

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANTHONY CORTEZ,

Defendant and Appellant.

H041684

(Monterey County

Super. Ct. No. SS110997A)

I. INTRODUCTION

Michael Anthony Cortez appeals from an order terminating his probation and executing a suspended prison sentence. He also challenges the denial of his request for new counsel under *People v. Marsden* (1970) 2 Cal.3d 118. Appointed counsel filed an opening brief stating the case and facts but raising no issues. We notified defendant of his right to submit written argument on his own behalf. Defendant responded by filing a one-page supplemental brief.

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and *People v. Kelly* (2006) 40 Cal.4th 106, we have reviewed the entire record. Following the California Supreme Court's direction in *Kelly*, 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.) We also discuss defendant's contentions and explain why we will affirm the judgment. (*Ibid.*)

II. TRIAL COURT PROCEEDINGS

A. THE UNDERLYING CASE

Defendant Michael Cortez was charged by felony complaint with carrying a loaded firearm in a vehicle (Penal Code, former § 12031, subd. (a)(1);¹ count 1), and street terrorism (§ 186.22, subd. (a); count 2). Count 1 contained a prior conviction allegation for robbery, committed when defendant was a juvenile (former § 12031, subd. (a)(2)(A)), a gang enhancement (§ 186.22, subd. (b)(1)), and an allegation that defendant was not the registered owner of the firearm (former § 12031, subd. (a)(2)(F)). Count 2 alleged the same robbery conviction as a prior strike. (§ 1170.12, subd. (c)(1).)

According to the probation report, defendant, who had outstanding traffic warrants, was seen getting out of a car and entering a residence. Defendant was found inside the residence, and a duffel bag belonging to defendant was found in the trunk of the car. The bag contained personal effects bearing defendant's name, along with a loaded handgun, gang paraphernalia including a blue bandana, and compact discs containing local rap songs from known gang members. One of the discs was labeled "Teflon beat," which was defendant's gang moniker.

In September 2011, defendant pleaded no contest to counts 1 and 2 and admitted the prior conviction and street gang allegation in exchange for a suspended seven-year, eight month sentence. Over the prosecutor's objection, the court granted defendant's motion to strike the prior conviction pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 because of defendant's age at the time of that offense, but only for the purpose of placing defendant on probation. The court committed defendant to the Department of Corrections and Rehabilitation for a term of seven years, eight months

¹ Unspecified statutory references are to the Penal Code. Former section 12031 was repealed in 2010, effective January 1, 2012 (Stats. 2010, ch. 711, § 4, p. 4036), and continued without substantive change, commencing with sections 12001 and 16000. (Stats. 2010, ch. 711, §§ 5-6, pp. 4036-4227.)

(three years on count 1, four years on the gang enhancement, and eight months on count 2), and suspended execution of that sentence on conditions including four years formal probation and a 300-day county jail term.

B. THE PROBATION VIOLATION

In August 2014, the probation department filed a petition alleging that defendant had failed to obey all laws based on a new arrest for possession of stolen property, had failed to report that arrest within 24 hours, and had failed to report to his probation officer in July 2014.

A revocation hearing was held in October 2014, at which time defendant's probation was revoked. The prosecution presented evidence that defendant, one of three assistants contracted through a local staffing agency, worked a promotional film event at the Fresno fairgrounds in August 2013. As the event was concluding, the event manager's laptop computer was stolen. Defendant was confronted but denied taking the computer. Three months later, defendant's wife pawned the computer at a Fresno pawn shop. The computer contained pictures of defendant and his resume. In June 2014, police arrested defendant for possession of stolen property after questioning him and his wife about the computer.

Defendant's wife first told police she had purchased the computer on Craigslist. But then she admitted to receiving the computer from defendant, and said she had lied to protect her family. She also denied attending the event at the fairgrounds. Defendant's wife then testified that she stole the computer from the fairgrounds event when no one was looking, and she denied telling police that defendant gave her the laptop, or that she was not at the fairgrounds event.

Defendant told police he had purchased the laptop from another employee who had worked the fairgrounds event, and he had no idea it was stolen. But, defendant testified that he did not make that statement to police. Rather, he had told the police he

thought his wife had purchased the computer on Craigslist, and he had no knowledge it was stolen.

Defendant's probation officer testified that defendant did not contact her after the June 2014 arrest, nor did he check in by telephone the following month. Defendant was required to report monthly, in person every third month and by phone the other months. When reporting by phone, defendant was required to personally speak with the probation officer, not leave a message. If he left a message and did not hear back from the probation officer, he was instructed to continue to reach her. The probation officer was certain that if defendant had called her, he did not leave a message. Defendant and his wife both testified that defendant left the probation officer voice messages on June 26, and his wife further testified that defendant left a voice message for his probation officer on July 11. Cell phone records were admitted into evidence showing one-minute calls from defendant's wife's cell phone to defendant's probation officer on those dates.

The court found that defendant had failed to obey all laws in that he was responsible for the computer theft. It further found that defendant had failed to report his June 2014 arrest within 24 hours, and failed to report to his probation officer in July 2014.

In November 2014, the court denied defendant's motion under *People v. Marsden* (1970) 2 Cal.3d 118 to relieve appointed counsel and continue sentencing to retain private counsel. The court terminated probation, and executed the previously suspended seven-years, eight-months prison sentence. Defendant filed a timely notice of appeal.

III. WENDE ANALYSIS

Having carefully reviewed the entire record, we conclude that there are no arguable issues on appeal. (*People v. Wende, supra*, 25 Cal.3d at pp. 441-443.) Defendant argues that he could not be found to have violated his probation for stealing the computer because he was never charged with the theft. He also contends that the

court ignored the evidence that he phoned his probation officer in June and July, and ignored his request at the *Marsden* hearing to retain private counsel.

The record shows that the trial court understood defendant's request to continue sentencing so his family could retain private counsel, and it presents no arguable issue that the court abused its discretion by denying that request. (*People v. Memro* (1995) 11 Cal.4th 786, 856-857 [*Marsden* ruling reviewed for abuse of discretion], overruled on another ground in *People v. Gaines* (2009) 46 Cal.4th 172, 181, fn. 2.) Nor does the record present a colorable issue regarding the defendant's probation revocation. The record contains substantial evidence supporting the revocation (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848), and there is no showing of any abuse of discretion. (*People v. Kelly* (2007) 154 Cal.App.4th 961, 965.)

V. DISPOSITION

The order denying defendant's *Marsden* motion is affirmed.

The order revoking and terminating defendant's probation and executing sentence is affirmed.

Grover, J.

WE CONCUR:

Rushing, P.J.

Márquez, J.