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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT SCOTT HISEL,

Defendant and Appellant.

A141339

(Lake County
Super. Ct. Nos. CR932267, CR932471)

Defendant Robert Scott Hisel appeals a judgment entered upon his plea of no contest to assault on a peace officer with a deadly weapon and unlawful possession of a firearm by a felon. He contends the trial court abused its discretion in denying probation and sentencing him to the upper term. We shall affirm the judgment.

I. BACKGROUND

Defendant was charged in case No. CR932471 with unlawful possession of a firearm by a felon (Pen. Code,¹ § 29800, subd. (a), count one); possession of ammunition by a felon (§ 30305, subd. (a)(1), count two); and possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a), count three). The information alleged as to all counts that defendant was ineligible for probation due to his prior felony convictions for burglary (§ 469) and receiving stolen property (§ 496, subd. (a)) in 1983. (§ 1203, subd. (e)(4).)

¹All undesignated statutory references are to the Penal Code.

In case No. CR932267, defendant was charged with assault upon a peace officer, Lyle Thomas, with a deadly weapon with force likely to produce great bodily injury (§ 245, subd. (c), count one); possession of ammunition by a felon (§ 30305, subd. (a)(1), count two); resisting an executive officer through force and violence (§ 69, count three); assault upon Brenda Austin with a deadly weapon, a high-powered pellet gun (§ 245, subd. (a)(1), count four); assault upon Brenda Austin by means of force likely to produce great bodily injury (§ 245, subd. (a)(4), count five); false imprisonment of Kristen Weiss (§ 236, count six); possession of methamphetamine (Health & Saf. Code, § 11377, count seven), and obstruction of a peace officer (§ 148, subd. (a)(1), count eight). The information also alleged as to count one that it was a serious felony (§ 1192.7, subd. (c)), as to counts three and five that defendant personally used a deadly weapon (§§ 12022, subd. (b)(1) & 1192.7, subd. (c)(23)), and as to counts one through seven that defendant was ineligible for probation due to his prior convictions (§ 1203, subd. (e)(4)).

The probation officer's report² describes the events underlying case No. CR932471 as follows: In April 2013, a sheriff's deputy responded to a report of a vehicle rollover, and found defendant and another person sitting near the vehicle, appearing intoxicated. An unloaded pistol, ammunition, and methamphetamine were found in defendant's jacket. A records check showed defendant was a convicted felon. Defendant said he had snorted methamphetamine the previous evening.

The allegations in case No. CR932267 were based on an incident that occurred in May 2013. In response to a dispatch call, a sheriff's deputy arrived at a home and was told by Brenda Austin that she had come to the home to speak with Kristin Weiss; when Austin asked Weiss to come outside the home to talk, defendant shot Austin in the hip with a high-powered pellet gun.

²Because defendant's convictions are based on a plea of no contest, our recitation of the facts is derived from the probation officer's report.

The deputy spoke to Weiss. She told him defendant had refused to allow her to leave the residence. While they were speaking, defendant left the house with a rifle, which was later found to be a pellet gun. The deputy pulled Weiss to cover, told defendant to drop the gun, and asked defendant to come talk with him. Defendant shot the pellet gun at the deputy multiple times. The deputy warned defendant that he would fire on him, but defendant continued to aim his weapon at the deputy and responded with “profanity and strange statements.” As more law enforcement officers arrived, defendant went into the house, then came out holding a handgun. The deputy continued to give orders to defendant, but defendant did not comply. Defendant raised his weapon and pointed it at the deputy, who fired shots at defendant. Defendant went into the house.

About four hours after the incident began, a SWAT team entered the building and found defendant passed out on the living room floor. A search of the residence revealed what appeared to be three grenades.

Pursuant to a negotiated disposition, defendant pled guilty to assault on a peace officer with a deadly weapon in case No. CR932267, and to possession of a firearm by a felon in case No. CR932471. The remaining counts were dismissed with a *Harvey* waiver. (*People v. Harvey* (1979) 25 Cal.3d 754.)

In a letter to the court, defendant apologized and explained that at the time of the crime he was using “speed” and “just wanted to [d]ie”; he also said that, with the help of a friend, he would not use methamphetamine again, and asked not to be sent to prison.

A psychologist, Dr. John Watts Podboy, evaluated defendant, and defendant submitted his report to the court. Dr. Podboy stated that defendant was 53 years old, but appeared far older, moved slowly, had a hard time sitting up, and suffered from arthritis. Defendant told Dr. Podboy he “fe[lt] more like 90 than 53.” Defendant’s mother, to whom he was close, had died in 2012, and he reported feeling extreme depression afterward. His companion of 20 years, Judy, had developed Alzheimer’s Disease; he had cared for her for an extended period of time, but she was currently living in an

Alzheimer's home in San Diego. Defendant also told Dr. Podboy he had given up methamphetamine 25 years previously, but had relapsed after the death of his mother and the onset of Judy's ill health.

Dr. Podboy stated that at the time of the May 2013 incident in which defendant shot at the officer, defendant was psychotic, had not slept in a number of days, had eaten little or nothing, and was drinking alcohol. He had become psychotic from similar behavior in the past. Defendant told Dr. Podboy he intended to shoot near the officers but not directly at them; when asked if he intended to commit "suicide by cop," he answered in the affirmative and said he did not care about living any more.

Dr. Podboy opined that defendant was "obviously depressed." He had uncontrollable fits of crying when he thought about Judy. He also had a number of physical ailments. Dr. Podboy stated that defendant had "committed himself to a life of sobriety and good conduct," and that he did not appear to pose a danger to the community.

The trial court denied probation. In doing so, it concluded defendant posed a danger to the community and that this was not an unusual case in which the interests of justice would best be served by a grant of probation. The court noted that defendant's current offenses were more serious than his earlier crimes and that he was neither youthful nor aged. The court also stated that even if there were no statutory restrictions on the grant of probation, it would deny probation. The court imposed the upper prison term of five years for assault on a peace officer with a deadly weapon, and an additional eight months for possession of a firearm by a felon.

II. DISCUSSION

A. Denial of Probation

Defendant acknowledges that he is presumptively ineligible for probation under section 1203, both because he used a deadly weapon on a person in connection with his crime and because of his prior convictions. (§ 1203, subd. (e)(2) & (4).) In such cases,

probation may not be granted “[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation” (§ 1203, subd. (e).)³

In deciding whether an unusual case exists, the court looks at the following criteria: “(1) *Facts relating to basis for limitation on probation*[.] [¶] A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including: [¶] (A) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and [¶] (B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense. [¶] (2) *Facts limiting defendant's culpability*[.] [¶] A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including: [¶] (A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence; [¶] (B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and [¶] (C) The defendant is youthful or aged, and has no significant record of prior criminal offenses.” (Rule 4.413(c).)

The terms “unusual cases” and “interests of justice” are narrowly construed, and rule 4.413 is “ ‘limited to those matters in which the crime is either atypical or the

³If the court finds unusual circumstances exist to overcome the statutory limitation on probation, it then applies the standards of California Rules of Court, rule 4.414, to decide whether to grant probation. (Cal. Rules of Court, rule 4.413(b); all rule references are to the California Rules of Court.)

offender's moral blameworthiness is reduced.' ” (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178 (*Stuart*).) If one of the criteria of rule 4.413 is met, the trial court may, but is not required to, find the case unusual. (*Ibid.*) “ ‘The standard for reviewing a trial court'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.’ ” (*Id.* at pp. 178–179.)

Defendant contends this case is unusual because his crimes were out of character and committed when he was in a psychotic state and overcome by depression after the loss of his mother and his companion, and that the trial court abused its discretion in concluding otherwise. It is not for us to determine *de novo* whether this was an unusual case; we decide only whether the trial court could reasonably conclude it was not unusual. Here, defendant first shot Austin in the hip, then shot at the deputy multiple times. It was within the bounds of reason for the court to decide that the facts of this case were not substantially less serious than other cases involving the same limitation. (Rule 4.413(c)(1)(A).) The court also correctly observed that the offense was not less serious than defendant's prior felony convictions. (Rule 4.413(c)(1)(B).) Nor does the record as a whole compel a conclusion, as a matter of law, that defendant committed the crime under “circumstances of great provocation, coercion, or duress not amounting to a defense” or because of a “mental condition not amounting to a defense” and that there was a “high likelihood” he would respond favorably to treatment during probation. (Rule 4.413(c)(2)(A) & (B).) Finally, despite defendant's health problems, the trial court could reasonably conclude a 53-year-old was neither youthful nor aged. (Rule 4.413(c)(2)(C).)

In any case, even if one or more of these factors were present, the trial court was not required to find unusual circumstances. (*Stuart, supra*, 156 Cal.App.4th at p. 178.) Defendant has not met his burden to show the trial court's decision was so irrational that no reasonable person could agree with it. (*Id.* at pp. 178–179.)

We are not persuaded otherwise by defendant's reliance on *People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, in which the appellate court concluded the trial court did not abuse its discretion in determining there was an unusual case. The defendant there was convicted of voluntary manslaughter of a customer at her store. (*Id.* at p. 825.) There had been many shoplifters at the store, and the defendant believed the victim was shoplifting. (*Id.* at p. 826.) The two engaged in a physical scuffle, and the defendant testified she thought she would die if she were hit one more time, and that the victim threatened to kill her. (*Id.* at pp. 826–827.) The defendant reached for a gun and shot the victim. (*Id.* at p. 827.) The trial court found the case to be unusual, noting that the gun was kept for a lawful use, that the defendant had no record of crimes of violence, and that she acted under “ ‘circumstances of great provocation, coercion, and duress,’ ” and the Court of Appeal found no abuse of discretion. (*Id.* at pp. 833, 837.) Here, on the other hand, the victims did not provoke defendant to commit his crimes, and defendant was not lawfully in possession of the gun. More important, the question before us is not whether it was within the trial court's broad discretion to find that unusual circumstances *did* exist, but whether the court abused its discretion in finding they did *not*. On the facts of this case, we find no abuse of discretion.

Because we conclude the trial court was within the bounds of reason in finding that the statutory limitation on probation was not overcome, we need not consider his contention that the court misapplied the standards of rule 4.414 in denying probation.

B. Imposition of Upper Term

Defendant contends that, even if the trial court properly denied probation, it abused its discretion and violated his constitutional rights in imposing the upper term for

assault on a peace officer. According to defendant, the trial court relied on improper aggravating factors and failed to consider mitigating factors.

Under the current sentencing law, trial courts have “discretion under section 1170, subdivision (b), to select among the lower, middle, and upper terms specified by statute without stating ultimate facts deemed to be aggravating or mitigating under the circumstances and without weighing aggravating and mitigating circumstances. [Citation.] Rather, ‘a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions.’ ” (*People v. Jones* (2009) 178 Cal.App.4th 853, 866.) We review the trial court’s decision for abuse of discretion, and reverse only where there is a clear showing the sentencing was irrational or arbitrary. (*People v. Ogg* (2013) 219 Cal.App.4th 173, 185.)

In imposing the upper term, the trial court relied on several circumstances in aggravation: that defendant had engaged in violent conduct that indicated a serious danger to society; that his prior convictions as an adult, while not numerous, were increasing in seriousness; that he had served a prior prison term; and that his prior performance on probation was unsatisfactory. The court also indicated that the single factor in mitigation was that defendant’s prior performance on parole had been satisfactory.

Defendant argues that the aggravating factors the trial court considered were improper. First, he contends, the court should not have taken the violence of his conduct into account because violence was an inherent aspect of the offense of assault on a peace officer with a deadly weapon. (Rule 4.420(d) [“A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term.”].) We disagree. Rule 4.421 allows the court to consider, as circumstances in aggravation, that the crime involved great violence, great bodily harm, or threat of bodily harm, and that the defendant has engaged in violent conduct that indicates a serious danger to

society. (Rule 4.421(a)(1) & (b)(1).) The court could properly note that defendant first shot Austin, then shot at the deputy multiple times, failed to respond to the deputy's orders, and pointed another weapon at the deputy after other law enforcement officers arrived, causing the deputy to shoot several rounds at defendant. Defendant's actions involved a level of violence and danger to others exceeding that inherent in his crime. Defendant also criticizes the trial court for relying on his prior convictions, which dated from 1983, and his probation violation, which occurred in 1986, because they took place so far in the past. Despite its distance in time, the trial court could properly consider defendant's prior criminal history, prison term, and probation violation. (Rule 4.421(b)(2), (3), & (5).)

Defendant also argues the trial court failed to consider factors that would have supported a lesser term, including the recent loss of his mother and his long-time companion, his depression and medical problems, his remorse, and his desire for treatment and counseling. To the extent these are proper mitigating factors, we disagree. It is well established that “ ‘[a] trial court may minimize or even entirely disregard mitigating factors without stating its reasons.’ [Citation.] Further, unless the record affirmatively reflects otherwise, the trial court will be deemed to have considered the relevant criteria, such as mitigating circumstances, enumerated in the sentencing rules.” (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637.) Defendant also suggests that the fact that he pled no contest showed that he “voluntarily acknowledged wrongdoing . . . at an early stage of the criminal process.” (Rule 4.423(b)(3).) However, his plea was part of an agreement that involved the dismissal of several other charges against him. “The Judicial Council did not have a plea bargain in mind when it proposed as a circumstance in mitigation a defendant's early admission of guilt.” (*People v. Burg* (1981) 120 Cal.App.3d 304, 306.) Moreover, a single factor in aggravation is sufficient to support imposition of the upper term. (*People v. Osband* (1996) 13 Cal.4th 622, 728.)

Accordingly, we find no abuse of discretion or error in the trial court's imposition of the upper term.

III. DISPOSITION

The judgment is affirmed.

Rivera, J.

We concur:

Ruvolo, P.J.

Reardon, J.