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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.

WILLIE RAY THOMAS,

Defendant and Appellant.

B231931

(Los Angeles County
Super. Ct. No. BA287334)

THE COURT:*

Defendant and appellant Willie Ray Thomas (defendant) appeals from a judgment entered upon a plea of no contest to charges of robbery and attempted robbery. His appointed counsel filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), raising no issues. On, December 5, 2011, 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. Defendant submitted two briefs raising the following issues: inadequacy of the proceedings to determine mental competence; unreasonable delay in determining competence; ineffective assistance of trial counsel; illegal sentence violating the terms of the plea bargain; and ineffective assistance of appellate counsel.

* DOI TODD, Acting P. J., ASHMANN-GERST, J., CHAVEZ, J.

We have reviewed defendant's briefs and the entire record, and find that all but two of defendant's contentions are not cognizable on appeal due to his failure to obtain a certificate of probable cause. We have considered the issues regarding sentencing and assistance of appellate counsel, and found them to be without merit. Finding no other arguable issues, we affirm the judgment.

On October 2, 2008, after a preliminary hearing, defendant was charged in count 1 with second degree robbery in violation of Penal Code section 211,¹ and in counts 2 and 3, of attempted second degree robbery in violation of sections 664/211. For purposes of the "Three Strikes" law² the information alleged as to all counts that defendant had been convicted of three prior felonies, robbery in 1991 and 1997,³ and attempted robbery in 1993. The information further alleged the same prior convictions for purposes of the five-year sentence enhancement of section 667, subdivision (a)(1).

All three offenses were alleged to have been committed in 2005. The proceedings were suspended from 2005 to 2008 under section 1368, to determine defendant's mental competence. Defendant was found competent to stand trial following a court trial in June 2008, and the proceedings were reinstated. Defendant filed a motion to dismiss, alleging a violation of his constitutional right to a speedy trial during the time that the proceedings were suspended. The motion to dismiss was denied.

After alternating periods of self-representation and representation by appointed counsel, defendant went to trial in September 2009 with retained counsel. During trial the defendant's section 1118.1 motion for acquittal as to count 2 was granted. The jury was later deadlocked as to the remaining counts, and the trial court declared a mistrial.

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

² See sections 1170.2, subdivisions (a) through (d), and 667, subdivisions (b) through (i).

³ The information initially described the 1997 conviction as a 1998 conviction but was amended by interlineations.

Prior to retrial defendant once again alternately represented himself or was represented by appointed counsel. Various motions and a petition for writ of habeas corpus were filed and denied. After the matter was called for the second jury trial in June 2010, defendant entered a plea of not guilty by reason of insanity. The trial court revoked defendant's pro. per. status and appointed standby counsel to represent defendant, and continued the trial to September 2010. Thereafter, the trial court denied defendant's *Marsden*⁴ motions and a renewed motion to dismiss.

On October 2, 2010, at the request of defense counsel, the trial court offered defendant an "open plea" agreement under which the court would strike the two older of defendant's three prior convictions, making the case a second strike case rather than a third strike case, meaning that defendant would face a doubling of his sentence rather than a life term. The court warned defendant that the two strikes would not "go away" but could be used against him in the future. The court explained that the middle term of three years, doubled to six years, would be imposed as to count 1, and as to count 3, the court would impose a consecutive middle term of nine months, doubled to one year six months. The sentence would then be enhanced by five years for each of the three prior convictions, for an additional consecutive term of 15 years. The court informed defendant that the total term would be 22 years 6 months. Defendant accepted the offer.

In response to the prosecutor's questions as part of the advisement of his rights, defendant stated that he understood the charges against him and the possibility of life in prison. Defendant stated that he understood that the offer was for a prison sentence of 22 years 6 months, and that he agreed to enter the plea under the stated terms. Following his being informed of his constitutional rights and the consequences of his plea, defendant entered a plea of no contest to the charges and admitted the prior convictions. Sentencing was continued to the following month.

At the sentencing of November 23, 2010, defendant asked for new counsel and for leave to withdraw his plea. Defendant told the court that he had accepted the plea

⁴ See *People v. Marsden* (1970) 2 Cal.3d 118.

bargain because his attorney had threatened him by telling him that he “couldn’t beat the case. And it was in [his] best interest to take the deal.” The court denied defendant’s motions and sentenced defendant according to the terms of the plea agreement, imposed statutory fines and fees, and an order that defendant provide a DNA sample. Defendant was awarded custody credit of 2,245 days. The trial court also sentenced defendant on a probation violation in Los Angeles County Superior Court case No. BA333124 to four years in prison, to run concurrently with the sentence in this case, plus statutory fines and fees, with 1,373 days of custody credit.

Defendant filed a timely notice of appeal and request for certificate of probable cause. However, defendant failed to obtain a ruling on his request within 20 days as required by California Rules of Court, rule 8.304(b)(2). The court denied the request on April 5, 2011.

A defendant may not appeal from a judgment of conviction upon a plea of guilty or no contest unless the trial court has executed and filed a certificate stating there is probable cause for the appeal. (§ 1237.5; Cal. Rules of Court, rule 8.304(b).) Section 1237.5 is strictly applied. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1098.) Thus, a defendant who fails to obtain a certificate within the time allowed is not entitled to appellate review of issues that require one (certificate issue). (*Id.* at pp. 1088, 1097-1098.)

Defendant contends that errors occurred in the course of the proceedings to determine his competence to stand trial. He argues that he should have been evaluated for a developmental disability and that the trial court failed to make an adequate determination of competence within a reasonable time. As mental incompetence prior to plea is a certificate issue, and defendant failed to obtain a certificate of probable cause, we do not address it. (*People v. Mendez, supra*, 19 Cal.4th at p. 1100.) Further, a speedy trial claim does not survive a plea of guilty or no contest. (*People v. Aguilar* (1998) 61

Cal.App.4th 615, 617.) Such a claim is not cognizable even with a certificate of probable cause. (See *People v. Bradley* (1984) 159 Cal.App.3d 399, 403.)⁵

Defendant also contends that trial counsel was ineffective. Ineffective assistance of trial counsel is a certificate issue, and thus not cognizable here. (See *In re Chavez* (2003) 30 Cal.4th 643, 651.)

Finally, defendant contends that his sentence was illegal because the trial court failed to honor a promise in the plea bargain to strike prior convictions for purposes of sentencing; and that appellate counsel rendered ineffective assistance by not raising this issue on appeal. A certificate of probable cause is unnecessary to challenge matters that occur after entry of the plea and do not go to the validity of the plea. (*People v. Buttram* (2003) 30 Cal.4th 773, 780; § 1237.5; Cal. Rules of Court, rule 8.304(b).) However, defendant's sentencing contentions have no merit.

Although the trial court did not *expressly* strike two of defendant's prior convictions, the court paused in pronouncing sentence and asked, "Did I strike his strike?" Defense counsel replied, "Yes, you did." The court then continued to sentence defendant as a second striker, rather than a third striker. Thus by implication, two prior convictions were stricken for purposes of this case as promised, and defendant received the full benefit of his plea bargain.

Because defendant's sentencing claim has no merit, we also reject his claim of ineffective assistance of appellate counsel. The Sixth Amendment right to the effective assistance of counsel does not require appellate counsel to raise frivolous issues. (*Smith v. Robbins* (2000) 528 U.S. 259, 278.)

⁵ Because we do not address this issue, we decline defendant's request for judicial notice of the record of the competency hearing and related proceedings.

We conclude that because of counsel's compliance with the *Wende* procedure and our review of the record, defendant has received adequate and effective appellate review of the judgment entered against him in this case. (*Smith v. Robbins*, *supra*, 528 U.S. at p. 278; *People v. Kelly* (2006) 40 Cal.4th 106, 112-113.)

The judgment is affirmed.

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