

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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.

FERNANDO R. AROCHA,

Defendant and Appellant.

A133527

(San Francisco City & County
Super. Ct. No. 211928)

After defendant Fernando R. Arocha refused to proceed with a negotiated disposition of his probation violation proceeding, the trial court conducted a hearing, found him in violation of probation, and imposed the upper term of four years for his underlying conviction of domestic violence (Pen. Code, § 273.5, subd. (a).)¹ Defendant claims that during the hearing on the proposed negotiated disposition, he was misadvised by the trial court as to custody credits he would receive and refused to proceed with the negotiated disposition because of that misinformation. He contends his due process rights were violated and the judgment must be reversed and the matter remanded for the district attorney to re-extend the offer or, if the district attorney chooses not to do so, for further negotiations. Defendant also contends the court, in imposing the upper term sentence, failed to consider two significant mitigating factors, requiring remand for resentencing. We affirm.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND

We summarize here the basic factual and procedural background and discuss additional facts as we address the issues raised by defendant. In the early morning hours of January 26, 2010, San Francisco police arrested defendant in connection with a domestic violence incident involving a female victim, E.T., who had visible injuries. On March 24, 2010, the district attorney filed a six-count information, alleging, inter alia, willful corporal injury resulting in traumatic condition inflicted on cohabitant or former cohabitant (§ 273.5, subd. (a), a felony), with a great bodily injury enhancement (§ 12022.7, subd. (e)). Three months later, on July 8, 2010, the parties reached a negotiated disposition, pursuant to which defendant pleaded guilty to count 1 and the remaining counts were dismissed. The court ordered imposition of sentence suspended and placed defendant on three years' probation subject to numerous terms and conditions, including a protective and stay-away order prohibiting defendant from threatening, assaulting, stalking, molesting or contacting the victim. On February 9, 2011, the court modified the protective order, deleting the no-contact provision.

One month later, on March 9, 2011, the district attorney filed a motion to revoke defendant's probation, which the trial court administratively revoked the same day. The police report stated defendant had been arrested on February 5 and charged with a number of offenses, including a second violation of section 273.5, arising from another domestic violence incident involving the same victim, E.T, who again had visible injuries.

On August 10, 2011, the matter came on for hearing on defendant's motion to continue the probation revocation hearing. After the motion was denied without prejudice, the case was recalled for discussion of a negotiated disposition, wherein defendant would admit a probation violation and be sentenced to three years in state prison, with credit for time served. After some discussion on the record, which we discuss in detail in the next section, defendant chose not to proceed with the negotiated disposition.

The probation violation hearing proceeded on August 17, 2011, and the trial court found by a preponderance of the evidence that defendant had willfully violated the terms and conditions of his probation and was not amenable to probation. On August 26, 2011, the trial court imposed sentence on the underlying conviction and imposed the upper term of four years' imprisonment.

DISCUSSION

Rejection of the Negotiated Disposition

Defendant contends that during the discussion of the proposed negotiated disposition, the trial court “misinformed” him about “the amount of custody credits” he would receive and on the basis of that misinformation he rejected the deal. In his opening brief, defendant focuses only on his presentence custody credit and claims he refused to go forward with the proposed disposition because he was not given assurance as to the number of days he would be credited. The Attorney General contends the trial court did not misinform defendant and defendant did not, in any event, refuse to proceed with the deal because of any concern about pre-sentence custody credit; rather, defendant’s concern was about the rate at which he would earn credit in prison. We agree with both points made by the Attorney General.

The relevant colloquy during the August 10 hearing was as follows:

“The Court: I think our understanding at the bench was that Mr. Arocha was going to take—to make an admission today, and we would sentence on the 17th. That would give everyone an opportunity to get your credits calculated for purposes of sending you to state prison. . . .

“[Prosecutor]: You Honor, we have out credit calculation.

“The Court: Oh, we do?

“[Prosecutor]: As of today, 324 actual days, 162 *Sage*,^[2] credit for [a total of] 486 days.

“Mr. Myslin [unidentified]: He has conduct credits.

“[Defense counsel]: That’s the abstract.

“The Court: Is that correct, Mr. Quigley [the prosecutor]? I thought *Sage* credit is calculated, it would be 162 days.

² *People v. Sage* (1980) 26 Cal.3d 498 (*Sage*) (holding presentence “conduct” credits were not available to the defendant for time spent at a state hospital while criminal proceedings were suspended).

“[Prosecutor]: That’s correct, Judge. 162 days credits.

“The Court: And once he goes to state prison, it’s re-calculated. But for purposes of preparing the abstract of judgment here, it would be 162 days as of today.

“[Defense counsel]: Well, your Honor, that did actually change for sentences for individuals who are sentenced to state prison, the calculation is day-for-day credit. If it remains a local case, then it’s the two-thirds time. If sentenced to state prison, without any disqualifying factors, it’s day-to-day credit calculation.

“The Court: As of what date did that take place?

“[Defense counsel]: Well, when the 4019 law changed, it also changed sentences to state prison.

“[Ms. Wright, Probation Department]: And that’s correct, your honor. But again, it happens when they get to state prison. They do get the day-to-day. But we do the two-thirds, what we normally do here. And they do it there, when they get there.

“The Court: I am going to follow the recommendation of the Probation Department here. If I am incorrect, you can be sure that the Board of Prison Terms and Rehabilitation will send us back a revised—or rather a request to revise the judgment abstract. The fact of the matter is that he has 364 actual days. Whether he gets conduct credits of 324 days or 162 days, that I am going to leave to the Department of Corrections and Board of Prison Terms. Here, I am going to give him 162 days of *Sage* credit. And if he goes to prison and they change it to 324 days, I don’t have an issue with that. But I’m not inclined to do it right now. [¶] Okay. So are we going to take the admission or what?

“[Defense counsel]: Yes, he will your honor. And he does want it to be made clear that *this offense is eligible* for half time credit. So he is entitled to 50 percent credit *for this offense*.

“The Court: Well, your record has been made. And so the court knowingly understands that, and I am going to take the admission now. [¶] All right. Mr. Arocha, I understand that you wish to admit a violation of your probation in this case. Is that what you wish to do?

“The Defendant: One moment. [¶] Yes, your Honor.

“The Court: All right. There are several constitutional rights that you give up when you make an admission . . . [advises as to rights]. [¶] Do you understand each one of these rights, sir?

“The Defendant: May I ask you a question?

“The Court: Yes.

“The Defendant: To be blatantly honest, I am doing this under the presumption or assumption that would be getting half time. So is that correct as to my knowledge?

“The Court: Sir, I am going to sentence you to three years in state prison, 324 days actual credits, I am obliged to put on the abstract at this time that it’s my view that, because your lawyer has not made it clear to me that *Sage* credit is not supposed to be computed at this time. I’ve received no missive indicating that it would be 324 days conduct credits. If the Board of Prison Terms believes that that is the correct amount of time, I will revise it accordingly, but I am not inclined to do that now.

“[Defense counsel]: You Honor, Mr. Arocha is referring *to the actual offense that he is being sentenced to* the Penal Code 273.5(a), whether or not *that offense entitles him to receive 50 percent credit once he arrived [sic] at state prison, as opposed to a strike where he will only receive 85 percent.*”

“[Prosecutor]: Your Honor, generally speaking, it does appear he will be eligible. But it is calculated by the prison individuals.

“The Court: Okay. So my understanding is that you are eligible for half time if the—it’s not considered a strike.

“The Defendant: I don’t know if that was discussed prior, but I was under the assumption that it would be stipulated prior to me being sentenced that I would get half time.

“The Court: No, I am not inclined to do that. The law is what the law is. It’s 324 actual days. [¶] If it is an offense which is not considered a serious or violent felony, then you are entitled generally to 50 percent. [¶] All right. I am going to reiterate these rights. [Reiterates the rights defendant would be giving up.] [¶] Do you understand each one of these rights, sir?

“The Defendant: Yes, your Honor.

“The Court: Are you willing to give up these rights in order to admit that you violated your probation in this case?

“The Defendant: No, your Honor.

“The Court: All right. Very well. We will have the hearing.” (Italics added.)

What is apparent from the transcript is that the court, counsel and defendant discussed both categories of “credit”—(1) the credit for time served (CTS) he would receive for the time he spent in custody at the county jail before sentencing pursuant to section 4019, which would include “custody” credits as discussed in *Sage* and (2) the credits against his sentence he would be eligible to earn in state prison, which would depend on, inter alia, whether his crime was a violent or serious felony and whether he had prior felony convictions. These are two entirely different types of “credit,” and it is clear the court, the prosecutor, defense counsel and defendant understood that.

It is also apparent from the transcript that defendant’s only concern pertained to the rate at which he would be eligible to earn credits against his sentence while in state prison. Indeed, when the trial court, in response to defendant’s statement that he was assuming he “would be getting half time,” reiterated its view about *Sage* credit, defense counsel made explicit that defendant was *not* referring to CTS, but “*to the actual offense that he is being sentenced to* the Penal Code 273.5(a), whether or not *that offense entitles*

him to receive 50 percent credit once he arrived [sic] at state prison, as opposed to a strike where he will only receive 85 percent.” (Italics added.) The prosecutor then agreed that “generally speaking” it appeared defendant would be eligible, observing “it is calculated by the prison individuals.” The trial court accepted the prosecutor’s statement and added, “my understanding is that you are eligible for half time if the—it’s not considered a strike.” Defendant then responded that he had assumed “it would be stipulated” that he would “get half time.” The trial court stated, “I am not inclined to do that. *The law is what the law is.*” (Italics added.) Defendant then declined to waive his rights.

Accordingly, defendant’s argument on appeal—predicated solely on supposed confusion about his CTS—is misdirected. There is no indication defendant was concerned about his CTS. He was concerned, rather, with the rate at which he would complete his time in prison. He therefore has not, on appeal, established prejudice—that is, he has not shown that had he been otherwise advised as to his CTS, he would have proceeded with the negotiated disposition and avoided the four-year sentence ultimately imposed by the trial court. Furthermore, it is clear from the record that while the trial court may have had a certain view about the manner of articulating CTS (breaking out actual and *Sage* (conduct) credits and stating only the actual), the trial court, all parties and the Probation Department were in agreement defendant was entitled to the maximum CTS available, including all available *Sage* credit. There was never any question, then, that defendant would receive all CTS, including what the court and parties referred to at the hearing as *Sage* credit.³ There is no merit, then, to defendant’s contention that his

³ *People v. Goodwillie* (2007) 147 Cal.App.4th 695, on which defendant relies is, thus, inapposite. In that case, the trial court, prosecutor and defense counsel misinformed the defendant that if he pleaded to two felony offenses, he could earn credits against his prison time only at 85 percent, not at 50 percent, because the offenses were serious felonies or strikes. (*Id.* at pp. 731–732.) After he was convicted on all counts, the trial court determined the defendant could, in fact, earn credit at 50 percent. (*Id.* at p. 732.) The defendant had, thus, been misinformed by all quarters as to the issue in concern at the hearing on the proposed negotiated disposition. The Court of Appeal concluded his due process rights had been violated and vacated the judgment. (*Id.* at pp. 734, 736, 738.) As we have discussed, the facts in the instant case are markedly different.

due process rights were violated and that he rejected the negotiated disposition because he was misinformed by the trial court as to his CTS.

Sentencing Factors

Defendant contends that in imposing the four-year upper term for defendant's domestic violence conviction, the trial court failed to consider two assertedly significant mitigating factors, that defendant had a "minimal criminal record" and "the role [defendant's] alcoholism played" in the domestic violence offense, and improperly identified as an aggravating factor victim vulnerability.

We review a criminal sentence under the abuse of discretion standard (*People v. Superior Court* (1997) 14 Cal.4th 968, 976–977 (*Alvarez*)) and must affirm the trial court's sentence " 'unless there is a clear showing the sentence choice was arbitrary or irrational.' " (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582 (*Avalos*).) Defendant bears the burden of affirmatively establishing an abuse of discretion. (*Alvarez*, at pp. 977–978.)

Prior to 2007, a trial court was required to consider various factors in aggravation or mitigation in determining the appropriate sentence term and to articulate its reasoning on the record. Under statutory amendments enacted in response to *Cunningham v. California* (2007) 549 U.S. 270, the trial court is now "required to specify reasons for its sentencing decision, but will not be required to cite 'facts' that support its decision or to weigh aggravating and mitigating circumstances." (*People v. Sandoval* (2007) 41 Cal.4th 825, 846–847 (*Sandoval*); see also California Rules of Court, rule 4.409 ["[r]elevant criteria enumerate in these rules must be considered by the sentencing judge, and will be deemed to have been considered unless the record affirmatively reflects otherwise".])

The Supreme Court has described a trial court's discretion under the current law as follows: "Even with the broad discretion afforded a trial court under the amended sentencing scheme, its sentencing decision will be subject to review for abuse of discretion. [Citations.] The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the

offender, and the public interest.’ ” (*Sandoval, supra*, 41 Cal.4th at p. 847.) Even under prior law, the trial court was not required to “explain its reasons for rejecting mitigating factors.” (*Avalos, supra*, 47 Cal.App.4th at p. 1583; see also *People v. King* (2010) 183 Cal.App.4th 1281, 1322 [“Trial courts need not state reasons for rejecting or minimizing a mitigating factor, particularly where no objection is raised.”].)

We find no basis for concluding the trial court did not consider either defendant’s criminal history or his history of alcohol abuse. In imposing sentence, the court stated it had reviewed the probation report and the sentencing memoranda filed by defense counsel. The probation report (which incorporated prior reports) noted that defendant had “minimal” criminal history and also discussed his history of alcohol and substance abuse, noting for a number of years he had a serious drinking problem. It also indicated alcohol had apparently played a “significant role” in the domestic abuse incident. Defendant’s sentencing memorandum, likewise, noted his “insignificant” criminal history and the role alcohol had played in the offense. When a trial court says it has reviewed and considered documents addressing factors in mitigation, the court is deemed to have considered those factors, even if it does not otherwise refer to the factors in explaining its sentencing decision. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1318.) The court further stated it had considered “the arguments of counsel and also the statement by Mr. Arocha.”

That the court stated “there is a single circumstance in mitigation noted in the presentence report”—that defendant voluntarily acknowledged his wrongdoing—does not establish that the court did not consider the other points defense counsel made. Rather, the court’s statement accurately recounts that under the heading “Circumstances in Mitigation,” the probation report identified only defendant’s early admission of wrongdoing. As discussed above, however, the probation report also characterized defendant’s criminal history as “minimal” and discussed his history of alcohol abuse and the role alcohol apparently played in the crime.

In sum, defendant has not carried his burden in showing the trial court ignored relevant sentencing factors.

Nor is there any merit to defendant's assertion that the trial court improperly cited victim vulnerability as an aggravating factor. The prosecutor recited, without objection or dispute by defense counsel, that the police responded three times within a 24-hour period to calls concerning the victim. The first time defendant was admonished to leave the premises. The second time he was arrested for intoxication and taken to the "tank." When he was released the following day, he returned and, according to the victim, beat her up. The probation report, in turn, described the scene the third time as follows: Police saw defendant on top of the victim on the bed. He refused to obey officer demands to exit the bedroom and became aggressive as they pulled him out of the room. The victim stated she lost consciousness several times during the attack from being suffocated, strangled, punched and thrown to the ground.

The court stated on the record it agreed with the probation report that the victim was "particularly vulnerable," even commenting "just appearance-wise, Mr. Arocha is about 5'10, 210 pounds" while "the victim in this case is five feet three, and approximately 120 pounds." The latter comment does not even suggest the trial court concluded the victim was vulnerable *solely* on the basis of the disparate sizes, as defendant asserts. Rather, we must assume the court acted on the basis of all the information it had before it, which was more than ample to support victim vulnerability as an aggravating factor. (See *People v. Huber* (1986) 181 Cal.App.3d 601, 629 [vulnerability means " 'defenseless, unguarded, unprotected, accessible, assailable' "].)

In sum, the totality of the record shows the trial court did not act in an arbitrary and capricious manner and that it imposed sentence "based upon an 'individualized consideration of the offense, the offender, and the public interest.'" (See *Sandoval, supra*, 41 Cal.4th at p. 847.)

DISPOSITION

The judgment is affirmed.

Banke, J.

We concur:

Margulies, Acting P. J.

Dondero, J.