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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HARRY L. HERNANDEZ,

Defendant and Appellant.

A131424

(San Mateo County
Super. Ct. No. SC065213A)

Defendant Harry L. Hernandez appeals the judgment imposed following his no-contest plea to the charge of assault with a deadly weapon (Penal Code, section 245, subdivision (a)(1),¹ and the trial court’s subsequent execution of his suspended sentence after a finding that defendant violated conditions of probation. Defendant’s appellate counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436, and requests that we conduct an independent review of the record. Defendant was informed of his right to file a supplemental brief and did not file such a brief. (See *People v. Kelly* (2006) 40 Cal.4th 106, 124.) We have conducted the review requested by appellate counsel and, finding no arguable issues, affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

At a preliminary hearing in December 2006, defendant and co-defendant Michael Brown appeared on a felony complaint filed by the San Mateo County District Attorney (DA) alleging, among other things, that defendant committed assault with a deadly

¹ Further statutory references are to the Penal Code, unless otherwise noted.

weapon, namely, a knife (§ 245, subd. (a)(1)), upon Carlos Doe. The complaint alleged the assault was committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and also accused defendant in a separate count of participation in a criminal street gang (§ 186.22, subd. (a)).

At the preliminary hearing, the victim testified concerning the events of November 18, 2005. That day, he heard there had been a fight at his high school. He was not involved in the fight. As he was walking home after school, a car pulled up alongside him. Five people got out of the car and approached him. The driver, co-defendant Brown, ordered him to stop. The victim backed up against a fence and the group surrounded him. Brown said, “Who jumped my little cousin?” The victim replied that he did not know who jumped Brown’s cousin. At that point, the members of the group confronting the victim began to “claim . . . what they bang,” shouting “Balboa Nortés.” Some of the group turned and headed back to the car. Just then, the individual on his left, who the victim identified in court as defendant, stabbed him in the left leg with a “shiny knife.” The victim felt blood running down his leg. After the group drove off, the victim went to meet his mother, told her what happened and she took him to the Daly City Police Station. Thereafter, the victim was transported by ambulance to the hospital for treatment.

The preliminary hearing continued on December 14, 2007. Defense counsel stipulated to a waiver “of any irregularities with respect to the time waiver.” The trial court found there was probable cause to hold defendant to answer on count 1 of the felony complaint, assault with a deadly weapon, and that the evidence was insufficient as to the remaining counts.

The DA filed a felony information on December 24, 2007, accusing defendant in count 1 of assault with a deadly weapon, in violation of section 245, subdivision (a)(1). Further, the DA alleged the assault was a serious felony within the meaning of section 1192.7, subdivision (c)(1)(23), and that defendant had suffered a prior juvenile adjudication under section 245, subdivision (a)(1) within the meaning of section 1170.12, subdivision (c)(1).

In January 2008, defendant entered a plea of no contest to the offense charged and admitted that the offense was a serious felony within the meaning of section 1192.7, subdivision (c)(1)(23). Before entering his plea, defendant made a knowing and voluntary relinquishment of his constitutional rights. Also, defendant acknowledged he understood the maximum term that could be imposed was four years in state prison. Defendant further acknowledged that other than the matter being referred to probation with an indicated term of two years in state prison, no other promises had been made to him. Finally, on the People's motion the court struck the strike allegation and set the matter for sentencing.

The probation report prepared for sentencing recommended that defendant's motion for probation be denied and that he be committed to the Department of Corrections. At the March 2008 sentencing hearing, defendant told the court his time in county jail "is the most humongous and biggest scare I have ever had in my life," expressed his remorse for the crime, and explained he grew up with Brown and "just had to show my friends that I was there." The prosecutor responded that defendant is a "poor risk for probation" and "if prison scares him that much I will ask the court to impose and suspend prison and then place him on probation." The court stated it was amenable to imposing a suspended mid-term sentence of 3 years, noting, "it's technically outside the plea bargain. Your client will agree to that?" Defendant stated his understanding and agreement to a mid-term sentence.

Thereafter, the court sentenced defendant to the mid-term of three years in state prison. The court suspended execution of sentence and placed defendant on three years supervised probation. As conditions of probation, the court ordered defendant not to associate with gang members, wear or display any gang colors, frequent areas of gang related activity, or participate in any gang activity. The following colloquy then ensued:

“Defense counsel: Your Honor, there was no plea to any gang allegations.

Court: It's a gang-related offense according to him, is it not?

Defense counsel: Yes it is. I understand the court's words.

Court: That's part of it.

Defense counsel: Okay, fine.”

As a further condition of probation, the court imposed a sentence of one year in county jail with credit for time served of 282 days. Defendant did not appeal the judgment imposed.

In February 2009, the probation officer filed an affidavit alleging defendant violated his conditions of probation by associating with known gang members. At a hearing in March 2009, and following a waiver of his constitutional rights, defendant admitted the violation of probation. The court imposed 120 days in county jail on the violation, with credit for time served of 55 days, and reinstated probation on the original terms and conditions.

On June 1, 2010, the probation officer filed a second affidavit of probation violations. The probation officer alleged defendant violated the conditions of his probation by (1) driving on a suspended license in San Francisco on March 6, 2010; (2) driving without insurance on that date; (3) vandalizing property on that date by doing “doughnuts” in a park with his vehicle; (4) being in possession of a stolen car stereo on March 21, 2010; (5) leaving the Jericho residential treatment program on April 8, 2010 without permission of the probation officer; (6) leaving the Victory Outpatient Treatment Program on May 18, 2010, without permission of the probation officer.

In June 2010, defense counsel filed a motion for defendant’s release on his own recognizance or in the alternative, setting of reasonable bail, which the People opposed. At a bail hearing on June 15, 2010, the court denied the motion in all respects, and ordered defendant remain in custody. Because each party filed separate, unopposed motions for a continuance, which the court granted, the hearing on the motion to revoke probation was continued from August 20, 2010 to January 7, 2011.

At the contested revocation hearing, the probation officer testified that after he learned defendant had been arrested in San Francisco on March 6, 2010 and again on March 21, 2010, he summoned defendant to his office. He told defendant to bring clothes with him because, in light of the two arrests, “we’re going to enter him into the Jericho Residential Treatment Program to change his behavior.” The probation officer

transported defendant to the facility. Subsequently, he received a voicemail message from defendant on April 8, 2010, informing him that defendant had left the Jericho Program. A few days later, he received a call from a staff member at Victory Outreach Program informing him that defendant had entered the program. Later, the probation officer learned defendant left the Victory Outreach Program on May 10, 2010. Defendant did not have the probation officer's permission to leave either program.

San Francisco Police Officer Jessica Nantroup testified that on the evening of March 6, 2010, she was on patrol with a partner when they were dispatched to Potrero del Sol Park on report of a vehicle "doing doughnuts in the park." Before they reached the park, the officers received a call from dispatch that the suspect vehicle, described as a dark-colored SUV, had fled the scene. When the officers arrived at the park, Nantroup observed the east gate to the park was open, the grass in the park was ripped and torn up and there were deep, rutted tire tracks all over the park. The officers left the park, pulled out into 24th Street and immediately spotted a Dodge Durango truck in front. The truck had raised wheels and there was a large chunk of mud and fresh grass dripping from the back of the vehicle. The officers initiated a traffic stop and the Dodge Durango pulled over. Officer Nantroup contacted the driver of the Durango and identified him in court as defendant; he was alone in the truck. Defendant surrendered his driving license and dispatch confirmed the license was suspended. Defendant was unable to provide proof of insurance. During her interaction with defendant, Officer Nantroup observed that the Durango was raised so that most of the wheels were visible; the wheels were "completely covered, dripping wet with mud and green tufts of grass" and the sides of the vehicle were sprayed with mud and grass.

Based on the evidence presented, the trial court found defendant in violation of his probation with respect to allegations 2 (driving without insurance), 3 (vandalizing property), 5 (leaving the Jericho treatment program without permission) and 6 (leaving the Victory treatment program without permission). After hearing argument of counsel and a plea in mitigation from defendant, the court revoked defendant's probation and executed the previously imposed sentence of three years in state prison. The abstract of

judgment was filed on January 11, 2011. Defendant filed a timely notice of appeal on March 3, 2011.

On October 20, 2011, defendant's appellate counsel wrote to the Superior Court, advising that the court had erroneously calculated defendant's conduct credit at 92 days instead of 94 days. The trial court filed an amended abstract of judgment on November 8, 2011 correcting conduct credits as requested by appellate counsel.

DISCUSSION

The present appeal is from the January 11, 2011 judgment in which the trial court revoked defendant's probation and executed the three-year prison sentence that was imposed in March 2008. Defendant never appealed from the March 2008 judgment, it became final 60 days after its rendition (Cal. Rules of Court, rule 8.308(a)), and its validity is not cognizable on an appeal from a decision revoking probation and executing the sentence previously imposed. (See *People v. Preyer* (1985) 164 Cal.App.3d 568, 576 [defendant who fails to timely appeal from imposition of upper term may not challenge that sentence when his probation is revoked].)

Regarding revocation of probation, a trial court may revoke probation if the facts supporting it are proven by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 446-447.) Great deference is afforded to the trial court's determination of whether to revoke probation. (*Id.* at p. 445; *People v. Self* (1991) 233 Cal.App.3d 414, 417.) The trial court's finding that there was sufficient evidence to revoke probation is reviewed for an abuse of discretion. (*People v. Self, supra*, 233 Cal.App.3d at p. 417.) No abuse of discretion appears on this record.

Furthermore, when a trial court grants probation after suspending execution of a sentence and thereafter exercises its discretion to terminate that probation, the court must order the previously suspended sentence into effect. (*People v. Howard* (1997) 16 Cal.4th 1081, 1088.) That is what the trial court did in this case.

Neither defendant nor his appellate counsel has identified any issue for our review. Upon our own independent review of the entire record, we agree none exists. (*People v. Wende, supra*, 25 Cal.3d 436.) Having ensured appellant has received adequate and

effective appellate review, we affirm the trial court's judgment. (*People v. Kelly, supra*, 40 Cal.4th at pp. 112-113.)

DISPOSITION

The judgment is affirmed.

Jenkins, J.

We concur:

McGuinness, P. J.

Pollak, J.