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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.

MICHAEL DON ANDERSON,

Defendant and Defendant.

A143461

(Mendocino County
Super. Ct. No. 14-77728)

Defendant Michael Don Anderson appeals from a judgment after conviction in which the trial court, among other things, imposed an upper term sentence of three years for defendant's drunk driving conviction pursuant to Vehicle Code section 23153, subdivision (b) and fined him \$2,622.60 pursuant to either Vehicle Code section 23556, subdivision (a)(1) or Vehicle Code section 23550 (the record being confused on this point). Defendant argues the court abused its discretion in imposing this upper term sentence and could not impose the fine under these Vehicle Code sections. We agree that these Vehicle Code sections did not authorize the court to impose the fine and, therefore, order that it be stricken. We affirm the judgment in all other respects.

BACKGROUND

I.

Defendant Pleads Guilty to Drunk Driving Causing Bodily Injury.

In July 2014, the Mendocino County District Attorney filed a criminal complaint in Mendocino County Superior Court. The district attorney charged defendant with two counts: causing bodily injury while driving unlawfully or negligently under the influence

of an alcoholic beverage or drug (Veh. Code, § 23153, subd. (a) (count 1)); and causing bodily injury while driving unlawfully or negligently under the influence with 0.08 percent or more of alcohol in his blood (Veh. Code, § 23153, subd. (b) (count 2)). Each count involved the same victim. The district attorney also alleged that defendant proximately caused bodily injury to two other victims in committing these offenses (Veh. Code, § 23558).

Subsequently, defendant pled guilty to count two, driving unlawfully or negligently under the influence with 0.08 percent or more alcohol in his blood and causing bodily injury (Veh. Code, § 23153), and admitted the other victim enhancement allegations. The court found him guilty of count two and the allegations to be true, and dismissed count one.

II.

The Probation Department Recommends Imposition of the Middle Term Prison Sentence.

Defendant was sentenced in October 2014. Prior to sentencing, the probation department prepared a report for the court. It wrote that defendant was 42 years old and had a criminal history that included a 1993 felony armed robbery conviction (for which he served a state prison term in Hawaii), a 2001 felony forgery conviction in Washington State and misdemeanor convictions in 2005 for driving while intoxicated and possession of a controlled substance in Minnesota. According to the department, defendant's prior record increased in seriousness and his prior probation performance was unsatisfactory.

Regarding the current offense, the department reported that, according to a police report, defendant admitted that he was driving a van under the influence of alcohol when he crashed into another vehicle containing a family of three vacationing in California. One passenger had difficulty breathing and pain in her torso, requiring that she be airlifted to a hospital, and the other two suffered injuries as well. At the scene, defendant admitted to drinking four beers. After receiving his Miranda rights and being placed under arrest, he agreed to blood testing and said, " 'Take what you need. I messed up. I'm drunk. I'm glad I didn't kill anyone.' " At his probation department interview,

defendant admitted again to consuming alcohol before driving, was thankful he did not kill anyone, expressed remorse for the victims and indicated he was willing to pay restitution.

The department further reported that defendant checked into a mental hospital after the accident, where he was diagnosed as bipolar and schizophrenic. He was under the care of a doctor and was taking prescription medications for these conditions. He hoped the court would allow him to continue his mental health and substance abuse treatment on probation.

Defendant had lived on and off in Mendocino County for seven years. In 1999, he suffered a major head injury from a snowboarding injury, requiring a plate to be inserted in his head. He suffered from insomnia. He said he first consumed alcohol at 15 years of age, and would consume alcohol “on a regular basis and would [black out].” He said he was consuming a six-pack a week around the time of the crash. He had used methamphetamine “on a daily basis throughout his lifetime to self-medicate prior to being diagnosed with [s]chizophrenia in May 2014.” He was now smoking marijuana daily as part of a medical marijuana regimen.

The department considered the circumstances in aggravation and mitigation pursuant to California Rules of Court, rules 4.421 and 4.423. In aggravation, the department stated that defendant had engaged in conduct that posed a serious risk to others, his prior record was increasing in seriousness, he served a prior prison term, and his prior probation performance was unsatisfactory.

In mitigation, the department stated that “[i]t could be said the defendant was suffering from an undiagnosed mental health condition at the time of the offense.” He “voluntarily acknowledged wrongdoing and pled [g]uilty at an early stage in the criminal process,” and had liability insurance that would help with some of the restitution.

The department concluded that defendant’s “actions are very serious and caused serious injury and loss to three victims. . . . Probation is very concerned due to the defendant’s actions in this matter and in his prior record. [Defendant] is presumptively ineligible for a grant of probation in this matter and although there may be some unusual

circumstances to overcome the limitation in this case[,] we are unwilling to recommend probation based on the seriousness.” The department recommended defendant be sentenced to the middle term of two years plus one year for each victim enhancement allegation, for a total sentence of four years in state prison. It also recommended that he pay certain fines, fees and restitution, including a \$2,622.60 fine pursuant to Vehicle Code section 23556, subdivision (a)(1).

III.

The Court Imposes the Upper Term Sentence.

At the October 2014 sentencing hearing, the court indicated it had reviewed the probation report, materials submitted by defendant’s counsel and a victim impact statement that stated the victims had incurred over \$500,000 in medical bills. The court continued, “[L]ooking at [defendant’s] prior record, and the extent of the injuries to multiple victims in this case, . . . this is not a probation case . . . and I don’t really see any circumstances that would warrant finding that . . . this is a case where special circumstances wouldn’t require a prison sentence.”

The court then continued, “Probation has recommended the midterm. I’m considering imposing the aggravated term. I understand that [defendant] is remorseful. I understand that he’s seeking treatments that he needs, but he has a prior record of not succeeding on probation, a long-term entrenched substance abuse problem where there have been prior instances of I believe him driving under the influence of controlled substances in 2005. [¶] . . . I understand he has a diagnosed mental health condition and that he’s being treated for that, but . . . those have been long-standing problems, I’m assuming. [¶] . . . [O]ne of the primary considerations the Court has to take in pronouncing judgment and sentencing is protecting society, . . . and I think there’s a need to maximize the benefit to society of preventing the defendant from committing new crimes by isolating him. [¶] This was a crime that devastated a family, devastated many lives, and that impact isn’t going to change. And, you know, he’s got the interest of protecting society from a person who’s accumulated a record for a robbery, forgery, and driving while under the influence of controlled substances just, you know, while I think

it's important that he gets the proper mental health treatment that he needs and that those factors be—you know, the existence of his mental health issues be considered by the Court, I don't see them sufficiently overriding the need for the Court to protect the public from future harm given the record that he's accumulated and that these things continue to occur.”

The court then invited argument, after which it continued to explain its point of view. It stated that factors referred to by defense counsel like defendant's mental health problems and 1999 head injury were mitigating factors. However, they also indicated defendant could not volitionally control his behavior, which was “actually just more of a concern . . . in terms of what the Court has to do. [¶] I'm trying to protect the community if the things that give him the propensity for this kind of conduct are beyond his control, that's a red flag.” The court understood defendant had sincere remorse for what had happened, but said “remorse alone isn't enough to protect society, especially when you've got long-standing mental health issues, long-standing substance abuse issues, and then a history of crimes of increasing severity, poor performance on probation.” After reviewing the probation department's circumstances in aggravation and mitigation, the court said, “I just think on balance the factors in aggravation outweigh those in mitigation” It stated it was deviating from the department's recommendations for the reasons it had stated and sentenced defendant to the aggravated term of three years for his conviction; it sentenced him as recommended by the department to one additional year for each other victim enhancement allegation. The court also imposed fines and fees recommended by the department, including “a penal fine of \$2,622.60 per Vehicle Code Section 23556[, subdivision] (a)(1).”

Defendant filed a timely notice of appeal.

DISCUSSION

I.

The Trial Court Did Not Abuse Its Discretion in Imposing the Upper Term Sentence.

Defendant first argues the trial court abused its discretion when it imposed the upper term sentence of three years for his drunk driving conviction, contrary to the probation department's recommendation that it impose the middle term of two years. This claim lacks merit.

Trial courts have broad discretion to select a sentence within the statutory range pursuant to Penal Code section 1170.¹ (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992 (*Wilson*)). “ [J]udicial discretion . . . means the exercise of discriminating judgment within the bounds of reason. To exercise judicial discretion, a court must know and consider all material facts and all legal principles essential to an informed, intelligent and just decision.’ ” (*People v. Muldrow* (1988) 202 Cal.App.3d 636, 643–644.)

“The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an “ ‘individualized consideration of the offense, the offender, and the public interest.’ ” (*People v. Sandoval* (2007) 41 Cal.4th 825, 847, quoting *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) In applying this standard, it is not our role to substitute our reasons for those omitted or misapplied by the trial court, nor to reweigh valid factors bearing on the decision below. (*People v. Scott* (1994) 9 Cal.4th 331, 355.)

Section 1170 was amended effective in 2007 “so that (1) the middle term is no longer the presumptive term absent aggravating or mitigating facts found by the trial judge; and (2) a trial judge has the discretion to impose an upper, middle or lower term based on reasons he or she states.” (*Wilson, supra*, 164 Cal.App.4th at p. 992.) The choice of the appropriate term, thus, rests “within the sound discretion” of the court. (§ 1170, subd. (b).) The court “shall select the term which, in the court's discretion, best

¹ All statutory references herein are to the Penal Code unless otherwise stated.

serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected” (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(e); *Wilson, supra*, 164 Cal.App.4th at p. 992.) The trial court can base an upper term sentence “ ‘upon any aggravating circumstance that the court deems significant, subject to specific prohibitions. [Citations.] The court’s discretion to identify aggravating circumstances is otherwise limited only by the requirement that they be “reasonably related to the decision being made.” ’ ” (*People v. Weber* (2013) 217 Cal.App.4th 1041, 1063–1064, quoting *People v. Sandoval, supra*, 41 Cal.4th at p. 848.) A trial court is prohibited from using an enhancement (unless stricken) or a fact that is an element of the crime to impose the upper term. (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c), (d).)

Defendant makes several arguments to support his abuse of discretion argument. First, he points out that, as at least one court has commented, the probation department, acting as a neutral source of information, plays the “most prominent role in informing the court of defendant’s history and available sentencing options in pronouncing judgment.” (*People v. Stuckey* (2009) 175 Cal.App.4th 898, 912–913.) This point is not significant because, as the People point out, the same case indicates a probation department’s recommendations are advisory in nature “and may be rejected in toto” by the sentencing court. (*People v. Server* (1981) 125 Cal.App.3d 721, 728.)

Defendant next presents the circumstances that he believes should be mitigating factors in his sentencing, i.e., his immediate expression of remorse for his actions, his taking responsibility for the damage he caused, his checking into a mental hospital, his diagnoses of bipolar and schizophrenia conditions, his persistent insomnia, the purported role his conditions and insomnia have played in his recurrent drug and alcohol addiction, the progress he has made since being properly diagnosed and treated, his seeking of substance abuse treatment, his support from a counselor from his treatment program and the recommendation of a substance abuse treatment service that he be placed in residential treatment. He concludes this presentation by asserting, “[s]ending [defendant] to prison for five years does not serve the public interest. Addicts and alcoholics often

falter in their recovery and may need several changes to be successful in long-term recovery. [Citation.] The people of the state of California have determined that using effective drug and alcohol treatment strategies reduces drug and alcohol-related crime; enhancing public safety and preserving jails and prison cells for serious and violence offenders. [Citation.] A five-year prison sentence for someone on the road to recovery is contrary to the public interest” and, therefore, the trial court abused its discretion in sentencing him to the upper term.

This extended argument reargues the circumstances presented to the court, highlighting those that were in mitigation and ignoring those that were aggravating. It asks that we reweigh the circumstances so as to conclude the probation department was correct in its recommendation. We are neither obligated nor permitted to do so. Rather, our limited role is to review the court’s decision for abuse of discretion. Under that deferential standard of review, we must affirm so long as the trial court, after consideration of all the facts and the law, based its upper sentence term upon one or more permitted aggravating circumstances that it deemed to be significant, and which was/were “ “reasonably related to the decision being made.” ’ ’ (*People v. Weber, supra*, 217 Cal.App.4th at pp. 1063–1064.) In the absence of defendant showing that the court’s sentencing decision was irrational or arbitrary, “ “the trial court is presumed to have acted to achieve the legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.” ’ ’ (*People v. Carmony* (2004) 33 Cal.4th 367, 376–377.) In other words, “ “a decision will not be reversed merely because reasonable people might disagree.” ’ ’ (*Id.* at p. 377.)

Defendant next argues that the trial court imposed the upper term sentence based on two improper circumstances because it “focused on the injuries to the victims, and its ‘need to protect the public’ ” Given that bodily injury was an element of the underlying offense and the basis for the other victim enhancements, and given that a court may not impose an upper term sentence based on either (§ 1170, subd. (b); Cal. Rules of Court, rule 4.420(c), (d)), defendant asserts the trial court’s imposition of the upper term sentence was an abuse of discretion.

This argument is unpersuasive in light of the trial court’s extended statement of its reasons for imposing an upper term sentence. Rule 4.421 of the California Rules of Court provides a list of circumstances for the court to consider as aggravating factors, including that the defendant served a prior prison term and previously performed unsatisfactorily on probation or parole. (Cal. Rules of Court, rule 4.421(b)(3), (5).) The court’s statements indicated it focused on these factors. It emphasized its responsibility to “protect society” in light of defendant’s “propensity for this kind of conduct” and “long-standing mental health issues, long-standing substance abuse issues, and then a history of crimes of increasing severity, poor performance on probation.” It stated there was a need “to maximize the benefit to society of preventing the defendant from committing new crimes by isolating him” and “to protect the public from future harm given the record that he’s accumulated and that these things continue to occur.” The court’s focus on these circumstances was appropriate and sufficient to support imposition of the upper term.

Further, defendant misconstrues the court’s references to the injuriousness of defendant’s present offense. Defendant is correct that “bodily injury” is an element of his drunk driving conviction (Veh. Code, § 23153, subd. (b)) and a basis for the other victim enhancement allegations. (*Id.* § 23558.) However, he is incorrect that the court “focused on the injuries to the victims” in imposing the upper term. Rather, the court referred to “the extent of the injuries to multiple victims” in deciding that *probation* would be inappropriate. It did not repeat this reference in stating its reasons for imposing the upper term. Rather, it referred to the crime as having “devastated a family,” which is not an element of defendant’s drunk driving offense or a basis for the enhancements.

Moreover, even if the court did consider “the extent of the injuries” to the victims in choosing the upper term, it was entitled to do so to the extent their seriousness went beyond mere “bodily injury.” A heightened level of injury is not an element of the offense or the enhancements. (See, e.g., *People v. Marshall* (1987) 196 Cal.App.3d 1253, 1259–1260 [rejecting defendant’s argument that “great violence” is an element of

the crime of battery with serious bodily injury and, therefore, “[i]t was proper for the court to consider great violence as a circumstance in aggravation”].)

For these reasons, we conclude the trial court did not abuse its discretion in imposing the upper term sentence.

II.

The Court’s Imposition of a \$2622.60 Penal Fine Must Be Stricken.

Defendant contends the court-imposed fine of \$2,622.60 must be stricken because it is without legal authority. We agree.

At the sentencing hearing, the judge imposed “a penal fine of \$2,622.60 per Vehicle Code [s]ection 23556 (a)(1).” This was the same as the probation department’s recommendation. Vehicle Code section 23556, subdivision (a)(1) states: “If the court grants probation to any person punished under Section 23554, in addition to the provisions of Section 23600 and any other terms and conditions imposed by the court, the court shall impose as a condition of probation that the person be confined in the county jail for at least five days but not more than one year and pay a fine of at least three hundred ninety dollars (\$390) but not more than one thousand dollars (\$1,000).” (Veh. Code, § 23556(a)(1).) This statute does not apply to defendant because he was not granted probation.

The abstract of judgment reflects that the \$2,622.60 fine was imposed pursuant to Vehicle Code section 23550. Vehicle Code section 23550, subdivision (a) provides for a fine between \$390 and \$1,000 in the event a defendant is convicted of multiple violations of certain Vehicle Code provisions.² This statute does not apply to defendant because he was not convicted of the offenses required for its application.

² Vehicle Code section 23550, subdivision (a) states in relevant part: “If a person is convicted of a violation of Section 23152 and the offense occurred within 10 years of three or more separate violations of Section 23103, as specified in Section 23103.5, or Section 23152 or 23153, or any combination thereof, that resulted in convictions, that person shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code, or in a county jail for not less than 180 days nor more than one year, and

The People do not assert these statutes authorize the court's imposition of the \$2,622.60 fine. Instead, they assert that the fine could have been imposed pursuant to yet another statute, Vehicle Code section 23560, which states: "If a person is convicted of a violation of Section 23153 and the offense occurred within 10 years of a separate violation of Section 23103, as specified in Section 23103.5, 23152, or 23153 that resulted in a conviction, that person shall be punished by imprisonment in the state prison, or in a county jail for not less than 120 days nor more than one year, and by a fine of not less than three hundred ninety dollars (\$390) nor more than five thousand dollars (\$5,000)." The People submit that since the fine could have been imposed under this section, we should modify the judgment and abstract of judgment to reflect that it was so imposed.

We reject the People's argument because there is no indication whatsoever in the record that the trial court intended to, or did, impose a fine pursuant to Vehicle Code section 23560, or that the court considered whether the circumstances required to do so were present in the record. The People provide no legal authority for our modification of the judgment and abstract of judgment as they request under these circumstances, and we are not aware of any.

DISPOSITION

We hereby order that the judgment and abstract of judgment be modified to reflect the striking of the fine of \$2,622.60. The judgment is affirmed in all other respects.

by a fine of not less than three hundred ninety dollars (\$390) nor more than one thousand dollars (\$1,000)."

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

People v. Anderson (A143461)