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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES LESTER HARRISON,

Defendant and Appellant.

A135639

(Mendocino County
Super. Ct. No. SCUK-CRCR-08-
84240)

Defendant pleaded no contest to felony charges of misappropriation of trust assets and filing a false tax return after he used his position as trustee of a testamentary trust to embezzle over \$400,000. Following the successful completion of his probation and the making of full restitution, defendant sought unsuccessfully to have the felony convictions reduced to misdemeanors. He contends the trial court abused its discretion in refusing to reduce the felony convictions to misdemeanors. We affirm.

I. BACKGROUND¹

Defendant was charged in an information, filed January 13, 2009, with grand theft by misappropriation of trust assets (Pen. Code, §§ 487, 506) and three counts of filing a willfully false tax return (Rev. & Tax. Code, § 19705, subd. (a)(1)). It was also alleged

¹ The account of the factual background for defendant's plea of no contest is taken from the probation report. (See *People v. Placencia* (2011) 194 Cal.App.4th 489, 492, fn. 3.)

defendant's misappropriation involved property valued in excess of \$100,000 (Pen. Code, § 1203.045, subd. (a)) and in excess of \$200,000 (Pen. Code, § 12022.6, subd. (a)(2)).

In 1993, an elderly couple created a revocable living trust to fund, following their deaths, a scholarship for women graduates of Ukiah High School. The trustors died in 1994 and 1995. In the course of his work at a Ukiah bank, defendant was appointed trustee of the trust.

An investigation into the trust affairs was undertaken after a complaint was received from a bank employee in 2005. It revealed that defendant had embezzled over \$420,000 from the trust, none of which had been reported as income on his tax returns. During defendant's trusteeship, no scholarships had been awarded. Defendant, who had no prior criminal record, told the probation officer the whole affair was the "result of mistakes and misunderstandings" and blamed the trustors, the bank president, accountants, and attorneys for his malfeasance.

Defendant pleaded no contest to felony charges of misappropriation of trust assets and filing a false tax return, and he admitted the allegation that his crimes involved more than \$200,000. Under a plea agreement, defendant paid \$144,000 in restitution, back taxes, penalties and interest, and costs. This added to the \$651,679 in restitution he had already paid to the trust as a result of civil litigation. At the sentencing hearing, defense counsel requested that the trial court suspend the imposition of sentence, rather than impose sentence and suspend its execution, as recommended by the probation report. The trial court complied, suspending imposition of sentence and placing defendant on three years' probation, with 365 days in jail.²

² The court's typed order of probation contained the sentence, "The defendant is sentenced to FOUR YEARS in state prison with execution of sentence is suspended [*sic*]." All of this phrase except "is suspended" was crossed out by hand, and "Imposition of sentence" was written above the lined-out text. In ruling on the motion under consideration here, the trial court concluded the probation order had been amended to reflect the terms of the sentence as imposed orally by the court at the hearing. Defendant used the typed order as the basis for an argument in the trial court, but we do not understand him to repeat that argument here. Defendant concedes in his brief that "the trial court suspended the imposition of sentence."

Following the successful completion of his probation in 2012, defendant moved to have the felony convictions reduced to misdemeanors and to withdraw his plea and dismiss the case. The trial court granted the motion to withdraw his plea and dismiss the case, but it declined to reduce defendant's convictions to misdemeanors. In explaining its decision, the court noted defendant took advantage of a position of trust for his own benefit, embezzled "quite substantial" sums, deprived young women graduates of the scholarships that should have been awarded from the trust proceeds for "many, many years," and failed to take responsibility for his actions. Summarizing its decision, the court said, "The plea was to some serious felony offenses, and I believe this to be a discretionary call and I find that the factors . . . that . . . auger [*sic*] in favor of keeping it as a felony outweigh any factors in mitigation."

II. DISCUSSION

Defendant contends the trial court erred in declining to reduce the felony convictions to misdemeanors.

A felony is a crime punishable by imprisonment in state prison. (Pen. Code, § 17, subd. (a).) When a crime is punishable either by imprisonment in state prison or county jail, it is termed a "wobbler." (*People v. Feyrer* (2010) 48 Cal.4th 426, 430 (*Feyrer*).) Whether a wobbler is ultimately classified as a misdemeanor or a felony depends upon the sentence imposed by the court. (*Meyer v. Superior Court* (1966) 247 Cal.App.2d 133, 137 (*Meyer*).) If a sentence other than state prison is imposed, the offense becomes a misdemeanor. (Pen. Code, § 17, subd. (b)(1); *Feyrer*, at p. 439.) If the court suspends imposition of sentence, as commonly occurs when a defendant is granted probation, the offense is considered a felony unless and until a sentence other than state prison is imposed. (*Feyrer*, at p. 439; *Meyer*, at p. 137.) If sentence is never pronounced, the offense remains a felony. (*Meyer*, at p. 137.) Under such circumstances, however, the offense can be reclassified at the discretion of the trial court. (*Feyrer*, at p. 439.) There is no dispute defendant's offenses were wobblers and his felony convictions eligible for reduction to misdemeanors.

Defendant first argues his offense was a misdemeanor as a matter of law under the plain language of Penal Code section 17, subdivision (b)(1) because he was “sentenced” to one year in county jail. It is clear, however, that the trial court imposed the year in jail as a condition of probation, not as a formal sentence. On the contrary, the court expressly suspended the imposition of sentence, thereby reserving the authority to sentence defendant to state prison at a later time. Defense counsel was presumably concerned with just this distinction when he requested the court suspend imposition of sentence, instead of imposing a state prison sentence and suspending its execution. Because no sentence was ever imposed, subdivision (b)(1) is inapplicable.

In addition, Penal Code section 17, subdivision (b)(3) specifically anticipates this situation, stating that when a court grants probation without imposing sentence, the offense does not become a misdemeanor unless the court declares it to be such. As the more specific provision, subdivision (b)(3) governs here, rather than subdivision (b)(1). (See *Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1208; *Meyer, supra*, 247 Cal.App.2d at p. 137 [when sentence is never imposed, a felony remains a felony unless expressly reduced by the court].)

Defendant next contends the trial court abused its discretion in declining to reduce the offense to a misdemeanor. Regarding the factors to be considered by a trial court in evaluating a request to reduce a felony to a misdemeanor under Penal Code section 17, the Supreme Court has held, “since all discretionary authority is contextual, those factors that direct similar sentencing decisions are relevant, including ‘the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.’ [Citations.] When appropriate, judges should also consider the general objectives of sentencing such as those set forth in California Rules of Court, rule [4.410]. The corollary is that even under the broad authority conferred by section 17[, subdivision] (b), a determination made outside the perimeters drawn by individualized consideration of the offense, the offender, and the public interest ‘exceeds the bounds of reason.’ ” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978, fn. omitted.)

Guided by these instructions, we find no abuse of discretion. The trial court's decision was plainly grounded in a consideration of " 'the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.' " In ruling, the court noted defendant's abuse of a position of trust, the large sums involved, the harm to the graduates deprived of scholarship funds, and defendant's failure to take responsibility for the wrongful nature of his conduct. All of these factors weigh against reducing what was plainly a felony to a misdemeanor.

In arguing an abuse of discretion, defendant refers to California Rules of Court, rules 4.421 and 4.423, which govern the selection of a sentencing term under California's tripartite determinate sentencing system. Defendant contends the probation report prepared in connection with his sentencing listed only one factor in aggravation, planning and sophistication, and three applicable factors in mitigation, his belief his conduct was rightful, lack of a prior record, and restitution. We find the argument unpersuasive for two reasons. First, the selection among sentencing options is a different decision, guided by somewhat different considerations, than the reduction of a felony. A defendant's making restitution, for example, may justify a decrease in the severity of punishment. It does not, however, change the nature of the original crime, and a trial court could conclude restitution is entitled to less weight in deciding whether to reduce a felony conviction to a misdemeanor. Second, and more important, a trial court is not bound by the probation report's conclusions about the factors in mitigation and aggravation. By finding the defendant had failed to take responsibility for his conduct, the court rejected the first factor in mitigation listed in the probation report, defendant's purported belief his conduct was excused. The trial court also mentioned additional factors in aggravation, including the large amount of money involved (Cal. Rules of Court, rule 4.21(a)(9)) and a breach of trust (Cal. Rules of Court, rule 4.21(a)(11)). Even applying the sentencing rules as defendant urges, these factors would have justified the trial court's decision. By relying on the probation report, defendant fails to address the actual ruling of the trial court, which was well-supported even under the standard he argues.

III. DISPOSITION

The ruling of the trial court is affirmed.

Margulies, Acting P.J.

We concur:

Dondero, J.

Banke, J.