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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. REGINALD LETT, Defendant and Appellant.	B235686 (Los Angeles County Super. Ct. No. GA081209)

APPEAL from a judgment of the Superior Court of Los Angeles County, Candace Beason, Judge. Affirmed.

California Appellate Project and Ann Krausz, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Reginald Lett appeals from the judgment entered following a jury trial which resulted in his conviction of petty theft after he previously had been convicted of a felony theft offense (Pen. Code, § 666, subd. (b)).[1] The trial court sentenced Lett to four years in prison. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts.*

a. *The prosecution's case.*

At approximately 1:10 p.m. on September 20, 2010, Terina Macneill was driving a rental car in Pasadena.[2] She had accidently locked the car's keys in the trunk but, because they had a "sensor . . . close enough to the car," all she had to do was push a button inside the car to make it start.

Macneill needed to put gasoline in the car and she pulled up next to a pump at a station at the corner of Walnut and Fair Oaks. In order to be able to pay for the gasoline and still get back into the car, Macneill left the car's driver's side window rolled down and the doors unlocked. As she was sitting in the car, Macneill noticed Lett standing in front of the car, toward the passenger side. Lett was wearing jeans and a black shirt and he had a white shirt, like a tank top, over his shoulder. He was approximately seven feet from the front of Macneill's car and was not pumping gas. He appeared to be a "pedestrian" in the gas station.

As Macneill got out of her car she looked at Lett, made eye contact, then walked the approximately 30 feet to the store, went inside and paid for her gas. She left her open purse on the front passenger seat of the car. Inside her purse was her wallet, in which she kept her credit cards, her social security card and her 15-month-old grandson's social security and insurance cards. In order to pay for the gas, Macneill had taken with her the small clutch in which she kept cash.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] In 2001, Macneill had been convicted of "taking a credit card and going shopping." She has been in no trouble with the law since that time.

Macneill was in the store for approximately three minutes. As she walked out of the store, Macneill was approached by an individual who told her something which directed her attention toward her car. Macneill also noticed that Lett was no longer standing in the gas station. She walked over to her car and realized that her wallet was missing. She looked down the nearby streets, but Lett was not to be seen. Macneill walked back to the gas station attendant, asked if she could use the telephone and called the police. A detective, in plain clothes and driving an unmarked car, arrived approximately 10 minutes later.

Macneill pulled her car up, got into the police officer's car and she and the officer drove around the neighborhood looking for Lett. As they were driving down Fair Oaks, Macneill spotted Lett attempting to enter a building. Lett was, however, unable to open the door. The officer drove closer to Lett so that Macneill could see his face and, when she did, Macneill was certain the individual was the man who had been standing in front of her car at the gas station.

Lett finally made it into the building and the detective who had been driving Macneill around, Ralph Ordonez, got out of the car and followed Lett.

Approximately one-half hour later, an officer approached Macneill carrying a number of credit cards, a driver's license and a social security card. When he showed them to Macneill, she identified them as hers. In total, there were 12 cards, each of which Macneill had kept in her wallet.

When Pasadena Detective Ralph Ordonez heard the call from the gas station, he was in the area of Arroyo Parkway, Holly and Marengo. Ordonez drove directly to the station, contacted Macneill and had her "get into [his] car to check the area for the person who took her wallet." Macneill had described the individual as "a male Black in his 30's, wearing a black T-shirt, dark pants, and holding a white shirt in his hands." In "Old Town Pasadena," at the corner of Fair Oaks and Colorado, Ordonez spotted a man who met Macneill's description. Ordonez saw Lett "pacing up and down," then attempt to open a door to a building which was apparently locked. When the traffic light changed,

Ordonez pulled up next to Lett and, at that point Lett was facing the detective and Macneill. Macneill told the detective, "That's him."

Once he had seen the officer and Macneill, Lett turned around and began to walk away from the police car. Ordonez followed Lett, but lost sight of him after he turned a corner. Believing that he had gone into one of two stores, Ordonez got out of his car and after "no more than a minute or two," saw Lett walk out of a J. Crew store. He was carrying a black plastic bag.[3]

As Lett walked down the street, Ordonez followed him on foot until the two eventually met up on the sidewalk. Ordonez identified himself as a police officer and asked Lett where he was coming from. Lett indicated that he "was coming from up the street." Ordonez noticed that Lett was clutching in his right hand an I.D. card and some credit cards. Ordonez asked Lett to put the cards "on the floor" and, when he noted that they belonged to Macneill, Ordonez took Lett into custody. He placed Lett in handcuffs and searched him. In one of Lett's pockets, the officer found Macneill's social security card. At this point, another police officer arrived on the scene. He took over the investigation while Ordonez took Macneill back to the gas station.

Pasadena Police Officer Edward Bondarczuk, dressed in his uniform and driving a marked patrol car, reported to the area near Colorado and Fair Oaks where Ordonez had detained Lett. Bondarczuk took a report from Macneill before Ordonez took her back to the gas station. Later, at the police station, Bondarczuk attempted to interview Lett.

In a "pre-booking room just outside of [the] jail," Bondarczuk read to Lett his *Miranda*[4] rights. After waiving those rights, Lett told the officer that he "rummages through trash cans" on a daily basis and had found Macneill's credit cards and social security card in one at a gas station. He could not, however, remember from which gas

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[3] Inside the bag, another officer, Officer Luevano, found "some loose cards. [There] was an I.D. card and . . . other various credit cards belonging to the victim."

[4] *Miranda v. Arizona* (1966) 384 U.S. 436.

station's cans he had retrieved them.[5] When Bondarczuk asked Lett if the credit cards and social security card were from the gas station at 200 North Fair Oaks, Lett "stated he could not remember."

Bondarczuk performed a "pre-booking" search and recovered from Lett approximately $16 in cash, a belt, two lottery tickets and a comb. The officer listed these items in his report. In addition, the officer indicated that Macneill had lost her wallet, some miscellaneous cards, "welfare cards belonging to her grandson" and her grandson's identification or social security card.

One other officer took part in the Macneill robbery investigation. Officer Luevano went to the gas station to "locate any [video] footage that might have been taken" there.

b. *Defense evidence*.

Pasadena Police Officer Louis Luevano had also responded to the call regarding the robbery at the gas station. He went to the station at Fair Oaks and Walnut "initially to contact the victim and, secondly, to contact [a] store employee." When he was able to speak with the gas station employee, Luevano asked him if they had any "surveillance video." Luevano was unable to obtain access to any video made that day and he so informed Officer Bondarczuk.

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[5] After telling the officer about the trash cans, Lett, who was neither sweating nor acting unusual, indicated that he had not slept for the past five days because he had been smoking crack cocaine. In spite of this fact, Lett seemed to understand the officer's questions and answered them appropriately.

2. *Procedural history*.

Following a preliminary hearing, on October 28, 2010, Lett was charged by information with one count of section 666, subdivision (b), the commission of petty theft by one who has previously been convicted of a felony theft offense.[6] It was further alleged that in 1991 and 1992, Lett had been convicted of burglary in violation of section 459, and in 1998 had been found guilty of grand theft in violation of section 487, subdivision (a). The information also alleged that in 1992 and 2007 Lett had been convicted of the serious or violent felonies of burglary in violation of section 459 and making a threat to commit a crime which would result in the death or great bodily injury to another in violation of section 422. Finally, it was charged that in 1992 Lett had committed burglary in violation of section 459 and in 2007 had made willful threats to commit a crime which would result in great bodily injury or the death of another in violation of section 422 within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i), the Three Strikes law.

On March 15, 2011, Lett made a *Marsden*[7] motion. He indicated that "a witness had [seen him] not doing the crime that [he was] being accused of. And [he] needed [his counsel] to locate that witness." Lett felt that his counsel's actions had not been "thorough." An employee of the gas station had told Lett that such a witness existed, but counsel had not contacted the individual. In addition, Lett had asked his counsel to attempt to locate "a couple of other potential witnesses . . . and [he] was told no . . . ." He felt that he was being pressured into taking a plea bargain and that his counsel was not confident about his chances at trial. She "really discouraged [him] about that."

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[6] In the middle of trial, the prosecutor amended the information to charge as count 2 the misdemeanor of the receipt of stolen property in violation of section 496, subdivision (a).

[7] *People v. Marsden* (1970) 2 Cal.3d 118.

With regard to the witnesses, counsel indicated that she had sent her investigator out after Lett had given her "a brief description of a guy named Mark who would be found at a city park…." The investigator went to the park four times, spoke with numerous people and was unable to find "Mark."

Counsel continued, " . . . [A]s to the other witnesses, for the most part I didn't get any phone numbers [with which to] . . . contact [them]." In any event, although counsel believed the individuals [might] have seen Lett on the day of the alleged crime, they would "not provide a defense for him."

As for the offer, counsel had advised Lett that 32 months was the best the District Attorney's office was willing to make and that "he [could] take it or leave it. He [had] the absolute right to go to trial." Counsel had spoken to the District Attorney, who had indicated that they would not proceed on the matter as a Third Strike case, so Lett would not receive a life sentence.[8] Counsel had also informed Lett that she "would be happy to take him to trial."

The trial court agreed with counsel that, to go any further with regard to obtaining witnesses was "not going to lead to anything productive or helpful to [Lett's] defense." In addition, the trial court had seen "how the [district attorney's] offer [had] stayed at four [years] for a while and [that counsel had] miraculously got it down to 32 months. [The trial court believed that was] good lawyering."

The trial court concluded that counsel was "doing a fine job" and that it did not "believe that there [was] a conflict that exist[ed] between [defense counsel and Lett] that would lead to ineffective assistance of counsel." Accordingly, the court denied Lett's *Marsden* motion.

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[8] Although Lett had been convicted of a crime which could have been alleged as a Third Strike, the District Attorney's office had determined that the primary charge, that Lett had committed petty theft, did not warrant a Third Strike allegation.

After his *Marsden* motion was denied, Lett made a *Faretta*[9] motion, indicating that he wished to represent himself. However, after receiving proper advisements, Lett withdrew his request for in propria persona status.

At proceedings held on May 12, 2011, Lett made a second *Marsden* motion. Out of the presence of the prosecutor, Lett indicated that, during the previous weeks, "the communication between [defense counsel] and [him]self ha[d] been pretty much not effective, [it had] been ineffective." Lett first indicated that, after he spoke with counsel regarding two stores that he had asked her to investigate, counsel told him that she "did one" and telephoned the other. Lett believed it would have been better had counsel gone to both stores.

Lett next indicated that he was in a residential substance abuse treatment program in the L.A. county jail which is associated with the "co-occurring disorder court." Although he had been set up for an evaluation, he never received it. When he complained to his counsel, she indicated that she had e-mailed the public defender representing clients in that court. Lett did not think that was proper protocol; "to e-mail another attorney regarding getting someone into their court." He believed that his file should have been sent and he should have received a proper evaluation.

When the trial court indicated that Lett's counsel had acted appropriately, Lett stated that he nevertheless had some questions for her. He had spoken to her once on the phone and she had indicated that, if he had any further questions, he could call her back. Lett "called [counsel] back twice because [he] had some other questions. And the third time, she really hung up in [his] face. She said, well, I have to go right now, bye. She didn't want to talk. So [Lett felt that their] communication [was] definitely [in] conflict. [¶] [He did not] feel confident in going further . . . with her if she [could not] communicate."

Counsel responded, " . . . I can understand that Mr. Lett really believes that this case stems from his drug use and his mental health issues and really would like a program

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[9] *Faretta v. California* (1975) 422 U.S. 806.

And we've been trying to do everything . . . to accomplish that." Counsel had e-mailed the public defender twice and had spoken to him two or three times on the phone regarding veteran's court, drug court and co-occurring disorder court. However, the public defender in charge of those programs had indicated that Lett would not qualify and "he [was] the one who [had] decided to cancel [Lett's] evaluation . . . ." Counsel continued, "So I understand Mr. Lett's frustration. And I did explain to him the reasons [the public defender] indicated that he would not be eligible for these programs. I spoke to Mr. Lett about three or four times on the phone. And by the fourth time, I [had] explained each thing three or four times because he was asking the same questions. [¶] So I advised him unless he ha[d] any new questions, I wasn't going to spend any more time on the phone with him. . . ."

After the trial court explained to Lett that his failure to qualify for the programs in other courts most likely had to do with the policies involving his strikes, Lett agreed that his counsel had been "working hard." He was, however, frustrated with their lack of communication. Lett stated, "I don't get to talk to her but very briefly, just moments. And then it's like a hurry, hurry thing. And, you know, a lot of times it's hard to get a hold of her on the phone, so it's just a frustration with that."

The trial court denied the *Marsden* motion. The court stated, "I understand frustration. And I think – to me, it sounds to me like that's what is really going on. And I just want you to know, she's a good lawyer. Every day she runs around to multiple courts. All the lawyers do. And they are very busy."

On May 24, 2011, the matter was called for trial. Lett, in the event he was found guilty of the charged crime, waived his right to a jury trial on his prior convictions. When he was advised of his right to testify or not to testify on his own behalf, Lett indicated he understood his rights and would advise the court of his decision at a later date.

After the prosecution presented its evidence, counsel for Lett made a motion to dismiss pursuant to section 1118. The trial court denied the motion.

During the presentation of Lett's case, counsel indicated that there was apparently a video surveillance tape being made at the gas station on the day of the alleged theft. According to defense counsel, a police officer "went to the [gas] station, he tried to talk to people to see the video . . . that day and was basically told that someone else, who wasn't there, had to help him do that . . . ." Counsel indicated, "I know there's technical hearsay in there, but we're not offering that whether – you know, whether that person could or could not show him the video, just that he did try to access it that day. He was unable to access it . . . and he basically let Officer Bondarczuk know that on that date . . . ."

The prosecutor indicated that he understood the situation differently. He stated, "We both talked to the officer. What I recall the officer saying is he physically tried to review the video and he couldn't, which would not be hearsay, but I heard him say . . . that he went and asked, 'Can I see this video,' and was told – this is the hearsay objection – that the person who has access to it [was] not [there]. So that's hearsay. [¶] But with respect to the state of mind exception, which I think [defense counsel is] relying on, here's the issue. Whether there's a video . . . or not doesn't impact the state of the evidence before the jury. They will decide this case without a video. [¶] . . . [¶] So under [Evidence Code section] 352 and hearsay grounds . . . I would object to it."

Defense counsel responded, "Even though neither side needs to bring in all the evidence, there is always whatever evidence is there. You know, I think defense usually always has a right to point out what you have access to and what could be brought in, especially if you've made attempts to . . . find it. It is highly relevant, especially in this case where . . . had there been a video, perhaps it would have all the answers to the questions."

After hearing further argument, the trial court indicated that it would allow reference to the video tape, "very briefly, not asking – just, did [the officer] attempt to access it, was he able to, and leave it at that . . . ."

After counsel delivered their arguments, the trial court instructed the jury. One instruction given read: "The defendant is charged in count 1 with petty theft and in count

2 with receiving stolen property. These are alternative charges. If you find the defendant guilty of one of these charges, you must find him not guilty of the other. You cannot find the defendant guilty of both."

After deliberating for several hours, the jury indicated it had reached verdicts on both counts. The foreperson handed the verdicts to the bailiff, who gave them to the court. The trial court then handed them to the clerk to read. As to count 1, the jury found Lett guilty of the crime of petty theft; that he unlawfully, stole, took and carried away the personal property of Terina Macneill. With regard to count 2, the jury found Lett not guilty of the crime of receiving stolen property. When the trial court polled the jury, each juror indicated that he or she had reached those verdicts.

After the jury was excused, Lett waived his right to a court trial and, with regard to his prior theft offenses, admitted having twice been convicted of burglary in violation of section 459, once in 1991 and once in 1992, and having been convicted of a 1998 charge of grand theft in violation of section 487, subdivision (a). As to his prior offenses alleged as strikes pursuant to the Three Strikes law, Lett admitted having been convicted of burglary in violation of section 459 in 1992 and making criminal threats in violation of section 422 in 2007. The trial court then found that Lett had been advised of his rights and the consequences of his admissions and the court "accept[ed] each of the admissions as indicated . . . ."

At sentencing, the trial court imposed the mid-term of two years, then doubled it to four years pursuant to the Three Strikes law. The court requested that Lett be sent to fire camp.

The court awarded Lett presentence custody credit for 323 days actually served and 323 days of conduct credit, for a total of 646 days. Lett was ordered to pay a $200 restitution fine (§ 1202.4, subd. (b)), a suspended $200 parole revocation restitution fine (§ 1202.45), a $40 court security fee (§ 1465.8, subd. (a)(1)), a $30 criminal conviction fee (Gov. Code, § 70373) and a $10 "theft fee."

Lett filed a timely notice of appeal on September 1, 2011.

CONTENTIONS

After examination of the record, counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record.

By notice filed April 10, 2012, the clerk of this court advised Lett to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider. No response has been received to date.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*Smith v. Robbins* (2000) 528 U.S. 259, 278-284; *People v. Wende* (1979) 25 Cal.3d 436, 443.)

DISPOSITION

The judgment is affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.