Filed 9/14/12

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. GREGORY ROBINSON, Defendant and Appellant.	B238016 (Los Angeles County Super. Ct. No. PA069378)

APPEAL from a judgment of the Superior Court of Los Angeles County, Harvey Giss, Judge. Affirmed as modified, and remanded.

California Appellate Project, Jonathan B. Steiner, Executor Director, Cheryl Lutz, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Hebert S. Tetef, Deputy Attorney General, for Plaintiff and Respondent.

.

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of BACKGROUND, part A, and DISCUSSION, parts A, B, and D.

INTRODUCTION

Defendant and appellant Gregory Robinson (defendant) was convicted of petty theft (Pen. Code, § 487[1]). On appeal, appointed counsel for defendant filed an opening brief in accordance with *People v. Wende* (1979) 25 Cal.3d 436 requesting this court to conduct an independent review of the record to determine if there are any arguable issues. On May 11, 2012, we gave notice to defendant that his counsel had failed to find any arguable issues and that defendant had 30 days within which to submit by brief or letter any grounds of appeal, contentions, or arguments he wished this court to consider. Defendant submitted a letter brief in which he contends that defense counsel provided ineffective assistance of counsel and the trial court erred in denying his request to represent himself.

After independently reviewing the record, we asked the parties to submit letter briefs addressing whether the trial court should have imposed a section 1465.8, subdivision (a)(1) court operations assessment and a Government Code section 70373, subdivision (a)(1) court facilities assessment. We hold that the assessments should be imposed and order the clerk of the Superior Court to issue an amended abstract of judgment accordingly. We also hold that section 2900.5, subdivision (a) providing that the time that a defendant has served in custody may be credited against fines does not apply to assessments. We otherwise affirm the judgment.

BACKGROUND

A. Factual Background

1. *Prosecution Evidence*

JDK Railroad Materials (JDK) disassembles railroad tracks, and hauls the material to its facility on Lang Station Road in Los Angeles at which its employees segregate the

---

[1] All statutory citations are to the Penal Code unless otherwise noted.

usable from the unusable material and bundle it for resale. Typically approximately 80 percent of the material is reusable.

On February 20, 2011, Metrolink employees Diego Alcantar, Martin Almanza, Romero Rubio, and Hector Gonzalez were in a Metrolink truck, driven by Gonzalez, on Lang Station Road, a private road on which the JDK facility is located. Gonzalez saw a white flatbed truck that he did not recognize, ~(RT 1214, 1244)~ and parked his truck next to it and honked his horn. Defendant then approached from behind an opening in the railroad ties. Defendant was with two other people and a dog. ~(RT 909)~ Gonzalez saw anchors and plates inside the truck bed. Almanza saw defendant carrying railroad material in a plastic basket and putting it in the white flatbed truck. Alcantar also saw defendant putting plates in the truck.

JDK Operations Manager David Huffman oversees portions of the salvage operations and keeps track of the inventory. Sometime after February 20, 2011, Huffman discovered that JDK was missing from its facility a pallet of bars, a pallet of switch plates, and two boxes of clips and anchors. The missing property had been inside an area that was difficult to access. Although Metrolink employees regularly enter onto the facility property, defendant was never given permission to do so.

Los Angeles County Sheriff Javier Guzman obtained the license number from Gonzalez, and Guzman determined that it was for a 1991 white Ford truck owned by defendant. In March 2011, Los Angeles County Sheriff Jeremy Carr ultimately located the truck parked in Los Angeles. Defendant was standing next to the truck and was arrested. Almanza and Gonzalez identified defendant from a photographic lineup consisting of six pictures. Alcantar was unable to make an identification from it.

On March 16, 2011, Los Angeles County Sheriff's Department Detective Michael Marino spoke with defendant. Defendant asked Detective Marino to explain why he was in custody, and Detective Marino told defendant that he was charged with a theft of metal. When Detective Marino told defendant that he had been seen at the railroad yard taking metal, defendant responded that the people who saw him at the yard must have

stolen the metal. Defendant further stated that the people who were with him that day were day laborers whom he had hired.

2. Defense Evidence

Defendant testified that on February 20, 2011, he was at the JDK facility "speculating and canvassing for work—attempting to buy scrap metal to subsequently sell it. The white truck was his, but he was not with other people; he was there only with his dog. On that day, Defendant did not remove railroad property from the JDK facility. Defendant has a "trick knee," a "bad back," and "nerve problems" caused by gunshot wounds he suffered to his neck, and he had "extensive" surgery performed on his right arm, which prevent him from lifting heavy items. Defendant left the JDK facility when he encountered the Metrolink employees who told him that he was on private property and threatened to call the police.

B. Procedural Background

The District Attorney of Los Angeles County filed an amended information charging defendant with one count of grand theft in violation of section 487. The District Attorney further alleged that defendant had suffered prior felony convictions within the meaning of section 1203, subdivision (e)(4), defendant had served two prior prison terms pursuant to section 667.5, subdivision (b), and defendant suffered a prior conviction of a serious or violent felony pursuant to sections 1170.12 subdivision (a) through (d), 667, subdivisions (b) though (i), 1192.7, and 667.5, subdivision (c).

On August 15, 2011, the trial court denied defendant's initial motion to replace counsel pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden* motion)[2] and his motion to reduce the offense to a misdemeanor pursuant to section 17, subdivision (b). On September 1, 2011, the trial court denied defendant's second *Marsden* motion, and

---

[2] On August 15, 2011, defendant intended to make, but then abandoned, a motion to represent himself.

on November 14, 2011, the trial court denied defendant's third *Marsden* motion and his motion made pursuant to *Farretta v. California* (1975) 422 U.S. 806 (*Farretta* motion) to represent himself.

Following trial, the jury found defendant not guilty of grand theft, but guilty of the lesser included offense of petty theft. The trial court sentenced defendant to county jail for a term of 180 days, and awarded defendant 253 days of custody credit consisting of 169 days of actual custody credit and 84 days of conduct credit. The trial court stated, "The defendant has served more time than the maximum time the court could impose on the misdemeanor. The defendant is given credit for the time served and no fees or fines are imposed."

DISCUSSION

A. Ineffective Assistance Of Counsel

Defendant contends that defense counsel provided ineffective assistance when he "fail[ed] to contest the exclusion" of the People's "main witness who lied about seeing [defendant] and the 911 emergency,"[3]—we presume defendant means that the witness should have been excluded—and refused to recall and impeach that witness at trial. We disagree.

Our California Supreme Court stated, "'The law governing defendant's claim is settled. "A criminal defendant is guaranteed the right to the assistance of counsel by both the state and federal Constitutions. [Citations.] 'Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance.'" (*People v. Wharton* (1991) 53 Cal.3d 522, 575 [280 Cal.Rptr. 631, 809 P.2d 290], quoting *People v. Ledesma* (1987) 43 Cal.3d 171, 215 [233 Cal.Rptr. 404, 729 P.2d 839], italics in original.) It is defendant's burden to demonstrate the inadequacy of trial

---

[3] Defendant does not identify specifically the witness to whom he refers, but Gonzalez testified at trial that he saw defendant, and Gonzalez testified at the preliminary hearing that he "called the police" during the February 20, 2011, incident.

counsel. [Citation.] We have summarized defendant's burden as follows: "'In order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." [Citations.] Second, he must also show prejudice flowing from counsel's performance or lack thereof. [Citation.] Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."'" [Citation.] [¶] Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." [Citation.] Defendant's burden is difficult to carry on direct appeal, as we have observed: "'Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission.'" [Citation.]' (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437 [48 Cal.Rptr.2d 525, 907 P.2d 373].) If the record on appeal '"'sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected,"' and the 'claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding.' (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267 [62 Cal.Rptr.2d 437, 933 P.2d 1134].)" (*People v. Vines* (2011) 51 Cal.4th 830, 875-876.)

Here, the record sheds no light on why defendant's trial counsel did not seek to exclude the People's "main witness who lied about seeing [defendant] and the 911 emergency," or why counsel refused to recall and impeach that witness at trial. We do not know on what legal basis the witness could have been excluded. The claim must be reviewed, if at all, in a habeas corpus proceeding. (*People v. Vines*, *supra*, 51 Cal.4th at pp. 875-876.)

B. Request For Self-Representation

Defendant contends that the trial court erred in denying his request to represent himself. We disagree.

At the November 14, 2011, hearing, the trial court stated that it was "day seven of ten for trial." Defendant's counsel requested a continuance of the trial because defendant's medical expert requested until approximately November 18, 2011, within which to prepare the physician's report. The trial court denied the request for a continuance because defendant said he would not waive his the Sixth Amendments right to a speedy trial.

At the hearing, defendant stated that he wanted to be heard on a *Marsden* motion, and the trial court conducted a closed hearing with defendant and his counsel and sealed the transcript of the proceedings. During the closed hearing, defendant advised the trial court that he wanted to exercise his rights pursuant to *Farretta v. California*, *supra*, 422 U.S. 806 to represent himself, but he needed a 30 day continuance of the trial.

The trial court reopened the hearing with all parties present. The trial court denied defendant's *Farretta* motion as untimely, stating, "I'm going to leave your defense in the hands of your attorney. [¶] I'm denying your *Faretta* motion. It's on the eve of trial, and we'll proceed tomorrow."

A defendant has a federal constitutional right to represent himself if he voluntarily and intelligently elects to do so and makes the request within a reasonable time before trial commences. (*Farretta v. California*, *supra*, 422 U.S. 806; *People v. Windham* (1977) 19 Cal.3d 121, 128.) The California Supreme Court has held, "[I]n order to invoke the right he must assert it within a reasonable time before the commencement of trial." (*People v. Marshall* (1996) 13 Cal.4th 799, 827; *People v. Clark* (1992) 3 Cal.4th 41, 98; *People v. Burton* (1989) 48 Cal.3d 843, 852; see also *People v. Rudd* (1998) 63 Cal.App.4th 620, 625.) Motions made just before the start of trial are untimely. (*People v. Scott* (2001) 91 Cal.App.4th 1197, 1205; *People v. Rogers* (1995) 37 Cal.App.4th 1053, 1057 [*Faretta* motion made after the jury was sworn and just as opening statements were to begin was untimely]; *People v. Hill* (1983) 148 Cal.App.3d 744, 757 [*Faretta*

motion made five days before trial was untimely]; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 790-791 [*Faretta* motion made six days before trial was untimely].) As observed by the court in *People v. Rudd*, *supra*, 63 Cal.App.4th 620,"When California Supreme Court authority has been applied, motions for self-representation made on the day preceding or on the trial date have been considered untimely. [Citations.]" (*Id* at p. 626.)

An untimely motion for self-representation is addressed to the trial court's sound discretion. (*People v. Windham*, *supra*, 19 Cal.3d at p. 128 & fn. 5.) Here, defendant made his motion to represent himself the day before trial commenced. The trial court deemed the motion untimely, and it had the discretion to deny it. (*People v. Howze* (2001) 85 Cal.App.4th 1380, 1397.)

C. Sentencing Issues

Section 1465.8, subdivision (a)(1) provides in part, "To assist in funding court operations, an assessment of forty dollars ($40) shall be imposed on every conviction for a criminal offense . . . ." The trial court should have imposed that assessment. (*People v. Crabtree* (2009) 169 Cal.App.4th 1293, 1327-1328.) Government Code section 70373, subdivision (a)(1) provides, "To ensure and maintain adequate funding for court facilities, an assessment shall be imposed on every conviction for a criminal offense . . . . The assessment shall be imposed in the amount of thirty dollars ($30) for each misdemeanor or felony . . . ." (See *People v. Woods* (2010) 191 Cal.App.4th 269, 274 [in dictum that court facilities assessment must be imposed on each count]; *People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, 5-7 [same]; cf. section 1465.8, subdivision (a)(1).) The trial court also should have imposed that assessment.

Defendant contends that the court operations assessment pursuant to section 1465.8, subdivision (a)(1) and the court facilities assessment pursuant to Government Code section 70373, subdivision (a)(1) are not punitive (*People v. Wallace* (2004) 120 Cal.App.4th 867, 876 ["the Legislature imposed the [section 1465.8] fee for a nonpunitive purpose"]; *People v. Brooks*, *supra*, 175 Cal.App.4th Supp. at pp. 6-7 ["a section 70373(a)(1) assessment [is] nonpunitive"]) and therefore they are not part of his

sentence that may be corrected on appeal. Section 1465.8, subdivision (a)(1), and the court facilities assessment pursuant to Government Code section 70373, subdivision (a)(1), however, provide that the assessments "shall be imposed." As such, the assessments are a required part of defendant's sentence and may be corrected on appeal. (See, *People v. Crabtree*, *supra*, 169 Cal.App.4th at pp. 1327-1328; *People v. Woods*, *supra*, 191 Cal.App.4th at p. 274; *People v. Brooks*, *supra*, 175 Cal.App.4th Supp. at pp. 5-7.)

Defendant also contends that a court operations assessment pursuant to section 1465.8, subdivision (a)(1) and a court facilities assessment pursuant to Government Code section 70373, subdivision (a)(1) "should simply be written off" because of credits. Defendant argues that his 253 days of presentence custody credit, which includes 84 days of conduct credit, exceeds his 180 day imprisonment term and therefore pursuant to section 2900.5, the additional days he served in custody should be credited against the assessments at the rate of $30 per day. Defendant concedes, however, that "[n]o case . . . has concluded that a defendant's presentence custody can be used to write off assessments such as those in this case."

Section 2900.5, subdivision (a) provides in pertinent part that "[i]n all felony and misdemeanor convictions . . . all days of custody of the defendant, including days . . . credited to the period of confinement pursuant to Section 4019, . . . shall be credited upon his or her term of imprisonment, or credited to any fine on a proportional basis, including, but not limited to, base fines and restitution fines, which may be imposed, at the rate of not less than thirty dollars ($30) per day, or more, in the discretion of the court imposing the sentence. . . . [W]here the court has imposed both a prison or jail term of imprisonment and a fine, any days to be credited to the defendant shall first be applied to the term of imprisonment imposed, and thereafter the remaining days, if any, shall be applied to the fine on a proportional basis, including, but not limited to, base fines and restitution fines."

Section 2900.5, subdivision (a) further provides that all days of custody of the defendant shall " first be applied to the term of imprisonment" and then to "any fine . . .

including, but not limited to, base fines and restitution fines . . . ." "A fine is punitive." (*Charles S. v. Superior Court* (1982) 32 Cal.3d 741, 748.) The term "fine" in section 2900.5, subdivision (a) includes "state and county *penalty* assessments." (*People v. McGarry* (2002) 96 Cal.App.4th 644, 647-648, italics added.) "The root word [of penalty], 'penal,' means 'of or relating to punishment or retribution.' [Citation.] The American Heritage Dictionary defines 'penalty' as '[a] punishment established by law or authority for a crime or offense.' [Citation.]" (*People v. High* (2004) 119 Cal.App.4th 1192, 1199.)

Section 2900.5, subdivision (a) also is applicable to "restitution fines," as restitution fines are penalties. (*People v. Hanson* (2000) 23 Cal.4th 355, 361-362.) "[R]estitution fines are distinct from restitution orders . . . ." (*Id*. at p. 362.) "[D]irect restitution to redress economic losses is not a criminal punishment . . . ."[4] (*People v. Brunette* (2011) 194 Cal.App.4th 268, 284.)

"The 'fine . . . including, but not limited to, base fines and restitution fines' referred to in section 2900.5(a) . . . encompasses state and county *penalty* assessments." (*People v. McGarry* (2002) 96 Cal.App.4th 644, 648, italics added.) As defendant asserts, the court operations assessment pursuant to section 1465.8, subdivision (a)(1) and the court facilities assessment pursuant to Government Code section 70373, subdivision (a)(1) are not considered punitive. (*People v. Wallace*, *supra*, 120 Cal.App.4th at p. 876; *People v. Brooks*, *supra*, 175 Cal.App.4th Supp. at pp. 6-7.) Thus, under section 2900.5, subdivision (a) if a defendant is "over-penalized" by serving presentence days in custody in excess of his imposed imprisonment term, those excess days are to be applied to the defendant's court-ordered payment of monies that serve as punishment, as opposed to court-ordered payment of monies for nonpunitive purposes. Accordingly, section 2900.5 is not applicable here. It may be that custody credits should apply to assessments as well as to fines. But the Legislature has not so provided.

---

[4] As defendant's appellate counsel states, "Certainly no one would argue that a defendant's excess time in custody should relieve him of the obligation to pay victim restitution."

D. Review

In addition to reviewing and addressing the matters raised in defendant's letter brief and the parties' letter briefs, we have made an independent examination of the entire record to determine if there are any other arguable issues on appeal. Based on that review, we have determined that there are no other arguable issues on appeal. We are therefore satisfied that defendant's counsel has fully complied with counsel's responsibilities under *People v. Wende*, *supra*, 25 Cal.3d 436.

DISPOSITION

The matter is remanded to the trial court to issue an amended abstract of judgment imposing a $40 section 1465.8, subdivision (a)(1) court operations assessment and a $30 section 1465.8, subdivision (a)(1) court operations assessment. The judgment is otherwise affirmed.

CERTIFIED FOR PARTIAL PUBLICATION

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.