

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,
v.
IVAN RUBIO,
Defendant and Appellant.

No. H039017
(Santa Clara
County
Superior
Court No.
SS120361A)

APPELLANT'S OPENING BRIEF

Appeal from a Judgment of Conviction Imposed
The Honorable Richard M. Curtis, Judge

Submitted in accordance with procedures outlined in
People v. Wende (1979) 25 Cal.3d 436

SIXTH DISTRICT APPELLATE PROGRAM

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STATEMENT OF APPEALABILITY

This appeal is from a final judgment following a guilty plea and is based on the sentence imposed. It is authorized by Penal Code section 1237.5 and California Rules of Court, rule 8.304(b)(4).

STATEMENT OF THE CASE

An information was filed on March 9, 2012, alleging appellant possessed methamphetamine for sale (Health & Saf. Code, § 11378). It also alleged he suffered a prior "strike" conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and a prior prison commitment (Pen. Code, § 667.5, subd. (b)). (CT 8-10.)

On August 21, 2012, the information was amended to allege simple possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), which appellant admitted in exchange for dismissing the original charge. He also admitted the prior strike conviction. It was agreed who ask the court to dismiss the prior strike conviction. (See *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 504.) If the motion were granted, he could be

sentenced to serve up to three years in prison. If it was denied, his sentence could be no more than 32 months. (CT 84-85.)

The *Romero* motion was denied on November 6, 2012. The court imposed the low term of 32 months. It awarded 257 actual days and 256 conduct days for a total of 513 days of presentence credits. It imposed a \$480 restitution fine and a second restitution fine of the same amount which was stayed unless appellant violated parole. (CT 126-127, 129-130.)

A notice of appeal was filed on November 8, 2012, challenging the sentence. (CT 128.)

STATEMENT OF THE EVIDENCE

According to the probation report, appellant parked his car in the fire lane of a Motel 6 after 2 a.m. on February 24, 2012 and went to the check-in window. (CT 110.) When Salinas Police officers noticed this, they approached appellant at the check-in window. He confirmed it was his car. (CT 110.) The police learned he was on parole and conducted a parole search. (CT 110-111.) He admitted he possessed “meth.” (CT 111.) They found 5.3 grams of methamphetamine, \$2237 in cash, and a meth pipe in his pants pockets. (CT 111.) He said the cash was from a tax refund. (CT 112.)

Appellant told the probation officer he told the officers he sold marijuana; he did not sell methamphetamine. (CT 112-113.)

The prior strike conviction was from 2007 when appellant was convicted of brandishing a weapon at a peace officer to resist arrest with a gang enhancement (Pen. Code, § 417.8, 186.22, subd. (b)(1)). (CT 9, 118.) He was a passenger in a car stop and

pointed a handgun at the windshield of an occupied police car. The police officer jumped out of the patrol car, which was still rolling. Appellant pointed the gun toward the ground and pulled the slide back. The patrol car continued rolling toward appellant, and he fled to avoid being hit. (CT 118.) He also had a record for assault, false imprisonment, trespassing, theft related offenses, and driving violations. (CT 118.)

Appellant was sentenced to serve seven years in prison for the brandishing case. (CT 118.) He since dropped out of gangs. (CT 115.) While on parole, he was working on obtaining a GED. (CT 116.) He had a two month old daughter. (CT 117.)

ANALYSIS OF THE LAW

Pursuant to *People v. Wende* (1979) 25 Cal.3d 436, counsel requests that this court independently review the entire record on appeal.

Appellant has been advised by counsel of his opportunity to inform the court of any issues he may think his case contains and his right to file a supplemental brief with this court. Counsel has reviewed the entire record on appeal and remains available to brief any issue upon the court's request.

CONCLUSION

Appellant respectfully requests that this Court independently review the entire record on appeal pursuant to *People v. Wende, supra*, 25 Cal.3d 436.

DATED: March 5, 2013

Respectfully submitted,
SIXTH DISTRICT APPELLATE PROGRAM

By: *Jonathan Grossman*
Jonathan Grossman
Attorney for Appellant
Ivan Rubio

DECLARATION OF COUNSEL

I, Jonathan Grossman declare:

1. I am an attorney of law admitted to practice before all courts of California, and am appointed counsel for appellant Ivan Rubio.

2. I have thoroughly reviewed the record and the files in this case.

3. I have determined that a brief pursuant to *People v. Wende, supra*, 25 Cal.3d 436 should be filed.

4. I have written appellant advising him that a brief pursuant to *People v. Wende, supra*, would be filed. I also informed him of his right to file a supplemental brief. I sent him the record on appeal to aid in the preparation of any supplemental brief.

5. I have also advised appellant that he has a right to ask the court to have present counsel relieved and another attorney appointed.

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that it was executed on March 5, 2013, at San Jose, California.

Jonathan Grossman
Jonathan Grossman

CERTIFICATION OF WORD COUNT

I, Jonathan Grossman, certify that the attached Appellant's Opening Brief contains 4464 words.

/s/ Jonathan Grossman
Jonathan Grossman

[Add proof of service]