

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

THE PEOPLE,
Plaintiff and Respondent,
v.
LEONARD R. BRADLEY,
Defendant and Appellant.

A135331
(Marin County
Super. Ct. No. SC11005368)

On September 26, 2011, a home in Nicasio was burglarized. Defendant was arrested and charged with burglary, receiving stolen property, and being a past convicted felon in possession of firearms. Defendant's criminal history went back to 1977, and included three revocations of probation.

On February 2, 2012, defendant was set to appear before Judge Andrew Sweet, sitting as a magistrate to conduct the preliminary examination. Matters never got to that stage because defendant and the prosecution reached a negotiated disposition. Defendant entered a plea of guilty to the burglary count (Pen. Code, § 459), and admitted allegations that the burglary qualified as a serious felony (Pen. Code, § 1192.7, subd. (c)(18)), and that he was presumptively ineligible for probation (Pen. Code, § 1203, subd. (e)(4)) because he had eight prior felony convictions. The two other counts were dismissed with the proviso that they could be considered at the time of sentencing. Defendant acknowledged that the maximum term of imprisonment was six years in state prison. Judge Sweet then certified the matter to the superior court for sentencing.

The sentencing hearing was conducted by Judge Sweet on April 26, 2012. Judge Sweet had before him a sentencing memorandum from defense counsel, advising that “Mr. Bradley is not well, mentally or physically.” Counsel explained: “With respect to his physical health, Mr. Bradley suffers from diabetes, high blood pressure, sleep apnea, and blindness in one eye. In 2007 he suffered a stroke” leaving him “with short-term memory loss, headaches, vomiting and the inability to function in a normal work environment.” “Regarding his mental health, Mr. Bradley has been diagnosed with Schizophrenia and Bipolar Disorder.” Because of these myriad maladies, counsel represented, defendant is taking a dozen daily medications. On top of that, “Mr. Bradley is a self-admitted heroin and cocaine addict” who “has undergone substance abuse treatment in five different facilities.”

Counsel asked for probation because “Mr. Bradley has [only] recently been dual diagnosed,” that is, his mental diagnosis added to his long-standing abuse problem. His unsatisfactory history of substance abuse treatment was therefore nullified because it did not address his mental problems. Defendant has begun attending a facility in Contra Costa (where he lives) which “is equipped to provide the psychotherapy, vocational therapy and social/psychiatric rehabilitation” that he needs. Defendant is also attending “NA meetings 2-3 times per week” and seeing a psychiatrist. Finally, “Mr. Bradley has the complete support of his wife of 20 years,” who “has been instrumental in getting him the help he so desperately needs.” Given that “This Honorable Court . . . has worked closely with dual diagnosis,” the court was aware that “dual diagnosis treatment is a long and arduous road.” Counsel therefore submitted that “prison . . . is not the right option for Mr. Bradley.” With some caution, the probation officer agreed with this reasoning and recommended probation.

At the sentencing hearing, the prosecutor stated that he was “quite shocked” by the probation officer’s recommendation, and remained “solidly convinced that this is a State Prison case and that Mr. Bradley has earned not only a State Prison sanction, but that it should be an upper term State Prison sanction.” Defendant’s criminal history “weighs

very heavily against [him],” the prosecutor submitted, thus making the statutory presumption of probation ineligibility “strong here.”

After listening to additional argument from counsel and hearing from defendant, Judge Sweet stated his decision as follows:

“I’m going to deny probation and sentence Mr. Bradley to prison.

“My first legal calculation starts with Penal Code Section 1203 (e)(4) and Penal Code Section 462 (a). Both of those sections indicate that Mr. Bradley is not eligible for probation, unless this is an unusual case where the interest of justice would be served to grant him probation.

“To help the Court make that legal evaluation, the Rules of Court¹ provide some guidance; Rule 4.413, specifically. I’ve carefully reviewed Rule 4.413 and find that the following factors clearly do not apply: (c)(1) (A), (c)(1)(B), (c)(2) (A) and (c)(2)(C). That would leave only factor (c)(2)(B) applicable here, possibly.

“That factor guides the Court and allows the Court, even when probation is presumptively not appropriate per statutes, to grant probation if the Court can conclude that the crime at issue was committed because of a mental condition and there’s a high likelihood that the defendant would respond favorably to mental health treatment.

“I’ve evaluated this case as carefully as I can and all the things I know about it and about the defendant and I cannot conclude either of those things are true. This crime was committed because the defendant wanted money to pay bills and buy drugs. I cannot conclude that it was committed because he has a mental health condition.

“He may well have a mental health condition but his motive was personal and selfish and independent, in my mind, of any mental condition that he has. He wanted money and he wanted to steal people’s things so he could sell them to get money to pay his bills and to buy drugs. So I do not find that this crime was committed because of a mental condition.

¹ All references to rules pertain to California Rules of Court.

“Secondly, the Court would also have to find, not alternatively, but also have to find there’s a high likelihood that the defendant would respond favorably to mental health treatment. But as I’ve indicated, this report makes clear to me that the defendant was undergoing mental health treatment already and committed this offense. So I cannot find, nor do I find, that there’s a high likelihood that, in the future, he would respond favorably to mental health treatment because, in the past, he has not.

“I am making this finding with as much compassion as I can but when I evaluate the factors that I need to evaluate, I find that this is not an unusual case and the interest of justice would not be served to place the defendant on probation. I think the community would be at risk if he was on probation.

“So under 4.413, in conjunction with Penal Code Sections 462 (a) and 1203 (e)(4), probation is denied. If there were no probation preclusion clauses in play in this case, I would do an evaluation on whether probation is appropriate under Rule 4.414.

“Just running through those factors quickly, even if I was making a probation versus prison determination, based on Rule 4.414, I would still deny probation. The unfavorable factors that I find are listed under factors (a)(5), (a)(6), (a)(8), (b)(1), (b)(2), (b)(6), (b)(7), and (b)(8). And rather than go through all of those, specifically, I’m just indicating for the record that probation would be denied under those factors, even if [Penal Code Sections] 1203 (e)(4) and 462 (a) were not in play. But since those are in play, the Court is not finding this an unusual case, I don’t have to do the full analysis.

“To decide which term of the triad to impose, the Court has to evaluate the aggravating circumstances versus the mitigating circumstances. I’ve evaluated the aggravating circumstances under Rule 4.421 and find that the following apply and are aggravated circumstances in this case: factor (a)(8), the manner in which the crime was carried out indicates planning, sophistication and professionalism. It appears to the Court that the defendant drove to an isolated area where he knew there were homes—this is a residential area—and had a plan on how to burglarize these homes. I’m not indicating that the plan, itself, was particularly sophisticated in that he knocked on doors until he broke in, but, overall, the fact that he went to a place out of view and had this plan, at

least, indicates to me, indicates planning, some level of sophistication and some level of professionalism.

“I find that factor (a)(9) also applies in that the amount of loss to the victims was great in this case. The numbers are detailed in the probation report. I find that it was a significant amount of loss.

“Factor (b)(2), I find, applies. The defendant’s prior convictions are numerous; specifically, he has eight prior felony convictions. Factor (b)(3) applies as an aggravating factor. The defendant served a prior prison term. I think two, the DA thinks maybe three, but two prior prison terms.

“(B)(4) applies. The defendant was on probation at the time the offense was committed. He was on probation out of Alameda County. And factor (b)(5) also applies, as probation documented in their report, defendant’s prior performance on probation or parole was unsatisfactory. It seems to the Court that, if not every time he’s been on probation or parole, certainly, most of the time, he’s been revoked. Some of his probation grants have ended up in revocations leading to State Prison terms. Those are the aggravating factors.

“When the Court considers the mitigating factors listed in Rule 4.423, I can only find one mitigating factor and that is (b)(3), which is that the defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process. And I think that’s true and that certainly, in this case, is a mitigating factor.

“It should be noted that, in addition to—well, what I want the record to reflect is, I’m not relying on the People’s representation that the property associated with Count II, [the receiving stolen property count] that was dismissed with a *Harvey*² waiver. I’m not accepting the People’s representation that that property was the subject of first degree burglaries or ones that the defendant committed. That was a 496 charge dismissed with a *Harvey* waiver. I’m considering that count only in the following context: That Mr. Bradley had in his possession property of others that he was not entitled to have. I’m

² *People v. Harvey* (1979) 25 Cal.3d 754.

not concluding that he committed additional burglaries in imposing my sentence here.

[¶] . . . [¶]

“So all of that being said, the Court has to select the appropriate term, balancing the aggravating and mitigating factors. This is a two, four, six crime. The Court has balanced the aggravating factors and finds the aggravated term is the appropriate one. Defendant is, therefore, sentenced to six years in the State Prison.”

The two statutes cited by the trial court concerning probation eligibility provide in relevant part:

“Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] . . . [¶] (4) Any person who has been previously convicted twice in this state of a felony” (Pen. Code, § 1203, subd. (e)(4).)

“Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any person who is convicted of burglary of an inhabited dwelling house” (Pen. Code, § 462, subd. (a).)

A trial court’s decision under these statutes is reviewed according to the abuse of discretion standard. (E.g., *People v. Bradley* (2012) 208 Cal.App.4th 64, 89 [§ 1203]; *People v. Marquez* (1983) 143 Cal.App.3d 797, 803 [§ 462].) This court has explained the extremely deferential nature of this review: “ ‘The standard for viewing a trial judge’s finding that a case may or may not be unusual is abuse of discretion.’ [Citation.] The trial judge’s discretion in determining whether to grant probation is broad. [Citation.] ‘[A] “ ‘decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” ’ ’ ’ [Citation.] ‘[T]hese precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.’ [Citation.] Generally, ‘ “ ‘[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary

determination to impose a particular sentence will not be set aside on review.’ ” ’
[Citation.]” (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178-179.)

The sole point of defendant’s opening brief is that Judge Sweet abused his discretion “in applying [rule 4.413 (c)(2)(B)] and denying . . . probation.” Judge Sweet’s remarks were quoted at length to show that he certainly did consider whether defendant should be admitted to probation, and even quoted the language of the rule. We do think it notable that defense counsel at trial made a point of mentioning Judge Sweet’s familiarity with the concept of dual diagnosis, yet appellate counsel charges Judge Sweet with failing to recognize that defendant’s “case squarely fit this exceptional circumstance.” Counsel’s claim that Judge Sweet “was unwilling to engage in a thorough analysis” seems particularly unfair. Defendant’s drawing attention to this court’s observation in *People v. Stuart, supra*, 156 Cal.App.4th 165, 178—that the situation contemplated by rule 4.413(c)(2)(B) “ ‘is permissive, not mandatory’ ”—undercuts defendant’s contention because it only underscores the scope of the trial court’s discretion. And although counsel’s reargument of defendant’s circumstances is ably done, it does not establish that Judge Sweet’s conclusion was legally erroneous. At best, it only establishes that reasonable minds could differ as to the application of the rule to defendant’s situation. However, as we recognized in *Stuart*, such a disagreement cannot establish an abuse of discretion, that is, a decision so irrational and arbitrary that no reasonable person could agree with it.

There is a separate and independent ground for affirmance. Judge Sweet’s remarks show that he went a step further than defendant acknowledges and in essence considered defendant’s application for probation de novo, as if there was no issue of statutory ineligibility. So, even if defendant was correct in his claim that Judge Sweet “was wrong on the facts and wrong in its application of [rule 4.413(c)(2)(B)],” there is no answer to the plain fact that Judge Sweet concluded that “even if I was making a probation . . . determination[] based on Rule 4.414, I would still deny probation. Defendant’s failure to challenge that determination means that reversal is not possible. (See *People v. Bradley, supra*, 208 Cal.App.4th 64, 89.)

The judgment of conviction is affirmed.

Richman, J.

We concur:

Kline, P.J.

Haerle, J.