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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE COSTA SOARES,

Defendant and Appellant.

B279870

(Los Angeles County
Super. Ct. No. BA440274)

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDRE SOARES RAMIREZ,

Defendant and Appellant.

B280389

(Los Angeles County
Super. Ct. No. BA440980)

APPEAL from a judgment of the Superior Court of Los Angeles County. Katherine Mader, Judge. Affirmed.

Karyn H. Bucur, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Andre Costa Soares appeals from the December 7, 2016 judgment revoking probation in two matters, case No. BA440274 and case No. BA440980.¹ Following our independent examination of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we conclude no arguable issues exist. Accordingly, we affirm.

PROCEDURAL AND FACTUAL HISTORY

In case No. BA440274, appellant was charged with one felony count for his August 19, 2015 attempt to cash a \$1,900 forged check. (Pen. Code, §§ 470, subd. (d), 473, subd. (a).)²

In case No. BA440980, appellant was charged with an additional forgery count for his August 31, 2015 attempt to use a \$6,422.22 cashier's check, which he had altered from a \$24.12 money order. (§§ 470, subd. (d), 473, subd. (a).)

On January 19, 2016, at the same court appearance, appellant entered a “no contest” plea in both cases, No. BA440274 and No. BA440980. In the combined cases, the court imposed a total sentence of three years eight months; in case No. BA440980, the court imposed the upper term of three

¹ We granted appellant's motion to consolidate the two appeals.

² Unless otherwise noted, further statutory references are to the Penal Code.

years and in Case No. BA440274, the court imposed eight months -- one-third the middle term of two years -- consecutive to the three-year term.

The court suspended sentence and placed appellant on probation for five years with various conditions, including the condition that he serve 180 days in jail.

While in jail, appellant spit in the eye of a corrections officer, thereby committing a battery of a peace officer by gassing.³ (§§ 243, subd. (b), 243.9, subd. (a).) The People moved to revoke probation in both cases, Nos. BA440274 and BA440980.

At the December 7, 2016 probation violation hearing, Los Angeles County Deputy Sheriff Peter Schafer testified that, on September 1, 2016, while he and other deputies were transporting appellant, appellant kicked Deputy Schafer just below the deputy's knee and then spit in the face of Deputy Daisy Funes. The deputies placed appellant on the floor, and one deputy pepper sprayed appellant. The People played a video recording of the incident, which was subsequently admitted into evidence.

Appellant testified on his own behalf that, on September 1, 2016, he was scheduled to attend a court hearing to determine his mental competence. Appellant testified that he had already been chained at the waist when a "Latino" deputy "was surprised that I was not wearing a suicide suit. I never said I was suicidal and he said, 'Okay. Let me call and verify what's going on.' "

³ "Gassing" means intentionally placing or throwing or causing to be placed or thrown on the person of another any human excrement or bodily fluid or substance (§ 243.9, subd. (b)).

When the deputy returned with several other deputies, he told appellant that the hearing would not take place, but that appellant would be going to a mental hospital “ ‘in a couple of weeks.’ ” Scared and feeling threatened, appellant “totally freaked out.” On cross-examination, appellant admitted that he had kicked Deputy Schafer, but did so as a “natural reaction” to the deputies’ pushing him against a wall. He also admitted that he spit in Deputy Funes’s face.

Appellant’s counsel argued that appellant reacted to mistreatment at the hands of the deputies. Counsel stated that, although the video recording was not clear, he believed that appellant was pepper sprayed before he spit at Deputy Funes; he did not intend to spit at Deputy Funes, but had been trying to get the pepper spray out of his mouth.

The court found that appellant willfully violated probation.

On December 9, 2016, the court reimposed the previously-suspended sentence: the high term of three years in case No. BA440980, with a consecutive term of eight months, calculated as one-third the middle term of two years in case No. BA440274. The court awarded credit of 493 days, comprised of 157 actual days, plus 156 good time/work time days, as well as 180 days of time served in county jail.

Appellant timely appealed.

DISCUSSION

After review of the record, appellant's court-appointed appellate counsel filed an opening brief, asking this court to review the record independently pursuant to *Wende, supra*, 25 Cal.3d 436. Via an October 5, 2017 letter, we advised appellant that he had 30 days within which to submit any contentions or issues that he wished us to consider.

Appellant timely filed a supplemental brief and an addendum to his supplemental brief. Appellant admits that he kicked one deputy and spit at the other, but explains that his actions constituted a "natural reaction" to being tasered.⁴

Appellant states that he is not satisfied with the performance of appellate counsel, because appellate counsel: made false statements in the *Wende* brief; asked multiple times for an extension of time to file the opening brief; did not speak to appellant about his case; and filed a *Wende* brief. This contention of ineffective assistance of appellate counsel fails. First, appellant does not set forth the "false" statements he challenges, and we cannot find any factual statements in the brief that are not supported by the appellate record. Second, appellant fails to show that counsel's conduct fell outside the wide range of reasonable professional assistance and that appellant was prejudiced thereby. (*Strickland v. Washington* (1984) 466 U.S. 668, 689-690, 104 S.Ct. 2052, 2065 2066; *People v. Jones* (2010) 186 Cal.App.4th 216, 235.) Third, to the extent that appellant is contending that appellate counsel has provided ineffective assistance by filing a *Wende* brief, he does not carry his burden to

⁴ "Taser" is the brand name of one type of conducted electrical weapon.

show that counsel was objectively unreasonable in failing to discover nonfrivolous issues, as appellant does not set forth any meritorious issues that appellate counsel could have raised. (*Smith v. Robbins* (2000) 528 U.S. 259, 285-286.) Moreover, appellant has not shown prejudice; he fails to show that if counsel had filed a merits brief, he would have prevailed on his appeal. (*Ibid.*)

Finally, appellant raises an issue not properly before us, as it concerns his sentence in a third case, No. BA458728.⁵

We have examined the entire record and are satisfied that no arguable issues exist, and that appellant has, by virtue of counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against him in this case. (*Smith v. Robbins, supra*, 528 U.S. at p. 278; *People v. Kelly* (2006) 40 Cal.4th 106, 112-113.)

⁵ Appellant raised this issue in petitions in cases No. B285614 and B285805. In both petitions, we considered this issue on its merits and declined to grant any relief.

DISPOSITION

The judgment is affirmed.

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DHANIDINA, J.*

We concur:

EDMON, P. J.

LAVIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.