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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.

RYAN KEONI TERKELSEN,

Defendant and Appellant.

A138176

(Mendocino County  
Super. Ct. No. SCUJ-CR-1270767)

On January 8, 2013, defendant Ryan Leoni Terkelsen waived his right to a preliminary examination, and entered pleas of guilty to receiving stolen property (Pen. Code, § 496) and reckless driving while being pursued by a peace officer. (Veh. Code, § 2800.2) An outstanding grant of probation was summarily revoked. Sentencing was set for February 22.

On that date, the court had before it the recommendation of Probation Officer Susan Kamm that defendant be sentenced to state prison for an aggregate term of three years and eight months, but that execution of that sentence be suspended and defendant be admitted to probation upon specified conditions, including that he serve a year in county jail, and then complete “a minimum year-long inpatient treatment program.”

The prosecutor opened his remarks by criticizing Kamm’s report for the “glaring” omissions of failing to address defendant’s “severe methamphetamine addiction,” gang affiliation, and “crime ridden lifestyle.” In support of a state prison commitment, the prosecutor argued: “I see him as a public safety risk. [¶] . . . [¶] I don’t see him as

someone who has a shot on probation. Looking through his record, I think I counted 14 or 15 convictions, two felonies and the rest misdemeanors. He violates probation . . . . [¶] So my position is two years, eight months” in state prison.

Defense counsel admitted that “I’m surprised that probation was willing to give him this chance” at probation, given that defendant’s record was “horrific.” (Ms. Kamm characterized defendant’s history as “appalling.”) Nevertheless, counsel argued, defendant did complete one grant of probation successfully, and his history was “horrific because he can’t drive with a valid driver’s license. That’s what has been Mr. Terkelsen’s history.” And counsel continued, defendant’s history was almost all misdemeanors, did not involve crimes of violence, and, with the suspended prison term, “we have a nice hammer over his head.” Because “he’s really close to burning that last bridge with his Dad and his family, Ryan knows he has to do this,” and therefore was deserving of another chance.

The court then stated:

“First, and I will ask probation as well, I was having trouble determining where probation found an unusual circumstance here where the interest of justice would favor the granting of probation against the statutory ineligibility.

“[Vehicle Code section] 2800.2, for whatever reason, the Legislature has placed in that category that doesn’t allow for the court to give him county prison or he can do a split sentence or something of that nature. It’s kind of an all-or-nothing thing.

“I think probation is relying on [defendant’s] use and ingestion of methamphetamine as somehow being an unusual circumstance unlikely to recur that would justify the granting of probation.

“And when he had his felony in 2005—and he’s a little loosey-goosey in his statements to probation about how long he had been sober and how long it had been since he had been in trouble. It was January of 2006 that he entered the Salvation Army program. And he successfully completed that program.

“And within the succeeding two years he managed to get violated repeatedly and ultimately . . . probation was terminated unsuccessfully. And that . . . was November of 2008.

“And then, of course, he had all these 11377’s, 11550’s [references to Health and Safety Code provisions prohibiting possession and use of controlled substances] . . . 2006 was the first one. He had an 11377 in 2008. He also had an 11550 in 2009 where he got an 18-month drug program. He was revoked a couple of times on that and ultimately he did time in jail, and that was terminated.

“And then yeah, a lot of this since then has been driving. And, frankly, it’s more of a scoff-law record, like, are you kidding me that somebody could have that many 14601’s? [Referring to the provision of the Vehicle Code forbidding operating a motor vehicle with a suspended license.] And then he has all these failures to appear as well.

“When we come—and this is what I was having trouble understanding here . . . . And then this offense was like December 12th of 2012.”

There followed the court addressing a different criminal matter against defendant; it was handled at the same time, but is not the action which is the subject of this appeal. The court then returned to this action:

“So I want to ask probation once how they got to the unusual circumstance that would make it in the interest of justice to grant probation, because I’m wavering with that. [¶] Mr. King?

“PROBATION OFFICER: Do you want me to assume?

“THE COURT: I don’t want you to assume. Don’t assume. If you know something—

“PROBATION OFFICER: I don’t. She’s [Susan Kamm] the author of the report. I looked through there and she didn’t exactly explain where she came from. So I can’t answer that.

THE COURT: I’d be happy if the defendant went through a rehabilitation program. It would be a great thing to do, and I think he needs to do that.

“I think that basically with me what he’s been involved in here I can’t find an

unusual circumstance where the interest of justice would support not sentencing him at this time. And I'm going to sentence him.

"I'm not giving him the aggravated term . . . [¶] . . . [¶] Because I'm doing something a little different than what probation had contemplated . . . . [¶] So what I would . . . do is sentence not to the aggravated term but to the mid-term. I'm not going to suspend it . . . . [¶] . . . [¶]

"He's like totally out of control. If I thought I could arrest it with a drug program, I probably would. I don't think I can. I think it's doing the same thing over and over again, and he has been through 1210 [a reference to the Penal Code provision authorizing drug diversion] and nothing has made an impression. [¶] . . . [¶]

"I appreciate your [defense counsel's] argument and you've done all that one possibly could in advocating for him and setting this up so the possibility of probation could be considered. And I seriously did consider it."

The court denied defendant's application for probation and sentenced defendant to state prison for an aggregate term of two years and eight months.

On this timely appeal, defendant's primary contention is that the trial court violated defendant's due process right "by the court's denying probation without considering the opinion of the probation officer who authored the probation report." The gist of the claim appears to be that the court ought not to have proceeded without testimony from Probation Officer Kamm. This claim is without merit.

"A trial court has broad discretion to determine whether a defendant is suitable for probation. [Citation.] The determination whether a case is an 'unusual' case is also within the sound discretion of the trial court. [Citation.] An appellant bears a heavy burden when attempting to show an abuse of such discretion. [Citation.] To establish abuse, the defendant must show that, under all the circumstances, the denial of probation was arbitrary, capricious or exceeded the bounds of reason. [Citation.]" (*People v. Bradley* (2012) 208 Cal.App.4th 64, 89.)

Defendant implies that the court's exercise of its discretion was defective because it had not read or considered Kamm's report. This insinuation is rebutted not only by the

court's express statement that "I have read and considered the probation report," but also by the evidentiary presumption the court did so (Evid. Code, § 664)—not to mention the court's evident familiarity with the contents of Kamm's report.

In addition, the claim defendant now advances was never presented to the trial court and is therefore deemed waived for purposes of review. (*People v. Kennedy* (2005) 36 Cal.4th 595, 612; *People v. Vera* (1997) 15 Cal.4th 269, 275.) This principle also applies to constitutional claims. (*United States v. Olano* (1992) 507 U.S. 725, 731; *People v. Saunders* (1993) 5 Cal.4th 580, 590.)

Anticipating this possibility, defendant contends his trial counsel was constitutionally incompetent for not making the point at the sentencing hearing. But this was not a situation involving deviation from objective, demonstrable, proven evidence developed at a full-blown trial, as occurred in *People v. Eckley* (2004) 123 Cal.App.4th 1072, but only a matter of opinion, specifically, Ms. Kamm's opinion. And that opinion backed only a recommendation, a recommendation that the trial court was at liberty not to follow. (*People v. Warner* (1978) 20 Cal.3d 678, 683; *People v. Downey* (2000) 82 Cal.App.4th 899, 910.) The substance of that recommendation was fully and competently argued by defense counsel at the sentencing hearing, as the trial court made a point of noting.

One point of defendant's argument requires comment. He erroneously states that Ms. Kamm "found that mental health issues may have been present." But the only mention of this at the sentencing hearing was by defendant's counsel, who stated: "I think when Ms. Kamm was looking at [California Rules of Court, rule 4.]413 we're not just talking about a chemical dependency, I think we're also talking mental health issues." This was counsel's opinion, not Ms. Kamm's. The only mention in the probation report of defendant's mental health was that "defendant stated his physical and mental health is good." The only mental issue addressed by Ms. Kamm was defendant's psychological difficulty in overcoming his substance abuse problem, and that issue was considered at length in her report. So, when defendant argues that "An undiagnosed and untreated mental illness would have explained appellant's past failures at both recovery

and rehabilitation” and “A dual diagnosis of both chemical dependency and mental health issues would have been an unusual circumstance justifying a grant of probation,” this is pure speculation.

After a full examination of the record, we conclude no abuse of the trial court’s discretion is established as to the court’s determination that defendant’s was not an unusual case falling outside the prohibition of probation mandated by Penal Code section 1203, subdivision (e)(4). (*People v. Bradley, supra*, 208 Cal.App.4th 64, 89.)

The judgment of conviction is affirmed.

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Richman, J.

We concur:

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Kline, P.J.

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Haerle, J.