Filed 3/29/12 P. v. Cady CA1/5

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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.

RONALD CADY,

Defendant and Appellant.

_____/

A130690

(San Francisco County Super. Ct. No. SCN204353)

Ronald Cady appeals from a judgment entered after the trial court revoked his probation. He contends his conviction must be reversed because (1) the court misunderstood its sentencing discretion, and (2) he received ineffective assistance of counsel. We will reject both arguments and affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

On January 18, 2008, San Francisco police officers were conducting a narcotics operation in the Tenderloin. An officer approached appellant on the 900 block of Hyde Street and asked to purchase methamphetamine. Appellant handed the officer methamphetamine in exchange for $20. Appellant then punched the officer in the face.

Based on this incident a complaint was filed charging appellant with transporting methamphetamine (Health & Saf. Code, § 11379, subd. (a)), and battery (Pen. Code, § 242).

Appellant pleaded guilty to both counts on February 7, 2008. On March 10, 2008, the trial court suspended the imposition of sentence and placed appellant on probation for three years.

In the years that followed, appellant was arrested several times and his probation was revoked and reinstated once.

On August 1, 2010, appellant offended yet again. A man named Lawrence Roberts was withdrawing money from an ATM in San Francisco when appellant approached him and asked for money. Roberts refused but appellant persisted. When the ATM dispensed the money, appellant hit Roberts in the head and tried to grab it. A friend came to Roberts's aid and appellant was arrested.

Based on this incident, a motion was filed to revoke appellant's probation. After a contested hearing, the trial court granted the motion. Subsequently the court revoked appellant's probation and sentenced him to the upper term of four years for his original offense of transporting methamphetamine.

II. DISCUSSION

A. Whether the Trial Court Understood the Scope of its Discretion

At the beginning of the sentencing hearing, the trial court told the prosecutor to focus on appellant's original offense as is required by California Rules of Court,[1] rule 4.435:[2]

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[1] All further rule references are to the California Rules of Court.

[2] As is relevant here, rule 4.435(b)(1) states:

"On revocation and termination of probation . . . when the sentencing judge determines that the defendant will be committed to prison:

"(1) If the imposition of sentence was previously suspended, the judge must impose judgment and sentence . . . .

"*The length of the sentence must be based on circumstances existing at the time probation was granted, and subsequent events may not be considered in selecting the base term . . . .*" (Italics added.)

"So I am going to ask the People to summarize their argument, please, of the underlying offense, which is a violation of Health and Safety Code, Section 11379, Subsection A. The potential sentences are two, three, or four years in state prison.

"The Court needs to look at factors that were in existence at the time of the imposition of the sentence. The Court is not considering the current violation and the factors regarding that violation for purposes of sentencing.

"What the Court is doing is going back in time, if you will, to look at the factors that would establish what an appropriate length of state prison would be if that's what the Court decides to do."

Appellant now contends this comment shows the trial court misunderstood the scope of its sentencing discretion because the court did not expressly mention an exception to rule 4.435 that was first articulated in *People v. Harris* (1990) 226 Cal.App.3d 141. In *Harris,* the defendant was placed on probation. The defendant's probation was revoked and reinstated and then revoked again. After the second revocation, the court sentenced the defendant to state prison. (*Id.* at pp. 143-144.) On appeal, the defendant challenged the sentence imposed arguing that under former rule 435(b)(1), the court could only consider the circumstances that existed at the time probation was originally granted. (*Id.* at p. 144.) The *Harris* court disagreed ruling that "a later sentence upon revocation of the reinstated probation may take into account events occurring between the original grant and the reinstatement. [¶] To hold otherwise would seriously impede a court's flexibility to deal effectively with the offender who . . . proves unable to abide by the conditions of that liberty the first time out. Allowing an offender to fail multiple grants of probation with absolute impunity under rule 435(b)(1) would discourage a court from ever reinstating probation." (*Id.* at p. 147.)

Appellant argues the trial court's comment that we have quoted shows the court was unaware it could consider facts that occurred *after* the initial grant of probation and that if the court had considered those facts, it may well have imposed a lesser sentence.

We reject this argument because it is based on a reading of the record that is too narrow. While the court did not expressly articulate the exception that was described in

the *Harris* decision, the prosecutor did. As she explained in response to the court's comment: "I did cite in my papers some exceptions to the law where when probation is revoked and then reinstated and then later revoked again, the Court can also consider different circumstances preceding that reinstatement. The length of the present sentence of prison, were it to be imposed, can in that sense be effected by things that happened between the original probation grant and to the present day . . . ."

The prosecutor's sentencing memorandum also addressed this issue specifically. After citing the general rule that the length of the sentence imposed must be based upon the circumstances that existed at the time probation was granted, the prosecutor described the very exception upon which appellant relies, "However, if probation is revoked and then reinstated and later revoked again, the court can also consider circumstances preceding the reinstatement (e.g., the circumstances of the first probation violation) in deciding the length of the prison sentence for the second probation violation. *People v. Harris* (1990) 226 Cal.App.3d 141, 145, *People v. Downey* (2000) 82 Cal.App.4th 899, 917; *People v. Black* (2009) 176 Cal.App.4th 145."

Given that the prosecutor repeatedly informed the court about the exception that is set forth in the *Harris* decision, we do not hesitate to conclude the court was aware of its discretion on that issue. We find no error on this ground.

B. Whether Trial Counsel Provided Ineffective Assistance

The record in this case indicates appellant has substance abuse issues and that he had enrolled in the New Leaf Substance Abuse Program pursuant to an earlier grant of probation. Between July 11, 2008, and June 12, 2009, appellant attended 56 substance abuse counseling sessions and made some progress in dealing with his addiction issues during that time.

Appellant now contends his trial counsel provided ineffective assistance because he failed to urge the court to consider the progress he made at New Leaf as a factor in mitigation.

A defendant who contends he received ineffective assistance has the burden of proving that (1) trial counsel's performance was deficient in that it fell below an objective

standard of reasonableness when measured by prevailing professional norms, and (2) there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. (*People v. Ledesma* (1987) 43 Cal.3d 171, 215-218.) An appellant who alleges ineffective assistance on direct appeal bears an especially heavy burden of proof: "'[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. [Citations.]" (*People v. Wilson* (1992) 3 Cal.4th 926, 936, quoting *People v. Pope* (1979) 23 Cal.3d 412, 426; see also *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

Applying that standard we cannot conclude defense counsel here was ineffective. The record does not explain why counsel failed to present the argument appellant has identified but a more than plausible reason exists for his failure to do so: appellant's participation in the New Leaf program was not a significant factor in mitigation. While the record shows appellant participated in that program for about a year and that he made some progress during that period of time, that progress was mixed at best. Appellant was arrested no less than five times while participating in New Leaf or shortly thereafter: on August 9, 2008 for possessing controlled substance paraphernalia; on October 4, 2008 for violating a stay-away order; on November 1, 2008 for disorderly conduct and possessing marijuana; on July 5, 2009 for possessing a large amount of methamphetamine and other drugs; and on August 1, 2010 for attempted robbery and battery.

Viewed against this background, trial counsel could, and impliedly did conclude that appellant's brief stab at sobriety through the New Leaf program had not been successful and it was unlikely that the court viewed appellant's participation as a convincing factor in mitigation. That implied conclusion is reasonable and certainly did not constitute ineffective assistance.

We conclude there was no error on this ground.

III. DISPOSITION

The judgment is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Bruiniers, J.