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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

EZEKIEL SIMON,

Defendant and Appellant.

B284952

(Los Angeles County
Super. Ct. No. BA388294)

Defendant and appellant Ezekiel Simon (defendant) appeals from the denial of his postjudgment motion to vacate an order for victim restitution. His appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), raising no issues. After defendant was notified of his counsel's brief he filed his own supplemental brief, asserting that trial counsel should have challenged the restitution order on the ground that he was a minor when the crime was committed, and that appellate counsel rendered ineffective assistance by filing a *Wende* brief without researching the applicability of Civil Code

sections 1556, 1557,¹ and Family Code section 6500, relating to a minor's capacity to enter into contracts.

Defendant was charged by information in count 1 with the murder of Kashmier James, in violation of Penal Code section 187, subdivision (a).² The information further alleged, pursuant to section 190.2, subdivision (a)(22), that defendant intentionally killed while he was an active participant in a criminal street gang and the murder was carried out to further the activities of the street gang. Count 2 charged defendant with the attempted murder of Diondre Woods, in violation of sections 664 and 187, subdivision (a), and alleged that defendant committed the attempted murder willfully, deliberately and with premeditation within the meaning of section 664, subdivision (a). As to count 1, it was further alleged that a principal personally and intentionally discharged a firearm, which proximately caused great bodily injury and death within the meaning of section 12022.53, subdivisions (d) and (e)(1). As to both counts, it was alleged pursuant to section 186.22, subdivision (b)(1)(C), that the offenses were committed for the benefit of, at the direction of, and in association with a criminal street gang with the specific intent to promote, further and assist in criminal conduct by gang members, that a principal personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivisions (c) and (e)(1), and that a principal personally used a firearm within the meaning of sections 12022.53, subdivisions (b) and (e).

¹ Defendant cited to the Code of Civil Procedure for these sections, but this was apparently a clerical or typographical error.

² All further statutory references are to the Penal Code unless indicated otherwise.

Defendant entered into a plea agreement with the prosecutor, in which he pled to an added charge of voluntary manslaughter (count 3), in violation of section 192, and admitted one gang and one firearm allegation, in exchange for a prison sentence of 29 years. Imposed on August 27, 2015, the sentence was comprised of six years for the substantive offense, a 10-year gang enhancement and a four-year firearm enhancement, and a consecutive nine years for attempted murder in count 2.³

After the judgment was final, in July 2017, defendant filed a motion to vacate the orders for victim restitution on the ground that he was a minor at the time the offense was committed. The trial court denied the motion, and defendant filed a timely notice of appeal.

The record does not reflect what research was completed by trial or appellate counsel, and thus any claim of ineffective assistance of counsel cannot be raised on appeal. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) Moreover, any motion to vacate or disaffirm the restitution term of the plea agreement would not have been well taken, as a minor's capacity to enter into a plea agreement is governed by criminal law, not civil law. (See generally, *Brown v. County of Los Angeles* (2014) 229 Cal.App.4th 320, 322-324.) Further, we observe that at the time defendant entered into the plea bargain he was no longer a minor. Counsel does not render ineffective assistance under the Sixth Amendment by failing or refusing to raise futile motions. (*People v. Solomon* (2010) 49 Cal.4th 792, 843, fn. 24.)

³ Appellate counsel pointed out that the abstract of judgment erroneously states that the six-year term was for count 2 and the nine-year term was for count 3. We accordingly order the superior court to file and amended abstract.

Nor is it ineffective assistance for appellate counsel to file a *Wende* brief, as “the appellate court . . . review[s] the entire record to determine whether there is any arguable issue.” (*People v. Kelly* (2006) 40 Cal.4th 106, 119.) The United States Supreme Court approved the *Wende* procedure in *Smith v. Robbins* (2000) 528 U.S. 259. (*People v. Kelly, supra*, at p. 118.) Substitution of counsel is not required so long as appellate counsel followed the prescribed *Wende* procedure. (See *Wende, supra*, 25 Cal.3d at p. 442.)

We have examined the entire record and are satisfied that defendant’s appellate counsel has fully complied with his responsibilities and that no arguable issue exists. We conclude that defendant 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 order denying his motion.

The order denying defendant’s motion to vacate the restitution order is affirmed. The superior court is directed to prepare an amended abstract of judgment to correctly reflect the oral pronouncement of sentence as stated above, and to forward a certified copy to the Department of Corrections and Rehabilitation.

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LUI, P. J.

CHAVEZ, J.

HOFFSTADT, J.