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

THE PEOPLE,

Plaintiff and Respondent,

v.

GUY RAY SILVIERA,

Defendant and Appellant.

H037946

(Santa Clara County

Super. Ct. No. CC808503)

I. INTRODUCTION

Defendant Guy Ray Silviera pleaded no contest to second degree robbery (Pen. Code, §§ 211, 212.5, subd. (c)).¹ He also admitted that he had five prior serious felony convictions and nine prior strikes (§§ 667, subds. (a), (b)-(i), 1170.12), and that he had served two prior prison terms (§ 667.5, subd. (b)). The trial court sentenced defendant to prison for 30 years to life consecutive to 25 years for the instant case, consecutive to a 16-year term imposed in an unrelated case from another county.

On appeal, defendant contends that the trial court erroneously denied his *Faretta*² motion. Defendant also contends that a criminal justice administration fee of \$259.50 imposed by the court must be stricken because there is insufficient evidence of his ability

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

² *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

to pay the fee and because there is no evidence regarding the actual administrative costs of processing his arrest.

For reasons we will explain, we will affirm the judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

As defendant was convicted by plea, the summary of his offense is taken from the probation report, which was based on a report by the San Jose Police Department. In 2008, defendant demanded money from a bank teller. He stated that he had a gun and threatened to kill her. After the teller handed over a “stack” of bills, defendant took the money and fled the bank.

In 2010, defendant was charged by information with second degree robbery (§§ 211, 212.5, subd. (c)). The information further alleged that he had five prior serious felony convictions and nine prior strikes (§§ 667, subds. (a), (b)-(i), 1170.12), and that he had served two prior prison terms (§ 667.5, subd. (b)). Defendant pleaded not guilty and denied the allegations.

On January 19, 2011, a hearing was held regarding defendant’s request to represent himself under *Faretta, supra*, 422 U.S. 806. In connection with the request, defendant indicated to the court that he was not ready to proceed to trial on the following Monday, and that he needed additional time. The court stated that defendant’s case “had been in front of this department on more than one occasion,” and that the case had previously been assigned to another judge and “was proceeding to trial when the request was made [by defendant] to represent himself.” The court believed that if it found the request for self-representation was being made for purposes of delay, it may consider the request untimely. The court stated: “And I’m finding based on the evidence at this time that the request is untimely. And so, therefore, I am denying the request” The court stated that it was “going to return [the case] to the trial calendar” for the following

Monday. Defendant subsequently expressed dissatisfaction with appointed counsel. The court set the matter for a *Marsden* hearing.³

On January 26, 2011, after hearing from defendant and his appointed counsel, the trial court denied the *Marsden* motion.

On February 1, 2011, defendant pleaded no contest to the robbery offense and admitted all allegations, with the understanding that if the court struck all the prior strikes the minimum sentence would be 27 years in prison, and that otherwise, the minimum sentence would be 55 years to life and the maximum sentence would be 59 years to life.

Defendant filed a *Romero*⁴ motion, requesting that the trial court strike his strikes. The People filed opposition to the motion.

On December 16, 2011, the court denied the *Romero* motion and sentenced defendant to prison for 30 years to life consecutive to 25 years for the instant robbery case, consecutive to a 16-year term imposed in an unrelated case from Alameda County. The court imposed a general order of restitution. The court also ordered defendant to pay various other amounts, including a criminal justice administration fee of \$259.50 and a \$10 fine (§ 1202.5). Regarding a restitution fine, the court found “compelling and exceptional circumstances” and ordered defendant to pay the statutory minimum of \$200, rather than the maximum of \$10,000 pursuant to the formula recommended by statute for calculating the amount of the fine (former § 1202.4, subd. (b)).

III. DISCUSSION

A. Request for Self-Representation

Before defendant entered his no contest plea, the trial court denied his motion for self-representation under *Faretta*, *supra*, 422 U.S. 806. On appeal, defendant contends that the court erred in denying his *Faretta* motion, that the error is prejudicial per se, and

³ *People v. Marsden* (1970) 2 Cal.3d 118.

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

that the judgment must be reversed. He further asserts that “[a] claim of *Faretta* error is cognizable on appeal following a guilty plea,” citing *People v. Marlow* (2004) 34 Cal.4th 131 (*Marlow*). Defendant’s notice of appeal states that his appeal “is based on the sentence or other matters occurring after the plea that do not affect the validity of the plea.” Defendant acknowledges that he “did not seek or receive a certificate of probable cause” from the trial court.

The Attorney General contends that the *Faretta* “issue may not be properly before this Court because [defendant] failed to obtain a certificate of probable cause.”

Section 1237.5 provides that “[n]o appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court.” A certificate of probable cause is not required if the appeal is based on the denial of a motion to suppress, or grounds that arose after entry of the plea and do not affect the plea’s validity. (Cal. Rules of Court, rule 8.304(b)(4)⁵; *People v. Johnson* (2009) 47 Cal.4th 668, 676-677 & fn. 4 (*Johnson*); *People v. Mendez* (1999) 19 Cal.4th 1084, 1096 (*Mendez*) [discussing former rule 31(d)].) If the defendant’s appeal is based solely on noncertificate grounds, and the notice of appeal so states, the appellate court may address the noncertificate issues. “But it must decline to address certificate issues. [Citations.]” (*Mendez, supra*, at p. 1096; see *id.* at pp. 1088, 1099, 1104; *Johnson, supra*, at p. 678, fn. 4; rule 8.304(b)(5).)

When a defendant is erroneously denied the right to self-representation *before* entering a plea of guilty or no contest, the error implicates the right to counsel and

⁵ All further rule references are to the California Rules of Court.

permeates all subsequent proceedings. (*People v. Robinson* (1997) 56 Cal.App.4th 363, 368, 370, fn. 2 (*Robinson*)). Further, “[j]ust as other issues relating to aspects of the right to counsel survive a guilty plea, a claimed *Faretta* violation may also properly be raised in an appeal from a guilty plea or plea of no contest. Compliance with *Faretta* is an issue unrelated to defendant’s guilt, and constitutes grounds going to the legality of the proceedings.” (*Id.* at p. 370.) However, in order to be entitled to raise the *Faretta* claim on appeal, the defendant must have obtained a certificate of probable cause. (*Robinson, supra*, at p. 370.)

To the extent defendant suggests that a certificate of probable cause is not required under *Marlow, supra*, 34 Cal.4th 131, we disagree with defendant.

In *Marlow*, the defendant pleaded guilty to all charges including murder, admitted all special circumstance allegations, and was sentenced to death. (*Marlow, supra*, 34 Cal.4th at p. 136.) On appeal, the defendant contended that the trial court erred in denying his *Faretta* motion. In response the Attorney General, “[a]lthough not relying on the absence of a certificate of probable cause,” argued that “the claim of erroneous denial of a *Faretta* motion is not one going to the ‘legality of the proceedings’ and thus is not cognizable on appeal. (§ 1237.5; . . .)” (*Marlow, supra*, at p. 146.) The California Supreme Court disagreed and held that a claim of *Faretta* error is cognizable on appeal after a guilty plea, citing *Robinson, supra*, 56 Cal.App.4th at page 370. (*Marlow, supra*, at pp. 146-147.)

Because the defendant in *Marlow* was sentenced to death, his appeal was automatic. (*Marlow, supra*, 34 Cal.4th at p. 136; § 1239, subd. (b).) The requirement of a certificate of probable cause does not apply to automatic appeals in capital cases. (*People v. Massie* (1998) 19 Cal.4th 550, 568-569.) Thus, the California Supreme Court in *Marlow* had no occasion to address, and did not address, the effect of the absence of a certificate of probable cause in a noncapital case such as the instant one.

In this case, because defendant failed to obtain a certificate of probable cause, we decline to address his claim of *Faretta* error. (See § 1237.5; *Robinson, supra*, 56 Cal.App.4th at p. 370; *Mendez, supra*, 19 Cal.4th at pp. 1096, 1099.)

B. Criminal Justice Administration Fee

The probation officer recommended in the probation report that defendant be ordered to pay a criminal justice administration fee of \$259.50 to Santa Clara County “pursuant to Government Code [sections] 29550, 29550.1 and 29550.2.” At sentencing, the trial court imposed a criminal justice administration fee of \$259.50, without specifying the entity to be paid or the statutory basis.

Defendant contends that it “appears” from the record that he was arrested by the county and that therefore the trial court must have imposed the criminal justice administration fee pursuant to Government Code section 29550 or 29550.2. He argues that both sections contain an ability-to-pay requirement and that there is insufficient evidence to support an implied finding by the court that he had an ability to pay the fee. He also argues that the county may recover only the actual administrative costs of his booking, and that there is no evidence to support the finding that it actually cost \$259.50 to process his arrest. Defendant requests that the fee be stricken. Although he did not object to the fee in the trial court, defendant contends that his claim on appeal has not been forfeited. To the extent his claim has been forfeited, defendant contends that his trial counsel rendered ineffective assistance by failing to object to the fee based on an inability to pay.

The Attorney General contends that defendant’s claim is forfeited by his failure to object below, that there is substantial evidence to support the trial court’s implied finding of an ability to pay, that there is substantial evidence to support the amount of the fee, and that defendant’s ineffective assistance of counsel claim is without merit.

1. Forfeiture

While this case was pending, the California Supreme Court in *People v. McCullough* (Apr. 22, 2013, S192513) ___ Cal.4th ___ [2013 Cal. LEXIS 3330] (*McCullough*) held that a defendant who fails to challenge the sufficiency of the evidence when the trial court imposes the criminal justice administration fee forfeits the right to challenge the fee on appeal. As defendant failed to object to the fee below, we determine that his sufficiency-of-the-evidence claims are forfeited. We next consider defendant's contention that his trial counsel rendered ineffective assistance by failing to object to the fee based on inability to pay.

2. Ineffective Assistance of Counsel

“In order to establish a claim of ineffective assistance of counsel, defendant bears the burden of demonstrating, first, that counsel's performance was deficient because it ‘fell below an objective standard of reasonableness [¶] . . . under prevailing professional norms.’ [Citations.] Unless a defendant establishes the contrary, we shall presume 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.’ [Citation.] If the record ‘sheds no light on why counsel acted or failed to act in the manner challenged,’ an appellate claim of ineffective assistance of counsel must be rejected ‘unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation.’ [Citations.] If a defendant meets the burden of establishing that counsel's performance was deficient, he or she also must show that counsel's deficiencies resulted in prejudice” (*People v. Ledesma* (2006) 39 Cal.4th 641, 745-746 (*Ledesma*); see *Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694.)

Government Code sections 29550, 29550.1, and 29550.2 authorize the imposition of a criminal justice administration fee on an arrestee who is ultimately convicted in order to cover the expenses involved in booking or otherwise processing the arrestee in a

county jail. Government Code sections 29550 and 29550.2 include provisions expressly requiring a finding that the person has the ability to pay the fee (*id.*, §§ 29550, subd. (d)(2), 29550.2, subd. (a)), whereas Government Code section 29550.1 does not contain such an express requirement. The applicability of these sections depends on which governmental entity arrested the defendant. (*McCullough, supra*, ___ Cal.4th at pp. ___ [*4-*5]; *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1399, fn. 6 (*Pacheco*), disapproved on another ground in *McCullough, supra*, at pp. ___ [*22-*23].) According to defendant, the record in this case reflects that he was arrested by the county and therefore either Government Code section 29550 or 29550.2 applies in this case. We will assume, without deciding, that the trial court was required to make an ability-to-pay finding in this case before imposing the fee. (See *Pacheco, supra*, at pp. 1399-1400 [Government Code sections 29550 and 29550.2 both require an ability-to-pay finding]; but see *McCullough, supra*, at p. ___ [*5] [the “factors a court considers in determining whether to order the fee payment . . . vary depending on whether or not the court sentences the defendant to probation or prison”].)

An ability-to-pay finding may be express or implied, but it must be supported by substantial evidence. (*Pacheco, supra*, 187 Cal.App.4th at p. 1400.) “Ability to pay does not necessarily require existing employment or cash on hand.” (*People v. Staley* (1992) 10 Cal.App.4th 782, 785.) The trial court may consider the defendant’s ability to pay in the future, including the defendant’s ability to obtain wages in prison. (*People v. Hennessey* (1995) 37 Cal.App.4th 1830, 1837; *People v. Gentry* (1994) 28 Cal.App.4th 1374, 1376-1377; *People v. Frye* (1994) 21 Cal.App.4th 1483, 1487; see § 2700 [providing that the “Department of Corrections shall require of every able-bodied prisoner imprisoned in any state prison as many hours of faithful labor in each day and every day during his or her term of imprisonment as shall be prescribed by the rules and regulations of the Director of Corrections”].)

In this case, the record is silent as to why trial counsel did not object to the criminal justice administration fee. The trial court may have determined that defendant had an ability to pay the relatively modest \$259.50 criminal justice administration fee based on wages earned in prison. Trial counsel may have known facts outside the record that would have supported an ability-to-pay finding. Counsel may have also determined that it was better for defendant to accept without objection the relatively modest \$259.50 criminal justice administration fee, as well as the minimal \$10 fine under section 1202.5 which requires an ability-to-pay finding (see § 1202.5, subd. (a)), rather than take the risk that the court's further consideration of the ability to pay issue would also affect, to defendant's detriment, the court's determination of the amount of the restitution fine, which the court had reduced from \$10,000 to the statutory minimum of \$200. (See § 1202.4, subd. (d) [in setting the restitution fine in excess of the statutory minimum, a court should consider, among other things, the defendant's inability to pay].) In view of the record in this case, "we shall presume 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.' [Citation.]" (*Ledesma, supra*, 39 Cal.4th at p. 746.) As counsel's failure to object to the criminal justice administration fee on the ground of inability to pay may have been the product of sound strategy, defendant fails to establish ineffective assistance of counsel.

IV. DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.
MÁRQUEZ, J.