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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEJO ALEGRE, JR.,

Defendant and Appellant.

H036329

(Monterey County

Super. Ct. No. SS092630)

Defendant Alejo Alegre, Jr., pleaded no contest to three counts of second degree robbery and admitted certain enhancements in connection with an armed robbery occurring in November 2009 at a Salinas convenience store. He was sentenced to a 33-year prison term.

Defendant claims that the court erred in failing to expressly state its reasons for imposing consecutive prison terms for the three convictions and that the failure of his attorney to object at the time constituted ineffective assistance of counsel. Defendant also contends that the court erred in imposing a court security fee totaling \$120, based upon a fee of \$40 per conviction instead of \$30 per conviction.

We conclude that defendant's ineffective assistance of counsel claim, which requires a showing of both deficient performance and resulting prejudice, fails because neither element has been established. We hold further that the amount of the court

security fee is incorrect. Accordingly, we will modify the judgment to reflect that the court security fee imposed is \$90 and will affirm the judgment as modified.

FACTS¹

On the afternoon of November 25, 2009, the Salinas Police Department was notified of an armed robbery in progress at a convenience store. The store owner and his two children were at the scene when the police arrived and the victims were very upset. The owner reported that two men had entered the store and began yelling loudly, demanding money. One of the men leaned over to retrieve money from a cash register and then fired a weapon into the ceiling above the owner's head. Before leaving, the man who had taken money from the register took a laptop computer and a cooling base that were on the counter.

The children reported that when the one man took money from the cash register, the second man came around behind the counter where the children were standing, pointed his firearm at them, and yelled, " 'Get the fuck down!' and " 'Give me the fucking money . . . I'm going to fucking shoot you!' " As one of the children was getting on the floor, the man kicked him several times. After getting on the floor, the man told the boy to open the other cash register, and after it was opened, the man took the money from the cash tray.

The owner believed that approximately \$500 in cash had been taken and that the computer had an approximate value of \$1,400.

The surveillance tape confirmed that two men had entered the store brandishing semiautomatic handguns, and that one of them discharged his weapon into the ceiling. After committing the robbery, the two men fled in a white Ford Explorer. (Defendant's parole officer later confirmed that defendant drove a white Ford Explorer.) A police

¹ Our summaries of the facts and strike priors are taken from the probation report.

officer who reviewed the surveillance tape identified defendant as one of the suspects, based upon prior police contacts. The day after the robbery, the police showed still photographs obtained from the surveillance tape to defendant's wife. She identified the two suspects as defendant and their 16-year-old son. After being arrested, defendant admitted that he had committed the robbery and told police that he had accidentally discharged his weapon.

PROCEDURAL BACKGROUND

Defendant was charged by information filed on January 25, 2010, with four counts, namely, three counts of second degree robbery (Pen. Code, § 211),² and one count of possession of a firearm by a felon (§ 12021, subd. (a)(1)). It was alleged further that defendant personally used a firearm in the commission of each of the robbery counts. (§ 12022.5, subd. (a).) It was also alleged that defendant had been convicted previously (1) of a violent or serious felony, i.e., a strike (§§ 667, subds. (b)-(i)/1170.12, subd. (c)(1)), namely, a 1994 conviction of robbery; and (2) of three offenses for which he had served prison terms, and since serving those terms, had not remained free of both prison custody and the commission of an offense resulting in a felony conviction for a period of five years (§ 667.5, subd. (b)). The information was later amended to allege that defendant personally discharged a firearm (§ 12022.53, subd. (c)) in the commission of the robbery offense charged as count 1.

On October 14, 2010, defendant entered a plea of no contest to counts 1 through 3 and admitted that he had personally discharged a firearm in the commission of the robbery charged in count 1, admitted the strike, and admitted the three prior felony convictions for which he served prison terms.³ The plea was entered with the

² All further statutory references are to the Penal Code unless otherwise stated.

³ The clerk's minutes reflect that defendant pleaded no contest to counts 1 and 3, only, which conflicts with the reporter's transcript of the hearing in which defendant

(continued)

understanding that defendant would receive a prison sentence of 31, 33, or 37 years. Before accepting the plea, the court apprised defendant fully of the rights he was giving up as a result of his guilty plea and concerning the consequences of that plea. Defendant also signed a written waiver of rights form. Counsel stipulated that there was a factual basis for the plea.

On November 19, 2010, the court sentenced defendant on count 1 to the midterm of three years, which was doubled, and imposed consecutive sentences of one-third of the midterm as to counts 2 and 3, doubled, namely, two years each, plus 20 years for the personal discharge of firearm enhancement, and one year for each of the three prison priors, for a total prison term of 33 years. The remaining count was dismissed. Defendant filed a timely notice of appeal, which notice was later amended to reflect that the appeal was from the judgment “based upon the ground[] that the court committed sentencing error” as authorized by California Rules of Court, rule 8.304(b)(4).⁴

DISCUSSION

I. *Consecutive Sentencing*

Defendant contends that the court erred because it failed to specify at the time of sentencing its reasons for imposing prison terms for the two robbery convictions (counts 2 and 3) running consecutive to, rather than concurrent with, the sentence for the count 1

changed his plea and pleaded guilty to counts 1, 2, and 3. The change of plea form indicates that defendant was pleading no contest to three counts of second degree robbery. Immediately prior to sentencing defendant on November 19, 2010, the court confirmed that defendant had previously entered a plea of no contest to count 2, and defendant reaffirmed that he wished to plead no contest to count 2. The court ordered that the probation report be amended to reflect that defendant had entered a no contest plea as to each of the three robbery counts.

⁴ Defendant also indicated in the amended notice that it was intended to be supplemental to defendant’s original notice of appeal that contained a request for a certificate of probable cause and he reiterated his request for the issuance of such certificate. The court granted defendant’s request for a certificate of probable cause in accordance with section 1237.5 and rule 8.304 of the California Rules of Court.

robbery conviction. He contends (correctly) that the court is required to state its reasons for selecting consecutive rather than concurrent sentences at the time of the sentencing hearing. (§ 1170, subd. (c); *People v. Champion* (1995) 9 Cal.4th 879, 934 (*Champion*), disapproved on another ground in *People v. Ray* (1996) 13 Cal.4th 313, 369, fn. 2.) Because of this error, defendant argues that he is entitled to have the case remanded for resentencing. Although defendant admits that his trial counsel did not object to the court's omission at the time, he claims that he is entitled to have the judgment reversed because the failure to object constituted ineffective assistance of counsel. We reject defendant's challenge.

We observe initially that defendant's claim of sentencing error has been forfeited.⁵ *People v. Scott* (1994) 9 Cal.4th 331, 352, clearly holds that a defendant cannot complain for the first time on appeal about the trial court's failure to state reasons for a sentencing choice. As the high court held: "Our reasoning is practical and straightforward. Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention. As in other waiver cases, we hope to reduce the number of errors committed in the first instance and preserve the judicial resources otherwise used to correct them." (*Id.* at p. 353; see also *In re Sheena K.* (2007) 40 Cal.4th 875, 881.)

Defendant claims that notwithstanding the forfeiture of the claim that otherwise results from his trial counsel's failure to object, the court's failure to explain its reasons for imposing consecutive sentences is cognizable on appeal because of ineffective

⁵ While "waiver" is the term commonly used to describe a party's loss of the right to assert an appellate challenge based upon the failure to raise an objection below, "forfeiture" is the more technically accurate term. (*In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2.)

assistance of counsel. As we have recently summarized: “Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the effective assistance of counsel. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) ‘The ultimate purpose of this right is to protect the defendant’s fundamental right to a trial that is both fair in its conduct and reliable in its result.’ (*Ibid.*) A claim of ineffective assistance of counsel in violation of the Sixth Amendment entails deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of an adverse effect on the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694.) The *Strickland* standards also apply to defendant’s claim under article I, section 15 of the California Constitution. (E.g., *People v. Waidla* (2000) 22 Cal.4th 690, 718.)” (*People v. Powell* (2011) 194 Cal.App.4th 1268, 1298.)

The burden of establishing ineffective assistance is upon the party claiming it. (*People v. Pope* (1979) 23 Cal.3d 412, 425, overruled on another ground in *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) “ ‘The proof . . . must be a demonstrable reality and not a speculative matter.’ [Citation.]” (*People v. Karis* (1988) 46 Cal.3d 612, 656.)

Here, defendant’s ineffective assistance claim fails to satisfy either of the requisite prongs.

The first prong—deficient performance—requires that the court “ ‘exercise deferential scrutiny . . .’ and . . . ‘view and assess the reasonableness of counsel’s acts or omissions . . . under the circumstances as they stood at the time that counsel acted or failed to act.’ [Citation.] Although deference is not abdication [citation], courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.) An ineffective assistance claim will be rejected unless there is a showing that there was no rational explanation for defense counsel’s act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) “ ‘

“[If] the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal must be rejected.’ [Citations.]” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266, quoting *People v. Wilson* (1992) 3 Cal.4th 926, 936.) Further, “deciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance. [Citations.]” (*People v. Maury* (2003) 30 Cal.4th 342, 419; see also *People v. Dickey* (2005) 35 Cal.4th 884, 914.)

Here, we cannot conclude from the record that “ ‘ “there simply could be no satisfactory explanation” ’ ” (*People v. Mendoza Tello, supra*, 15 Cal.4th at p. 266) for counsel’s failure to object at the sentencing hearing. The question of whether defendant would receive consecutive or concurrent sentences for counts 2 and 3 had already been determined by the time of the sentencing hearing: He would receive consecutive sentences. At the time defendant entered his plea of no contest, he acknowledged and agreed—both in the plea taken by the court and in his signed change of plea form—that he would be sentenced to a 31-, 33-, or 37-year prison term. Each of the second degree robbery offenses of which defendant was convicted was punishable by imprisonment for a term of two, three, or five years. (§ 213, subd. (a)(2).) As such—although not expressly indicated at the time of defendant’s no contest plea—the anticipated aggregate sentence of 31, 33, or 37 years was to be determined by whether the court selected the lower, middle or upper term for the robbery count to be used to establish the principal term. Once the court established the principal term, doubled it for the prior strike offense, added 20 years for the weapon-discharge enhancement, and added one year for each of the three prior prison terms, *the only way* that defendant would receive a punishment of a 31-, 33-, or 37-year prison term is if the court were to impose consecutive sentences of one-third of the middle term for each of the two subordinate terms, and then doubled each of them for the strike offense. (See § 1170.1, subd. (a);

People v. Felix (2000) 22 Cal.4th 651, 655.) Thus, defense counsel may well have chosen not to object to the court's failure to specify its reasons for imposing consecutive terms because to do so would have been futile, because the prosecutor and defendant had agreed before sentencing that consecutive terms would be imposed. Defendant has not demonstrated that counsel's performance was deficient.

Further, defendant cannot establish the second prong—prejudice—necessary for an ineffective assistance claim. The probation report listed only one factor in mitigation, i.e., defendant voluntarily acknowledged wrongdoing at an early stage in the criminal process. In contrast, the probation officer identified nine factors in aggravation, including that the crime involved a threat of great bodily harm; defendant induced a minor (his son) to assist in the commission of the crime; defendant had engaged in violent conduct indicative of his creating a serious danger to society; defendant's prior convictions as an adult or sustained petitions in juvenile delinquency proceedings were numerous or of increasing seriousness; defendant was on parole at the time the crime was committed; and defendant's prior performance on parole and probation had been unsatisfactory. Courts have held under similar circumstances that a trial court's failure to state its reasons for imposing a consecutive sentence is not grounds for remand. (See, e.g., *Champion, supra*, 9 Cal.4th at p. 934; *People v. Osband* (1996) 13 Cal.4th 622, 728-729 (*Osband*).) In *Champion*, the defendant's probation report listed 10 circumstances in aggravation and none in mitigation. (*Champion*, at p. 934.) The high court held that it was "inconceivable that the trial court would impose a different sentence" if the case were remanded for resentencing; therefore, the court's failure to state reasons for imposing consecutive sentences was harmless error. (*Ibid.*) "Where sentencing error involves the failure to state reasons for making a particular sentencing choice, including the imposition of consecutive terms, reviewing courts have consistently declined to remand cases where doing so would be an idle act that exalts form over substance

because it is not reasonably probable the court would impose a different sentence.

[Citations.]” (*People v. Coelho* (2001) 89 Cal.App.4th 861, 889.)

Similarly, here, defendant’s probation report listed nine factors in aggravation and only one mitigating factor. In addition, as discussed *ante*, it is readily apparent that defendant’s receiving consecutive sentences for the two additional robbery convictions was a foregone conclusion by the time of the sentencing hearing; the sentencing range agreed upon by defendant at the change of plea hearing presupposed that he would receive consecutive sentences. Under these circumstances, we conclude it is not reasonably probable the trial court would have imposed a more favorable sentence, even if defense counsel had objected.

Therefore, because defendant has neither shown that counsel’s performance was deficient nor that the failure to object was prejudicial, defendant’s ineffective assistance of counsel claim fails.

II. *Court Security Fee*

At the sentencing hearing, the court ordered that defendant “[p]ay a \$40 court security fee times the number of convictions, which is [\$]120.” Defendant claims that the court erred because the statutory amount of the court security fee as of the date of defendant’s conviction was \$30 per count. The Attorney General concedes that the court security fee should have been \$30 for each conviction.

Under former section 1465.8 (Stats. 2009, ch. 342, § 5, p. 2097), the court was required to impose a court security fee of \$30 on every conviction for a criminal offense. Although section 1465.8 was amended in 2010 to raise the court security fee amount to \$40 per conviction, this amendment became effective October 19, 2010. (Stats. 2010, ch. 720, § 33, p. 4918.) Since defendant pleaded no contest five days before the effective date of the amendment, the court should have imposed a court security fee of \$30 per conviction for a total of \$90. (See *People v. Davis* (2010) 185 Cal.App.4th 998, 1001 [defendant deemed convicted on date of no contest plea; since conviction was before

effective date of statute requiring court to impose court facilities fee, it did not apply to defendant].)

DISPOSITION

The judgment is modified to reduce the court security fee from \$120 to \$90. As so modified, the judgment is affirmed. The superior court is ordered to send a certified copy of the corrected abstract of judgment to the Department of Corrections.

Duffy, J.*

WE CONCUR:

Bamattre-Manoukian, Acting P.J.

Mihara, J.

* Retired Associate Justice of the Court of Appeal, Sixth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.