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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL AVILA,

Defendant and Appellant.

B279466

(Los Angeles County
Super. Ct. No. BA410376)

APPEAL from a judgment of the Superior Court of Los Angeles County. Dennis J. Landin, Judge. Affirmed.

David M. Thompson, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

On April 8, 2016, this court affirmed the convictions of defendant and appellant Daniel Avila on multiple counts, but remanded with directions to resentence defendant on several counts and special allegations, as well as for preparation of a new abstract of judgment. (*People v. Avila* (Apr. 8, 2016, B257654) [nonpub. opn.].) The trial court held a sentencing hearing in compliance with our opinion on September 23, 2016. The hearing was held in defendant's absence after the court concluded defendant had refused to cooperate in transportation from state prison to court. Defendant filed a timely notice of appeal.

This court appointed counsel to represent defendant on appeal. On April 12, 2017, appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, raising no issues but requesting this court to review the record for arguable issues. Defendant was advised by letter dated April 17, 2017, of his right to file a supplemental brief within 30 days. Defendant's request for an extension of time to file his supplemental brief was granted to June 16, 2017. This court later granted permission to file a late brief.

Defendant raises four issues in his supplemental brief. First, he argues the trial court erred in ruling that defendant voluntarily absented himself from the resentencing hearing. Second, defendant contends his presence at the resentencing hearing would have changed the outcome of the hearing. Third, defendant argues the trial court failed to rule on two motions filed with his notice of appeal. Fourth, defendant

contends trial counsel provided constitutionally deficient representation.

We first discuss defendant's claim that his absence from court for resentencing was involuntary. We consider the issue against the backdrop of defendant's documented history of violent refusal to exit his cell, attacks and threats against deputies, and disruptions of proceedings. The extent of defendant's violent misconduct was set forth in our prior opinion, and need not be repeated here. In an attempt to arrange for transportation of defendant from state prison to court, on September 21, 2016, the trial court issued an order stating that the resentencing hearing would be on September 23, 2016, and the court had been advised that defendant "has refused to be transported to Los Angeles for said hearing." The Sheriff was directed to advise defendant of the following:

"Los Angeles Superior Court Judge Dennis Landin has directed that we inform you that you have a right to be present at your resentencing hearing scheduled on September 23, 2016 Judge Landin has ordered that you leave your cell and cooperate in your transportation to court.

"Judge Landin has further instructed us to inform you that if you fail to cooperate in your transportation to court, your refusal will be treated as a voluntary absence from your resentencing hearing and the hearing will proceed in your absence."

The court order directed the Sheriff to ask two questions of defendant: “Will you leave your cell voluntarily?” [¶] “Will you cooperate in your transportation to court today?” Judge Landin further ordered that the advisement be video recorded and a copy of the recording be provided to the court no later than 9:00 a.m. on September 23, 2016.

At the resentencing hearing on September 23, 2016, all counsel and the court viewed the video recording of the discussion taking place between a sheriff’s lieutenant and defendant at the Corcoran State Prison on September 22, 2016. A transcript of that discussion is included in the record on appeal. The lieutenant read Judge Landin’s order to defendant. When asked on multiple occasions if he would leave his cell voluntarily or “cooperate in the transportation to court today,” defendant repeatedly responded, “[o]n the day of court.” The lieutenant noted that defendant stated he would “leave on the day of his court hearing,” that “Transportation” tried twice unsuccessfully to “get him to come out of his cell to go to court,” and defendant’s refusal to exit his cell is an “act of refusal.”

Judge Landin reviewed the previous difficulties in removing defendant from his cell, which required substantial resources and dangers that “are very significant.” Judge Landin concluded, “it is not necessary to extract [defendant],” and deemed “his responses as a refusal to cooperate, and I will proceed with the sentencing hearing.”

After a break in proceedings, Judge Landin further explained that two days were required to transport defendant to court from the Corcoran State Prison in central California. The plan was to transport defendant from Corcoran to the state prison in Lancaster, and then to court on the day of resentencing. “So we’re not going to make special arrangements for Mr. Avila so he only has to be away from his cell for one day. That’s impossible.”

A defendant shall be personally present at trial in a felony case. (Pen. Code, § 1043, subd. (a).) However, the court may proceed in a defendant’s absence in “[a]ny prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent.” (*Id.*, § 1043, subd. (b)(2).) We review defendant’s contention that the trial court erred in finding that he voluntarily absented himself from the resentencing hearing under the substantial evidence standard of review. (*People v. Concepcion* (2008) 45 Cal.4th 77, 84.) Refusal to exit from a lockup supports a finding of voluntary absence. (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1206.)

The trial court’s determination that defendant refused to cooperate by exiting his prison cell for transportation is fully supported by the record, as is the implied finding that defendant was voluntarily absent. Defendant was a sentenced state prisoner who had no right to dictate the manner of transportation to court. A sentenced prisoner has no unilateral right to overrule a reasonable plan to secure the attendance of the inmate in court, particularly where the

inmate has a well-documented history of violence. Defendant was made aware that his failure to cooperate in transportation would be treated as a voluntary absence, and he has no basis to complain of the consequences of his actions.

As a result of our conclusion on defendant's first contention, his second argument—that his presence would have changed the outcome—need not be discussed. The trial court was free to proceed with resentencing in defendant's voluntary absence. We will not speculate what might have happened had defendant not made the decision to voluntarily absent himself.

Defendant's third contention—that the trial court failed to rule on two motions embedded in his notice of appeal—provides no basis for reversal. The first motion relates to defendant's absence from the resentencing hearing, a contention we have already rejected. His second motion relates to his designation of the record, which he wanted to include the proceedings in the trial that resulted in our previous opinion. We have access to that record, and nothing in it changes our view of the merits of this appeal.

Finally, defendant's claim that his trial counsel was ineffective at the resentencing hearing relates to the issue of defendant's absence from trial. “An ineffective assistance claim has two components: A [defendant] must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.’ (*Wiggins v. Smith* (2003) 539 U.S. 510, 521 (*Wiggins*), citing *Strickland v. Washington* (1984)

466 U.S. 668, 687 (*Strickland*).)” (*In re Welch* (2015) 61 Cal.4th 489, 514.) Defendant fails to establish that counsel’s performance was deficient or prejudicial, considering that it is readily apparent that defendant voluntarily elected not to participate in transportation to court. He also fails to establish prejudice, as no showing is made that the trial court committed error in recalculating defendant’s sentence.

We have examined the record for other arguable contentions, and find none. The judgment is affirmed. (*Smith v. Robbins* (2000) 528 U.S. 259.)

KRIEGLER, Acting P.J.

We concur:

BAKER, J.

DUNNING, J.*

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