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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN M. OLIVA,

Defendant and Appellant.

E085876

(Super.Ct.No. FVI1503175)

OPINION

APPEAL from the Superior Court of San Bernardino County. Tony Raphael, Judge. Affirmed.

John M. Oliva, in pro. per.; James M. Kehoe, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant John M. Oliva appeals from the trial court’s resentencing decision after remand from this court’s decision on defendant’s direct appeal in *People v. Oliva* (2023) 89 Cal.App.5th 76 (*Oliva*). Appointed appellate counsel has filed a no-issue brief and requested our independent review under *People v. Delgadillo* (2022) 14 Cal.5th 216, 231. (See also *Anders v. California* (1967) 386 U.S. 738 [no-issue determination subject to independent review in a criminal defendant’s first appeal of right, to safeguard right to counsel]; *People v. Wende* (1979) 25 Cal.3d 436 [same].) We have independently reviewed the record and find no arguable issues on which to request briefing by the parties. (See *People v. Johnson* (1981) 123 Cal.App.3d 106, 109 [threshold for “an arguable issue” requires “a reasonable potential for success” on appeal].) We have also reviewed defendant’s supplemental brief (see *Delgadillo*, at p. 232) and, as we briefly explain *post*, there is no merit in his bid for another sentencing hearing. We therefore affirm the trial court’s resentencing decision.

BACKGROUND

In November 2018, a jury convicted defendant of first degree murder for taking the life of David Robert Bustamante on December 25, 2015. (Pen. Code,¹ §§ 187, subd. (a); see *Oliva, supra*, 89 Cal.App.5th at p. 80.) The jury found true on the murder count both a gang-benefit enhancement allegation (§ 186.22, subd. (b)) and that defendant personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subd. (d)). The jury further found two special circumstance

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

allegations true: (1) that as an active participant in a criminal street gang, defendant intentionally killed the victim to further the activities of a criminal street gang (§ 190.2, subd. (a)(22)), and (2) that defendant committed the murder by means of lying in wait to kill his victim (§190.2, subd. (a)(15)). (*Oliva*, at p. 81.) In a bifurcated proceeding, the court found defendant had a prior serious or violent felony conviction or juvenile adjudication for voluntary manslaughter. (§§ 190.2, 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

At defendant's original sentencing, the trial court sentenced defendant to life in prison without the possibility of parole (LWOP) on the murder count, based on the jury's true findings on each of the special circumstance allegations. The court imposed a consecutive 25 years to life term for the shooting death firearm enhancement. The court also imposed and then stayed execution of a 10-year sentence for the gang-benefit enhancement. The court stayed any doubling of defendant's LWOP sentence for his prior serious or violent criminal offense history, under *People v. Mason* (2014) 232 Cal.App.4th 355.

Defendant appealed and during the pendency of his appeal, after this court issued its original opinion in the matter, affirming the judgment on the issues defendant raised to that point, new legislation became effective, specifically Assembly Bill No. 333 (2021-2022 Reg. Sess.) (Stats. 2021, ch. 699, §§ 3, 4). (*Oliva, supra*, 89 Cal.App.5th at pp. 80-81.) We recalled and vacated the opinion, cancelled the remittitur, and, after supplemental briefing, determined that Assembly Bill No. 333's addition of section 1109 and amendments to the criminal street gang provisions in section 186.22 required reversal

of the true findings on defendant’s gang special circumstance and gang benefit enhancement. (*Oliva*, at p. 94.) We affirmed the judgment in all other respects, and remanded the matter with directions permitting the People to retry the gang allegations or, if the prosecutor elected not to do so, for resentencing. (*Ibid.*)

On remand, the People elected not to retry the gang special circumstance or the gang-benefit enhancement allegations, and the trial court dismissed them. At an initial hearing before resentencing, the parties, as the trial court later summarized, “waived any request to rerefer the matter to the probation department for an updated presentence report.” Defendant also waived his personal appearance for the resentencing hearing, executing a written waiver under section 977.

At resentencing, the trial court expressly acknowledged its “discretion to reconsider all of its sentencing decisions.” The court said of the shooting death gun enhancement (§ 12022.53, subd. (d)) in particular that it “is aware of its discretion to strike the firearm enhancement.” Citing “the facts and circumstances of this case and the history of [defendant],” the court declined to do so. The court reimposed the 25-years-to-life term for the enhancement, consecutive to defendant’s sentence for murder. On that count, the court reimposed LWOP, this time based solely on the lying-in-wait special circumstance. The court noted that “even if [it] had the discretion to strike the special circumstance,” it would not do so. The court again stayed punishment for defendant’s prior serious or violent voluntary manslaughter offense.

Defendant appealed and, as noted, appointed appellate counsel filed a brief attesting he found no arguable issue to advance, including after consultation with Appellate Defenders, Inc. Counsel advised that he had considered briefing issues concerning whether the trial court erred in resentencing defendant, and found none. Counsel listed the general question of resentencing error for our potential reconsideration. Defendant subsequently filed his supplemental letter brief.

DISCUSSION

Having independently reviewed the record for potential error, we are satisfied defendant's appellate attorney has fully complied with the responsibilities of counsel and no arguable issue exists. (*Delgadillo, supra*, 14 Cal.5th at p. 232; *People v. Kelly* (2006) 40 Cal.4th 106, 126; *People v. Wende, supra*, 25 Cal.3d at pp. 441-442.)

Defendant's supplemental contentions are also without merit. Defendant faults his attorney who represented him at resentencing for failing to request a supplemental probation report. Defendant contends counsel's decision to waive the report constituted ineffective assistance of counsel (IAC). Defendant lists as mitigation information that could have been presented by way of such a report or otherwise: "Certificates from school [i.e., prison programs] as well as [receiving] all Regular Visits and My Conjugal Family Visits." Defendant emphasizes such visits "are only given to model inmates who are discipline free!" Defendant argues that "without the IAC[,] I could [have received] a dismissal []or a Reduction of the fire arm enhancement."

To succeed on an IAC claim requires two showings. First, the defendant must establish that counsel's representation fell below an objective standard of reasonableness. Second, the defendant must show the allegedly deficient representation was prejudicial; in other words that there is a reasonable probability that but for counsel's failings, the result would have been more favorable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694-695; *In re Neely* (1993) 6 Cal.4th 901, 908.) In considering an IAC claim, a reviewing court "need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland*, at p. 697; *People v. Fairbanks* (1997) 16 Cal.4th 1223, 1241.)

That is the case here, where the record reflects no reasonable probability of success for defendant on his claim that a probation report reflecting his postsentencing prison conduct would have resulted in a dismissal or lesser sentence for his firearm enhancement. As noted, the record indicates the trial court understood its sentencing discretion, including regarding the firearm enhancement, which the court declined to strike, based on the circumstances of the case and defendant's criminal history. The circumstances of the case included that defendant lured the victim to an In-N-Out restaurant parking lot on Christmas Day and immediately shot him to death in front of his girlfriend. (*Oliva, supra*, 89 Cal.App.5th at p. 80.) Defendant also had a prior voluntary manslaughter conviction or adjudication. Measured against defendant's invocation of his good prison behavior for a little more than five years after his initial sentencing, for

which he was rewarded with conjugal and regular visits, we find no reasonable probability of a better result than that for defendant. His IAC claim therefore fails.

DISPOSITION

The trial court's resentencing decision is affirmed.

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MILLER

J.

We concur:

RAMIREZ

P. J.

FIELDS

J.