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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.

MARY M. STACHER,

Defendant and Appellant.

A132039

**(Solano County
Super. Ct. No. FCR263398)**

Defendant Mary M. Stacher (appellant) appeals the court's revocation of her probation and imposition of a two-year state prison term. She contends that, in light of her chronic, serious health problems, the imposition of a state prison term was an abuse of the court's discretion and constituted cruel and unusual punishment. We disagree and affirm.

BACKGROUND

On February 25, 2009, appellant pled no contest to transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)) and was placed on three years' probation on the condition that she complete a drug treatment program (Pen. Code, § 1210).¹

¹ Pursuant to the plea bargain, a count of possession for sale of methamphetamine (Health & Saf. Code, § 11378) was dismissed with a *Harvey* waver (*People v. Harvey* (1979) 25 Cal.3d 754) and appellant agreed to register as a drug offender (Health & Saf. Code, § 11590).

On April 17, 2009, appellant admitted she violated her probation by failing to submit to drug testing and by using methamphetamine. The court continued her probation on the same terms and conditions. On July 10, appellant admitted a second probation violation for using methamphetamine and the court again continued her probation on the same terms and conditions.

On May 21, 2010, appellant denied an alleged third probation violation based on her having missed four drug testing appointments and having tested positive for drug use on one occasion. On June 11, she opted out of the court-supervised drug treatment program and probation was terminated.

Prior to sentencing, appellant filed a statement in mitigation of sentence asserting that she suffers from chronic, serious health problems, for which she takes numerous medications. The problems include congestive heart failure necessitating a heart transplant, bipolar disorder, depression, hepatitis, cardiomyopathy, hypothyroidism, peripheral vascular disease, chronic pain, anxiety, migraines, asthma, anemia, and methamphetamine addiction. In reliance on *Plata v. Schwarzenegger* (N.D.Cal., Oct. 3, 2005, No. C01-1351 TEH) 2005 WL 2932253), she argued that, due to the inadequacy of medical treatment at the California Department of Corrections and Rehabilitation (CDCR), a prison commitment would constitute cruel and unusual punishment. On August 18, 2010, the court placed her on three years' formal probation.

On September 14, 2010, the district attorney filed a request to revoke appellant's probation based on her September 12 arrest for possession of an "illegal drug." At the contested March 28, 2011 probation violation hearing, a Solano County deputy sheriff testified that his September 12, 2010 probation search of appellant's vehicle revealed a digital scale and a baggie with a white powder residue, which tested positive for methamphetamine. A prescription bottle labeled "methamphetamine salts" was recovered from the vehicle's driver's side door pocket. A baggie found inside appellant's purse contained a white residue, which presumptively tested positive for methamphetamine.

The probation department's May 6, 2011 supplemental report recommended that appellant be sentenced to one year in county jail given her minimal criminal record, which included no violent or weapons-related offenses.

At the May 6, 2011 sentencing hearing, appellant renewed her cruel and unusual punishment argument in support of her request for continued probation. The district attorney urged the court to impose a two-year mitigated prison term. In sentencing appellant to the two-year prison term with credit for time served, the court stated:

“Well, it's clear to the [c]ourt that [appellant] is no longer appropriate for probation. We have tried repeatedly to have [appellant] take advantage of the resources probation has to offer, and [appellant], when she is left to her own devices and out of custody, refuses to follow the [c]ourt's directions and the directions of probation.

“There is no question that she has had a longstanding substance abuse issue, but probation has offered her — this started as a Prop 36 case. She has been offered counseling repeatedly to assist her in getting past and dealing with her substance abuse issues. She doesn't want it. She makes the choice just to use drugs, and she has continued to do that, even as probation points out, in spite of these significant health issues that she has, which are no doubt in part exacerbated by her continued drug usage. Whether or not they were caused by it or not[,] . . . I am not sure. But I have no question that her continued use of methamphetamine — you couldn't pick a worse drug with the kinds of disabilities [appellant] has experienced in medical problems, and that hasn't slowed her down at all.

“The question really in the [c]ourt's mind, is should she receive a county jail sentence or a term in the [CDCR]? I have given substantial thought to this, and I did review the original reports in this matter. [Appellant] was apprehended in this case with in excess of five grams of methamphetamine. She had scales. She had a substantial amount of money, and . . . these drugs were in separate packets. In other words, she had all the accoutrements for selling drugs. So we are not just dealing with a situation where [appellant] is damaging herself. She is damaging the community, as well.

“ [A]t this time I really see no reason why [appellant] should not be placed in the [CDCR]. [¶] . . . [¶] . . . She has been given many, many opportunities.”

The court concluded that the mitigating circumstances outweighed those in aggravation and imposed the two-year low term. Appellant filed a timely notice of appeal.

DISCUSSION

Appellant contends, because she had chronic physical and health problems that cannot be addressed within the state prison system, the court’s refusal to reinstate probation and its imposition of a prison sentence constituted an abuse of discretion and cruel and unusual punishment under the Eighth Amendment of the United States Constitution.

Unless a statute provides otherwise, all defendants are eligible for probation in the discretion of the sentencing court. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.) The court has broad discretion in determining whether to grant or deny probation and we will not overturn that determination on appeal absent a showing that the court exercised its discretion in an arbitrary or capricious manner or its decision “exceeds the bounds of reason considering all the facts and circumstances.” (*Ibid.*) The decision to grant or deny probation requires the court’s consideration of all the facts and circumstances of the case. (*Id.* at p. 1312.)

“[D]eliberate indifference to serious medical needs of prisoners” constitutes cruel and unusual punishment in violation of the Eighth Amendment. (*Estelle v. Gamble* (1976) 429 U.S. 97, 104; see also *id.* at pp. 104-105.) Appellant relies on *Jett v. Penner* (9th Cir. 2006) 439 F.3d 1091, which states: “In the Ninth Circuit, the test for deliberate indifference consists of two parts. [Citation.] First, the plaintiff must show a ‘serious medical need’ by demonstrating that ‘failure to treat a prisoner’s condition could result in further significant injury or the ‘unnecessary and wanton infliction of pain.’” [Citation.] Second, the plaintiff must show the defendant’s response to the need was deliberately indifferent. [Citation.] This second prong—defendant’s response to the need was deliberately indifferent—is satisfied by showing (a) a purposeful act or failure to respond

to a prisoner's pain or possible medical need and (b) harm caused by the indifference. [Citation.] Indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.' [Citation.]" (*Id.* at p. 1096.)

Appellant also relies on *Plata v. Schwarzenegger*, a 2005 civil class action decision from the Northern District of California, which found the state's prison medical care was "broken beyond repair" and appointed a receiver to "bring the delivery of health care in California prisons up to constitutional standards." (*Plata v. Schwarzenegger, supra*, 2005 WL 2932253 [at p. *1].) Finally, appellant relies on *Brown v. Plata* (2011) 563 U.S. ___ [131 S.Ct. 1910] (*Brown*), which concluded that the system-wide medical and mental healthcare provided to California inmates was inadequate and violated the Eighth Amendment and that prison overcrowding was the primary reason for the inadequacy. The court concluded, "The medical and mental health care provided by California's prisons falls below the standard of decency that inheres in the Eighth Amendment. This extensive and ongoing constitutional violation requires a remedy, and a remedy will not be achieved without a reduction in overcrowding." (*Brown*, [at p. 1947].)

However, the factual findings and conclusions regarding the deficiencies in the general state of medical care in the CDCR do not establish, as a matter of law, that appellant will necessarily receive constitutionally inadequate medical care in state prison and, therefore, should avoid a CDCR prison commitment. At the time of appellant's sentencing hearing, she had yet to be committed to the CDCR and had not received a prison medical evaluation; also, there was no showing that the CDCR was aware of her medical condition. Appellant provided no evidence that she would in fact receive inadequate medical care upon her commitment to CDCR, and we will not engage in such a presumption. (See *People v. Superior Court (Himmelsbach)* (1986) 186 Cal.App.3d 524, 534-535 [rejecting contention that any state prison sentence would violate cruel and unusual punishment because the risk defendant would preyed upon by other inmates was unsubstantiated], overruled on other grounds in *People v. Norrell* (1996) 13 Cal.4th 1, 7,

fn. 3.) Moreover, appellant made no showing that her serious medical condition would be treated any differently if she were placed on probation or committed to county jail instead of state prison.²

Appellant also contends, in sentencing her to state prison, the trial court failed to adequately consider her medical needs and did not address the fact that she had insurance coverage and was receiving ongoing treatment for her many chronic medical problems. Appellant's contention lacks merit. A trial court need not state its reasons for rejecting or minimizing a mitigating factor and, unless the record affirmatively indicates otherwise, it is deemed to have considered all relevant criteria, including any mitigating factors. (*People v. King* (2010) 183 Cal.App.4th 1281, 1322.) Here, in imposing the prison term the court expressly noted appellant's serious medical conditions and concluded they were exacerbated by her continued use of methamphetamine. Based on the facts before it, the court reasonably concluded that, despite appellant's serious medical conditions and insurance coverage, her possession of drug sale paraphernalia suggested that her chronic, long-standing drug use was negatively impacting the community, as well as her, and required a prison term commitment.

In sum, appellant has failed to demonstrate that the court's imposition of a state prison term was an abuse of its discretion or a violation of the prohibition against cruel and unusual punishment.

² In the event that appellant does, in fact, receive constitutionally inadequate medical care while in prison, she is not without a remedy. For example, she may seek a writ of habeas corpus, "an appropriate vehicle for persons lawfully in custody who seek to vindicate rights to which they are entitled while in confinement." (*In re Alcala* (1990) 222 Cal.App.3d 345, 352, fn. 4.)

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUNIERS, J.