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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.

ELLIS LEE CLARK, JR.,

Defendant and Appellant.

B287957

(Los Angeles County
Super. Ct. No. MA072713)

THE COURT:

Ellis Lee Clark, Jr., (appellant) was charged with, inter alia, possession of a firearm by a felon.¹ (Pen. Code, § 29800, subd. (a)(1).)² He pleaded no contest and admitted he was previously convicted of burglary (§ 459) subjecting him to

¹ He was also charged with unlawful possession of ammunition. (§ 30305, subd. (a)(1).)

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

sentencing under the “Three Strikes” Law (§§ 667, subds. (b)–(j), 1170.12, subd. (b)). The trial court sentenced appellant to the low term of 16 months, doubled under the Three Strikes law to 32 months.

Appellant appealed from the judgment.

His appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*) raising no issues. On May 17, 2018, we notified appellant of his counsel’s brief and gave him leave to file his own brief or letter stating grounds for appellate relief. He submitted a letter arguing that his conviction should be reversed based on ineffective assistance of counsel and various other grounds.

Relevant Facts

Probation Officer’s Report

On November 28, 2017, appellant was transported by a private investigator for a bail bonds company to the Lancaster Police Station. The private investigator identified himself when he made contact with appellant. Appellant consented to a search of his pockets. The private investigator found a firearm in appellant’s pants pocket and a loaded revolver with six live rounds and two additional rounds in his jacket pocket. Appellant said that he was involved with a street gang called “All For Crime” and that a state prison gang was trying to kill him so he carried the gun for protection. Appellant was arrested for being a felon in possession of a firearm and for unlawful possession of ammunition.

Appellant’s Plea

On November 30, 2017, appellant appeared in court with defense counsel to enter a plea. The trial court indicated that it had a plea form with an explanation of waiver of rights, and that

the initials E.C. were “in the boxes on the right side of the page.” When the trial court asked if appellant put his initials in those boxes, he said yes. He was asked if he read and understood the form, and if he understood that a no contest or guilty plea would result in the trial court finding him guilty. To those questions he answered yes. He proceeded to plead guilty to possession of a firearm by a felon, and to admit a prior conviction for burglary.

Certificate of Probable Cause

Appellant filed a notice of appeal on January 19, 2018. Soon after, he requested a certificate of probable cause, which the trial court granted. The certificate of probable cause stated that appellant wanted to withdraw his plea based on racial profiling, illegal search and seizure, and misrepresentation by the public defender.

DISCUSSION

Appellant seeks reversal based on ineffective assistance of counsel because defense counsel did not file a motion to suppress evidence under section 1538.5 or a motion to dismiss the information under section 995. In the alternative, appellant argues that his conviction should be reversed due to racial profiling, illegal search and seizure, and insufficiency of the evidence to establish his guilt.

“Other than search and seizure issues specifically reviewable under [section] 1538.5, subdivision (m), all errors arising prior to entry of a plea of guilty or nolo contendere are waived by the plea, except those based on “reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings.” [Citation.]” (*People v. McNabb* (1991) 228 Cal.App.3d 462, 470.) A search and seizure argument is only cognizable on appeal if defendant made a motion to

suppress in the trial court. (§ 1538, subd. (m).) Appellant's challenges to racial profiling and sufficiency of the evidence are waived because he entered a plea. Further, because appellant did not make a motion to suppress evidence, he cannot challenge the seizure of the firearm.

For the sake of argument, we presume appellant can argue ineffective assistance of counsel regarding defense counsel's failure to file a motion to suppress. To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability, absent counsel's failings, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687–688, 694.) Appellant cannot establish that defense counsel should have filed a motion to suppress the firearm, or that it was probable such a motion would have succeeded. The probation report indicates that appellant consented to be searched. Also, the private investigator was not a government agent. “[A]cquisition of property by a private citizen from another person cannot be deemed reasonable or unreasonable [citations], and a motion to suppress evidence so obtained cannot be made on the ground that its acquisition constitutes an unreasonable search and seizure under section 1538.5.” (*People v. Superior Court of Los Angeles County* (1969) 70 Cal.2d 123, 128–129.) Thus, defense counsel could not have successfully moved the trial court to suppress the firearm found in appellant's pocket, and appellant could not have gotten the case dismissed.

CONCLUSION

Upon due consideration, we are satisfied that appellant's counsel complied with his responsibilities. We conclude appellant

has received adequate and effective appellate review of the judgment entered against him by virtue of counsel's compliance with the *Wende* procedure as well as our review of the record. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 123–124.)

The judgment is affirmed.

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LUI, P. J.

ASHMANN-GERST, J.

HOFFSTADT, J.