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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHEN EARL GUICE,

Defendant and Appellant.

H042870

(Monterey County

Super. Ct. No. SS100975A)

Defendant Stephen Earl Guice appeals from judgment following a jury trial and negotiated settlement that resolved sentencing in three cases.<sup>1</sup> In case No. SS100975A, a jury convicted Guice of transporting a controlled substance, possessing cocaine base for sale, and evading a peace officer. The trial court found true allegations concerning one prior strike, a prior narcotics conviction, and two of four alleged prison priors. In case No. SS130742A, Guice pleaded no contest to possession of cocaine base for sale, possession for sale of a controlled substance, and smuggling contraband into jail. He admitted committing the offenses while out on bail, as well as a prior narcotics conviction from 2003. In case No. SS110737B, Guice pleaded no contest to second degree robbery and possession of marijuana for sale and admitted committing the offenses while out on bail.

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<sup>1</sup> The specific charges in each case, and their corresponding statutes, are set forth in greater detail below. (See *post*, section I.B.1.)

After denying Guice's motion to withdraw the plea and for appointment of new counsel, as well as Guice's *Romero*<sup>2</sup> motion to strike his prior strike conviction, the court imposed an aggregate prison sentence in all three cases of 20 years. Guice filed a notice of appeal and request for certificate of probable cause in each of the three cases on October 9, 2015, which the court granted.

We appointed counsel to represent Guice in this court. His counsel has filed an opening brief in which no issues are raised and asks this court for an independent review of the record as required by *People v. Wende* (1979) 25 Cal.3d 436. We advised Guice of his right to submit written argument on his own behalf within 30 days. Guice has submitted a letter brief arguing ineffective assistance of counsel and error at several stages of the negotiated settlement, including the denial of his *Romero* motion and waiver of his right to appeal from judgment after the jury trial in case No. SS100975A.

Pursuant to *Wende*, we have reviewed the entire record and have concluded there are no arguable issues on appeal. We will 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." (*People v. Kelly* (2006) 40 Cal.4th 106, 110.) Pursuant to *Kelly*, we will explain why we reject the contentions in Guice's letter brief. (*Id.* at p. 113.)

## **I. FACTUAL AND PROCEDURAL BACKGROUND**

### **A. FACTS**

#### **1. Case No. SS100975A<sup>3</sup>**

On March 19, 2010, two Seaside police officers and one county probation officer were patrolling a neighborhood where drug sales occurred regularly. A Ford Thunderbird was parked in front of Guice's residence with its brake lights on and engine running. The officers illuminated the Thunderbird with their spotlight, and two officers got out and approached on foot. When they got close, the Thunderbird took off.

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<sup>2</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

<sup>3</sup> We take our summary of these facts from the evidence adduced at the jury trial.

The officers returned to their car, activated emergency lights and siren, and gave chase. After speeding at approximately 50 miles per hour through the residential area, the Thunderbird lost control and crashed into a parked car.

Guice exited his vehicle while holding something in his right hand, and ducked behind the parked car he had hit. After taking Guice into custody, the officers retrieved an infant's sock containing a plastic baggy of cocaine base from under the car Guice ducked behind. A similar baggy of cocaine base was discovered on the driver's side floorboard of the Thunderbird. Guice was carrying \$236 on him, including eleven \$20 bills, but no drug or drug sales paraphernalia was found in the car, on his person or in his home.

## **2. Case No. SS130742A<sup>4</sup>**

Police contacted Guice on April 12, 2013, in relation to a search warrant. Guice was sweating profusely, wearing several layers of clothing, and smelled of feces. During a strip search, officers discovered a black plastic baggy protruding from Guice's buttocks, which contained three clear plastic baggies of cocaine. While in a holding cell, Guice removed a second baggy from his buttocks which contained an additional 33 rocks of cocaine.

## **3. Case No. SS110737B<sup>5</sup>**

Seaside police pulled over a vehicle on April 16, 2011, which matched the description provided by the victim of a robbery at gunpoint. The victim had parked in front of a wrecking yard when a silver Dodge pick-up truck with three Black male subjects pulled up. The driver asked for directions, while the rear passenger, later

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<sup>4</sup> We take our summary of these facts from the probation officer's report, which was based on a report prepared by the Seaside Police Department, as well as from testimony at the trial of case No. SS100975A, which was offered pursuant to a limiting instruction regarding uncharged offenses.

<sup>5</sup> We take our summary of these facts from the probation officer's report, which was based on a report prepared by the Monterey County Sheriff Office.

identified as Guice, exited and approached the passenger side of the victim's car. The driver pulled out a gun, aimed it at the victim's chest, and demanded his money. The victim handed over \$2,800. Guice entered the victim's vehicle and searched the victim's pockets, taking an additional \$40, along with his cell phone and car keys.

When police stopped the suspect vehicle, the three men said they had just left Guice's grandmother's house. Police found a replica of a Colt 1911 handgun at the grandmother's house, approximately a half-pound of marijuana in the glove compartment of the pick-up, and \$1,747 in cash on Guice's person.

## **B. PROCEEDINGS**

### **1. The Charges**

An information filed on December 20, 2010, in case No. SS100975A charged Guice with transportation of a controlled substance (Health & Saf. Code, § 11352, subd. (a), count 1, a felony), possession of cocaine base for sale (*id.*, § 11351.5, count 2, a felony), and evading a peace officer (Veh. Code, § 2800.2, subd. (a), count 3, a felony). It further alleged that Guice had suffered a prior conviction of a serious or violent felony in April 1996 for assault with a deadly weapon (Pen. Code, § 245, subd. (b)),<sup>6</sup> a narcotics prior from October 2003 (Health & Saf. Code, § 11370.2, subd. (a)), and four prison priors (§ 667.5, subd. (b)).

An information filed on November 9, 2011, in case No. SS110737B charged Guice with second degree robbery (§ 211, count 1, a felony) and possession of marijuana for sale (Health & Saf. Code, § 11359, count 2, a felony). It alleged that he committed the charged offenses while on bail for the offenses charged in case No. SS100975A and for three counts of violating section 1320.5 (§ 12022.1). It also alleged enhancements under section 1170.12, subdivision (c)(1) and section 667.5, subdivision (b), for the 1996

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<sup>6</sup> Unspecified statutory references are to the Penal Code.

conviction for assault with a deadly weapon (§ 245, subd. (b)), as well as two prison priors (§ 667.5, subd. (b)).

A complaint filed on April 15, 2013, in case No. SS130742A alleged possession for sale of cocaine base (Health & Saf. Code, § 11351.5, count 1, a felony) and possession for sale of a controlled substance (*id.*, § 11351, count 2, a felony)—each alleged with a narcotics prior from January 2003 (*id.*, § 11370.2, subd. (a)). It alleged bringing controlled substances to jail (§ 4573, count 3, a felony) and that Guice was disqualified from a jail sentence on all three counts pursuant to section 1170, subdivision (h)(2). It also alleged an enhancement under section 1170.12, subdivision (c)(1) for the prior conviction for assault with a deadly weapon (§ 245, subd. (b)), that he committed the charged offenses while on bail or release from custody for three separate offenses (§ 12022.1), and further alleged two prison priors (§ 667.5, subd. (b)).

## **2. Trial of Case No. SS100975A<sup>7</sup>**

In a bifurcated proceeding, the jury found Guice guilty as charged on the three counts. The court found true the allegation that Guice had a strike conviction from April 1996, a prior narcotics conviction from November 2002, and two prison priors from April 1996 and 2003.

## **3. Negotiated Settlement and *Romero* Motion**

Guice filed a *Romero* motion on December 29, 2014, requesting the trial court strike his prior strike conviction based on the age of the conviction (over 18 years ago) and its lack of similarity to his more recent nonviolent criminal behavior. Regarding the robbery charge in case No. SS110737B, Guice argued it was unlikely to lead to a

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<sup>7</sup> As part of the comprehensive negotiated settlement, discussed *post* at section I.B.3, Guice waived his right to appeal the judgment following the jury trial. Because we find no error in the waiver, we summarize only the outcome of the trial.

conviction given substantial weaknesses in the state's evidence. Guice attached numerous letters of support from his family and community.

The following day, the parties appeared before the trial court to discuss a plea deal in case Nos. SS130742A and SS110737B, for a negotiated settlement on sentencing in those cases and case No. SS100975A. The trial court reviewed on the record the maximum possible sentences in each case and summarized for Guice that he faced "a sentencing range that would be subject to a lot of discretion" of the court, from a minimum of 12 years four months on case No. SS100975A to a maximum of 27 years on all three cases if Guice were to plead and to admit the allegations discussed. Guice stated that he understood these consequences. He confirmed that he had signed a waiver of rights form for both case Nos. SS130742A and SS110737B and understood his constitutional rights and the potential penalties and consequences explained in the forms. Guice initialed and signed the waiver of rights form for both cases, including a handwritten notation providing for a sentence range of 12 years four months to 27 years in all three cases.

The trial court continued: "There was also a discussion about giving up your right to appeal and file writs in the case for which you were found guilty by the jury; is that correct?" The prosecutor replied, "That's what the People had contemplated when we talked in chambers about that. We didn't talk further about it, but that is what my understanding was," and defense counsel added, "Yes, Your Honor." Turning to the defendant, the trial court repeated that as part of the plea bargain, Guice was agreeing to give up his right to appeal the case with the jury verdict (case No. SS100975A) and to file writs in connection with that case. Guice responded that he understood.

Following further advisements, Guice pleaded no contest in case No. SS110737B to felony second degree robbery, felony possession of marijuana for sale, and admitted committing these offenses while on bail. Guice also pleaded no contest in case No. SS130742B to felony possession of rock cocaine for sale, felony possession of a

controlled substance for sale, felony smuggling of contraband into jail, and admitted committing these offenses while on bail and to a prior narcotics conviction. The trial court confirmed that counsel had stipulated to a factual basis for the pleas, found that Guice had voluntarily and intelligently waived his rights, and accepted the pleas and admissions.

Following the entry of Guice's pleas, the prosecutor raised the issue of Guice's *Romero* motion. The record reflects the following discussion: “[Prosecutor]: Judge, does the court want to rule on the *Romero* motion pending before the court at this point? [¶] THE COURT: Oh, no. I wasn't planning on doing that. [¶] [Prosecutor]: Well, perhaps we should either withdraw it or if you want to run the motion, but that's not part of the plea bargain really. So if the motion were withdrawn at this point based on our discussions, we could handle it that way. [¶] [Defense Counsel]: May we approach, Your Honor? [¶] THE COURT: Sure. [¶] (DISCUSSION HELD OFF THE RECORD AT SIDE BAR) [¶] THE COURT: All right. As a result of the plea bargain—also, I think I had given the indication that in connection with the *Romero* motion filed on case ending 975 it would be a slim to nil chance that I would grant that motion based on what I knew at the time we were having our discussions, and that included the trial, the probation report, the *Romero* motion filed by the defense. [¶] The plea bargain was that the floor on this is 12 years and 4 months. That means that at this point, since that was the agreement of the parties, the only way that floor can stay in place is the court to deny the *Romero* motion and leave the strike in place. I will do that at this time.”

#### **4. Motion to Withdraw Plea and for Appointment of Counsel**

Defense counsel informed the trial court at a hearing on May 7, 2015, that Guice wished to withdraw his plea and sought appointment of counsel. Defense counsel believed he could not provide Guice with “a nonconflicted opinion on that issue,” given his involvement in negotiating the plea and his belief that the plea was in Guice's best interest.

Based on Guice's offer of proof regarding his plea, the court appointed separate counsel for the limited purpose of determining whether Guice had a basis to file a motion to withdraw the plea. The court denied defense counsel's motion to withdraw as counsel of record.

At the August 13, 2015 hearing on Guice's motion to withdraw his plea, Guice's appointed counsel argued there was good cause to withdraw the plea based on defense counsel's failure to investigate the two plea cases, particularly that counsel did not interview witnesses or visit Guice in jail prior to Guice's appearance in court on December 30, 2014, the day the plea was taken. The trial court denied Guice's motion, explaining that Guice had multiple attorneys investigating the cases over the past years and had not shown, by clear and convincing evidence, mistake or any basis to justify withdrawing the plea.

## **5. Sentencing**

The trial court revisited Guice's *Romero* motion at the sentencing hearing on September 24, 2015 and denied the motion.

In case No. SS100975A, tried to the jury, the court sentenced Guice to a total of 16 years four months in prison, calculated as the upper term of five years on count 1, doubled due to the strike, plus three years for the narcotics prior, plus one-third the middle term on count 3, doubled due to the strike, for another one year four months, plus two years for the two prison priors. The court further imposed the upper term of four years on count 2, doubled due to the strike, for eight years, concurrent to count 1, plus three years for the narcotics prior, for another one year four months, plus two years for the two prison priors, for a total of 13 years, and stayed that sentence. The court calculated Guice's total credits for this base term at 1,405 credits.

In case No. SS130742A, the court sentenced Guice to the upper term of four years on count 1, plus three years for the narcotics prior, to be served concurrently to the sentence in case No. SS100975A, and struck the section 12022.1 crime-on-bail

enhancement. The court further imposed one-third the middle term for a total of one year on count 3, consecutive to count 1, and the upper term of four years on count 2, concurrent with count 1, and stayed the sentence on both counts 1 and 2. The court calculated Guice's total credits for this case at 1,136 credits.

In case No. SS110737B, the court sentenced Guice to one-third the middle term of one year on count 1, and to one-third the middle term of eight months on count 2, plus two years for the section 12022.1 crime-on-bail enhancement, and ordered both sentences to run consecutive to the sentence in case No. SS100975A. The court calculated zero credits for this case.

The court also imposed restitution fines and fees. The aggregate sentence was 20 years with 1,405 credits.

## II. DISCUSSION

Guice's letter brief raises several issues. He attacks the validity of the negotiated settlement, arguing the trial court's denial of the *Romero* motion in order to accommodate the plea agreement was error and rendered the outcome fundamentally unfair. Next, he challenges the validity of his appeal waiver in relation to case No. SS100975A, arguing the trial court failed to inquire into the basis for the waiver, which this court should not enforce. Finally, he contends he did not receive effective assistance of counsel during critical stages of these proceedings.

The record does not support Guice's contentions. Regarding his appeal waiver, a defendant may waive the right to appeal as part of a plea agreement where the waiver is knowing, intelligent, and voluntary. (*People v. Mumm* (2002) 98 Cal.App.4th 812, 815; *People v. Panizzon* (1996) 13 Cal.4th 68, 80 (*Panizzon*)). The waiver may be oral or in writing. (*Panizzon, supra*, at p. 80.) During the plea hearing, the court orally advised Guice that "in connection with this plea bargain . . . you're going to be giving up your right to appeal the case for which you were found guilty by the jury and to file writs in connection with that case as well. Do you understand that?" Guice responded that he

did. After reviewing the maximum possible sentence terms for all three cases, the court again advised Guice that “you’ll be giving up your rights to appeal, file writs or withdraw your plea” as well as “giving up your right to appeal the conviction you suffered in the case ending 975A. Do you understand that?” Guice again said he understood.

Guice argues the trial court should have ascertained whether he understood the magnitude and consequence of his waiver of the right to appeal, and whether he was pressured or coerced. He points to the prosecutor’s statement about an in-chambers discussion regarding the appeal waiver—to which he was not privy—as evidence that the proceeding violated due process and was fundamentally unfair. Yet Guice verbally acknowledged that he understood the trial court’s advisements, said that he was not being threatened or forced to change his plea, and said he had no further questions of his trial counsel or of the court. Nothing in the record raises a doubt that Guice understood and knowingly waived his rights. (*People v. Castrillon* (1991) 227 Cal.App.3d 718, 722-723.) Therefore, we find Guice was adequately advised of the rights he was waiving and the consequences of his pleas and the negotiated settlement. To the extent Guice’s claim is one of ineffective assistance of counsel, it is based on matters outside the record (i.e., counsel’s in-chambers discussion, the implications of which defense counsel may not have fully explained to Guice) and is more appropriately raised by writ of habeas corpus. (*People v. Salcido* (2008) 44 Cal.4th 93, 172.)

Guice further argues that he was deprived of a fair and impartial hearing on his *Romero* motion when the trial court denied the motion in order to accommodate the plea agreement. He points to off-the-record discussions between counsel and the court, particularly that the court addressed the *Romero* motion after taking the plea, leading to an unrecorded discussion at side-bar after which the court pronounced that in light of the parties’ agreed-upon “floor” of 12 years four months, “the only way that floor can stay in place is [for] the court to deny the *Romero* motion and leave the strike in place.” Guice’s argument overlooks the trial court’s statement that based on “the trial, the probation

report, the *Romero* motion filed by the defense,” it had indicated the chances were “slim to nil” that it would grant his motion. The court thus had already considered the relevant information and indicated it was not inclined to grant the motion. The court later explained at the hearing on Guice’s motion to withdraw his plea that “I’ve been very familiar with this case through trial, through handling it for a number of years. And I saw no reason at all why the Court would grant the *Romero* motion.”

“[A] trial court’s refusal or failure to dismiss or strike a prior conviction allegation under section 1385 is subject to review for abuse of discretion.” (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*)). “[A]lthough a trial court is required to state on the record its reasons for striking a prior conviction (§ 1385, subd. (a)), there is no similar statutory requirement of an on-the-record statement of reasons when a court declines to strike a prior.” (*In re Coley* (2012) 55 Cal.4th 524, 560.) Even so, at the sentencing hearing the trial court revisited the motion on the merits and explained the basis for its denial. The court noted that although the prior strike was old, the defendant since then had “been involved in [a] series of crimes . . . over 16 misdemeanors and 5 felony convictions, [and] recent charges are of a serious nature,” including the robbery charge, conviction for evading a peace officer, and narcotics sales. Moreover, during the plea proceedings, Guice was advised multiple times of the minimum and maximum possible terms under the agreement. The forms in both cases set forth the minimum sentence range in all three cases as 12 years four months, which is the same minimum that the court advised Guice was the range if the court were to deny the *Romero* motion. Guice initialed that statement on both forms.

On this record, we do not find the trial court’s decision to deny the *Romero* motion was “ ‘ ‘irrational or arbitrary’ ’ ” in the context of the sentencing determination and the parties’ plea agreement. (*Carmony, supra*, 33 Cal.4th at p. 376.)

Guice also claims his counsel provided ineffective assistance throughout these proceedings and that he did not receive the benefit of the bargain under the plea

agreement. The California Supreme Court has “repeatedly stressed ‘that “[i]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,” the claim on appeal must be rejected.’ [Citations.] A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.” (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) The same reasoning applies to Guice’s claim of ineffective assistance of counsel with respect to his trial counsel’s conduct and advisements regarding his pleas and the negotiated settlement, which are devoid of support in the appellate record.

Contrary to Guice’s assertions, the record indicates he received a benefit in exchange for his plea and waiver of rights. Guice’s maximum exposure in the open cases, prior to the jury trial in case No. SS100975, was estimated by both sides to be over 30 years. The prosecutor explained that under the agreement, the People “dismissed the strikes” and did not file the enhancements under section 667, subdivision (a), allowing the trial court to exercise its discretion to impose concurrent rather than consecutive sentences by also striking the enhancements pursuant to section 12022.1. In addition, the People dismissed three counts of violating section 1320.5, as charged in case No. SS110737B and did not ask Guice to admit the section 1170.12 enhancement alleged in both cases.

In addition to considering the arguments set forth by defendant in his letter brief, we have also conducted an independent review of the record pursuant to *Wende* and *Kelly* and have concluded there are no arguable issues on appeal.

### **III. DISPOSITION**

The judgment is affirmed.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Walsh, J.\*

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\* Judge of the Santa Clara County Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.