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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.

TONY THOMAS,

Defendant and Appellant.

B234597

(Los Angeles County
Super. Ct. Nos. BA381214
& BA382542)

APPEAL from judgments of the Superior Court of Los Angeles County,
Ronald H. Rose, Judge. Affirmed.

Arielle Bases, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

Tony Thomas appeals from the judgments entered following his plea of no contest to second degree commercial burglary (Pen. Code, § 459); his admissions that he had previously been convicted of three felonies in case No. BA382542; and that he had suffered imposition of a 16-month sentence for a violation of petty theft with a prior (Pen. Code, § 666) to which he had previously pled guilty in case No. BA381214. In total, the trial court sentenced Thomas to nine years four months in prison. We affirm.

FACTUAL AND PROCEDURAL HISTORY

1. Facts.

This matter involves trial court case Nos. BA381214 and BA382542. In BA381214,¹ at approximately 4:30 p.m. on February 15, 2011, Los Angeles Police officers from the southwest area received a call directing them to a Target store. The officers contacted the loss prevention officer at the store, who informed them that Thomas had selected several items from the shelves and placed them in a shopping cart. After walking to the “boy’s department,” Thomas placed some of the items he had previously taken into two plastic shopping bags while leaving others in the cart. Thomas then walked out of the store “without making any attempt to pay for the” items in the bags. Outside the store, Thomas was stopped by Target loss prevention officers. He was escorted back into the store and the police were called. The police officers took Thomas into custody.

In case No. BA382542,² at approximately 7:25 p.m. on March 25, 2011, Loss Prevention Officer Eduardo Rodriguez was on duty at the Macy’s Department Store on South Crenshaw Boulevard in Los Angeles. As he was monitoring the store via closed circuit television, Rodriguez saw Thomas walking toward the “fashion jewelry department.” After selecting some necklaces and earrings, Thomas concealed them in his jacket. He did not go to “any manned register to attempt to pay for the items.” Instead,

¹ The facts from case No. BA381214 were taken from the probation report in that matter.

² The facts were taken from the transcript of the preliminary hearing.

he “quickly” walked towards the store exit. Rodriguez left his partner to continue watching the closed circuit television and followed Thomas as he left the store.

Outside the store, Rodriguez approached Thomas, explained that he worked for Macy’s security and that he needed to talk to Thomas. Thomas reached into his jacket and threw some merchandise at Rodriguez’s face. He then “became belligerent and began to push and forcibly swing” at Rodriguez. Rodriguez grabbed Thomas’s arm and attempted to escort him back to the office. However, Thomas, using his right arm, “pushed” Rodriguez and “swung” with a closed fist at Rodriguez’s chest. Thomas continued to resist, but Rodriguez was able to “get him to the ground.” Although Thomas then stated that he had a weapon, Rodriguez did not find one when he searched Thomas. Instead, he found a pair of earrings inside Thomas’s jacket.

When Rodriguez asked Thomas why he had taken the merchandise, Thomas told him that “he was homeless and he wanted to sell the merchandise and rent a room to spend the night.”

2. Procedural history.

On February 25, 2011, after being advised of his right to a preliminary hearing or trial, his right to confront and cross-examine the witnesses against him, his right to use the subpoena power of the court to present a defense and his right against self-incrimination, in case No. BA381214 Thomas pled guilty to petty theft with three priors, a felony, in violation of Penal Code section 666, subdivision (a), and unlawfully stealing and taking and carrying away the personal property of Target in violation of Penal Code section 484, subdivision (a). In addition, Thomas admitted having previously suffered a conviction for robbery in violation of Penal Code section 211 in case No. A520298 within the meaning of Penal Code sections 1170.12, subdivisions (a) to (d) and 667, subdivisions (b) to (i), the Three Strikes law.

At proceedings held on June 22, 2011, Thomas indicated that he wanted a jury trial in case No. BA382542. In that matter he was charged with second degree robbery in count 1 and commercial burglary in count 2. The trial court noted that it was also alleged that Thomas had suffered “four prior violent or serious felony convictions, two from

1997, one from 1987, and one from 1994. [¶] It [was] also alleged that he ha[d] three prior convictions under 667 [subdivision] (a)(1) of the Penal Code.” The court continued, “So as we look at this, I assume that [Penal Code section] 654³ would apply to count 1 and count 2.”

The trial court explained to Thomas that, should he go to trial and a jury were to find him guilty of the alleged offenses, he would face up to five years in state prison for the robbery, up to three years in prison for the burglary, and if he were convicted of the robbery, he would face an additional “three[,] five-year priors, meaning that each of these robberies, from 1997, from 1987 [and from] 1994 . . . [would] add[] an additional five years onto [his] sentence.” The trial court then noted that it was “also alleged that [Thomas had] four prior strike convictions[,]” making his maximum exposure on the case “25 years to life.” The court continued: “Now, [the People] have made you an offer that frankly is a very good offer, because they’re offering you nine years and four months. But what they are also offering you is almost equally important[.] [B]esides the number of years in reduction from the possible sentence, is the fact that they are offering to let you plead to a commercial burglary, which is not considered a strike. [¶] So if in the future you were to pick up a new case, it would make a big difference to any judge who hears your new felony case. It’s one thing to say that you have these prior strike convictions from many many years ago. It’s something else to say you have these four prior strike convictions that are old and a new strike. That would certainly increase substantially on any new felony case the odds on you receiving 25 years to life”

Thomas’s counsel indicated that Thomas “had a question about what percentage of the time he would serve.” The trial court responded: “Well, that’s also an advantage for you in that if you were to plead to the robbery charge, you would have to serve

³ Penal Code section 654 provides in relevant part: “(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other.”

85 percent. But if you plead to the burglary charge, you would serve only 80 percent because you are admitting to the [prior] strike. So there is a substantial difference in the amount of time that you would be facing between having a jury trial and being found guilty and accepting this offer.”

The trial court “strongly suggest[ed]” that Thomas accept the People’s offer. The court indicated that, once a trial had been started, it would “be too late.” The court would “not accept the offer.” The court continued: “[O]nce we start this trial, it is in my hands, and if you are found guilty, if the strikes are proven, if the five-year priors are proven, it will be substantially more than the eight years that’s being offered as to this case. I am not bound by this offer of nine years, four months on these two cases, and will do what I deem appropriate if you are found guilty.”

After conferring with counsel, Thomas asked the trial court if it would be possible to have a “strike hearing before [he went] to trial since [the] strikes are so old[.]” The trial court responded, “Well, it’s not going to happen before your trial because that requires a written motion” and “there are certain rules.” The court would, among other things, be required to place on the record its reasons for striking a strike. The court noted, however, that: “The People [were] in effect willing to offer [Thomas] the granting of a *Romero*⁴ motion in the sense that they’re willing to eliminate three of [his] strikes” and “to eliminate all of [his] five-year priors.”

Thomas indicated he had one more question for the court. He stated: “Since I caught these two infractions, the two petty thefts, one robbery, I didn’t know it was going to be a robbery, because anytime you touch a guy I didn’t know it became a robbery. . . . [¶] Now, . . . I was under the influence of drugs, cocaine. I have been clean for five years. And what I’m trying to get at is I need a program. [Another judge] said I should have had a program and I never had a program.” The following colloquy then occurred: “The Court: Mr. Thomas, let me explain this to you. If you are addicted to drugs, certainly you should have had a program. [¶] [Thomas]: Right. [¶] The Court: It’s too

⁴ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

late now. [¶] [Thomas]: It's too late? [¶] The Court: I'm sorry. But I have to take into account your prior record. [¶] [Thomas]: Right. [¶] The Court: I cannot give you probation at all. [¶] . . . If the strike is proven, I may not give you probation. It's prohibited by law. Sometimes people are caught up in their past, even though [they] may have changed over the years." "But [they] still have [their] background that is baggage that [they] carry with [them]."

After the People rejected Thomas's offer of six years in prison, which was essentially the same as the People's offer but without the two-year prison priors, the trial court reminded Thomas that he had an open case, the theft from Target, when he picked up the burglary, and robbery from Macy's. The court stated: "It isn't as though you had been clean since 1994. So the same way that you would like to go back in time and accept the offer of six years, you now have to face the reality that the People are unwilling to make that offer, and you now have to make a decision as to whether you want to accept this nine[-]year and four[-]month offer."

Thomas again consulted with counsel, then asked the trial court whether, "if he were to choose to represent himself, . . . the court would be inclined to grant him a short continuance." Again, the court refused. The court stated: "No. The case was sent here for trial. It's too late. It's untimely." Finally, after the trial court informed him that he would be unable to get "half time," Thompson decided to accept the People's offer.

The prosecutor indicated what the plea would entail. He stated: "You are charged in case number BA382542 with two separate counts The maximum penalty, as the court has explained to you, that you could receive if you were found guilty of these two counts, plus your prior allegations, is [42] years to life. [¶] . . . [¶] However, given your plea here today, you would be pleading to count 2, which is a violation of Penal Code section 459, which is commonly known as second degree commercial burglary [from] the department store Macy's. As a result of your plea, you will receive the high term of three years. That would be doubled given your 1994 prior conviction, which results [in] six years[] state prison. Plus you would be admitting . . . your two prior one-year priors under Penal Code section 667.5[, subdivision] (b), which would then calculate to a total

of eight years in state prison on this case.” In addition, as part of his plea agreement, Thomas had agreed to be sentenced with regard to his prior admission that he had violated Penal Code section 666, subdivision (a), petty theft with priors as committed against the Target store. As to that matter, he was to be sentenced to the low term of 16 months in prison. In total, Thomas was to be sentenced to nine years four months in prison for the two cases.

After the prosecutor explained the consequences of the plea and he waived his right to a jury trial, his right to remain silent, his right to confront and cross-examine the witnesses against him, his right to use the subpoena power of the court and his right to present a defense, Thomas pled no contest to count 2 of felony information No. BA382542, a violation of Penal Code section 459, “commonly known as second degree commercial burglary at Macy’s Department Store.” Thomas then admitted that on March 28, 1994, he had been convicted of bank robbery in case No. LA16457, that on September 3, 2002, he had been convicted of possession of a controlled substance in violation of Health and Safety Code section 11350, subdivision (a) in case No. BA226287 and that on September 14, 2005, he had been convicted of Penal Code section 666, petty theft with priors, in case No. MA032632.

The trial court indicated that in case No. BA381214, Thomas had admitted to a strike. The court stated that in order to “effectuate this disposition, [it] assume[d] that the . . . admission to the strike prior [would] be withdrawn[.]” The prosecutor agreed and the trial court then indicated that it could impose the agreed upon 16 months in prison. The court stated: “I will allow the defendant to withdraw his admission to the strike prior [in] BA381214 in order to pursue the disposition that’s been worked out as to both cases.”

Pursuant to the plea agreement, in case No. BA382542, the trial court sentenced Thomas to the high term of three years in state prison, doubled the term pursuant to Penal Code section 667.5 as to count 2, “a violation of Penal Code section 459, second degree,” imposed a consecutive term of one year pursuant to Penal Code section 667.5, subdivision (b) and “another year consecutive, for a total of eight years as to [that] case.”

Thomas was awarded presentence custody credit for 90 days actually served and 44 days of good time/work time, for a total of 134 days.

With regard to case No. BA381214, a violation of Penal Code section 666, subdivision (a), the trial court sentenced Thomas to the low term of 16 months, the term to run consecutive to the sentence imposed in case No. BA382542. For this case, the trial court awarded Thomas presentence custody credit for 10 days actually served and 4 days of good time/work time, for a total of 14 days. The trial court granted the People's motion that all remaining counts and allegations be dismissed pursuant to section 1385.⁵

As to both cases, Thomas was ordered to pay a \$200 restitution fine (Pen. Code, § 1202.4, subd. (b)), a \$40 court security charge (Pen Code, § 1465.8, subd. (a)(1)), a \$30 criminal conviction assessment (Gov. Code, § 70373) and a \$200 suspended parole revocation restitution fine (Pen. Code, § 1202.45).

Thomas was remanded to the custody of the sheriff for transportation to the Department of Corrections. The trial court recommended that he receive drug counseling.

On July 6, 2011, Thomas filed timely notices of appeal from both case Nos. BA382542 and BA381214.

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 March 16, 2012, the clerk of this court advised Thomas to submit within 30 days any contentions, grounds of appeal or arguments he wished this court to consider.

On April 2, 2012, Thomas filed a letter brief in which he raised a number of issues. Initially, he asserted the record failed to show that he knowingly and intelligently

⁵ Penal Code section 1385 provides in relevant part: “(a) The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed.”

waived his *Boykin/Tahl*⁶ rights before entering his plea of no contest to second degree commercial burglary. However, a review of the transcript of the proceedings indicates otherwise. Before entering the plea, Thomas was advised of and waived his right to a jury trial, his right to remain silent, his right to confront and cross-examine the witnesses against him, his right to use the subpoena power of the court and his right to present a defense.

Thomas next contends that his counsel had been ineffective for failing to carefully review the files of convictions that were alleged as priors. The contention is without merit. Although an indigent defendant has the right to the effective assistance of counsel on appeal, a competent counsel's duties include only the arguing of " 'all issues that are arguable.' " (*In re Spears* (1984) 157 Cal.App.3d 1203, 1210.) Here, Thomas's assertion his counsel failed to adequately review the alleged priors is unsupported by any facts indicating any of the priors was improper. Under these circumstances, it cannot be said that counsel failed to investigate the prior convictions or to determine their legitimacy.

Thomas asserts that prior felony convictions obtained by a plea (see Pen. Code, § 1192.7, subd. ((b)) may not be used for purposes of plea bargaining (see Pen. Code, § 1170.12, subd. (e)) unless the prosecution has proved the prior convictions. However in the present matter, the prosecutor was not required to prove Thomas's prior convictions. He admitted them. The same is true with regard to Thomas's argument that the prosecutor did not adequately show that his priors amounted to serious or violent felonies. Thomas admitted as such.

In his fifth contention, Thomas appears to be asserting that the prosecution erred by failing to hold a proper hearing before striking his prior convictions pursuant to *People v. Superior Court (Romero)*, *supra*, 13 Cal.4th 497. The trial court noted, however, that "The People [were] in effect willing to offer [Thomas] the granting of a *Romero* motion in the sense that they [were] willing to eliminate three of [his] strikes"

⁶ *Boykin v. Alabama* (1969) 395 U.S. 238; *In re Tahl* (1969) 1 Cal.3d 122.

and “to eliminate all of [his] five-year priors.” Thomas benefitted from the prosecutor’s actions and he should not now complain about the procedures followed.

In his final argument, Thomas asserts he was “induce[d] to enter a guilty plea because of some factual or legal misrepresentation.” (Underlining in original.) Thomas, however, does not indicate what that misrepresentation was.

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 judgments are affirmed.

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KITCHING, J.

We concur:

KLEIN, P. J.

CROSKEY, J.