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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JONATHAN MARSHALL HENRY,

Defendant and Appellant.

A142511

(Sonoma County
Super. Ct. No. SCR597905)

This is an appeal from an order by the trial court denying a motion filed by the probation department to modify the terms of appellant Jonathan Marshall Henry's probation. Appellant contends the trial court's ruling was erroneous because it "effectively" modified his probation without the requisite showing of changed circumstances and without a statement on the record of the reasons supporting modification. For reasons set forth below, we conclude appellant's appeal is not properly before us at this time and, therefore, must be dismissed.

FACTUAL AND PROCEDURAL BACKGROUND

On February 15, 2011, a criminal complaint was filed charging appellant with assault with a deadly weapon in violation of Penal Code section 245, subdivision (a)(1).¹ This charge stemmed from an incident occurring between appellant and Nicholas Grant on February 13, 2011 in Petaluma. Specifically, the two men engaged in a physical

¹ Unless otherwise stated, all statutory citations herein are to the Penal Code.

altercation outside a bar, during which appellant struck Grant in the head with a glass beer bottle.

On March 2, 2011, appellant pled guilty to the non-strike offense of assault with force likely to cause great bodily harm. In exchange, among other things, the prosecution agreed to dismiss a separate criminal case pending against appellant.

On March 24, 2011, the trial court suspended imposition of sentence, and placed appellant on formal probation for 36 months, subject to various terms and conditions, including his participation and completion of assistance/counseling programs as directed by the probation department. Appellant subsequently violated the terms of his probation several times between 2012 and 2013.

On July 14, 2014, just days before appellant's probation was set to terminate on July 17, the trial court heard a motion by the probation department to modify the terms of appellant's probation to extend it by one year to enable him to complete a 52-week domestic violence program. During this hearing, the trial court sought appellant's consent to the proposed modification, and advised him that, if he failed to complete the domestic violence program, his probation would terminate unsuccessfully. Appellant, however, declined to consent to the proposed modification and the court thereafter denied the probation department's motion.

On July 17, 2014, before any order terminating his probation had been issued, appellant filed a notice of appeal from the trial court's July 14, 2014 order.

DISCUSSION

Appellant raises the following issue for our review. He contends the trial court acted in excess of its jurisdiction by modifying his probation, without a showing of changed circumstances, to impose a term extending his probationary term to enable him to complete a 52-week domestic violence program that was initially ordered as a probationary term in another criminal matter. (See § 1203.3, subd. (b).)² Accordingly,

² Section 1203.3 provides in relevant part: “(a) The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence. The court may at any time when the

appellant asks this court to reverse the order entered by the trial court on July 14, 2014, and to remand with instructions that the court find that he has successfully completed probation.

The People respond with a request to dismiss this appeal on two grounds. First, the People contend that an appeal does not lie from a favorable ruling. Here, appellant's notice of appeal identifies the court's July 14, 2014 order, which was a *denial of the probation department's request to modify his probation*. As such, the People reason, there was no adverse ruling from which appellant could appeal. Second, the People contend that appellant failed to provide the necessary record on appeal to permit this court to assess the merits of his claim. Rather, the record reflects appellant filed his

ends of justice will be subserved thereby, and when the good conduct and reform of the person so held on probation shall warrant it, terminate the period of probation, and discharge the person so held. The court shall also have the authority at any time during the term of mandatory supervision pursuant to subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170 to revoke, modify, or change the conditions of the court's order suspending the execution of the concluding portion of the supervised person's term. "(b) The exercise of the court's authority in subdivision (a) to revoke, modify, or change probation or mandatory supervision, or to terminate probation, is subject to the following:

"(1) Before any sentence or term or condition of probation or condition of mandatory supervision is modified, a hearing shall be held in open court before the judge. The prosecuting attorney shall be given a two-day written notice and an opportunity to be heard on the matter, except that, as to modifying or terminating a protective order in a case involving domestic violence, as defined in Section 6211 of the Family Code, the prosecuting attorney shall be given a five-day written notice and an opportunity to be heard.

"(A) If the sentence or term or condition of probation or the term or any condition of mandatory supervision is modified pursuant to this section, the judge shall state the reasons for that modification on the record.

"(B) As used in this section, modification of sentence shall include reducing a felony to a misdemeanor.

"(2) No order shall be made without written notice first given by the court or the clerk thereof to the proper probation officer of the intention to revoke, modify, or change its order.

"(3) In all probation cases, if the court has not seen fit to revoke the order of probation and impose sentence or pronounce judgment, the defendant shall at the end of the term of probation or any extension thereof, be by the court discharged subject to the provisions of these sections."

notice of appeal before any order was entered by the trial court terminating his probation. As such, the People argue, there is no factual basis supporting his request to this court to “reverse the court’s July 14, 2014 order and remand with instructions that [he] be found to have completed probation successfully.” For reasons set forth below, we agree with the People that dismissal of this appeal is appropriate.³

We begin with the relevant record. In June 2014, the probation department filed a request to modify the terms of appellant’s probation. Specifically, the probation department requested that the court extend by one year the period of appellant’s probation, which was set to expire on July 17, 2014, so that he would have enough time to complete a 52-week domestic violence program that was a mandatory term of his probation. Completion of this program was originally a term of appellant’s probation in another case, a domestic violence matter in Yolo County. However, after appellant had completed about half of the required sessions, he committed a probation violation in the domestic violence case – to wit, the assault charged in this case – that resulted in his placement in a court-ordered residential drug treatment program. Due to this placement, appellant could not complete the program before his probation terminated in the Yolo County case. As such, it appears the probation department subsequently directed appellant to complete this program as a term of probation in the present case.

At the July 14, 2014, hearing on the motion to modify appellant’s probation, probation department representative, Marsella Rueda, explained as follows: “Your Honor, the original [domestic violence] case came to us from Yolo County. And you’ll see that he had almost completed the program; but, unfortunately, due to relapsing and having to go into drug rehab on this current grant, he didn’t finish [the program] and had to start over when he finally was done addressing his substance abuse issues. “Now, the [domestic violence] provider made a tentative agreement with Mr. Henry saying that if he was able to complete 26 of these sessions, they’d give him credit for the

³ Appellant did not file a reply brief to address the People’s argument that his appeal should be dismissed.

past 26 he had done. And as you'll see, he's halfway through these 26 already. He could potentially be done within the next 12 weeks."

Defense counsel countered that "there's no legal basis to modify his probation. He's doing everything he was asked." Defense counsel further explained that, although not willfully, appellant could not finish the entire 52-week program in the Yolo County domestic violence case before his probationary term ended.

The court then clarified that completion of the 52-week domestic violence program had in fact been made a condition of his probation in this case and, that, unless appellant agreed to the proposed one-year extension of time to enable him to complete the program, his probation would not terminate successfully on July 17, 2014, when his probationary term in this case was set to end.⁴ In addition, the court had already confirmed that, as soon as he completed the remaining sessions of the program, "your probation could and would be terminated"

Appellant, however, declined to consent to the proposed extension, prompting the court to respond: "Okay. Then your probation will expire, and it will terminate unsuccessfully because you haven't completed the [domestic violence] program."⁵ The court also pointed out that appellant had multiple probation violations in this case, aside from the his failure to complete the domestic violence program. The court then stated: "I am not going to make findings right now. He's not agreeing [to the modification], so [his probation] will not terminate successfully."

Three days later, before any order was entered by the trial court terminating appellant's probation, he appealed the court's July 14, 2014, order to deny the probation department's request for modification.

⁴ The probation report filed March 23, 2011 stated that "[appellant] indicated he would comply with the required domestic batterer's probation as ordered in Yolo County, and would participate in other counseling services deemed necessary by the Court or probation officer."

⁵ The court acknowledged appellant had been fully participating in the program.

This record, we conclude, supports the People’s claim that dismissal of appellant’s appeal is appropriate. We agree with the People that appellant’s challenge, at its core, is to the court’s warning that, if he failed to complete the 52-week domestic violence program (which, as a practical matter, required extension of his probationary term), he would not successfully complete probation. However, because, as the People note, there is no order in this record terminating appellant’s probation – whether successfully or not – his challenge remains premature. (*City of Santa Monica v. Stewart* (2005) 126 Cal.App.4th 43, 59 [an action does not become ripe until “it reaches, ‘but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made’ ”].)

Indeed, it is a fundamental tenet of law that “ ‘an appeal reviews the correctness of a judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration.’ ” (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.) Here, the only matter before the court was the probation department’s motion to modify the terms of appellant’s probation, which the court denied. As such, while it is clear appellant disagrees with the trial court’s statement that it *intended* to terminate his probation unsuccessfully should he fail to complete the domestic violence program, appellant must await an actual adverse ruling by the trial court before bringing his appellate challenge. (Compare *Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 268 [“a trial judge’s prejudgment oral expressions do not bind the court or restrict its power to later declare final findings of fact and conclusions of law in the judgment. [Citation.] . . . Absent contrary indication in the final judgment or statement of decision, the appellate court will assume that, during the period before rendition of judgment, the trial court realized any error and corrected it”].)⁶

⁶ As noted above, at the July 14, 2014 hearing on the probation department’s modification motion, the trial court expressly declined to make any findings on the record regarding the upcoming termination of appellant’s probation.

Accordingly, for the reasons provided, we conclude this appeal is premature and, thus, subject to dismissal.

DISPOSITION

The appeal is dismissed.

Jenkins, J.

We concur:

Pollak, Acting P. J.

Siggins, J.