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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re DAMION HENRI SOUL

on Habeas Corpus.

G051409

(Super. Ct. No. 13CF2824)

O P I N I O N

Original proceedings; petition for a writ of habeas corpus to challenge an order of the Superior Court of Orange County, Jonathan S. Fish, Judge. Petition denied.

Elizabeth Garfinkle, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and James H. Flaherty III, Deputy Attorneys General, for Plaintiff and Respondent.

An information charged Damion Henri Soul with pimping and pandering. (Pen. Code, §§ 266h, subd. (a), 266i, subd. (a); counts 1, 2.)¹ It was alleged defendant had two strikes (§ 667, subds. (b)-(i)) and served three prior prison terms (§ 667.5, subd. (b)). A jury found defendant guilty of both counts, and the court found true all enhancements allegations. The court denied defendant's motion for new trial and sentenced him to a 10-year prison term.

Defendant argues his trial attorney provided ineffective assistance of counsel on multiple grounds. Because the petition for writ of habeas corpus duplicates the prosecutorial misconduct and ineffective assistance of counsel claims we rejected in defendant's direct appeal (*People v. Soul* (Oct. 14, 2015, G050439) [nonpub. opn.]), and the evidence contained in defense counsel's supporting affidavit does not alter the result, defendant's petition for writ of habeas corpus is denied.

FACTS

A statement of the evidence adduced at trial is set out in our opinion in defendant's direct appeal. His petition for writ of habeas corpus is supported by a declaration of his appellate counsel, Elizabeth Garfinkle.

Garfinkle asked defendant's trial counsel, Justin Glenn, if he had considered demurring to the information because it did not properly reflect the elements of one of the six subdivisions in section 266i, subdivision (a). Garfinkle also asked Glenn if he intentionally omitted a discussion of whether defendant used promises, threats, violence, or any device or scheme to encourage Ms. Versey to engage in prostitution, and if he had considered requesting a pinpoint definition of "device."

Glenn said he believed the section 1118.1 motion for acquittal was a better way to challenge the evidentiary weaknesses in the prosecution's case, he thought he had

¹ All further references are to the Penal Code.

discussed both elements of pandering during closing argument, and he had not considered an instruction on the meaning of device because he did not want to confuse the jury.

Garfinkle advised Glenn she intended to question his failure to object to the prosecutor's misstatement of the elements of pandering, and the prosecutor's purported attempts to lessen the burden of proof, give improper personal opinions on guilt, and improperly eliciting information from the expert about defendant's dollar sign tattoo. Garfinkle also asked Glenn if he was familiar with *People v. Burnett* (1999) 71 Cal.App.4th 151, and whether Glenn had considered objecting to the prosecution relying on subdivision (a)(2) of section 266i because "those elements were not proven at the preliminary hearing."

Glenn said he tries to avoid objections during closing argument because he believes objections "do not go over well with jurors." He "missed" the question from the prosecutor that elicited the expert's reference to defendant's dollar sign tattoo. Glenn also said he was not familiar with the *Burnett* case and could not recall if he had objected to CALCRIM No. 1151 on grounds no evidence of the elements had been proven at the preliminary hearing.

DISCUSSION

To prevail on a claim of ineffective assistance of counsel, the defendant must prove (1) his or her attorney's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional standards; and (2) his or her attorney's deficient representation subjected him or her to prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Cain* (1995) 10 Cal.4th 1, 28.) Generally, a reviewing court will reverse a conviction "on the ground of inadequate counsel only if the record . . . affirmatively discloses that counsel had no rational tactical purpose for his act or omission." [citation]. (*People v. Plager* (1987) 196 Cal.App.3d 1537, 1543.)

As in the appeal, defendant raises a number of ineffective assistance of counsel claims related to the pandering conviction, which we have reversed for insufficient evidence. Glenn's responses to Garfinkle's questions do not change this conclusion. So defendant's pandering related ineffective assistance habeas claims are moot.

On the pimping conviction, defendant also asserts counsel should have objected to the prosecutor's alleged misconduct in saying defendant could be convicted of pimping solely on Versey's calling him "daddy," improperly eliciting expert testimony about his dollar sign tattoo, and mocking the deliberative process by questioning defendant's veracity. We have considered and rejected each of these prosecutorial misconduct claims separately in the direct appeal. Garfinkle's declaration and the statements attributed to Glenn do not change this result.

DISPOSITION

The petition is denied.

THOMPSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

MOORE, J.