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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.

NATHANIEL CALDWELL,

Defendant and Appellant.

B281931

(Los Angeles County  
Super. Ct. No. YA094767)

THE COURT\*:

Nathaniel Caldwell (defendant) filed a timely notice of appeal following his entry of a plea of no contest to one count of discharging a firearm with gross negligence (Pen. Code,<sup>1</sup> § 246.3, subd. (a)) and one count of possession of a firearm by a felon (§ 29800, subd. (a)(1)) and his admissions that he had served four prior prison terms within the meaning of section 667.5,

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\* CHAVEZ, Acting P.J.      HOFFSTADT, J.      GOODMAN, J.†

† Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

<sup>1</sup> Further undesignated statutory references are to the Penal Code.

subdivision (b) and suffered a prior serious felony conviction (§§ 667, subds. (a)(1), (b)-(j), 1170.12). Defendant also admitted that he had violated his probation in case No. BA441439 by virtue of his current conviction.

Defendant was sentenced to a total term of seven years eight months in prison for the count 1 firearm discharge conviction, along with a concurrent term of seven years eight months for the count 2 firearm possession conviction and a concurrent term of five years for the offense underlying the probation violation in case No. BA441439.

Defendant's notice of appeal was accompanied by a request for a certificate of probable cause contending his sentence was "excessive" and was improper because he was entitled and was promised a drug rehabilitation program as part of his plea agreement which is not reflected in his sentence. The trial court denied defendant's request for a certificate of probable cause.

We appointed counsel to represent him on appeal. Defendant's counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and requested this court to independently review the record on appeal to determine whether any arguable issues exist.

On September 6, 2017, we advised appellant he had 30 days in which to personally submit any contentions or issues which he wished us to consider. On October 4, 2017, we received a supplemental brief from defendant. In this brief, he contends his plea agreement was for a seven-year sentence, not a seven-year, eight-month sentence; the trial court erred in refusing to sentence him to drug rehabilitation and/or a mental health treatment program; he accepted the plea agreement under duress; and his appellate counsel is ineffective. He requests we appoint new counsel. We affirm the judgment.

## BACKGROUND<sup>2</sup>

On September 6, 2016, Benjamin Navarro and Jeremy Coffield were sitting in Navarro's car, which was parked outside Navarro's apartment in Los Angeles. Navarro heard six gunshots, one of which hit his front tire. He called 911.

Los Angeles County Sheriff's Deputy Veronica Fantom came to the scene. Deputy Fantom canvassed the apartments in the building looking for witnesses. When she reached apartment 4, she observed a bullet hole in the door, a bullet hole in the living room window and another bullet hole in a bedroom window. Deputy Fantom knocked on the front door and defendant answered. She instructed defendant and his female companion to step outside. Deputy Fantom then conducted a protective sweep of apartment 4. She found a .38-caliber revolver in the bedroom, along with five shell casings. After being advised of and waiving his *Miranda*<sup>3</sup> rights, defendant told Deputy Fantom that he shot bullets out of his apartment because he believed someone with a gun was trying to break in.

## DISCUSSION

### 1. Length of Sentence

Defendant contends in his brief he accepted a plea agreement for a seven-year term and it was only after he reached prison that he learned his sentence was in fact for seven years eight months. The reporter's transcript for February 24, 2017, the date defendant entered his plea and was

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<sup>2</sup> Because defendant pled no contest to the two charges against him, the background facts are taken from the preliminary hearing in this matter.

<sup>3</sup> *Miranda v. Arizona* (1966) 384 U.S. 436, 478-479.

sentenced, clearly shows that the court's proposed sentence for an open plea was seven years eight months, and that defendant accepted the court's offer.

The discussion began when defense counsel, at defendant's request, asked the court what its response to an open plea by defendant would be. The court replied, "Seven years eight months." Defendant and defense counsel conferred, and then counsel stated, "He's going to accept the court's offer."

After a brief recess, the prosecutor read the charges against defendant and stated, "In exchange for your plea, it's agreed that you would accept the court's offer of seven years and eight months. Is that your understanding of the agreement?" Defendant responded, "Yes." After defendant was advised of and waived his constitutional rights, the prosecutor stated, "Like I mentioned a moment ago, you're going to be sentenced to state prison for a term of seven years and eight months." Defendant did not disagree. Shortly thereafter, defendant plead no contest to the charges against him. Thus, nothing in the record on appeal supports defendant's claim the plea agreement was for only seven years.

## 2. Ineffective Assistance of Counsel

Defendant contends his appellate counsel does not have his best interests in mind and requests we appoint an "effective" counsel for him. It is not clear what defendant means by his claim. To the extent defendant contends broadly that appellate counsel's decision to file a *Wende* brief is ineffective assistance of counsel, defendant is mistaken.

"[T]he constitutional right to assistance of counsel entitles an indigent defendant to independent review by the Court of Appeal when counsel is unable to identify any arguable issue on appeal. California's [*Wende*] procedure for securing this right requires counsel to file a brief summarizing

the proceedings and the facts with citations to the record, and requires the appellate court to review the entire record to determine whether there is any arguable issue.” (*People v. Kelly* (2006) 40 Cal.4th 106, 119.) The United States Supreme Court approved the *Wende* procedure in *Smith v. Robbins* (2000) 528 U.S. 259. (*Kelly*, at p. 118.) Defendant’s appellate counsel filed a brief which complied with the *Wende* procedure and so did not render constitutionally ineffective assistance simply by filing a *Wende* brief. There is no basis to replace defendant’s current appellate counsel.

### 3. Other Claims

Because defendant is appealing after entry of a no contest plea and does not have a certificate of probable cause, his appeal is limited to claims of error in the sentence or other matters occurring after the plea that do not affect the validity of the plea. (§ 1237.5; Cal. Rules of Court, rule 8.304(b).)<sup>4</sup> To the extent defendant claims the trial court was required to offer him the option of a drug rehabilitation program or mental health program because he is a military veteran, that claim, if true, would affect the validity of his plea and so is outside the scope of his appeal.<sup>5</sup> Defendant’s claim he was under

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<sup>4</sup> A defendant may also appeal the denial of a motion to suppress evidence under section 1538.5 without obtaining a certificate of probable cause. Although defendant checked the box on the certificate of appeal which states that his appeal is based on the denial of a motion to suppress evidence under section 1538.5, he does not make this claim on appeal. There is nothing in the record on appeal to indicate defense counsel filed any such motion.

<sup>5</sup> We strongly question whether section 1170.9, cited by defendant to support his claim, applies to plea agreements. Even if it does apply, that section does not mandate placement in a drug rehabilitation or mental health program for a veteran who has service-related mental health problems. (§ 1170.9, subd. (b)(1).

duress when he entered the plea agreement is likewise outside the scope of the appeal because it would affect the validity of the plea. (See *People v. McEwan* (2007) 147 Cal.App.4th 173, 178 [citing cases holding claims that plea was induced by misrepresentations, obtained while defendant was mentally incompetent and lacked warning about lack of appealability all require certificate of probable cause].) Accordingly, we do not reach those contentions.

#### 4. Independent Review of the Record

Having considered defendant's contentions of error and conducted our own examination of the record, we are satisfied defendant's attorney on appeal has complied with the responsibilities of counsel and no arguable issue exists. (*People v. Wende, supra*, 25 Cal.3d at p. 441; see also *Smith v. Robbins, supra*, 528 U.S. at pp. 278-282; *People v. Kelly, supra*, 40 Cal.4th at pp. 122-124.

#### **DISPOSITION**

The judgment is affirmed.