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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.

DONALD FRANCIS PATE,

Defendant and Appellant.

A143194

(Lake County
Super. Ct. No. CR925047)

Following defendant's admission of a probation violation, the trial court imposed a three-year state prison sentence. Defendant filed a timely appeal. As required under *People v. Kelly* (2006) 40 Cal.4th 106, 124, we affirmatively note counsel for defendant has filed a *Wende* brief (*People v. Wende* (1979) 25 Cal.3d 436) raising no arguable issues, counsel apprised defendant of his right to file a supplemental brief, and defendant did not file such a brief. Upon review of the record for potential error, we conclude no arguable issues are presented for review and affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND¹

As a Clearlake police officer was patrolling Koloko Street on November 29, 2010, he observed defendant walking down the side of the street. When the officer made contact with defendant to check on his welfare, defendant provided the officer with his identification. Though dispatch reported defendant had no active warrants, he was a sexual registrant with the Clearlake Police Department. Defendant provided the officer

¹ The summary of the underlying offense is taken from the probation postsentence report filed June 17, 2013.

with his registration card, and the officer asked defendant if he possessed any illegal items. After defendant replied, “No,” the officer asked for permission to search defendant’s person to which he replied, “Sure.” In defendant’s pocket, the officer found a glass smoking pipe and 4.1 grams of methamphetamine.

Defendant was subsequently charged in an information with one count of felony possession of a controlled substance, methamphetamine (Health & Saf. Code, § 11377, subd. (a)) and one count of misdemeanor possession of a device used to smoke a controlled substance (Health & Saf. Code, § 11364). It was further alleged that defendant had served a prior prison term. (Pen. Code, § 667.5, subd. (b).)

Defendant pled no contest to felony possession of a controlled substance, and the court granted the People’s motion to dismiss the misdemeanor charge and prior prison term enhancement. On the same day as the plea, defendant was placed on probation for three years pursuant to Proposition 36 (Pen. Code, § 1210.1)² with various terms and conditions.

In April 2013, after it was alleged by the probation department defendant had committed indecent exposure (Pen. Code, § 314, subd. 1), and used alcohol, the court summarily revoked his probation. Defendant was also charged in a separate case, case No. CR932141, with one count of felony indecent exposure.

On May 21, 2013, defendant admitted he violated his probation by committing indecent exposure and by using alcohol, and in addition, pled no contest in case No. CR932141 to misdemeanor indecent exposure.³ Less than a month later, on June 17, 2013, defendant was sentenced to 180 days in county jail, and probation was restored

² Penal Code section 1210.1, subdivision (a) provides that “any person convicted of a nonviolent drug possession offense shall receive probation.” The court shall impose as conditions of probation participation in and completion of a drug treatment program and submission to drug testing. The court may not impose incarceration as a condition of probation, rather, “[p]robation shall be imposed by suspending the imposition of sentence.” (*Ibid.*)

³ Prior to taking defendant’s plea in case No. CR932141, the court granted the People’s motion to amend count one, felony indecent exposure, to a misdemeanor.

outside of Penal Code section 1210.1 (Proposition 36) and extended to December 20, 2014. As an additional condition of probation, defendant was ordered to enroll and complete the SAFER program, a sex offender treatment program, because according to the probation officer's report, filed on July 18, 2014, "defendant is required to register [as a sex offender] pursuant to [section] 290 of the Penal Code due to numerous misdemeanor convictions of violation of [Penal Code section] 314[, subdivision 1], as well as the defendant's prior violation of probation was the result of another violation of Section 314[, subdivision 1]."⁴ In case No. CR932141, probation was denied, and defendant was sentenced to 180 days to be served concurrently with his probation violation sentence.

Slightly over a year later in July 2014, the probation department alleged defendant had violated the terms of his probation by failing to successfully complete the SAFER program. It was further alleged defendant had received a police citation for misdemeanor possession of drug paraphernalia (Health & Saf. Code, § 11364.1, subd. (a)) in a new case, case No. CR936022. The court summarily revoked probation.

Defendant admitted he violated his probation in this present case for being terminated from the SAFER program. Before taking defendant's admission, the court advised defendant he was "looking at possibly up to three years in prison." The court then granted the People's motion to dismiss case No. CR936022, unlawful possession of drug paraphernalia.

After conducting a later sentencing hearing, the court imposed the aggravated term of three years in state prison for a violation of felony possession of methamphetamine. In imposing the upper term, the court relied on three aggravating factors: (1) defendant's prior adult convictions were numerous, (2) he served a prior prison term, and (3) he was

⁴ The June 17, 2013 probation postsentence report details defendant's prior misdemeanor convictions for violating Penal Code section 314, subdivision 1, in 1997 and 2003, as well as his conviction for the same offense in 2013. In 1997 and 2003, defendant was ordered to register pursuant to section 290. Defendant was also convicted in 2005 of misdemeanor failing to register under section 290.

on probation when the latest crime was committed. In mitigation, the court found defendant voluntarily acknowledged wrongdoing at an early stage of the criminal process. However, the court determined the aggravating factors outweighed the one mitigating factor.

DISCUSSION

Defendant was ably represented by counsel throughout the proceedings.

Further, the trial court did not abuse its discretion in sentencing defendant to the aggravated term of three years on his conviction for felony possession of methamphetamine. Prior to his conviction in 2010, defendant had a record of numerous drug-related, lewd conduct and indecent exposure misdemeanor convictions dating back to 1986. He also suffered a felony conviction in 2004 for possession of cocaine. Additionally, his performance on probation was poor, having suffered two prior probation violations in 2013 and 2014. This sentence should not have come as any surprise to defendant since the court warned him when it took his probation violation admission that he was looking at the possibility of up to three years in prison. In short, the trial court had ample grounds for finding the aggravating factors outweighed the one mitigating factor justifying the three-year, upper-term sentence.

We have reviewed the entire record on appeal and find no issues requiring further briefing. The judgment is affirmed.

Margulies, J.

We concur:

Humes, P.J.

Dondero, J.