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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. TERRY GORDON, Defendant and Appellant.	A171375 (Alameda County Super. Ct. No. 17-CR-027923)

Terry Gordon (appellant) appeals from his convictions for two counts of assaulting a peace officer. We reject his various claims and affirm.

BACKGROUND

In June 2024, a jury convicted appellant of two counts of assaulting a peace officer (Pen. Code, § 245, subd. (c)),[1] and found true allegations of eight prior convictions. The trial court sentenced appellant to 9 years 116 days in prison.

[1] All undesignated statutory references are to the Penal Code. We omit background facts about the offenses, which are not relevant to our resolution of the appeal.

DISCUSSION

I. *Appellant's Absence From Trial*

Appellant argues reversal is required because he was not personally present for any part of his trial. We reject the claim.

A. *Legal Background*

"A criminal defendant's right to be present at trial is protected under both the federal and state Constitutions." (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202.) "Sections 977 and 1043 implement the state constitutional protection." (*Ibid.*; see § 1043, subd. (a) ["Except as otherwise provided in this section, the defendant in a felony case shall be personally present at the trial"].) "A defendant's right to presence, however, is not absolute. The high court has stated that a defendant's 'privilege may be lost by consent or at times even by misconduct.' " (*Gutierrez*, at p. 1202.)

Section 1043, subdivision (f)(1) provides, "A trial shall be deemed to have commenced in the presence of the defendant for purposes of subdivision (b),[2] . . . if the court finds, by clear and convincing evidence, all of the following to be true: [¶] (A) The defendant is in custody and is refusing, without good cause, to appear in court on that day for that trial. [¶] (B) The defendant has been informed of their right and obligation to be personally present in court. [¶] (C) The defendant has been informed that the trial will proceed without the defendant being present. [¶] (D) The defendant has been informed that they have the right to remain silent during the trial. [¶] (E)

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[2] Section 1043, subdivision (b) sets forth circumstances under which "[t]he absence of the defendant in a felony case after the trial has commenced in their physical presence shall not prevent continuing the trial to, and including, the return of the verdict," including, "(2) Any prosecution for an offense which is not punishable by death in which the defendant is voluntarily absent."

The defendant has been informed that their absence without good cause will constitute a voluntary waiver of any constitutional or statutory right to confront any witnesses against them or to testify on their own behalf. [¶] (F) The defendant has been informed whether or not defense counsel will be present." The statute provides the court "shall state on the record the reasons for the court's findings and shall cause those findings and reasons to be entered into the minutes," and directs that, "[i]f the trial lasts for more than one day, the court is required to make the findings required by this subdivision anew for each day that the defendant is absent." (§ 1043, subd. (f)(2)–(3).)

B. *Additional Background*

The complaint was filed in September 2017 and appellant was held without bail. An information was filed in March 2019.

In December 2020, a hearing minute order indicated that appellant refused to appear in court. Nearly three years later, the trial court issued an order documenting "some 24 refusals to come to court dating back to December of 2020" and ordered that, on November 29, 2023, should appellant "once again refuse to come to court that he be extracted from his cell and transported to" the trial court "to set trial dates and for the defendant to be admonished by the court pursuant to Penal Code Section 1043.5." (Boldface & italics omitted.) The order authorized the sheriff's office to use "any reasonable force necessary."

On November 29, 2023, the court (Judge Delucchi), counsel, and a court reporter went to appellant in a "holding tank" at the courthouse. The trial court admonished appellant: "pursuant to Penal Code section 1043, I am hereby informing you of your right and obligation to be personally present in court for your trial. [¶] I'm informing you that your trial will . . . proceed

without your being present. [¶] I'm informing you that you have a right to remain silent during your trial. I'm informing you that your absence from your trial without good cause will constitute a voluntary waiver of any Constitutional or Statutory Right to confront any witnesses against you or to testifying on your own behalf, and I'm informing you that your Defense Counsel will be present at your trial. [¶] Your trial date is hereby set for March 11, 2024 with a readiness date of March 7th, 2024. Your attorney is here and can talk to you. We'll see you in March. Thank you."

Appellant refused to appear at court hearings on February 1, February 16, and March 11, 2024. On March 11, the trial court ordered that, on March 13, appellant "be extracted from his cell using reasonable force" and brought to court. On March 13, appellant was transported to the courthouse but refused to come to the courtroom. The trial court (Judge Cramer), attorneys, and a court reporter again went to appellant in the holding cell. The reporter's transcript indicates appellant was "screaming out loud" throughout the attempted proceeding, which the court concluded after finding, "He's not going to hear anything I say." After returning to the courtroom, the trial court stated for the record that, before the holding cell door was opened, the court could see appellant sitting calmly in a wheelchair. As soon as the door opened, appellant "began wailing . . . , just kind of an uncontrolled wail" and appeared to be "making every effort to fall forward out of the wheelchair onto the floor." The court "was unable to read him the Penal Code Section 1043 admonition that the trial would proceed in his absence." Although appellant's conduct "appeared contrived," it was possibly "due to some mental illness," so the court found substantial evidence of incompetence to stand trial, appointed two psychiatrists to review competency, and suspended trial

proceedings. On May 1, after considering two psychiatric reports, the trial court found appellant competent to stand trial. Trial was set for May 20.

On May 20, 2024, appellant again refused to come to court. The trial court (Judge Madden) stated, "For the record, this is a case from 2017. The Court reviewed just the history in particular of [appellant] not coming to court. There was an extraction order that was filed on November 28th, 2023, that was signed by Judge Paul Delucchi. This is after there had been 23 refusals on the part of [appellant]. [¶] [Appellant] was brought in, and Judge Delucchi did admonish him pursuant to Penal Code section 1043. He has been fully admonished, and we are going to proceed in his absence." The court directed, "[E]very day the Court is in session, the order forthwith is that the Sheriff's Department makes an attempt to bring [appellant] in."

On May 21, 2024, the bailiff informed the court that appellant refused to come to court, and the court stated, "[F]or the record, he was fully admonished pursuant [to] Penal Code section 1043 on November 29th of last year. We are proceeding." Jury selection took place on May 22 and 28, 2024. The minute orders for both days indicate that appellant refused to appear and that trial proceedings would continue pursuant to section 1043. On each day of the jury trial up to and including the reading of the verdict, appellant's refusal to appear was documented and the trial court stated it was proceeding pursuant to section 1043.

C. *Analysis*

Appellant argues the trial court erred in failing to expressly make each section 1043, subdivision (f)(1) finding on each day of trial. We need not decide this issue—or whether the claim is forfeited, as the People contend—because any error was harmless.

Appellant contends the error is structural, but our Supreme Court has repeatedly held otherwise. (See *People v. Perry* (2006) 38 Cal.4th 302, 312 ["Erroneous exclusion of the defendant is not structural error that is reversible per se, but trial error that is reversible only if the defendant proves prejudice"]; *People v. Miranda-Guerrero* (2022) 14 Cal.5th 1, 23 [same].) Appellant argues these cases involved the exclusion of the defendant from only part of the proceedings, rather than from the entire trial, but the Supreme Court's holdings regarding reversible error were not so limited.

The parties dispute the appropriate standard of prejudice, but this we also need not decide. Appellant had refused to come to court dozens of times for well over three years before trial started. The trial court twice ordered appellant forcibly removed from jail to come to court, and both times appellant refused to leave the court holding tank. Both times, the bench officer went to the holding tank to either deliver or attempt to deliver the section 1043, subdivision (f) admonishments. On each day of trial, deputy sheriffs attempted to transport appellant to court and each day appellant refused. There is no basis whatsoever in the record to find that, had appellant been readmonished each trial day and/or had the trial court made additional express findings on the record, appellant would have appeared in court for any part of his trial. We hold any error harmless beyond a reasonable doubt.

II. *Defense Counsel's Motion to Withdraw*

Appellant argues the trial court abused its discretion in denying defense counsel's motion to withdraw. We disagree.

A. *Additional Background*

In January 2024—after appellant had been refusing to come to court for more than three years, and two months before the then-set trial date—

defense counsel filed a motion to withdraw. Counsel had been representing appellant since October 2021. Counsel submitted a declaration averring an "irreconcilable conflict of interest has developed," appellant "refuses to meet with me . . . and refuses to cooperate in any way with his defense," and appellant "has written me requests to withdraw and has complained to the State Bar about my representation on several occasions."

A hearing on the motion was held on March 13, 2024, the second day appellant was forcibly brought to the courthouse but refused to come to the courtroom. Defense counsel reported that, before the hearing, appellant "indicated he wanted to show me some papers that I couldn't really see. And he said I was under investigation. And then he left the interview room." The papers were apparently recent State Bar complaints about defense counsel.

The prosecutor stated, "[W]e know that he's kind of played the same game with [the] Public Defender's Office and made them kind of have to withdraw because of the complaints that he was making about them.[3] [¶] So I think by letting [defense counsel] out, we're just going to get a new attorney and go through the same thing again. And at what point do we say these are just games being played by the defendant and we can't just age this case because he's doing that." After reviewing appellant's history of not coming to court, the court told defense counsel, "I understand . . . his refusal to ever communicate with you makes it very, very difficult for you to effectively represent him. But the way I view it is that is a conscious tactical decision on his part and not an inability."

Defense counsel argued, "[M]y limited understanding of his history on this case with the other attorneys was he wasn't vehemently opposed to their

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[3] The public defender's office declared a conflict of interest in October 2021, and appellant's trial counsel was appointed at that time.

representation to the degree that he has communicated to me. He does write me letters. He does write letters that I take to be threatening. Not physically threatening. He's complained to the State Bar. I think he merely, with the Public Defender's Office, but I can't say with any certainty, he just filed a complaint. And they said well, we got a conflict because he filed a complaint. He's filed at least two complaints against me. [¶] . . . [T]his relationship I have with him has grown to the point where it's irreconcilable in getting us back together. I just feel it's in my client's best interest that I bring this withdraw motion to be granted and he gets a shot with some other attorney through his approval. He clearly does not want to be represented by me. Just no doubt in my mind. And he refuses to participate in any meaningful communication about this case with me."

The court noted, "[I]f [appellant] wanted to come to court and run a *Marsden* motion, I'd be happy to hear it, but he's not even doing that."[4] The court agreed with defense counsel that appellant "is clearly hindering your ability" to represent him, but found that "he is doing that consciously, not because he's unable to." The court denied the motion to withdraw.

B. *Analysis*

"The determination whether to grant or deny a motion by an attorney to withdraw is within the sound discretion of the trial court and will be reversed on appeal only on a clear showing of abuse of discretion." (*People v. Sanchez* (1995) 12 Cal.4th 1, 37, disapproved on another ground by *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22.) "The case law establishes that the court has discretion to deny an attorney's request to withdraw where

[4] Appellant made numerous motions pursuant to *People v. Marsden* (1970) 2 Cal.3d 118 earlier in the proceedings when the public defender was representing him.

such withdrawal would work an injustice or cause undue delay in the proceeding. [Citations.] But the court's discretion in this area, as elsewhere in the law, is one to be exercised reasonably." (*Mandell v. Superior Court* (1977) 67 Cal.App.3d 1, 4.)

The trial court could reasonably find that appellant's conduct in refusing to talk to defense counsel and filing complaints against counsel was a conscious effort to further delay the trial, that the conduct would likely be repeated with any subsequent counsel as it had been with his previous counsel, and that granting the motion would therefore cause undue delay in the proceeding. Appellant has failed to establish an abuse of discretion.

III. *Ineffective Assistance of Counsel*

In his opening brief, appellant argues trial counsel was constitutionally ineffective in failing to object to the dual use of facts at sentencing. However, in his reply brief, appellant declines to respond to arguments raised in the response brief, noting that he "ha[s] been released from prison after serving the custodial term imposed by the trial court." Appellant does not argue this claim is not mooted by his release, and we find it has been so mooted.[5]

[5] "Although a defendant's excess custody credits may be applied to reduce a fine imposed by the trial court, such excess credits may not be applied to reduce victim restitution, a restitution fine, the court operations assessment, or the court facilities assessment." (*People v. Petri* (2020) 45 Cal.App.5th 82, 92.) No reducible fines were imposed by the trial court.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JACKSON, P. J.
CHOU, J.

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