

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

EARL LEE VOGT III,

Defendant and Appellant.

A131790

(Lake County Super. Ct.
Nos. CR921703, CR922959A)

Defendant Earl Lee Vogt III pleaded no contest to felony charges of second degree burglary, dissuading a witness, and unlawful possession of methamphetamine. At the sentencing hearing, the trial court denied probation and imposed a total prison term of three years eight months. The court denied Vogt's request for referral for commitment to the California Rehabilitation Center (CRC).

Vogt contends the trial court abused its discretion in denying his request for a referral to the CRC. As discussed below, we conclude there was no abuse of discretion and affirm the judgment.

BACKGROUND

On March 5, 2009, a law enforcement officer pulled defendant over for speeding on Highway 29. Defendant was arrested, cited, and released. The incident led to an information in No. CR921703, filed October 21, 2010, which charged defendant with four drug offenses: felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); felony possession of marijuana for sale (Health & Saf. Code,

§ 11359); felony possession of Vicodin (Health & Saf. Code, § 11350, subd. (a)); and misdemeanor possession of marijuana (Health & Saf. Code, § 11357, subd. (c)). This information included enhancement allegations of a prior serious or violent felony conviction and a prior prison term. (See Pen. Code, §§ 667, 667.5.)

On August 4, 2010, defendant's ex-spouse Tanasha Edwards reported that her bank debit card had been stolen from her residence and used without her authorization on two occasions at a Wal-Mart store. Her account had debited a total of \$434.87. This incident resulted in an information in No. CR922959A, filed February 25, 2011, which charged defendant and a codefendant Kourtney Donley with three offenses, two of them felonies: second degree burglary (Pen. Code, § 459); receiving stolen property (Pen. Code, § 496, subd. (a)); and petty theft by the fraudulent, unauthorized use of a bank card (Pen. Code, § 484g). An additional charge, against defendant alone, alleged he committed a felony in January 2011 when he attempted to dissuade Edwards from giving testimony. (Pen. Code, § 136.1, subd. (a)(2).) Enhancement allegations again charged defendant with a prior serious or violent felony conviction and prior prison term (Pen. Code, §§ 667, 667.5), and also that he had committed the felony offenses while released from custody on his own recognizance in two other cases involving felony charges (see Pen. Code, § 12022.1).

On February 28, 2011, at his arraignment on the information filed in No. CR922959A, defendant entered a plea of no contest to the felony charges of second degree burglary (Pen. Code, § 459) and attempting to dissuade a witness (Pen. Code, § 136.1, subd. (a)(2)). On the prosecution's motion, the trial court dismissed the remaining counts and allegations of that information and referred the matter to the probation department for a sentencing report and recommendation. The court also dismissed the charges against codefendant Donley. At this same hearing, defendant entered a change of plea in No. CR921703, pleading no contest to the felony charge of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)). Again, on the prosecution's motion, the trial court dismissed the remaining counts and allegations in that information and referred the matter for a sentencing report and recommendation.

The court released defendant on his own recognizance pending the sentencing hearing, to allow defendant time “to get his affairs in order.”

The probation department’s combined sentencing report for Nos. CR921703 and CR922959A recommended the trial court deny probation, and that it impose an aggregate prison term of four years four months for defendant’s three felony convictions for second degree burglary, dissuading a witness, and possession of methamphetamine.

The combined sentencing hearing was called as scheduled at 8:30 a.m. on March 14, 2011. Defendant was not present at that time, nor did he appear when the matter was called for a second time at 9:30 a.m. or a third time at 2:00 p.m. When defendant finally appeared at 2:25 p.m., he was taken into custody pursuant to a bench warrant the trial court had signed earlier in the day. After the matter was called a fourth time, at 2:45 p.m., the trial court denied probation and imposed a total prison term of three years eight months. The court imposed an upper-term prison sentence of three years for the felony conviction for second degree burglary (Pen. Code, § 459), a consecutive prison term of eight months for the felony conviction of attempting to dissuade a witness (Pen. Code, § 136.1, subd. (a)(2)), and a concurrent prison term of three years for the felony conviction for possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)).

During the course of the sentencing hearing, defendant’s trial counsel informed the trial court that defendant had done some “soul searching” and had concluded his “biggest problem” was drug abuse. Defendant had never “really” participated in a “rehab program,” but he had “heard a lot about CRC” and was requesting that the court order a referral to the CRC. The court denied this request.

Vogt’s appeal followed.¹ (See Pen. Code, § 1237, subd. (b).)

¹ The trial court denied defendant’s request for a certificate of probable cause on the ground he had been coerced into pleading no contest so that the charges against his “girlfriend”—codefendant Donley—would be dismissed. (See Pen. Code, § 1237.5.)

DISCUSSION

“Upon conviction of a defendant for a felony . . . and upon imposition of sentence, if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics the judge shall suspend the execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Director of Corrections for confinement in the narcotic detention, treatment, and rehabilitation facility *unless, in the opinion of the judge, the defendant’s record and probation report indicate such a pattern of criminality that he or she does not constitute a fit subject for commitment under this section.*” (Welf. & Inst. Code, § 3051, par. One, italics added.) In determining whether such a “pattern of criminality” exists, the court may consider “prior convictions, [the defendant’s] performance on probation or parole, and the circumstances of the present offense.” (See *People v. Jeffrey* (2006) 142 Cal.App.4th 192, 196 (*Jeffrey*).)

Defendant contends the trial court in this case abused its discretion in declining to initiate a CRC referral, because it considered factors other than his “excessive criminality” in making its determination. According to defendant, the court’s comments indicated it improperly considered defendant’s failure to appear on time at the scheduled hearing, and it improperly speculated about “what it thought CRC might do” if the court did initiate a referral. Defendant objects that the court did not make an express finding he was unsuitable because of excessive criminality, so much as it expressed doubt that the CRC would accept defendant due to his criminal history. Defendant asserts his prior convictions did not appear to be among those that would *statutorily* exclude a CRC commitment pursuant to Welfare and Institutions Code section 3052.² It is defendant’s position the court abused its discretion in denying his request for a referral because it “erroneously” believed the CRC would deem him ineligible because of his prior criminal

² Such prior convictions include any violent felony as defined by Penal Code section 667.5, subdivision (c), sex offenses to which Penal Code section 667.6 applies, an offense subject to enhancement for the use of a firearm or deadly weapon, and offenses resulting in an aggregate prison term sentence exceeding six years. (Welf. & Inst. Code, § 3052, subd. (a).)

history, and it improperly considered factors unrelated to excessive criminality in reaching a conclusion that defendant would not “succeed or otherwise follow through with treatment” if the court were to order such a referral.

Whether criminal proceedings should be suspended under Welfare and Institutions Code section 3051 is “a matter left to the sound discretion of the trial court and will not be disturbed on appeal in the absence of a clear abuse of that discretion.” (*People v. Moreno* (1982) 128 Cal.App.3d 103, 107 (*Moreno*)). A determination by that court, “that a defendant is not a fit candidate for CRC[,] will not be upset where the decision is supported by the evidence.” (*Moreno, supra*, at p. 107.)

Reviewing courts have interpreted Welfare and Institutions Code section 3051 to allow a trial court to refuse to initiate a referral to the CRC *only* on the basis of its consideration of the defendant’s “excessive criminality,” and that all other eligibility factors should be left to the experts at the CRC. (*People v. Granado* (1994) 22 Cal.App.4th 194, 200.) This appears to be the majority view, although other decisions have suggested the trial court may properly consider the criteria used by the CRC to determine eligibility, reasoning it would be an idle act to make a CRC referral when the CRC experts would not consider a defendant eligible for admission. (See *People v. Madden* (1979) 98 Cal.App.3d 249, 261–262.)

The sentencing report in this case, under a section entitled “Prior Record,” spent more than five pages summarizing defendant’s prior extensive offenses. These began with defendant’s commission of petty theft in March 1994—while still a minor—and ended with five offenses arising from an incident in November 2010, when defendant, transporting a pound of marijuana in his trunk, attempted to evade a law enforcement officer who had initiated a traffic stop, while his four-year-old daughter was a passenger in the vehicle. The summary of defendant’s “Prior Record” listed over 40 offenses committed in over 25 separate incidents spanning the period between March 1994 and November 2010. The offenses listed included several drug offenses, but also included assault, battery, unlawful manufacture of a weapon, battery on a spouse, criminal threats, brandishing a firearm, attempts to dissuade a witness from testifying or reporting a crime,

driving under the influence, reckless driving, numerous probation violations, and a violation of parole following his release from a prison term.³

Defendant's trial counsel, at the outset of the sentencing hearing, commented he was "somewhat appalled at [defendant's] lengthy, lengthy, lengthy record." Nevertheless, he later requested that the trial court order a referral under Welfare and Institutions Code section 3051. Conceding that defendant's "criminality may be excessive"—he expressed a belief, based on his experience with prior clients, that defendant would "get in" if referred.

The trial court, in stating the reasons for its sentencing decision, outlined defendant's criminal record as summarized in the sentencing report, and noted it demonstrated both poor performance on probation and parole, as well as numerous offenses of increasing seriousness. Turning to defendant's request for a referral to the CRC, the court stated it was "of the opinion that the excessive criminality, there's probably going to be a bar." It believed the CRC, based on defendant's "lengthy history"—and more particularly his numerous offenses involving "violent behavior"—would reject the referral, as it had in "similar type cases" before the court, and send defendant back for resentencing. The court stated its determination to "prevent that from happening," and declined "to order the DA [to] file a petition for a hearing as to [defendant's eligibility] for CRC."

At this point, defendant himself remarked that he had not "ma[d]e the best [use of his] time" during his prior prison term, and "really wanted to get into a program [to] utilize . . . everything [he could]" this time. It was only in response to this comment that the court expressed doubt that the defendant had the ability to "follow through" if the CRC "did overlook [his] extensive record and . . . violence." The court again expressed its conclusion that it did not regard defendant as a "good candidate" for a CRC commitment, noting that its conclusion was "kind of underlined" by his failure to appear

³ The trial court dismissed a number of these offenses, in at least seven other pending criminal proceedings, as a part of defendant's negotiated plea in case Nos. CR921703 and CR922959A.

at the sentencing hearing as scheduled, without making any attempt to communicate with the court.

We are not persuaded that the court's remarks demonstrate an abuse of discretion. The court's expression of doubt concerning defendant's "follow through"—one that was "underlined" by his failure to appear as scheduled, was not, in our view, a reliance on improper factors so much as a response to remarks the defendant made *after* the court had already discussed defendant's prior offenses and his performance on probation and parole—in effect a proper consideration of defendant's "pattern of criminality"—and its consequent conclusion that defendant was not a "good candidate" for a CRC referral. (See *People v. Jeffrey*, *supra*, 142 Cal.App.4th at p. 196.)

Nor was it necessary for the court to state its reasons and conclusion in literal accordance to the language of Welfare and Institutions Code section 3051, so as to require an express finding of a "pattern of criminality." The important consideration for purposes of our review is whether the record shows the trial court properly considered defendant's prior convictions, his prior performance on probation or parole, or other facts "evidencing criminality" when it determined not to make a referral to the CRC. (See *People v. Masters* (2002) 96 Cal.App.4th 700, 706.) While the court in this case may have couched its reasons and conclusion in terms of whether the CRC would accept defendant, we are satisfied that its reasons and its conclusion, at their core, sufficiently express "the opinion of the judge [that] the defendant's record and probation report indicate[d] such a pattern of criminality that he . . . does not constitute a fit subject for commitment" (Welf. & Inst. Code, § 3051, par. One.)

The probation report considered by the court demonstrated a glaring pattern of excessive criminality. We conclude there was no abuse of discretion in denying defendant's request for a CRC referral.

DISPOSITION

The judgment is affirmed.

Marchiano, P.J.

We concur:

Dondero, J.

Banke, J.