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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ISHMAEL MIZRAHI,

Defendant and Appellant.

B235297

(Los Angeles County
Super. Ct. No. KA079942)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed.

Marta I. Stanton, 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, Linda C. Johnson and Carl N. Henry, Deputy Attorneys General, for Plaintiff and Respondent.

Ishmael Mizrahi appeals from the judgment entered following his no contest plea to forgery, grand theft and several other crimes, contending imposition of sentence in his absence violated his federal and state constitutional rights to due process. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In June 2010 Mizrahi pleaded no contest to 24 offenses charged in two consolidated cases (case nos. KA079942 and BA326567), including multiple counts each of forgery (Pen. Code, § 470, subd. (b)),¹ the unauthorized practice of law (Bus. & Prof. Code, § 6126, subd. (a)), false personation (§ 529) and grand theft (§ 487, subd. (a)).² On November 1, 2010 Mizrahi, representing himself in case No. KA079942, and represented by counsel in case No. BA326567, appeared for sentencing. Counsel moved to continue sentencing because Mizrahi had surgery scheduled at the men's county jail in 21 days and he was concerned he would not be able to reschedule the surgery for several months if he were remanded to the Department of Corrections and Rehabilitation, where he would have to wait for classification and transportation. After the court denied the motion, noting the cases were several years old, Mizrahi explained he had scheduled surgery to take advantage of prior waivers of time for sentencing prompted by the district attorney's illness and his counsel's engagement in another trial. The following exchange then took place:

"The Court: I'm sorry.

"The Defendant: What are you sorry about?

"The Court: We're done. Your request to postpone sentencing is denied. Now then—

"The Defendant: What an asshole man.

"The Court: Sir, watch your language.

¹ Statutory references are to the Penal Code unless otherwise indicated.

² Mizrahi also admitted he had suffered one prior serious or violent felony conviction within the meaning of section 667, subdivision (a)(1), and the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)) in connection with case No. BA326567.

“The Defendant: You know what, man, I don’t give a fuck. Fuck you. Get me out of here, man. Fuck you.

“The Court: Take him out. I don’t have time for this.

“The Defendant: Fuck you. You’re a piece of shit, motherfucker. I sat here and continued this case to accommodate everybody—

“The Court: Sir.

“The Defendant: Sir, my ass. Fuck you.”

Two days later, on November 3, 2010, Mizrahi was brought back to the courthouse for sentencing, but he refused to enter the courtroom. The court found, “[Mizrahi] is a refusal. He refuses to come out. I have no information from the sheriff’s department that it’s a medical refusal or anything other than just his refusal to be here today. Given the outbursts that occurred on Monday . . . and given his refusal to cooperate as a pro. per. in this matter, I’m, No. 1, finding that he has voluntarily absented himself from the sentencing; and, No. 2, revoking his pro. per. privileges limited solely to the sentencing.” After the court appointed defense counsel in case No. BA326567 to represent Mizrahi in case No. KA079942, counsel objected that Mizrahi was entitled to be present at sentencing without any concrete information whether he was “in fact a refusal or simply a medical missout, since Mr. Mizrahi is a special handle in county jail.” The court overruled the objection, clarifying it had information Mizrahi was “a non-medical refusal, simply refusing to be here, obviously flouting the authority of this court to sentence him now.” The court then sentenced Mizrahi to an aggregate state prison term of eight years and dismissed the prior strike allegation.

DISCUSSION

A defendant has a constitutional and statutory right to be present at all critical stages of the criminal proceeding, including sentencing hearings. (See *People v. Rodriguez* (1998) 17 Cal.4th 253, 257; *People v. Arbee* (1983) 143 Cal.App.3d 351, 355-356; §§ 977, subd. (b)(1), 1193, subd. (a).) Section 1193 provides a defendant may waive the right to be present at sentencing or, even if not waived, the court may proceed in defendant’s absence if “after the exercise of reasonable diligence to procure the

presence of the defendant, the court shall find that it will be in the interest of justice that judgment be pronounced in his or her absence.” We review any error for prejudice under the beyond-a-reasonable-doubt test in *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People v. Robertson* (1989) 48 Cal.3d 18, 62 [no prejudice because defendant had “made a statement to the court following its sentence verdict and before the sentence modification hearing— at a time, therefore, when the court likely was most open to reassessment of its determination[—] . . . acknowledg[ing] his responsibility for his crimes and fully express[ing] his remorse”].)

Mizrahi’s argument the trial court failed to exercise reasonable diligence to procure his presence is primarily based on the false premise the court failed to make any inquiry “to determine the actual reason for [his] absence whether he was a refusal or medical miss-out.” To be sure, the trial court’s initial statement, “I have no information from the sheriff’s department that it’s a medical refusal or anything other than just his refusal to be here today,” could be construed as indicating the court was unsure whether it was a medical-related refusal or just defiance. However, after defense counsel’s objection it was improper to sentence Mizrahi in absentia without “concrete information,” the court clarified it had information Mizrahi was “a non-medical refusal, . . . obviously flouting the authority of the court” This was an unequivocal statement that needed no further explanation in light of Mizrahi’s contemptuous behavior two days earlier.

Mizrahi’s argument the court failed to make any attempt to procure his presence is similarly unpersuasive. Rather than sentence Mizrahi after he was removed from court because of his outburst, the court had him brought back after telling defense counsel, “whenever your client is ready I’m happy to bring him back.” Once he was brought back, Mizrahi refused to come to the courtroom. Reasonable diligence does not require the court to have him forcefully brought into the courtroom.

Even if the court erred, it was harmless. When Mizrahi pleaded guilty in June 2010, he stated he understood the maximum time to which he could be sentenced in state prison if convicted on all counts with true findings on the special allegations was 11 years plus three years in county jail, but that “the court has agreed that upon [his] open plea the

court [would] sentence [him] to eight years” and he would be entitled to 50 percent credit. Additionally, as to the crimes in case No. KA079942, the probation report listed no mitigating factors and seven aggravating factors; as to the crimes in case No. BA326567, the probation report listed no mitigating factors and four aggravating factors. There is no question Mizrahi could not have presented any evidence in mitigation that would have convinced the court to sentence him to a lesser term. (Cf. *People v. Song* (2004) 124 Cal.App.4th 973, 984 [“[t]o find the error harmless we must find beyond a reasonable doubt . . . that it was unimportant in relation to everything else the jury considered on the issue in question”].)

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.