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

THE PEOPLE,

Plaintiff and Respondent,

v.

BRANDON NELSON WEST,

Defendant and Appellant.

H036690

(Monterey County

Super. Ct. No. SS101112)

I. STATEMENT OF THE CASE

Defendant Brandon Nelson West appeals from a judgment entered after he pleaded no contest to forgery and was sentenced to a term of 16 months to be served consecutive to the prison sentence that he was currently serving. (Pen. Code, §§ 470, subd. (d); 1237.5.)¹ He claims defense counsel rendered ineffective assistance in failing to move to dismiss the felony charges against him on the ground of vindictive prosecution.

We affirm the judgment.

¹ All unspecified statutory references are to the Penal Code.

II. PROCEDURAL HISTORY²

On July 3, 2007, the Monterey County District Attorney filed a misdemeanor complaint (MS256982A) charging defendant with five counts of commercial burglary and four counts of forgery. (§§ 459, 470, subd. (d).) Defendant failed to appear at his arraignment, and the court issued an arrest warrant. Defendant did not appear because he was on his way to prison after being convicted of unrelated offenses.³ Defendant did not receive notice of the warrant until shortly before April 1, 2010. On that date, he sent a written demand to the Monterey County District Attorney seeking a trial within 90 days. (See § 1381.)

On April 16, 2007, the district attorney filed a felony complaint (SS101112A), in which he recharged defendant with commercial burglary and forgery but expanded the allegations to include separate burglary and forgery charges based on five separate checks that defendant allegedly had passed. The felony complaint also added a strike allegation based on defendant's 2002 conviction for robbery and a prior-prison-term allegation. (§§ 211, 1172.12, subd. (c)(1), 667.5, subd. (b).)

Because he was not brought to trial on the misdemeanor complaint within 90 days as demanded, defendant moved to dismiss that complaint. (§ 1382.) In August 2010, he was arraigned on the felony complaint and pleaded not guilty. In December, defendant was finally arraigned on the misdemeanor complaint.

On January 10, 2011, defendant moved to dismiss both the misdemeanor and felony complaints. He claimed that the three-year delay between the filing of the misdemeanor complaint and his arraignment on the felony complaint violated his

² Given the issue raised on appeal, we need not summarize the facts of the forgery conviction.

³ Some months before the misdemeanor arraignment, defendant was arrested in Los Angeles, convicted of robbery and stalking, and sent to prison to serve a five-year, four-month sentence.

statutory and constitutional rights to a speedy trial. In opposing the motion, the prosecutor explained that he had exercised his legal authority and discretion to file a felony complaint instead of proceeding to trial on the misdemeanor complaint. He also noted that the felony complaint was timely. (See § 803, subd. (b).) He further argued that there was no speedy-trial violation because the felony complaint had superseded the misdemeanor complaint. In this regard, he asked the court to either consolidate the felony and misdemeanor complaints or simply dismiss the misdemeanor complaint. (§ 1385.) Concerning the three-year delay, the prosecutor claimed that defendant had suffered no actual prejudice.

On January 14, 2011, the court denied defendant's motion to dismiss. The minute order states: "The misdemeanor matter is deemed superseded by the felony complaint, which was properly filed. The misdemeanor matter is hereby dismissed as duplicative."

On January 21, 2011, defendant pleaded no contest to one count of forgery and admitted the strike allegation, and the court imposed sentence.

III. INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant contends that trial counsel rendered ineffective assistance in failing to seek dismissal on the additional ground of vindictive prosecution.⁴

A. General Principles

"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 assistance of counsel." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.)

To obtain reversal due to ineffective assistance, a defendant must first show "that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably

⁴ Defendant obtained a certificate of probable cause to raise this claim on appeal.

competent attorney[.]” (*People v. Cunningham* (2001) 25 Cal.4th 926, 1003 (*Cunningham*); *Strickland v. Washington* (1984) 466 U.S. 668, 688 (*Strickland*).

In this regard, “[a] reviewing court will indulge in a presumption that counsel’s performance fell within the wide range of professional competence and that counsel’s actions and inactions can be explained as a matter of sound trial strategy.” (*People v. Carter* (2003) 30 Cal.4th 1166, 1211, *Strickland, supra*, 466 U.S. at pp. 689, 694.) Moreover, where the record on direct appeal “does not show the reason for counsel’s challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation.” (*People v. Anderson* (2001) 25 Cal.4th 543, 569; *People v. Castillo* (1997) 16 Cal.4th 1009, 1015.)

If a defendant satisfies this initial burden, he or she must then show that there is “a reasonable probability that defendant would have obtained a more favorable result absent counsel’s shortcomings.” (*Cunningham, supra*, 25 Cal.4th at p. 1003; *Strickland, supra*, 466 U.S. at pp. 693-694.) “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694; *People v. Staten* (2000) 24 Cal.4th 434, 450-451.)

B. Vindictive Prosecution

“[T]he due process clauses of the federal and state Constitutions (U.S. Const., 5th & 14th Amends.; Cal. Const., art. I, §§ 7, 15) forbid the prosecution from taking certain actions against a criminal defendant, *such as increasing the charges*, in retaliation for the defendant’s exercise of constitutional rights.” (*People v. Jurado* (2006) 38 Cal.4th 72, 98 (*Jurado*), italics added.) “To punish a person because he has done what the law plainly allows him to do is a due process violation ‘of the most basic sort.’ ” (*United States v. Goodwin* (1982) 457 U.S. 368, 372 (*Goodwin*), quoting *Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363.)

In the post-trial context, where, for example, a defendant obtains a reversal of a conviction on appeal and thereafter the prosecutor increases the charges for retrial, a presumption of vindictiveness applies, and the prosecution must rebut it by presenting objective evidence that there was a reasonable justification for the increased charges—e.g., there was a material change in the circumstances; or the prosecutor could not have known about the evidence supporting the increased charges when the defendant was initially charged. (*Goodwin, supra*, 457 U.S. at pp. 383-384; *People v. Ledesma* (2006) 39 Cal.4th 641, 731; *In re Bower* (1985) 38 Cal.3d 865, 879; *Twiggs v. Superior Court* (1983) 34 Cal.3d 360, 369-370.)

In the pretrial setting, however, a presumption of vindictiveness does not apply. So held the majority of the United States Supreme Court in *Goodwin, supra*, 457 U.S. 368. There, the defendant was charged with several misdemeanor and petty offenses. When he requested a jury trial, the prosecutor filed a felony indictment increasing the charges. (*Goodwin, supra*, 457 U.S. at pp. 370-371.) In declining to adopt a pretrial presumption of vindictiveness, the court explained that “[i]n the course of preparing a case for trial, the prosecutor may uncover additional information that suggests a basis for further prosecution or he simply may come to realize that information possessed by the State has a broader significance. At this stage of the proceedings, the prosecutor’s assessment of the proper extent of prosecution may not have crystallized. In contrast, once a trial begins—and certainly by the time a conviction has been obtained—it is much more likely that the State has discovered and assessed all of the information against an accused and has made a determination, on the basis of that information, of the extent to which he should be prosecuted. Thus, a change in the charging decision made after an initial trial is completed is much more likely to be improperly motivated than is a pretrial decision. [¶] In addition, a defendant before trial is expected to invoke procedural rights that inevitably impose some ‘burden’ on the prosecutor. Defense counsel routinely file

pretrial motions to suppress evidence; to challenge the sufficiency and form of an indictment; to plead an affirmative defense; to request psychiatric services; to obtain access to government files; to be tried by jury. It is unrealistic to assume that a prosecutor's probable response to such motions is to seek to penalize and to deter. *The invocation of procedural rights is an integral part of the adversary process in which our criminal justice system operates.*" (*Id.* at p. 381, italics added.)

The court opined that in the case before it, the mere fact that the prosecutor took action after the defendant asserted his rights—the prosecutor's timing—further "suggests that a presumption of vindictiveness is not warranted. *A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution. An initial decision should not freeze future conduct.*" (*Goodwin, supra*, 457 U.S. at p. 382-383, italics added, fn. omitted.) The court explained that a prosecutor is not required to bring all legitimate charges in the first charging document because not every possible charge may have been fully investigated and to presume otherwise is to presume that prosecutors are infallible and ignore reality and the practical restraints on prosecutorial resources. (*Id.* at p. 382, fn. 14.)

Moreover, in the defendant's request for a jury trial, the court found further confirmation that a presumption of vindictiveness was not warranted. (*Goodwin, supra*, 457 U.S. at p. 382.) In requesting a jury the defendant "forced the Government to bear the burdens and uncertainty of a trial. This Court in *Bordenkircher* [*v. Hayes, supra*, 434 U.S. 357] made clear that the mere fact that a defendant refuses to plead guilty and forces the government to prove its case is insufficient to warrant a presumption that subsequent changes in the charging decision are unjustified." (*Goodwin, supra*, 457 U.S. at pp. 382-383.)⁵

⁵ In *Bordenkircher*, during plea negotiations, the prosecutor said that if defendant did not waive a trial, he would increase the charges against him. When the defendant declined to waive a trial, the prosecutor did so. The court held that these circumstances

The *Goodwin* court recognized that the circumstances presented the prosecutor with an “opportunity for vindictiveness.” (*Goodwin, supra*, 457 U.S. at p. 384.) However, “a mere opportunity for vindictiveness is insufficient to justify the imposition of a prophylactic rule. . . . ‘[T]he Due Process Clause is not offended by all possibilities of increased punishment . . . but only by those that pose a realistic likelihood of ‘vindictiveness.’” [Citation.] The possibility that a prosecutor would respond to a defendant’s pretrial demand for a jury trial by bringing charges not in the public interest that could be explained *only* as a penalty imposed on the defendant is so *unlikely* that a presumption of vindictiveness certainly is not warranted.” (*Ibid.*)

Although the court declined to adopt a pretrial presumption, it did not foreclose claims of vindictive prosecution in the pretrial setting. The court opined that “a defendant in an appropriate case might prove objectively that the prosecutor’s charging decision was motivated by a desire to punish him for doing something that the law plainly allowed him to do. In this case, however, the Court of Appeals stated: ‘On this record we readily conclude that the prosecutor did not act with actual vindictiveness in seeking a felony indictment.’ [Citation.] Respondent does not challenge that finding. Absent a presumption of vindictiveness, no due process violation has been established.” (*Goodwin, supra*, 457 U.S. at p. 384, fn. omitted.)

C. Discussion

As noted, where, as here, defense counsel was not asked why he did not assert a claim of vindictive prosecution and the record does not otherwise reveal counsel’s reasons, we will affirm the judgment unless there could have been no reasonable explanation for the omission.

neither warranted a presumption of vindictiveness nor established actual vindictiveness. (*Bordenkircher v. Hayes, supra*, 434 U.S. at pp. 361-365.)

Defendant contends, in essence, that counsel's omission was unreasonable as a matter of law because there was objective evidence of vindictive prosecution and, therefore, a motion to dismiss would have been meritorious.

Defendant first notes that when the prosecutor filed the felony complaint, the prosecution had done nothing to further the misdemeanor prosecution, which had lain dormant for three years. According to defendant, these circumstances support a "common-sense inference" that filing the felony complaint immediately after the speedy-trial demand was retaliatory. However, defendant acknowledges that such a "common-sense" inference is neither the equivalent of a presumption of vindictive or punitive intent nor objective proof that he acted with such an intent in filing the felony complaint. Moreover, the record suggests that the case lay dormant because defendant's whereabouts were unknown until the district attorney received defendant's demand for a misdemeanor trial.

Defendant further claims that there was "smoking gun" objective proof of vindictive intent. In particular, he cites statements by the prosecutor in his opposition to the motion to dismiss. There, in summarizing the procedural history, the prosecutor recounted that defendant had sent a demand for trial dated April 1, 2010, and "[o]stensibly, in response to this demand," the deputy district attorney filed the felony complaint. Later, in arguing that the pending misdemeanor complaint tolled the statute of limitations, the prosecutor stated, "In lieu of bringing defendant to trial on the pending misdemeanor case, within the 90 day period . . . , the people exercised their discretion to file the same offenses as felonies under a separate pleading."

These two statements do not, in our view, clearly establish, or even convincingly suggest, that the prosecutor actually harbored an intent to punish defendant for demanding a speedy trial and filed the felony complaint to do so. Rather, in context, these statements simply reflect the timing of the felony complaint and explain that the

prosecutor exercised his discretion to refile the charges as felonies and add additional enhancement allegations commensurate with defendant's criminal history. Simply put, the statements do not represent objective evidence of vindictive intent such that the prosecutor would have been required to provide reasonable justification for the felony complaint.

Moreover, as defendant notes, the misdemeanor case sat for three years without any action by the district attorney. When the prosecutor received the demand and thus learned about defendant's most recent convictions and prison term, he apparently investigated further and discovered the 2002 prior convictions and prison term. Under the circumstances, the prosecutor reasonably could have concluded that the initial misdemeanor complaint did not reflect the proper extent to which defendant should be prosecuted for the conduct underlying the current burglary and forgery charges and that a felony complaint was more appropriate.

Furthermore, as the Attorney General argues, if the prosecutor could not have timely commenced the misdemeanor trial, defendant could have moved to dismiss the complaint, and there was a reasonable possibility of a dismissal. Such a dismissal would have barred a second misdemeanor complaint. However, it would not have barred filing a *felony* complaint charging the same offenses. (*Burris v. Superior Court* (2005) 34 Cal.4th 1012, 1016-1022.) Thus, the prosecutor reasonably could have decided to file the felony complaint to avoid any statutory speedy-trial issues arising from the defendant's demand for a misdemeanor trial.

In sum, we conclude that there was insufficient objective evidence of vindictive or punitive intent to support a meritorious claim of vindictive prosecution. Defense counsel could have reached the same conclusion and considered it pointless to add such a claim to the motion to dismiss. It is settled that "counsel is not required to make futile motions or

to indulge in idle acts to appear competent.” (*People v. Torrez* (1995) 31 Cal.App.4th 1084, 1091.)

Under the circumstances, defendant cannot establish either that counsel’s performance in failing to assert a claim of vindictive prosecution fell below an objective standard of reasonableness or that counsel’s failure to assert such a claim was prejudicial.

IV. DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

ELIA, J.