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

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT JOHN KRENN,

Defendant and Appellant.

H037544

(Santa Clara County
Super. Ct. No. C1082388)

I. INTRODUCTION

After being arrested on the charge of felony attempted extortion (Pen. Code, § 524),¹ defendant Robert John Krenn pleaded no contest to the misdemeanor charge of making annoying telephone calls (§ 653m, subd. (a)). At the sentencing hearing held on October 17, 2011, the trial court placed defendant on informal probation for three years and ordered him to serve one day in county jail, with credit for time served. Over defendant's objection, the court also ordered defendant to provide DNA² samples pursuant to section 296, subdivision (a)(2)(C) since he had been arrested on a felony charge.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² DNA is an acronym for deoxyribonucleic acid. (§ 295, subd. (b)(1).)

On appeal, defendant contends that trial counsel was ineffective in failing to object to the order requiring him provide DNA samples on Fourth Amendment grounds. Defendant points out that at the time of the sentencing hearing, a recently published appellate court decision, *People v. Buzza* (2011) 197 Cal.App.4th 1424, review granted October 19, 2011, S196200 (*Buzza*) had held that the Penal Code provisions requiring a felony arrestee to submit DNA samples were invalid under the Fourth Amendment. For reasons that we will explain, we determine that defendant's ineffective assistance of counsel claim fails because he has not shown prejudice. Therefore, we will affirm the trial court's order.

II. BACKGROUND

The facts underlying defendant's charges were not included in the record on appeal, and for that reason our background summary is limited to the relevant procedural history.

The complaint filed on July 16, 2010, charged defendant with one count of felony attempted extortion (§ 524; count 1). The record reflects that defendant was subsequently arrested on the felony charge.

On August 4, 2011, the People moved to amend the complaint to add count 2, a misdemeanor, which alleged that defendant had made annoying telephone calls (§ 653m, subd. (a)), with the same date and victim as count 1. Also on August 4, 2011, defendant entered into a plea agreement in which he agreed to plead no contest to count 2 in exchange for being placed on informal probation for three years and receiving credit for time served.

The sentencing hearing was held on October 17, 2011. The trial court granted the People's motion to dismiss count 1, placed defendant on informal probation for three

years,³ ordered him to serve one day in county jail, and gave credit for time served of one day. In addition to ordering defendant to pay various fines and fees, the trial court ordered defendant to provide DNA samples as indicated in the following colloquy:

“THE COURT: I’ll go ahead and order that he supply DNA samples.

“[DEFENSE COUNSEL]: Your Honor, could we object to that since this is a misdemeanor conviction?

“THE COURT: And my understanding is that so long as it was a felony arrest and that there has been a subsequent conviction, irrespective of whether the conviction was a felony or a misdemeanor, that there is authority to order the testing; correct?

“[THE PROSECUTOR]: That’s my understanding as well, your Honor.

“THE COURT: All right. So go ahead and order the DNA testing. [¶] . . . [¶]

“[DEFENSE COUNSEL]: Your Honor, he is again objecting to the DNA. He did not have any understanding that he was going to have to provide a DNA sample. So I’m not sure that he wants to agree to the terms and conditions of this deal because he was not informed of that.

“THE COURT: Well, that’s not a basis for withdrawing a plea.

“[DEFENSE COUNSEL]: Okay.

“THE COURT: That’s a collateral consequence. That does not need advisement. If he does not wish to agree to the terms and conditions of probation, I will deny probation and sentence him to county jail.

“THE DEFENDANT: Okay. I have no choice. I will agree.”⁴

³ Section 1203, subdivision (a) provides in part: “As used in this code, ‘conditional sentence’ means the suspension of the imposition or execution of a sentence and the order of revocable release in the community subject to conditions established by the court without the supervision of a probation officer. It is the intent of the Legislature that both conditional sentence and probation are authorized whenever probation is authorized in any code as a sentencing option for infractions or misdemeanors.” (See also section 1203b [court’s power to grant a conditional sentence in misdemeanor cases].)

On October 28, 2011, defendant filed a notice of appeal based on matters occurring after the plea that do not affect the validity of the plea.

III. DISCUSSION

A. *Issue on Appeal*

Defendant contends that the order requiring him to provide DNA samples should be reversed due to ineffective assistance of counsel. Specifically, defendant argues that trial counsel was ignorant of “ ‘easily discoverable case law,’ ” consisting of the recent decision of *Buza, supra*, 197 Cal.App.4th 1424, which held that that the Penal Code provision requiring all felony arrestees to submit a DNA sample, section 296, subdivision (a)(2)(c), is invalid under the Fourth Amendment. Defendant also argues that trial counsel’s error in failing to object to the DNA order on Fourth Amendment grounds pursuant to *Buza* was prejudicial, because “[h]ad she done so, the trial court would have been bound to follow the law as it existed at the time, and the order would not have been made.”

The People disagree. In their view, trial counsel was not ineffective in failing to cite *Buza* at the October 17, 2011 sentencing hearing because the law was unsettled with regard to the constitutionality of statutes requiring the collection of forensic DNA samples from felony arrestees. In support of this argument, the People maintain that *Buza* was not final at the time of the sentencing hearing because a petition for review was pending in the California Supreme Court. They also rely on the decisions of the federal courts and the courts of other states upholding the constitutionality of statutes authorizing DNA collection from arrestees. The People therefore argue that defendant cannot show that he would have obtained a better result had trial counsel objected to the DNA order on Fourth Amendment grounds.

⁴ The record on appeal does not indicate whether defendant has provided DNA samples.

Defendant responds that the pending petition for review in the California Supreme Court did not invalidate the *Buza* decision. According to defendant, *Buza* became final 30 days after it was published, on September 3, 2011, pursuant to California Rules of Court, rule 8.366(b)(1), well before the October 17, 2011 sentencing hearing. Since the petition for review was not granted until October 19, 2011, two days after defendant was sentenced, defendant argues that *Buza* was “final . . . [,] citable authority” at the time of the sentencing hearing.

B. *Standard of Review*

We will begin our analysis of the issue on appeal with the applicable standard of review. “To prevail on a claim of ineffective assistance of counsel, a defendant ‘ ‘must establish not only deficient performance, i.e., representation below an objective standard of reasonableness, but also resultant prejudice.’ ’ [Citation.] A court must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance. [Citation.] Tactical errors are generally not deemed reversible, and counsel’s decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation. [Citation.] Moreover, prejudice must be affirmatively proved; the record must demonstrate ‘a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.’ [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 389.)

However, “there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel’s performance was deficient before examining the prejudice

suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697 (*Strickland*); *In re Cox* (2003) 30 Cal.4th 974, 1020.)

In the present case, defendant argues that he was prejudiced because, but for trial court's ineffective assistance in failing to object on Fourth Amendment grounds pursuant to *Buza*, the trial court would not have ordered him to provide DNA samples under section 296. We therefore turn to a brief overview of that section.

C. Section 296

Section 296 is part of DNA and Forensic Identification Data Base and Data Bank Act of 1998 (the Act). (§ 295 et seq.; see *People v. Robinson* (2010) 47 Cal.4th 1104, 1113 (*Robinson*)). "The Act became effective January 1, 1999. (Stats. 1998, ch. 696, § 4.) It created a data bank to assist 'criminal justice and law enforcement agencies within and outside California in the expeditious detection and prosecution of individuals responsible for sex offenses and other violent crimes, the exclusion of suspects who are being investigated for those crimes, and the identification of missing and unidentified persons, particularly abducted children.' " (*Robinson, supra*, at pp. 1116-1117, fn. omitted.)

The Act has been amended several times. (*Robinson, supra*, 47 Cal.4th at p. 1117, fn. 13.) Most recently, "[t]he voters of this state approved Proposition 69 on November 2, 2004. Proposition 69 made significant amendments to the Act and was an urgent law that became immediately effective on November 3, 2004." (*Good v. Superior Court* (2008) 158 Cal.App.4th 1494, 1503 (*Good*)). Relevant here, "Proposition 69 amended section 296, subdivision (a) to substantially broaden the scope of DNA sample collection. The new subdivision (a)(1) requires DNA samples from any adult or juvenile convicted of *any* felony offense, not just the listed offenses in the prior law. [Citation.] The new

subdivision (a)(2) requires samples from any adult *arrested for or charged with felony sex offenses requiring registration; murder or voluntary manslaughter or the attempt thereof; and, beginning in 2009, any felony offense.*” (*Good, supra*, at p. 1503, fn. omitted.)

Sections 296 and 296.1 govern the collection of DNA samples from adult felony arrestees. The current version of section 296, subdivision (a)(2)(C) provides in part: “The following persons shall provide buccal swab samples, . . . and any blood specimens or other biological samples required pursuant to this chapter for law enforcement identification analysis: [¶] . . . [¶] Commencing on January 1 of the fifth year following enactment of the act that added this subparagraph, as amended, any adult person arrested or charged with any felony offense.”

Section 296.1, subdivision (a)(1)(A) currently provides: “Each adult person arrested for a felony offense as specified in subparagraphs (A), (B), and (C) of paragraph (2) of subdivision (a) of Section 296 shall provide the buccal swab samples and thumb and palm print impressions and any blood or other specimens required pursuant to this chapter immediately following arrest, or during the booking or intake or prison reception center process or as soon as administratively practicable after arrest, but, in any case, prior to release on bail or pending trial or any physical release from confinement or custody.”

The California Supreme Court has ruled that the nonconsensual collection of DNA samples from a convicted felon is reasonable under the Fourth Amendment “as ‘ ‘ ‘judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate government interests.’ ” ’ [Citation.]” (*Robinson, supra*, 47 Cal.4th at p. 1123; see also *In re Calvin S.* (2007) 150 Cal.App.4th 443, 445 [Fourth Amendment does not preclude collection of DNA sample from juvenile adjudicated under Welf. & Inst. Code, § 602]; *Coffey v. Superior Court* (2005) 129

Cal.App.4th 809, 823 [for purposes of the Act, defendant was convicted of a felony when he pleaded guilty to a wobbler offense as a felony].)

At present, the issue of whether the Fourth Amendment precludes the nonconsensual collection of DNA samples from a felony arrestee under section 296, subdivision (a)(2)(C) is pending before the California Supreme Court in *Buza*, 197 Cal.App.4th 1424, review granted October 19, 2011, S196200. The First District Court of Appeal considered the issue and determined that the Act, “to the extent it requires felony arrestees to submit a DNA sample for law enforcement analysis and inclusion in the state and federal DNA databases, without independent suspicion, a warrant or even a judicial or grand jury determination of probable cause, unreasonably intrudes on such arrestees’ expectation of privacy and is invalid under the Fourth Amendment” (*Buza, supra*, at p. 1461.)

The *Buza* decision was published on August 4, 2011. The California Supreme Court granted review on October 19, 2011, which had the effect of depublishing the decision. (See *People v. McKee* (2010) 47 Cal.4th 1172, 1218; Cal. Rules of Court, rule 8.1105(e)(1).)

D. Prejudice

Defendant’s chief argument is that trial counsel was ineffective in failing to object to the order that he provide DNA samples on the ground that the recently published *Buza* decision had ruled that the Fourth Amendment precludes collection of a DNA sample from a felony arrestee. With regard to legal research, the general rule is that “constitutionally adequate assistance requires that the attorney diligently and actively participate in the complete preparation of the client’s case, and investigate all defenses of law and fact. [Citations.]” (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1129.) The People contend that the *Buza* decision was not yet final and therefore trial counsel had no obligation to cite it.

As we have noted, the *Buza* decision was filed on August 4, 2011. California Rules of Court, rule 8.1115(d) provides that “[a] published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.” Thus, it has been held that “[e]xcept in extraordinary circumstances, a trial judge should follow an opinion of the Court of Appeal that speaks to conditions or practices in the judge’s courtroom, even though the opinion is not final, until the opinion is depublished or review is granted.”⁵ (*Jonathon M. v. Superior Court* (2006) 141 Cal.App.4th 1093, 1098 [former Cal. Rules of Court, rule 977(d), now rule 8.1115(d)].)

However, even assuming that at the time of the sentencing hearing on October 17, 2011, trial counsel could have properly cited *Buza* in opposition to the order that defendant provide DNA samples, we determine that any error on trial counsel’s part in failing to do so was not prejudicial. To establish prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694.)

The decision in *Buza* was not citable after October 19, 2011, when the California Supreme Court granted review and the decision was effectively depublished. (Cal. Rules of Court, rules 8.1105(e)(1) & 8.1115(a).) Defendant has not directed us to any decision holding that the collection of DNA samples from felony arrestees pursuant to section 296, subdivision (a)(2)(C) violates the Fourth Amendment other than the depublished decision in *Buza*. Therefore, as of October 19, 2011, in the absence of a published decision

⁵ Decisions indicating that a published decision is not citable until it is final for all purposes (see, e.g., *People v. Superior Court (Clark)* (1994) 22 Cal.App.4th 1541, 1547) predate the 2005 repeal and adoption of California Rules of Court, rule 977. The 2005 version of rule 977(d) states, “A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published.” Former rule 977(d) was renumbered rule 8.1115(d) in 2007.

holding otherwise, imposition of an order requiring a felony arrestee to provide a DNA sample pursuant to section 296, subdivision (a)(2)(C) was mandatory.

Where an order is mandatory, the trial court's sentence omitting the order is unauthorized and subject to correction at any time. (*People v. Karaman* (1992) 4 Cal.4th 335, 349, fn. 15; see also *People v. Rowland* (1988) 206 Cal.App.3d 119, 126 [sentence omitting mandatory restitution fine unauthorized and subject to correction at any time]; *People v. Barriga* (1997) 54 Cal.App.4th 67, 70 [sentence omitting order for mandatory AIDS test was unauthorized and subject to correction at any time].) Although "as a general rule, 'an appeal from an order in a criminal case removes the subject matter of that order from the jurisdiction of the trial court' [citation], it is settled that an unauthorized sentence is subject to correction despite the circumstance that an appeal is pending." (*People v. Cunningham* (2001) 25 Cal.4th 926, 1044.)

Therefore, even if trial counsel had cited the *Buza* decision when objecting to the order to provide DNA samples, and the trial court had followed *Buza*, the omission of an order requiring defendant to provide a DNA sample pursuant to section 296, subdivision (a)(2)(C) was subject to correction as an unauthorized sentence at any time after *Buza* was depublished on October 19, 2011. For that reason, even if this court vacated the DNA order on the ground of ineffective assistance of counsel as requested by defendant, the People could properly move for imposition of a new order requiring defendant to provide DNA samples as mandated by section 296, subdivision (a)(2)(C). We therefore find that defendant has not shown "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." (*Strickland, supra*, 466 U.S. at p. 694.)

Having determined that defendant suffered no prejudice as a result of trial counsel's failure to cite *Buza*, we conclude that defendant's claim of ineffective assistance of counsel lacks merit and we will affirm the order requiring defendant to provide DNA samples pursuant to section 296, subdivision (a)(2)(C). We emphasize that

our ruling today is limited to defendant's claim of ineffective assistance of counsel and we express no opinion on the constitutionality of section 296, subdivision (a)(2)(C).

IV. DISPOSITION

The order requiring defendant to provide DNA samples pursuant to Penal Code section 296, subdivision (a)(2)(C) is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.