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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.

CHARLES FRANKLIN PAYTON,

Defendant and Appellant.

B233701

(Los Angeles County  
Super. Ct. No. MA047370 c/w  
MA049919)

APPEAL from a judgment of the Superior Court of Los Angeles County. Charles A. Chung, Judge. Affirmed.

Rachel Varnell, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Charles Franklin Payton (defendant) appeals from his conviction of felony vandalism and misdemeanor disobedience of a court order. His appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), raising no issues, but requesting a review of the record including the in camera *Pitchess* review.<sup>1</sup> On January 17, 2012, we notified defendant of his counsel's brief and gave him leave to file, within 30 days, his own brief or letter stating any grounds or argument he might wish to have considered. That time has elapsed, and defendant has submitted no brief or letter. However, respondent filed a brief objecting to appellate review of the *Pitchess* hearing and we requested a reply from defense counsel.<sup>2</sup> We reject respondent's objection and we have reviewed the entire record, including all in camera proceedings. Finding no arguable issues, we affirm the judgment.

By information filed on January 12, 2010, in Los Angeles County Superior Court case No. MA047370, defendant was charged in count 1 with assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1);<sup>3</sup> and in count 2 with felony vandalism in violation of section 594, subdivision (a).

On the prosecutor's motion case No. MA047370 was later consolidated into case No. MA049919, in which defendant was charged with two counts of dissuading a witness in violation of section 136.1, subdivision (b)(2), two counts of criminal threats in

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<sup>1</sup> See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*); Penal Code sections 832.7 and 832.8; Evidence Code sections 1043 through 1045.

<sup>2</sup> Respondent appears to suggest that defendant must establish an abuse of discretion as a prerequisite to our review of the in camera proceedings. The authority cited by respondent does not so hold. (See *People v. Hughes* (2002) 27 Cal.4th 287, 330; *People v. Mooc* (2001) 26 Cal.4th 1216, 1228; *People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.) Further, the *Wende* procedure requires the appellate court to conduct a complete review of the entire record. (*People v. Kelly* (2006) 40 Cal.4th 106, 118; *Wende, supra*, 25 Cal.3d at pp. 441-442.)

<sup>3</sup> All further statutory references are to the Penal Code unless otherwise indicated.

violation of section 422, and one count of misdemeanor disobedience of a criminal protective order (protective order) in violation of section 273.6, subdivision (a). Upon consolidation, these counts became counts 3 through 7, respectively. On March 23, 2011, count 7 was amended by interlineation to allege the violation occurred between June 7, 2009 and August 2, 2010.

The consolidated information alleged as to counts 3, 4, 5, and 6, that defendant had been released on bail or on his own recognizance at the time of committing the crimes, within the meaning of section 12022.1; it was also alleged that defendant had suffered prior serious felony convictions pursuant to sections 667, subdivision (a)(1), 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d).

Defendant filed a pretrial *Pitchess* motion requesting discovery of any evidence of misconduct by Los Angeles Sheriff's Detective William Gordon. The trial court granted the motion, held an in camera review, and found no discoverable information. Defendant also brought a *Marsden* motion for new counsel, which the trial court denied.<sup>4</sup>

Defendant admitted his prior convictions. A jury convicted defendant of count 2, felony vandalism, and count 7, misdemeanor disobedience of a protective order. The jury acquitted him of counts 3, 4, 5, and 6, and was unable to reach a verdict on count 1. The trial court declared a mistrial as to count 1 and later dismissed the count. Defendant filed another *Marsden* motion, and a *Romero*<sup>5</sup> motion to dismiss the prior serious felony conviction.

On June 10, 2011, the trial court denied probation and sentenced defendant to the middle term of two years on count 2, doubled under the "Three Strikes" law, for a total of four years in prison. The court sentenced defendant to one day in jail on count 7 with credit for time served, to run concurrently with the prison term. The court found that sections 667, subdivision (a)(1) and 12022.1 were inapplicable, and struck the allegations. Defendant received 465 days of custody credit, which included 311 actual

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<sup>4</sup> See *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

<sup>5</sup> *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

days of custody. The court imposed a restitution fine of \$800, a parole revocation fine in the same amount, stayed until any revocation of parole, \$70 in other fees, and victim restitution to be determined in a later hearing. The court issued and served a protective order forbidding contact with the victim for 10 years.

On the same date, but following the sentencing hearing, the trial court found that it had overlooked the second *Marsden* motion and calendared a hearing on that motion for the following week. Defendant withdrew his motion at the time it was called for hearing. Defendant filed a timely notice of appeal the day of sentencing.

The evidence showed that on October 18, 2009, during an argument with his wife Kelly Payton (Kelly), defendant removed a tire from her car, jacked up the car, dropped it, and then smashed several of the windows with a wrench or other tool, causing damage in excess of \$400. Defendant later admitted to Detective Gordon that he had smashed his wife's car windows during an argument.

The sheriff's department was called and a responding deputy issued an emergency five-day protective order requiring defendant to move out of the family residence, stay at least 100 yards away from his wife, and among other things, not contact, threaten, or telephone her. The trial court issued and served defendant with a three-year protective order on June 7, 2010. On August 3, 2010, Kelly reported to the district attorney's office that defendant had violated both orders. In a recorded interview with an investigator, Kelly stated that in July 2010, defendant had threatened her both in person and in telephone voice and text messages.

We have examined the entire record, including the in camera hearing on the *Pitchess* motion. We are satisfied that defendant's attorney has fully complied with her 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 judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly*, *supra*, 40 Cal.4th at pp. 112-113.)

**DISPOSITION**

The judgment is affirmed.

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\_\_\_\_\_, J.  
CHAVEZ

We concur:

\_\_\_\_\_, P. J.  
BOREN

\_\_\_\_\_, J.  
ASHMANN-GERST