of, or in association with a criminal street gang.

Section 186.22, subdivision (b)(4)(B) declares a defendant convicted of “home invasion robbery” “committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members,” shall receive “an indeterminate term of life imprisonment with a [15-year] minimum term” The Supreme Court has repeatedly recognized section 186.22, subdivision (b)(4) constitutes an alternative sentencing scheme where the statutory requirements are satisfied. (*People v. Briceno* (2004) 34 Cal.4th 451, 460, fn. 7 [“Section 186.22, subdivision (b)(4) is an alternate penalty provision that provides for an indeterminate life sentence for certain underlying felony offenses that are gang related”]; (*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900, fn. 6 [“section 186.22, subdivision (b)(4) . . . is an alternate penalty provision”]; *People v. Jefferson* (1999) 21 Cal.4th 86, 101 [“Unlike an enhancement, which provides for an *additional term* of imprisonment, the 15-year minimum term in section 186.22[, subdivision] (b)(4) sets forth an *alternate* penalty for the underlying felony itself, when the jury has determined that the defendant has satisfied the conditions specified in the statute”].)

At the sentencing hearing, the trial court ordered the sentence on the second home invasion robbery to be served consecutive to the first charge “because the crime was committed at [a] different location[] on [a] different victim[.]” This constituted an appropriate exercise of the court’s sentencing discretion. Crimes involving “separate acts of violence or threats of violence” or that are “committed at different times or separate places” support the imposition of consecutive sentences. (Cal. Rules of Court, rule 4.425(a)(2) & (3); *People v. Calderon* (1993) 20 Cal.App.4th 82, 87.) Although the trial court chose to impose a concurrent sentence on the third home invasion robbery charge, under the law it arguably could have also ordered the sentence on it to be served consecutive to the first and second charges. The record reflects the trial court properly exercised its discretion in making this sentencing choice.

Nor do the sentences on the home invasion robbery counts violate section 654. It declares “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” (§ 654, subd. (a).) In *Neal v. State of California* (1960) 55 Cal.2d 11, the Supreme Court held “[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.” (*Id.* at p. 19.)

However, *Neal* recognized an exception to this rule where a defendant engages in acts of violence against multiple victims. “The purpose of the protection against multiple punishment is to insure that the defendant’s punishment will be commensurate with his criminal liability. A defendant who commits an act of violence with the intent to harm more than one person or by a means likely to cause harm to several persons is more culpable than a defendant who harms only one person.” (*Neal v. State of California, supra*, 55 Cal.2d at p. 20.) “Robbery is violent conduct warranting separate punishment for the injury inflicted on each robbery victim.” (*People v. Champion* (1995) 9 Cal.4th 879, 935, overruled on another ground in *People v. Combs* (2004) 34 Cal.4th 821, 860; see also *People v. Thurs* (1986) 176 Cal.App.3d 448, 452 [“section 654 does not proscribe consecutive sentences for . . . robber[y]” because “[t]he central element of the crime of robbery [is] the force or fear applied to the individual victim in order to deprive him of his property”].) Here, defendant participated in breaking into two homes, robbing the occupant of one residence and two of the occupants in the second residence. Under the foregoing authorities, imposing a separate sentence on each count did not violate section 654.

Appellant's request for relief from default and a second request for an extension of time to file a supplemental brief are denied. The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

FYBEL, J.

IKOLA, J.