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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.

KIRK JOHN TILLMAN II,

Defendant and Appellant.

G046185 (Consolidated with
G046186 & G046187)

(Super. Ct. Nos. 07WF0500,
08WF1053 & 08WF1263)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Thomas M. Goethals, Judge. Affirmed.

Gregory Marshall, under appointment by the Court of Appeal, for
Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

The trial court revoked defendant Kirk John Tillman, II's probation and ordered execution of the 20-year prison sentence it had previously imposed but suspended pursuant to negotiated guilty pleas in three pending criminal prosecutions. In a prior opinion, we granted defendant's petition for a writ of habeas corpus relieving him from the failure to timely file a notice of appeal from this ruling (*In re Tillman* (Nov. 28, 2011, G045938) [nonpub. opn.]) and thereafter appointed counsel to represent him. Appellate counsel filed a brief in compliance with *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493] and *People v. Wende* (1979) 25 Cal.3d 436 that, while not arguing against defendant, advised this court counsel could not find any issues to argue on defendant's behalf. Defendant was notified of his right to file written argument and he did so. In compliance with *People v. Kelly* (2007) 40 Cal.4th 106 and *People v. Wende, supra*, 25 Cal.3d 436, we have conducted a full examination of the appellate record and considered defendant's supplemental brief and conclude there are no arguable issues. Thus, we affirm the postjudgment order.

FACTS AND PROCEDURAL BACKGROUND

Between early 2007 and mid-2008, the Orange County District Attorney filed three separate criminal actions against defendant, charging him with numerous drug-and-weapons-related crimes. Two of these cases contained criminal charges against Brenda Tillman, defendant's wife. The information in one case also jointly charged defendant and his wife with street terrorism (Pen. Code, § 186.22, subd. (a); all further statutory references are to this code) and alleged criminal street gang enhancements (§ 186.22, subd. (b)) as to all but three of the other counts, based on their participation in a white supremacist criminal street gang named Public Enemy Number One (PENI).

At a January 2010 joint hearing, defendant and his wife pleaded guilty to all of the crimes each was charged with having committed in the pending actions in return

for a specified prison sentence, suspension of its execution, and placement on five-years' supervised probation. In defendant's case, the court imposed a 20-year state prison term. The probation conditions included prohibiting defendant and his wife from possessing or using either drugs or weapons and associating with gangs or gang members.

Two months later the probation department filed the first petitions alleging defendant and his wife violated the terms of their probations. Three months later the probation department filed a supplemental petition alleging defendant violated the gang terms of his probation while in custody.

At an August hearing, the public defender representing defendant declared a conflict of interest and asked to be relieved as defendant's counsel. The court conducted a hearing on the matter, portions of which were held in chambers. It then granted the request. The hearing on defendant's alleged probation violations was continued while the hearing on his wife's petition proceeded. During the hearing, a probation officer and a deputy sheriff testified a probation search of the couple's residence resulted in the discovery of a weapon, drug paraphernalia, evidence of recent drug use, and materials suggesting the couple associated with members of a criminal street gang. When defendant and his wife met with their probation officer two days later, Ms. Tillman acknowledged using both heroin and methamphetamine and that the couple had been associating with gang members. Thereafter, they were arrested.

The court conducted a hearing on the petitions in defendant's case in January 2011. The parties stipulated to admitting the testimony from Ms. Tillman's hearing relevant to allegations against defendant. The court then heard testimony on the second petition. A deputy sheriff assigned to the men's jail testified that, after defendant's arrest on the initial probation violation petition, a random search of another jail inmate resulted in the discovery of a written message addressed to a "B" seeking to join "P" and stating, "Kirk wants to bring me in." A sheriff's investigator who testified as an expert on criminal street gangs opined the message was from a jail inmate to a

leader in the Aryan Brotherhood, a white supremacist prison gang, seeking permission to join PENI and indicating a PENI gang member named “Kirk” was recruiting the inmate. Through the investigator the prosecution introduced a recorded telephone call during which defendant spoke with an individual the investigator described as a PENI leader. During the call, defendant vouched for an inmate, acknowledging he would “put [his] life on the line for” the inmate. A third witness, another deputy sheriff, testified that during defendant’s transfer between two jail facilities, he discovered PENI gang related materials in a bag belonging to defendant.

The court found defendant violated portions of both petitions, revoked his probation and imposed the previously suspended 20-year prison term.

DISCUSSION

Much of defendant’s supplemental brief raises issues concerning the underlying charges and his entry of guilty pleas as part of the negotiated agreement. These matters are not properly before us. The order placing defendant on probation was an appealable judgment, provided he complied with section 1237.5, by submitting to the court the required statement of grounds and obtaining a certificate of probable cause. (§ 1237, subs. (a) & (b); *People v. Barlow* (1980) 103 Cal.App.3d 351, 360, fn. 3.) Defendant failed to take these steps. (*People v. Turner* (1975) 44 Cal.App.3d 753, 756.) Thus, his pre-plea ineffective assistance of counsel claim cannot be raised now. (*People v. Richardson* (2007) 156 Cal.App.4th 574, 595-596.)

The postjudgment order revoking probation and imposing sentence also constitutes an appealable ruling. (*People v. Robinson* (1954) 43 Cal.2d 143, 145; *People v. Delles* (1968) 69 Cal.2d 906, 908-909.) But except for constitutional defects, defendant cannot challenge the underlying proceedings now. (*People v. Howerton* (1953) 40 Cal.2d 217, 220; *People v. Barlow, supra*, 103 Cal.App.3d at p. 362.)

One constitutional argument defendant mentions is the denial of his motions to suppress evidence. Either before or at his preliminary hearings in two of the prosecutions, defendant filed unsuccessful suppression motions, claiming the police violated his rights under United States Constitution's Fourth Amendment. The denial of a suppression motion can be challenged on appeal where a defendant pleads guilty even if he or she fails to comply with section 1237.5. (§ 1538.5, subd. (m).) But defendant's motions were presented to a magistrate only. He failed to renew either motion or challenge the suppression rulings by motions to dismiss under section 995 after he was bound over to the superior court for trial. Consequently, he forfeited his right to challenge those rulings on appeal. (*People v. Hawkins* (2012) 211 Cal.App.4th 194, 198-200; *People v. Richardson, supra*, 156 Cal.App.4th at pp. 591-595.)

Nor do any of defendant's attacks on the court's probation violation rulings have any merit. Again, he claims he failed to receive effective assistance of counsel, arguing his attorney met with the prosecutor and the judge in chambers "behind my back" and agreed to "plead [him] guilty" to the allegations in the first petition. This argument misstates the record. When the hearing began, the judge told defendant about the chambers conference and what was discussed. His attorney stated, without contradiction, that he had "discussed th[e matter] with Mr. Tillman, just so the record is clear and we're all on the same page." Furthermore, counsel merely stipulated the court could consider the testimony presented at his wife's probation violation hearing that would be relevant to the allegations against him. The stipulation did not amount to an admission of the first petition's allegations. Rather, in closing argument counsel claimed that petition did not support revoking defendant's probation. Noting "the search of the [Tillmans'] residence" occurred "within hours" of the couple's first meeting with their probation officer and that defendant "was not there" "[w]hen th[e] search was conducted," defense counsel asserted "I don't know if you can put these items in [the] possession of [defendant]."

Nor does the record support a conclusion defense counsel's stipulation to the use of the testimony from his wife's probation violation hearing amounted to ineffective assistance of counsel. Unless good cause exists to excuse compliance, a defendant has a due process right to confront and cross-examine the witnesses against him during a probation violation hearing. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1152-1154, 1159-1161.) But "[g]enerally, failure to object [to the introduction of evidence] is a matter of trial tactics as to which we will not exercise judicial hindsight. [Citation.]" (*People v. Kelly* (1992) 1 Cal.4th 495, 520.) What's more, "[t]he record in this case strongly suggests a reasonable explanation for [counsel's] failure to object" to the use of the prior hearing testimony because while that evidence "was harmful in some respects, . . . counsel could reasonably believe it helped the defense in other respects." (*Ibid.*) Some of the testimony from the prior hearing indicated defendant possessed the contraband discovered during the probation search. But, as noted, only Ms. Tillman was home when the search occurred and the focus of the prior hearing was her violation of the probationary terms. Finally, even assuming counsel lacked a valid tactical reason for stipulating to the use of the prior hearing's transcript, there was no prejudice. The court found the allegation of the second petition to be true as well and this ruling, standing alone, supported its decision to revoke defendant's probation.

Another claim defendant asserts in his supplemental brief is that his conviction, the probation revocation proceedings, and prison sentence were the result of the actions of a vindictive prosecutor. Again, his argument fails. First, defendant waived his right to assert vindictive or discriminatory prosecution by failing to seek dismissal of the prosecution or the probation revocation proceedings on this ground. (*People v. Edwards* (1991) 54 Cal.3d 787, 827.) Nor does the record support relief on this basis. "The gravamen of a vindictive prosecution is the increase in charges or a new prosecution brought in retaliation for the exercise of constitutional rights. [Citation.]" (*People v. Valli* (2010) 187 Cal.App.4th 786, 802.) The record reflects the prosecutor had

legitimate grounds to charge defendant with crimes alleged in each action and to seek revocation of his probation and nothing suggests he took these actions because of defendant's assertion of his constitutional rights.

A final claim interspersed throughout the supplemental brief is that the evidence fails to support the court's decision to revoke probation and order execution of the 20-year prison sentence. The decision to revoke a defendant's probation falls within the court's discretion (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445) and that discretion is not abused where, by a preponderance of the evidence, it finds the probationer has failed to comply with the terms of his or her probation (*People v. Urke* (2011) 197 Cal.App.4th 766, 772). On appeal, "[w]e review a probation revocation decision pursuant to the substantial evidence standard of review [citation]." (*Id.* at p. 773.) The evidence summarized above supports the court's decision in this case.

DISPOSITION

The postjudgment order is affirmed.

RYLAARSDAM, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.