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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.

ROBERT MICHAEL SWEET,

Defendant and Appellant.

G051504

(Super. Ct. No. R-02814)

O P I N I O N

Appeal from an order of the Superior Court of Orange County, Richard M. King, Judge. Affirmed.

Forest M. Wilkerson, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

* * *

The trial court revoked Robert Sweet's postrelease community supervision (PRCS) and imposed a county jail sentence. (Pen. Code, § 3455; all statutory references are to the Penal Code unless noted). Sweet appealed, and his appointed counsel filed a brief under the procedures outlined in *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Counsel summarized the facts and procedural history of the case, but raised no specific issues, and asked this court to review the record to determine whether there were any arguable matters. Counsel submitted a declaration stating he thoroughly reviewed the record. Counsel advised Sweet he would file a *Wende* brief, and stated he was providing him with a copy. He advised Sweet he could personally file a supplemental brief on his own behalf raising any issues he believed worthy of consideration, and he sent him a copy of the appellate record. Counsel did not argue against his client or declare the appeal was frivolous. He informed Sweet he could ask the court to relieve him as counsel. We gave Sweet 30 days to file a supplemental brief, but he has not responded. We have reviewed the record, found no arguable issues, and therefore affirm the order.

FACTS AND PROCEDURAL HISTORY

In February 2015, the Orange County Probation Department filed a petition (§ 3455) alleging Sweet had been convicted in March 2013 of two counts of commercial second degree burglary (§§ 459, 460, subd. (b)), and released from prison on PRCS in October 2014. The petition alleged Sweet had violated the terms and conditions of his PRCS by testing positive for amphetamines (methamphetamine) and THC (marijuana) on January 5 and January 22, 2015. He also failed to enroll in residential drug treatment as directed by his probation officer on January 22. According to the probation officer, "on 1/22/2015, [Sweet] was instructed to enter in to a residential treatment facility. He was provided a Health Care Agency (HCA) referral and was able to be assessed by the counselor for placement that same day. The counselor informed [Sweet] that he could enter into a facility the next day; however, [he] left the assessment stating he had some

stuff to take care before [*sic*] he entered into treatment. The offender failed to enroll in residential treatment.” Finally, the petition alleged Sweet possessed drug paraphernalia on January 29, 2015. At the time of his arrest, Sweet told the probation officer he was using \$10 to \$20 of methamphetamine daily, but he had no current income. He had previously violated PRCS in December 2014 by twice testing positive for methamphetamine, and the probation officer imposed a 10-day term of flash incarceration (§ 3454, subd. (c)).

At the arraignment, Sweet’s lawyer moved the court to dismiss the petition, arguing it violated Proposition 36. (See § 3063.1; *People v. Armogeda* (2015) 233 Cal.App.4th 428 (*Armogeda*) [authorities prohibited from revoking PRCS based on commission of a nonviolent drug possession crime or violation of a drug-related condition].) The prosecutor cited Sweet’s long history of theft-related criminal behavior, and also argued the petition alleged Sweet had refused drug treatment.

The court denied the motion to dismiss on the grounds the petition presented a factual issue whether Sweet refused drug treatment (§ 3063.1). The court then conducted a probable cause hearing. The prosecutor submitted on the probation officer’s sworn assertions contained in the petition. Sweet’s counsel offered to prove her client would testify he was told at a drug treatment assessment he would have to test clean to enter the program. Because he knew he would fail the test, Sweet elected to leave with the intention of returning later to take the test again. He was arrested the day before he planned to complete the assessment. Sweet argued his intention to return later when he would pass the test was not a refusal to undergo drug treatment. Nevertheless, the court found probable cause to believe Sweet had violated PRCS and set a hearing to determine whether Sweet violated PRCS.

On the date set for the hearing Sweet, over counsel’s objections, elected to admit the allegations of the petition in exchange for the court’s offer of credit for time

served, plus a requirement that he enroll in drug treatment by February 12, 2015. The court reinstated PRCS.

Sweet filed a notice of appeal on February 13, 2015 from the orders denying his motion to dismiss (demurrer) and finding probable cause. Trial counsel requested a certificate of probable cause (§ 1237.5), stating all grounds in the revocation petition were barred by the *Armogeda* case, and Sweet's asserted refusal of treatment was not clear and unequivocal. The court granted the certificate of probable cause. This court filed an order staying preparation of the record, stating the court was considering dismissing the appeal from these orders as nonappealable. Counsel filed points and authorities and an amended notice of appeal adding the appeal was also from the order revoking PRCS and imposing a jail term. This court dissolved the stay and permitted the appeal to proceed.

DISCUSSION

Following *Wende* guidelines, we have reviewed counsel's brief and the appellate record and discern no arguable issue. This includes counsel's suggestion we consider whether Sweet was eligible for treatment under section 3063.1. Sweet has not availed himself of the opportunity to file a supplemental brief (*People v. Kelly* (2006) 40 Cal.4th 106, 111 [appellate court must address issues raised personally by appellant in a *Wende* proceeding]), nor has he requested to have appellate counsel relieved. We therefore affirm the judgment. (*Wende, supra*, 25 Cal.3d at p. 443.)

DISPOSITION

The order is affirmed.

ARONSON, ACTING P.J.

WE CONCUR:

FYBEL, J.

IKOLA, J.