Filed 3/18/15 P. v. Arciga CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. ZABDIEL SOLIS ARCIGA Defendant and Appellant.	H041125 (Monterey County Super. Ct. No. SS101806A)

Following a court trial, defendant Zabdiel Arciga was convicted of second degree murder. (Pen. Code, § 187.) Subsequently, on June 13, 2014, the court committed defendant to state prison for 15 years to life.

Defendant filed a timely notice of appeal.

Defendant's appointed counsel has filed an opening brief in which no issues are raised. Counsel asks this court to conduct an independent review of the record as required by *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). Counsel has declared that defendant was notified that no issues were being raised by counsel on appeal; that an independent review under *Wende* was being requested; and that defendant was notified that he could file a supplemental brief with this court.

On December 11, 2014, by letter, we notified defendant of his right to submit written argument on his own behalf within 30 days. That time has passed and we have not received a response from defendant.

Pursuant to *Wende*, *supra*, 25 Cal.3d 436, we have reviewed the entire record and have concluded there are no arguable issues on appeal. Pursuant to *People v. Kelly*

(2006) 40 Cal.4th 106, we provide "a brief description of the facts and procedural history of the case, the crimes of which the defendant was convicted, and the punishment imposed." (*Id*. at p. 110.)

Facts and Proceedings Below

On July, 27, 2010, Officer John Magana was on duty just before 1:00 a.m.[1] As he pulled into the left turn lane at the intersection of Imjin Parkway and Imjin Road, he noticed headlights behind him. A car pulled into the left turn lane and waited behind Officer Magana's police car. When the light turned green, Officer Magana turned left, but the car behind him went straight through the intersection and accelerated to "a high rate of speed." Officer Magana made a U-turn and pursued the car; he testified that the car accelerated to speeds of 70 to 100 miles per hour in a 45 mile per hour zone. Officer Magana turned on his lights and siren, but the other car did not stop; rather, it accelerated away from the officer.

Officer Magana followed the car as it turned left onto Highway 1. The pursuit continued for two or three miles with the car reaching speeds of 100 to 120 miles per hour. Officer Magana saw the car leave the highway at the Del Monte/Fremont exit to Seaside. As the officer followed, he saw a big cloud of dust and dirt in the air. He slowed down because he thought he was running over debris in the road. As he looked to his left he noticed a car in the tree line with its hazard lights on.

After Officer Magana parked his patrol car and got out he saw that the car in the trees had been split in half. The officer approached the passenger side and saw defendant in the driver's seat and a young child in the passenger seat. Defendant was calling for help; he asked Officer Magana to help his son. The officer noticed that defendant's speech was a little slurred.

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[1] It appears that the prosecutor misspoke concerning the date of the incident by asking the officer if he was on duty on August 27, 2010. The incident occurred on July 27, 2010.

Officer Magana checked the boy's carotid artery and felt a pulse so he radioed for help; additional police units, fire and AMR arrived in response. When the emergency services arrived, both defendant and his son were removed from the car. Officer Magana could smell the strong odor of alcohol in the car. The boy was unconscious and appeared to have a laceration to his thigh. Both defendant and his son were transported to the hospital. Officer Magana followed them in order to question defendant.

Defendant told the officer that he had been on Imjin Parkway when he noticed the patrol car in front of him. He saw that the patrol car made a left hand turn and then a U-turn and start to follow him. Defendant said that he panicked because he did not want to get arrested for driving under the influence, thereby leaving his son alone. He said he had intended to get away from the officer. Defendant told the officer that he had drunk a Heineken beer and a rum and coke; he admitted to having smoked marijuana. Defendant explained that he had been involved in an argument with his girlfriend at her house and left because he did not want to continue arguing. He told the officer that while he was being chased he told his son "to hold on, that he had messed up." He said he was going to try to get away.

Officer Magana tried to administer a field sobriety test by asking defendant to track a pen from side to side. Initially, defendant opened his eyes, then shut them; he said the room was too bright. Later, the Department of Justice determined that defendant's blood alcohol level was .10 percent and that his blood tested positive for marijuana and methamphetamine. Central Valley Toxicology, Inc. determined that defendant's blood alcohol level was .09 percent and that his blood tested positive for methamphetamine.

At the hospital, defendant was very upset and at one point he was crying. He told Officer Magana that he knew he had done something wrong. When he learned that his son had been killed, he asked one of the officers to shoot him.

The parties stipulated that defendant had attended and completed a DUI first-offender course taught by Sun Street Center and that one of the many topics that was

covered during the course was the fact that alcohol, drugs, and driving can cause fatal accidents. Defendant's cellular telephone records were admitted into evidence. They showed that defendant made several telephone calls while he was driving on July 27. The testimony of defendant's girlfriend from the preliminary hearing was admitted into evidence. At the preliminary hearing, she testified that she had tried to take defendant's keys away from him.

The prosecution asserted that the evidence showed malice[2] because defendant had previously been convicted of driving under the influence of alcohol and had attended a program as a result. Nevertheless, defendant drove at speeds up to 120 miles per hour with his son in the car. The prosecutor contended that the fact that defendant told his son to hold on indicated that he knew his actions were dangerous. Further, while he was driving defendant telephoned a friend on his cellular telephone asking to be picked up so he could evade the police. The prosecutor argued that taken together all this evidence indicated that defendant had full knowledge that his actions were dangerous; he was driving drunk, endangering his son's life.

In reaching a guilty verdict, the trial court stated that defendant had exhibited a conscious disregard of the danger to life when he told his son, " 'I've messed up. Hold on.' " The court reasoned that defendant engaged in a high-speed chase in an attempt to evade Officer Magana and he tried to telephone someone because he knew he would probably be arrested if he was stopped by the officer. The court believed that the decision to engage in a high-speed chase was a conscious one and that the behavior was

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[2] In *People v. Watson* (1981) 30 Cal.3d 290, the Supreme Court held that a person, with knowledge of the hazards of drunk driving, who drives a vehicle while intoxicated and proximately causes the death of another may be convicted of second-degree murder under an implied malice theory. (*Id*. at pp. 300-301; see also *People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1080.) "Malice is implied . . . when a killing results from an intentional act, the natural consequences of which are dangerous to human life, and the act is deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [Citation.]" (*People v. Cook* (2006) 39 Cal.4th 566, 596.)

"very risky[.]" The trial court found defendant guilty of second degree murder.[3] As noted the court sentenced defendant to 15 years to life in prison. The court ordered that defendant pay a restitution fund fine of $1,000 and a parole revocation fine in the same amount, which was suspended pending parole revocation. The court imposed various other fines and fees and retained jurisdiction for purposes of victim restitution. The court awarded defendant 1,418 actual days of presentence credit[4] but no conduct credits pursuant to section 2933.2.

Upon our independent review of the record, we conclude there are no meritorious issues to be argued, or that require further briefing on appeal. The verdict is supported by substantial evidence. Further, the fines and fees imposed are supported by the law and the facts.

Disposition

The judgment is affirmed.

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[3] Initially, defendant was charged with murder (§ 187 count one); gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a), count two); child endangerment (§ 273a, subd. (a), count three); causing death while evading a peace officer (Veh. Code, § 2800.3, subd. (b), count four); driving under the influence of alcohol or drugs thereby causing bodily injury with a prior conviction for driving under the influence (Veh. Code, § 23153, subd. (a), count five); and driving with a blood alcohol level greater than .08 percent thereby causing injury with a prior conviction (Veh. Code, § 23153, subd. (b), count six). As to count one, there was an intentional and personal infliction of great bodily injury allegation (§ 1203.075); as to counts three, five, and six there were personal infliction of great bodily injury allegations (§ 12022.7, subd. (a)). Before the court trial on count one, on March 18, 2014, defendant pleaded no contest to counts two, three, four and five and admitted the great bodily injury enhancements. The court dismissed count six, essentially on the motion of the prosecutor. Defendant's plea was entered on the condition that if he was found guilty of murder his maximum sentence would be 15 years to life in prison, but if he was found not guilty his maximum sentence would be 13 years and four months. Following the guilty verdict on count one, the court allowed defendant to withdraw his no contest pleas and admissions that had been entered on March 18, 2014; and on motion of the district attorney, the court dismissed counts two, three, four and five and the related enhancements.

[4] Defendant was in custody from July 27, 2010, until the date of sentencing—June 13, 2014.

ELIA, J.

WE CONCUR:

RUSHING, P. J.

PREMO, J.