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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

RICHARD J. WILLIAMS

Defendant and Appellant.

A130235

(Lake County
Super. Ct. Nos. CR919573,
CR911682-B, CR918271)

BACKGROUND

Appellant Richard J. Williams was charged by information with six felony counts of theft and embezzlement of property of a value of more than \$400 from an elder and dependent adult. (Former Pen. Code, § 368, subd. (d), as amended by Stats. 2004, ch. 893, § 1.)¹ The charges arose from a scheme in which Williams and his confederates would seek elderly victims and offer to perform asphalt paving work, overcharging the victims for substandard work. On January 20, 2009, Williams entered a plea of no contest pursuant to a negotiated disposition to a felony violation of section 487, grand theft, as a lesser included offense, with the remaining felony charges dismissed.²

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

² Williams also entered a no contest plea to a misdemeanor charge of contracting without a license. (Bus. & Prof. Code, § 7028.) He entered a *Harvey* waiver (*People v. Harvey* (1979) 25 Cal.3d 754) allowing the court to consider all offenses at time of sentencing.

Williams failed to appear for sentencing on April 27, 2009, and a warrant was issued for his arrest. A new information was filed which charged him with a felony violation of section 1320.5³ for his failure to appear for sentencing, and a penalty enhancement under section 12022.1 for committing a new felony while on felony bail was alleged. On August 27, 2010, after Williams was apprehended and extradited from the state of Colorado, he entered a no contest plea to the new charge and admitted the enhancement allegation.

On October 15, 2010, Williams was sentenced to an aggregate prison term of four years and eight months, consisting of a two-year midterm sentence for the section 1320.5 conviction, a consecutive term of eight months (one-third of the midterm) for the grand theft conviction,⁴ and a two-year consecutive term for the sentencing enhancement under section 12022.1. He received presentence credit of 469 days for time served (235 days of actual custody credit and 234 days of conduct credits).

A restitution hearing was held at the time of sentencing and the court ordered victim restitution to the theft victims on four of the original six charges in a total amount of \$21,736, with restitution reserved as to the victims on the other two counts.

Williams filed a timely notice of appeal. His notice of appeal specifies that he challenges only the sentence “or other matters occurring after the plea that do not affect the validity of the plea.”

Assigned counsel has submitted a *Wende*⁵ brief, certifying that counsel has been unable to identify any issues for appellate review. Counsel also has submitted a declaration confirming that Williams has been advised of his right to personally file a supplemental brief raising any points which he wishes to call to the court’s attention. No

³ “Every person who is charged with or convicted of the commission of a felony, who is released from custody on bail, and who in order to evade the process of the court willfully fails to appear as required, is guilty of a felony. . . .” (§ 1320.5.)

⁴ As we discuss *post*, the court orally indicated that it was imposing a 16-month *lower term* consecutive sentence for the grand theft charge.

⁵ *People v. Wende* (1979) 25 Cal.3d 436.

supplemental brief has been submitted. As required, we have independently reviewed the record. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110.)

DISCUSSION

The trial court reviewed and considered the probation report (which recommended a prison sentence), considered the sentencing report and mitigation statement presented by Williams, heard testimony from both prosecution and defense investigators, and considered argument of counsel. The court considered and rejected probation. (Cal. Rules of Court, rule 4.414.) “Probation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court. [Citations.]” (*People v. Pinon* (1973) 35 Cal.App.3d 120, 123.)

The court weighed the aggravating and mitigating circumstances both in assessing the appropriate prison term and in deciding whether to impose concurrent or consecutive terms. (Cal. Rules of Court, rules 4.410, 4.425.) “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . .” (§ 1170, subd. (b); see Cal. Rules of Court, rule 4.420.)

No arguable issues are presented as to the fines and penalties imposed, nor as to the custody credits Williams received. There is a statutory mandate for victim restitution. (§ 1202.4, subds. (f)(3) & (g).) Victims have “a right to restitution based on the *full amount* of their losses.” (*People v. Birkett* (1999) 21 Cal.4th 226, 229; see § 1202.4, subd. (f)(2).) Nothing in the record raises any arguable issue as to the restitution amounts determined by the court.

The record does reflect an error in the sentence articulated by the court. That error does not, however, benefit Williams. The court stated that it intended to impose a consecutive sentence on Williams’s grand theft conviction, but that it would use the lower 16-month term for that offense. The minutes of the hearing also reflect a 16-month term for that offense, and the sentencing abstract shows imposition of the lower term. However, as the court recognized in calculating the total term, and as the minutes and abstract also reflect, a subordinate consecutive term of imprisonment is required to be

calculated as one-third of the *base* or midterm sentence for that offense—in this case 24 months. (§ 1170.1, subd. (a).)⁶

While the oral pronouncement of sentence ordinarily controls (*People v. Price* (2004) 120 Cal.App.4th 224, 242), use of a mitigated base term would be an “unauthorized sentence[.]” entered in “excess of jurisdiction.” (*People v. Stowell* (2003) 31 Cal.4th 1107, 1113, 1116.) Nevertheless, when calculating the total sentence to be imposed, the court correctly stated that “[p]ursuant to penal code section 1170.1, the subordinate term then becomes eight months [(one-third of 24 months)], and the prison sentence becomes four years eight months.” The minutes and the prison abstract likewise reflect the correct total term. The court’s erroneous reference to the lower base term for the consecutive sentence is therefore ultimately immaterial.

DISPOSITION

The judgment is affirmed.

⁶ Section 1170.1, subdivision (a) provides: “Except as otherwise provided by law, and subject to Section 654, when any person is convicted of two or more felonies, whether in the same proceeding or court or in different proceedings or courts, and whether by judgment rendered by the same or by a different court, and a consecutive term of imprisonment is imposed under Sections 669 and 1170, the aggregate term of imprisonment for all these convictions shall be the sum of the principal term, the subordinate term, and any additional term imposed for applicable enhancements for prior convictions, prior prison terms, and Section 12022.1. The principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements. The subordinate term for each consecutive offense shall consist of one-third of the middle term of imprisonment prescribed for each other felony conviction for which a consecutive term of imprisonment is imposed, and shall include one-third of the term imposed for any specific enhancements applicable to those subordinate offenses.”

Bruiniers, J.

We concur:

Jones, P. J.

Needham, J.

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