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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JASON SCOTT KIRKLEY, Defendant and Appellant.	G041709 (Super. Ct. No. RIF118857) O P I N I O N

Appeal from a judgment of the Superior Court of Riverside County, Douglas E. Weathers, Judge. Affirmed as modified.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Melissa Mandel and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Jason Scott Kirkley appeals from his conviction for first degree murder. (Pen. Code, § 187, subd. (a).)[1] He contends: (1) the trial court erred by removing his appointed defense counsel and appointing new counsel; (2) he is entitled to additional days of custody credit; and (3) the abstract of judgment incorrectly reflects the amount of the parole revocation fine imposed. We agree Kirkley is entitled to additional custody credit but reject his other contentions.

FACTS

The Crime

In view of the issues on appeal, we need not set forth the substantive facts of the crime in detail and provide only a short summary. On August 23, 2004, at around 4:00 p.m., Ana Alcaraz (Ana), her husband, and her infant child went to a liquor store where Ana used to work to cash a check. Kirkley, who Ana recognized as a regular customer of the store, was parked in a brown Chevrolet Blazer outside the store with another man, Juan Lopez. A store employee and another man were talking to Kirkley and Lopez.

Ana's father, Armando Alcaraz, pulled up in his car and parked. He began talking to Ana about her baby as he got out of his car and started walking towards her. Kirkley pointed a gun out of his car window and shot Alcaraz in the chest, killing him. Kirkley drove away. Ana's husband tried to follow him and got the Blazer's license plate number.

Adam Esparza lived in a mobile home on property where there were several other residences, including one in which Kirkley and Lopez were living. He testified that sometime between 3:00 p.m. and 4:00 p.m., on August 23, 2004, Kirkley and Lopez drove up "quick" in a brown Chevrolet Blazer and parked it in a large cargo container

[1] All further statutory references are to the Penal Code.

located on the property. One of the men told Esparza the police were after them, and Kirkley told Lopez to wipe down the car.

Kirkley asked Esparza to drive him to a friend's house; Esparza complied. Kirkley was carrying a gun, which Esparza had seen him with four or five times in the days before the shooting. Kirkley asked if he could leave the gun in Esparza's trunk, but Esparza would not let him. Later, Esparza helped Kirkley get rid of the gun.

A few days before Alcaraz's murder, Kirkley told Esparza he had been having trouble with Alcaraz, who owed him money. A few days after the murder, Esparza overheard Kirkley say to Lopez "it was either him or us," and that Alcaraz was pulling out a gun when Kirkley shot him in the chest.

Kirkley's Legal Representation

At Kirkley's custody arraignment in September 2004, the Riverside Public Defender's Office was appointed to represent him. A preliminary hearing was set for October 8, 2004, but continued repeatedly until May 2005.

On May 12, 2005, the public defender declared a conflict and was relieved. Conflict Defense Lawyers (CDL), was appointed and by May 26, 2005, CDL contract attorney John Aquilina was representing Kirkley. Aquilina represented Kirkley at his preliminary hearing in June. On August 11, 2005, an information was filed charging Kirkley with one count of first degree murder of Alcaraz, an allegation of personal use of firearm within the meaning of section 12022.53, subdivision (d) (consecutive 25-years-to-life enhancement term), and a prior prison term under section 667.5, subdivision (b) (consecutive one-year enhancement term).

Trial was set for January 2006, but at Aquilina's request continued to March. On March 22, 2006, Aquilina filed a motion to continue the trial to July 17, 2006, due to his current trial caseload. A trial readiness conference was set for May 24, 2006, and then continued several times either at Aquilina's request or pursuant to stipulation of counsel.

On August 7, 2006, the district attorney filed a motion to relieve Aquilina as defense counsel in Kirkley's case, and in another unrelated case, asserting the People's speedy trial rights. In his declaration, Deputy District Attorney David Steward stated that for the past year he had been attempting, to no avail, to get a realistic assessment from Aquilina as to when he would be ready to go to trial. Aquilina told Steward he did not believe he would be able to go to trial anytime in the foreseeable future—for at least another year—because he still had so many older cases to try. Steward noted the victim's daughter, who witnessed the crime, called him monthly to find out when the case would begin trial.

At a hearing on August 18, 2006, Steward and Aquilina agreed Kirkley's trial would probably take five or six days. Aquilina explained he was not ready for trial because of his current trial schedule and because the matter had not yet been investigated or worked up. He had done no substantial work on the case. He had not talked to witnesses and his only "investment" in the case was his relationship with Kirkley and Kirkley's family. Aquilina agreed he could provide any information he had to another lawyer should he be relieved. Aquilina agreed with the court's assessment that it was a straight forward case; one "in which any number of lawyers could ably assist the defendant."

The court and counsel then engaged in a lengthy discussion about the systemic reasons for the current delays in bringing this, and the other unrelated case, to trial. In short, the court surmised that due to county funding constraints, there were simply not enough conflict attorneys available forcing the CDL attorneys to often carry unmanageable caseloads. "Maybe rather than giving the district attorney's office all the money they get, they could actually start funding the defense bar. And then we would have more defense lawyers available to defend." The court was concerned that relieving Aquilina because of his current commitments and inventory of older cases would be pointless if the next appointed counsel could not get the case ready any sooner. The court

continued the hearing to September 8, 2006, directing that the two attorneys who held the CDL contract with the county, and supervised CDL case assignments, appear to respond to the court's inquiries about the availability of other counsel.

At the continued hearing on September 8, 2006, Aquilina explained he had a capital murder case set to begin trial at the end of 2006 or early 2007. And assuming that trial went forward as anticipated, he could then prepare for Kirkley's trial, and the trial in the unrelated case, and be ready to start trial in one or the other by April or May of 2007. The court indicated it believed that was an overly optimistic assessment. The CDL supervising attorneys told the court it was probable they could locate a new defense counsel who could try the case in the next 60 to 90 days.

The court continued the hearing to September 15, 2006, at which time Tracy Macuga, an experienced criminal defense lawyer who had just recently agreed to take CDL cases, appeared. Macuga advised the court she had reviewed Kirkley's file and believed she could be ready to try the case in 60 days. Kirkley addressed the court directly and objected to Aquilina being relieved as his counsel, explaining they had a good relationship and he felt comfortable with Aquilina. The court stated Macuga was a very experienced defense attorney, and given Aquilina's lack of availability to try the case within a reasonable time, the People's speedy trial rights were impaired. The court found Kirkley's legal interests did not require Aquilina continue to be his counsel as Aquilina had done very little work on the case. The court ordered Aquilina relieved and appointed Macuga as counsel for Kirkley.

Trial was initially set for November 27, 2006. Counsel stipulated to continue trial to January 29, 2007, and then after trailing, the trial began on February 15, 2007. After a 10-day trial, the jury returned a verdict finding Kirkley guilty of first degree murder, and finding true the section 12022.53, subdivision (d), firearm allegation. In a bifurcated proceeding the court found true the prior conviction allegation. Kirkley was sentenced to a total term of 51 years to life comprised of a 25-years-to-life term for

first degree murder, a 25-years-to-life term for the firearm allegation, and a one-year term for the prior prison term.

DISCUSSION

1. Removal of Appointed Defense Counsel

Kirkley contends the trial court erred by removing his appointed defense counsel over his objection. We find no abuse of discretion.

Although an indigent criminal defendant has a right to appointed counsel, he does not have a right to his counsel of choice. It is the function of the trial court, in the exercise of its discretion, to select and appoint counsel for an indigent defendant. (§ 987; *Harris v. Superior Court* (1977) 19 Cal.3d 786, 794-796 (*Harris*).)

"'A court may remove appointed counsel both to "prevent substantial impairment of court proceedings" [citation] and when counsel, without good cause, does not become ready for trial [citation].' [Citation.] A trial court's removal of appointed counsel for an indigent defendant is reviewed for abuse of discretion. [Citation.]" (*People v. Mungia* (2008) 44 Cal.4th 1101, 1119 (*Mungia*); see also *People v. Panah* (2005) 35 Cal.4th 395, 426.)

The trial court removed Aquilina because he was unable to prepare the case for trial in a reasonable time. In a criminal case, the People as well as the defendant have speedy trial rights. (Cal. Const., art. I, § 29.) The trial court may balance a criminal defendant's desire for his preferred appointed counsel against "'other values of substantial importance, such as assurance of an orderly and speedy determination of criminal charges . . . .' [Citation.]" (*Maniscalco v. Superior Court* (1991) 234 Cal.App.3d 846, 852.)

In *Mungia, supra,* 44 Cal.4th 1101, the Supreme Court concluded the trial court did not abuse its discretion by replacing defendant's appointed counsel in a capital murder case. The public defender's office had represented defendant for 17 months when the deputy public defender initially assigned became incapacitated. A new deputy public

defender was assigned. He advised the court he would need at least nine more months before he could try the case, but based on the deputy's heavy caseload, the trial court believed the estimate was unrealistically optimistic. (*Id.* at p. 1122.) The Supreme Court concluded that "given the procedural history of defendant's case . . . , [the trial court] reasonably was skeptical of the public defender's ability to become ready for trial in a timely manner." (*Id.* at p. 1124.) "The trial court did not abuse its discretion when it removed the public defender as defendant's counsel of record, based on its conclusion that the public defender would not bring defendant's case to trial within a reasonable time." (*Id.* at p. 1125.)

Similarly, in *People v. Cole* (2004) 33 Cal.4th 1158, the trial court had appointed the Alternate Defense Counsel (ADC). A year later, the first attorney left ADC, and the case was reassigned to another ADC attorney. (*Id*. at p. 1179.) Thereafter, over the course of one year, the trial court granted several continuances because the ADC replacement attorney was not ready for trial. Ultimately, the court relieved the ADC as counsel and appointed a third attorney who indicated he could be prepared for trial faster than the ADC counsel. (*Id*. at pp. 1182-1183.) The Supreme Court held there was no abuse of the trial court's discretion in relieving appointed counsel given its skepticism counsel could be ready for trial in a reasonable time. (*Id*. at p. 1188.)

As in *Mungia* and *Cole*, the trial court here was reasonably skeptical of Aquilina's ability to become ready for trial in a timely manner given his heavy outstanding caseload. Aquilina was appointed to represent Kirkley in May 2005 and the trial was set for December 5, 2005. At defense request, the trial was continued to March 27, 2006. In March, the defense sought and obtained another continuance to July 2006. Aquilina explained he had yet to do any work on Kirkley's case due to his involvement in other felony trials. The court set a new trial readiness conference in May 2006, which was then continued several times until August 2006.

In his motion to relieve Aquilina, filed in August 2006, the district attorney explained Aquilina was still unable to give him a realistic possible trial date—telling the prosecutor it would be at least another year until he could get to the case due to his other commitments. At the August 18, 2006, hearing, Aquilina again advised the court he had done no work on the case due to his involvement on other older felony cases. In September 2007, Aquilina told the court he thought he could be ready to try the case by April or May of 2007. The court was skeptical of that estimate given Aquilina's caseload. By contrast Macuga, an experienced defense attorney who had only recently become affiliated with CDL, believed she could get the case ready within 60 days. And while one continuance was obtained, she in fact was ready to start trial by February 2007.

Citing *Harris, supra,* 19 Cal.3d 786, Kirkley complains his close relationship to Aquilina was entitled to great weight, and his preference for Aquilina should have been honored. But *Harris* stated "[a]n indigent defendant's preference for a particular attorney" was only a consideration; it was "not a determinative factor . . . [and] the matter rests wholly within the sound discretion of the trial court." (*Id.* at pp. 795-796.)

Furthermore, *Harris* is factually inapposite. The attorneys in *Harris* had represented defendants in related prosecutions. That prior representation "not only established a close working relationship between [defendants] and [the attorneys] but also served to provide those attorneys with an extensive background in various factual and legal matters which may well become relevant in the instant proceeding—a background which any other attorney appointed to the case would necessarily be called upon to acquire." (*Harris, supra,* 19 Cal.3d at pp. 797-798.) That is not the case here. Aquilina had acquired no significant background in the case—he had yet to conduct any investigation or do any work on it. He conceded the case could readily be handed off to another attorney.

Kirkley complains the prosecution made no showing that it would suffer any prejudice as a result of further delaying the trial until Aquilina had time to work the case up. But he cites no case authority requiring prejudice be shown—as already noted the constitution grants the People a speedy trial right. And the prosecutor represented to the court that a primary percipient witness—the victim's daughter—was calling him monthly concerned as to why the matter was not coming up for trial.

Kirkley also argues Aquilina's removal must be viewed against the backdrop of overall heavy defense attorney caseloads and inadequate funding for defense counsel. He complains the prosecutor never offered an adequate explanation as to why this case was being pushed to the front of the line—the trial court specifically commented on the number of older cases waiting to be tried. But Kirkley offers no cogent explanation as to how systemic problems of defense funding, or district attorney management decisions that result in some cases being tried before other older cases, cast doubt on the trial court's exercise of its discretion in this matter. (See generally *Barsamyan v. Appellate Division of Superior Court* (2008) 44 Cal.4th 960.) The trial court concluded Kirkley's appointed counsel was too overloaded with other cases to prepare this case for trial within a reasonable time. Accordingly, it removed counsel and appointed new experienced defense counsel to try the case. We simply cannot say under the circumstances the trial court abused its discretion.

2. Custody Credits

Kirkley contends, and the Attorney General agrees, the trial court improperly calculated Kirkley's actual days in custody. He was credited with 978 actual custody days. Based on his arrest date of September 6, 2004, and his sentencing date of December 14, 2007, Kirkley was entitled to be credited with 1,195 actual custody days. We have reviewed the record and agree Kirkley is entitled to the additional days of actual custody credit and order the judgment modified accordingly.

3. Parole Revocation Fine

Kirkley contends the abstract of judgment does not accurately reflect the parole revocation fine imposed by the court and must be modified to reflect the correct amount. We disagree.

In its oral pronouncement of sentence, the trial court ordered Kirkley to pay a victim restitution fine of $5,000 pursuant to section 1202.4, and a parole revocation fine of $200 pursuant to section 1202.45 (which was ordered suspended unless parole is revoked). The sentencing hearing minute order and the abstract of judgment both state Kirkley is to pay a $5,000 section 1202.4 victim restitution fine and a $5,000 section 1202.45 parole revocation fine.

Relying on the rule that "[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls . . . " (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385), Kirkley argues the abstract of judgment must be modified to reduce the section 1202.45 parole revocation fine from $5,000 to the $200 amount announced by the court at sentencing. We cannot oblige him. Having imposed a $5,000 victim restitution fine, the court had no discretion to order a lesser amount for the parole revocation fine.

Section 1202.4, subdivision (b)(1), requires the court to impose a victim restitution fine of between $200 and $10,000, the amount being in the court's discretion. Section 1202.45 governs the parole revocation fine challenged by Kirkley. That section is mandatory in its requirement that if a defendant's sentence includes a period of parole, when the court imposes the section 1202.4 victim restitution fine, it shall "assess an additional parole revocation restitution fine *in the same amount* as that imposed pursuant to subdivision (b) of [s]ection 1202.4." (Italics added.) Although the trial court stated a lesser amount when announcing its sentence, the minute order and abstract of judgment correctly state the parole revocation fine in the amount the court was required by law to impose.

DISPOSITION

The clerk of the superior court is directed to prepare an amended abstract of judgment to reflect that defendant is entitled to 1,195 days of actual custody credit and to forward a certified copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation, the Division of Adult Operations. In all other respects, the judgment is affirmed.

O'LEARY, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.