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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS GUERRERO,

Defendant and Appellant.

A134360

(San Francisco County
Super. Ct. No. SCN-204724)

I. INTRODUCTION

Appellant was placed on probation in 2008 after pleading guilty to a charge of attempted murder, a charge accompanied by allegations of involvement with a street gang in San Francisco. In 2011, the superior court revoked his probation after it was alleged, and the court found, that he had been present in a proscribed area of San Francisco both wearing his prior gang colors and in the company of another person also wearing those colors. Appellant appeals the revocation of probation, but we find no abuse of discretion by the trial court and hence affirm its order.

II. FACTUAL AND LEGAL BACKGROUND

On March 6, 2007, the San Francisco District Attorney filed a two-count complaint against appellant. The first count charged attempted murder (Pen. Code, § 664/187, subd. (a))¹ and the second alleged assault with a deadly weapon other than a firearm, i.e., a knife. (§ 245, subd. (a)(1).) Both counts included alleged enhancements,

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

i.e., personal infliction of great bodily injury, personal use of a deadly weapon, and commission of the offense for the benefit of a street gang regarding the first count (see §§ 12022.7, subd. (a), 12022, subd. (b)(1), and 186.22, subd. (b)(1)(A)), and the last-noted enhancement plus a prior strike for voluntary manslaughter and a prior prison term in connection with the second count. (§§ 186.22, subd. (b)(1)(A); 667, subds. (d) and (e); & 667.5, subd. (b).)

On March 19, 2008, appellant pled guilty to the attempted murder charge although without admitting the alleged enhancements. The second count and its enhancements were dismissed. Although the probation department had its doubts about appellant's suitability for probation, due to his "extensive criminal history," including serving a prison term for killing a person with a knife, the trial court sentenced him to the upper term of nine years, but with execution of that sentence suspended. Appellant was placed on probation for a period of five years, with conditions including a year in county jail, completion of a two-year drug treatment program at Delancey Street, and adherence to an agreement not to display the color red, the colors of the Norteño gang, and that he stay away from the "24th street corridor from Mission to La Raza/Potrero Garfield Park" in San Francisco.

On September 14, 2011, appellant was seen at 24th and Folsom Streets in San Francisco, part of the prohibited area, wearing a black and red baseball cap and "red streams" hanging from his pants. Appellant was in the company of another man wearing "a lot of red." He was detained by the police, and thereafter admitted to them that "he did know about the stay away order" regarding the area he had been in.

The following day, September 15, 2011, the District Attorney filed a motion to revoke probation, alleging that appellant had been in the proscribed area and wearing red while in the company another man also wearing red. After an evidentiary hearing conducted on November 18, 2011, the trial court ordered probation revoked and imposed the previously suspended nine-year sentence, albeit with an award of both custody and conduct credits.

On January 6, 2012, appellant filed a timely notice of appeal.

III. DISCUSSION

Under section 1203.2, subdivision (a), a trial court may revoke probation “if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the person has violated any of the conditions of his or her probation” (§ 1203.2, subd. (a).) A trial court’s decision in probation revocation proceedings is reviewed for abuse of discretion. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443 (*Rodriguez*); *In re Coughlin* (1976) 16 Cal.3d 52, 56; *People v. Urke* (2011) 197 Cal.App.4th 766, 773; *People v. Stuckey* (2009) 175 Cal.App.4th 898, 916.) As our Supreme Court stated in *Rodriguez*: “It has been long recognized that the Legislature, through this language, intended to give trial courts very broad discretion in determining whether a probationer has violated probation. (See, e.g., *People v. Lippner* (1933) 219 Cal. 395, 400 [‘. . . only in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation. . . .’] . . . [¶] Our decision in *In re Coughlin*, *supra*, 16 Cal.3d 52, continues to read section 1203(a) as conferring great flexibility upon judges making the probation revocation determination.” (*Rodriguez*, *supra*, 51 Cal.3d at p. 443.)

That standard has not been met here. As noted above, and also in the probation department’s 2008 report to the trial court, appellant has an “extensive criminal history” including a conviction for voluntary manslaughter for inflicting “multiple stab wounds” on a man in 1994. Prior to that, he had been charged with one juvenile offense and 10 adult felony offenses and convicted of four of the latter. (The others were “dismissed” for various procedural reasons.) As noted above, his 1994 crime resulted in a 1995 conviction for voluntary manslaughter under section 192, subdivision (a). He was put into custody in 1995, apparently paroled sometime early in this century, and then returned to custody for parole violations *five times* thereafter, i.e., starting in 2002 and ending when he was discharged from parole in 2006. The following year, 2007, the crime for which he was most recently convicted, cutting a victim with a knife, occurred.

Regarding the latter offense, when appellant was first approached by the police, he denied having a knife but, after being taken into custody and led away, a knife fell to the

ground. When questioned about this and his previous denial, appellant replied: “I’m not going to snitch myself off.”

In the matter before us, appellant concedes in his opening brief to us that he violated probation by where he was in September 2011. Regarding why, therefore, he should not be continued on probation, the trial court explained: “There really isn’t much more dangerous activity that you can conduct other than gang activity, and Mr. Guerrero has been given ample opportunity to turn his life around and get away from it. He’s no longer amenable to probation. It’s a public safety issue at this point. [¶] It’s the judgment and sentence of the Court [that] he’s no longer amenable to probation.”

In view, among other things, of appellant’s extensive past criminal record and his admission to the police that he was aware he was in a specifically prohibited area in September 2011, this is clearly not a “ ‘very extreme case’ ” in which “ ‘an appellate court [should] interfere with the discretion of the trial court in the matter of . . . revoking probation. . . .’ ” (*Rodriquez, supra*, 51 Cal.3d at p. 443.)

The parties agree that the record before the trial court was and is unclear as to whether appellant is entitled to credits for the time he spent in the Delancey Street program. Both sides recommend that the matter be remanded to the trial court for clarification of that issue. We will do so.

IV. DISPOSITION

The order revoking appellant’s probation is affirmed. The matter is remanded to the superior court for the determination of any custody or conduct credits to which appellant may be entitled for the time he spent at Delancey Street.

Haerle, J.

I concur:

Lambden, J.

I concur in the judgment:

Kline, P.J.