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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.

JOSEPH HANANIA,

Defendant and Appellant.

A145493

(Napa County
Super. Ct. No. CR172748)

Defendant Joseph Hanania pleaded no contest to willfully evading a peace officer, a felony, and resisting an executive officer in performance of his or her duties, a misdemeanor. He asked to be placed on probation, but the trial court sentenced him to 16 months in prison. On appeal, defendant argues the trial court abused its discretion by sentencing him to prison because it relied on factors that were not supported by the evidence. We disagree and find no abuse of discretion.

Separately, defendant argues the trial court awarded him the wrong amount of presentence custody credits, and asks us to modify the judgment. We agree that defendant is entitled to 23 additional days of presentence custody credits and will instruct the trial court to modify the judgment. As so modified, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant’s theft and subsequent flight from police

Because this matter was resolved without the taking of testimony or trial, we rely on the Napa County Probation Officer’s Report for a description of the underlying facts.

“According to [a police] report, on September 24, 2014, at approximately 1412 hours officers were dispatched for a report of a theft at 225 Soscol Avenue at the Napa Home Depot store. Dispatch[] stated a male suspect loaded stolen tools in the back of a dark colored pickup truck. The truck was last seen heading southbound, two minutes prior to officer’s arrival. Officers set up an area check.

“The [reporting] officer spoke with Maria Avalos, Home Depot Loss Prevention employee. As the officer gathered information, he heard over the radio that the suspect vehicle was located southbound on Highway 29. Officers were in a pursuit with the subject, who eventually stopped his vehicle on West Imola Avenue wherein he fled on foot before being apprehended. The suspect was later identified as Joseph Anthony Hanania.

“Avalos told the officer at 1252 hours she received a ‘Be on the Look Out (BOL)’ from the Vallejo Home Depot Loss Prevention Department regarding an attempted theft in their store. Avalos showed a picture of Hanania to the officer. The officer was told Hanania attempted to remove items until confronted, and left the store.

“At approximately 1354 hours Avalos noticed Hanania inside the [Napa Home Depot] store. Hanania began to select miscellaneous items such as light bulbs, tools, and large boxes as he walked through the [a]isle. He then walked along the front aisle of the store and then returned to the Electrical Department and took some more items. He walked past the cash registers, without attempting to pay, and left the store. He walked directly to the front parking lot. Avalos said she ran to catch up to him, and when she went out the exit door, she saw him loading the items into a bed of a small dark pickup truck, parked four or five spaces from the front door. She then called the police. She saw the truck travel southbound on Soscol Avenue.

“At approximately 1425 hours, officers were advised of a vehicle pursuit of a suspect (Hanania) in a theft that had occurred and at that time he was northbound on Highway 29 from Highway 221. As the officer responded on Imola, toward the Maxwell Bridge, he observed a deputy preparing to deploy a spike as the suspect vehicle approached. The officer observed the suspect vehicle eastbound down the eastern portion

of the bridge wherein the vehicle was traveling at a high rate of speed, weaving in and out of traffic. The vehicle passed the deployed spike strip and continued on Imola at a high rate of speed. The officer observed Officer Helfrich was leading the pursuit and two other officers were a distance away. Due to this the officer assisted in the pursuit. The vehicle proceeded eastbound, at speeds [in] excess [of] 70 miles per hour. After the vehicle passed Soscol Avenue, it swerved onto the right shoulder into gravel as it passed eastbound Imola traffic. The vehicle lost control and spun around 180 degrees, coming to a complete stop. The vehicle was facing westbound in the westbound lane. Due to the fact the driver had shown reckless an[d] wanton disregard for safety, the officer felt it was paramount to end the pursuit as soon as feasible. The officer drove his vehicle at a 45 degree angle across the westbound lane of Imola Avenue as the vehicle proceeded in the officer's direction, this blocked the vehicle's path and the vehicle continued toward the officer's direction, but quickly veered into the driveway at 1070 Imola Avenue when it came to an abrupt stop.

“Hanania exited the vehicle and began running westbound on Imola Avenue. The officer exited his vehicle and attempted to tackle him to the ground by wrapping his arms around his upper body, however, he continued to run. The officer caused him to fall to the ground. Hanania and the officer fell to the ground, the officer (Thomas Keener) fell on his left elbow.

“After landing on the ground, Hanania posted both hands onto the ground and attempted to push himself up. While he was doing this, the officer could feel him slipping from his grip. As he attempted to get up, the officer grabbed his hair and pulled him back to the ground. Other officers arrived at the scene. The officer transitioned to his knees and was unable to grab control of Hanania's hands. The officer could see Hanania's left hand was under his body, near his midsection and the officer knew this was a common area to conceal weapons. Fearing for his safety, the officer delivered three closed fist hammer strikes to Hanania's face. As officers told Hanania to place his hands behind his back, the officer could feel Hanania's body move violently. The officer

then placed his knee onto Hanania's head in order to keep him from moving his head and/or biting an officer.

"The officer requested medical attention for Hanania as he sustained scrapes to his face. The officer noticed he sustained contusions to his elbow and the top of his left hand, moderate pain to his elbow, and moderate pain to his left side as a result of delivering the hammer distraction strikes.

"While at the Queen of the Valley Hospital, where Hanania was being treated, the officer asked him what his plan was during the pursuit. He told the officer he wanted to get to an area that had a lot of traffic so he would then drive as reckless as he could. He said he would do this so the police would cancel the vehicle pursuit."

Defendant's negotiated disposition and sentence

The district attorney charged defendant with three felonies: resisting an executive officer from performing his or her duties (Pen. Code, § 69), willfully evading a peace officer while driving a motor vehicle (Veh. Code, § 2800.2), and second degree commercial burglary (Pen. Code, § 459). Defendant was also charged with misdemeanor receipt of stolen property (Pen. Code, § 496, subd. (a)), and misdemeanor driving with a suspended or revoked license (Veh. Code, § 14601.1, subd. (a)).

Pursuant to a negotiated disposition, defendant pleaded no contest on April 24, 2015, to resisting an executive officer from performing his or her duties, which was reduced to a misdemeanor. He also pleaded guilty to willfully evading a peace officer while driving a motor vehicle, a felony. The remaining charges were dismissed at the district attorney's request. The disposition included a sentencing "lid" of 16 months in state prison.

Defendant was 25 years old at the time of the events leading to his conviction in this matter. The probation officer's report filed in advance of the hearing recommended that probation be denied and defendant serve a state prison term. The recommendation was based in large part on defendant's criminal history, which included two felony convictions and five misdemeanor convictions. His first conviction was in 2008 for misdemeanor theft, for which he was placed on 36 months of probation in October 2008.

Defendant committed another misdemeanor—obstruction of an officer or emergency medical technician (Pen. Code, § 148, subd. (a)(1))—in November 2008. Then, in February 2009, he was charged with, and eventually convicted of, willfully evading a peace officer while driving a motor vehicle (Veh. Code, § 2800.2), the same felony he pleaded no contest to in this case. Defendant then reoffended in October 2010, this time by driving under the influence of alcohol (Veh. Code, § 23152, subd. (b)), resulting in another misdemeanor conviction. In March 2014, defendant was convicted of two additional misdemeanors related to driving a motor vehicle without a proper license.¹

Defendant's most recent conviction was in February 2015 for felony car theft (Veh. Code, § 10851, subd. (a)) arising from an incident that took place in November 2014, approximately two months *after* the incident leading to defendant's conviction in this case. According to the probation officer's report, defendant stole his ex-girlfriend's car in Mill Valley and used it to drive down to Santa Barbara, where the ex-girlfriend was staying with her mother. After defendant was located and contacted by police, he fled. Police pursued him, and while attempting to detain him, defendant "physically resisted" and "had to be tased to stop him. After being tased, [defendant] continued to kick and physically resist. Another officer deployed his taser wherein [defendant] stopped resisting."

The probation officer's recommendation was also based on defendant's unwillingness to seek help from mental health professionals despite his statements that he suffered from certain mental disorders, including Attention Deficit Hyperactivity Disorder and Oppositional Defiance Disorder. The report also stated that although defendant expressed remorse for his crimes, "defendant's remorse is questionable as he seems more concerned about the consequences he may face as opposed to his at risk behaviors and the risk he placed the police and others in the community."

¹ In addition to these crimes, Defendant received seven citations for traffic violations between October 2011 and January 2014.

At the sentencing hearing, the district attorney asked the trial court to adopt the probation officer's recommendation and sentence defendant to 16 months in prison. Defendant's counsel responded that defendant's case "clearly calls for probation." She argued that defendant's case, "while calling certainly for a long time in jail, is not a state prison case given his age and given his past record. He is a young man who still has many, many different ways to grow and the ability to do it. Mental health issues, especially at someone his age, are important. It's important that they're treated early. And it is still early."

After his counsel presented argument, defendant read a statement expressing remorse for his "absolutely outrageous crimes," and urged the court to grant probation. Defendant told the court that "[a]ll my life I have struggled to manage my own mental health," and that it "has become blaringly [sic] obvious that I suffer from undiagnosed and untreated mental health condition[s]." He recounted how in June 2014, "things began to go terribly wrong" after he had a falling out with his mother, lost employment at a sporting goods store, then had a difficult break-up with his girlfriend. These events, defendant explained, were part of the "catalyst that generated a violent tailspin of self destruction." Defendant said he made "desperate attempts to see a therapist or psychiatrist" but "became frustrated and overwhelmed trying to make appointments and comprehend health insurance." According to defendant, these circumstances are what led him to steal from Home Depot and then flee from police. He explained that he was working on a demolition project, but that "[i]n my agitated state of mind, I chose to obtain the tools necessary to complete this project by taking them illegally. When the police attempted to apprehend me, I impulsively chose to flee without considering the safety of the public, the safety of the police, or my personal safety."

Defendant stated that if "left untreated, my mental health will continue to deteriorate, that I will absorb this toxic environment, drown in the criminal element, and become institutionalized." Instead of prison, defendant hoped "that the Court will assist me in gaining access to therapeutic or psychological resources that will help me to make permanent and essential change in the way that I cope with disappointment and failure."

He told the court that “I’m willing to abide by all terms and conditions of probation, if granted, work with a therapist or psychiatrist in order to better understand and overcome the personal challenges, and for the first time in my life I’m willing to take psychotropic medication as recommended. I’m determined to overcome my mistakes.”

After the parties submitted their arguments, the trial court announced it was denying probation and sentencing defendant to 16 months in state prison. The trial court explained that “this case was very serious, very dangerous,” and that defendant “has a prior history of the same kind of conduct.” The court was “impressed” by defendant’s comments and intelligence, but believed that “sometimes that cuts both ways for somebody. Because sometimes what happens is you get people who are—who have good social skills, who are intelligent, and they get involved in criminal behavior because they believe they can get away with it and they believe they can talk their way out of it.”

The court observed that “what keeps coming through in my assessment of his situation is that he wants to do the things that he wants to do and he’s not really willing to follow through with what a probation officer tells him to do, or a police officer. And what happened here could have been incredibly tragic given his conduct here, and he seemed to be completely unwilling to take that into account when he made the decisions that he made in this case.” The court noted “as an aside” that defendant has an “abysmal” driving record, and that “then you add to that the prior felony convictions, the prior misdemeanor convictions as set forth in the [probation officer’s report]. The Court simply cannot conclude that he’s an appropriate candidate for probation.”

At this point, defendant’s counsel asked to “respond” to the court’s comments. The court permitted counsel to do so, and she made a further request for “behavior modification” therapy in light of defendant’s age. The court responded “I understand” but told defendant’s counsel it did not see defendant “in the same way you do. It’s as simple as that.” The court then concluded: “Probation is denied based on defendant’s prior poor performance on parole [sic], serious nature of the offense, and his prior criminal record.”

Defendant timely filed this appeal.

DISCUSSION

Sentencing error

Defendant contends the trial court abused its discretion in denying him probation because it relied on factors “that had no support in the evidence.” We disagree.

A trial court is given discretion to grant or deny probation to a defendant who is otherwise eligible. (Pen. Code, § 1203, subd. (b)(3).) “The trial judge has broad discretion in determining whether the statutory conditions are satisfied. [Citation.] This discretion, however, is neither arbitrary nor capricious, but is an impartial discretion, guided and controlled by fixed legal principles, to be exercised in conformity with the spirit of the law, and in a manner to subserve and not to impede or defeat the ends of substantial justice. [Citations.] Discretion is abused when granting probation ‘exceeds the bounds of reason, all of the circumstances being considered.’ [Citations.]” (*People v. Warner* (1978) 20 Cal.3d 678, 683, superseded by statute on another point as stated in *People v. Douglas* (1999) 20 Cal.4th 85, 92, fn. 6.)

California Rules of Court, rule 4.414² sets out criteria relating to the crime and to the defendant that the trial court may consider in exercising its discretion to grant or deny probation. As relevant here, those factors include the seriousness of the crime as compared to other instances of the same crime (rule 4.414(a)(1)), a defendant’s prior record of criminal conduct (rule 4.414(b)(1)), a defendant’s prior performance on probation (rule 4.414(b)(2)), and the willingness and ability of a defendant to comply with reasonable terms of probation (rule 4.414(b)(3) and (b)(4)).

“A defendant who is denied probation bears a heavy burden to show the trial court has abused its discretion. [Citations.]” (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1157.) “[I]n determining whether a trial court abused its discretion by denying probation, we consider, in part, whether there is sufficient, or substantial, evidence to support the court’s finding that a particular factor was applicable.” (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1313, disapproved of on other grounds by *People v. Cook*

² All further references to rules are to the California Rules of Court.

(2015) 60 Cal.4th 922, 935.) On appeal, we may not reweigh the sentencing factors. (*People v. Scott* (1994) 9 Cal.4th 331, 355.) Instead, we limit our review to a single issue—“whether the sentencing court abused its statutory discretion.” (*People v. Jordan* (1986) 42 Cal.3d 308, 317.)

Defendant asserts the trial court abused its discretion in denying probation because it incorrectly “alluded” to defendant’s “prior felony convictions,” his “poor performance on parole,” and his “prior criminal record.” We are not persuaded. The trial court accurately stated that defendant had “prior felony convictions,” as the record shows he had two other felony convictions at the time of sentencing in this case: his conviction in 2009 for willfully evading a peace officer, and his conviction in February 2015 for car theft. Defendant, however, disputes the characterization that he had “prior felony convictions” because the incidents leading to the car theft conviction occurred in November 2014, which was *after* he committed the underlying crime in this case. Defendant has cited no authority supporting his contention that it was improper for the trial court to consider the felony car theft conviction. In fact, the trial court’s consideration of the car theft conviction appears to be fully consistent with rule 4.414, which lists as a factor a defendant’s “[p]rior record of criminal conduct, . . . including the *recency* and frequency of prior crimes[.]” (Rule 4.414, subd. (b)(1), *emphasis added*.)

The record also shows defendant had a significant criminal record and performed poorly on probation in the past. After his first misdemeanor conviction in 2008 for theft, he was placed on 36 months of probation. During that probationary period, he committed three more offenses, including a felony in 2009 for the same crime he was convicted of here—fleeing from a police officer. After his felony conviction in 2009, he was again placed on 36 months of probation, but just over a year later, his probation was modified and he was required to serve 30 days in jail. All told, the trial court could properly characterize defendant’s prior performance on probation as “poor.”³

³ In denying probation, the trial court made other findings based on rule 4.414 that defendant does not challenge on appeal. These include that defendant’s crime was “very serious, very dangerous” (rule 4.414(a)(1)), and that defendant had a long criminal

Defendant faults the trial court for referring to defendant's performance on "parole" because defendant had been on "probation," not parole. It is apparent the trial court simply misspoke and was referring to defendant's prior performance on probation.⁴ The record shows the trial court relied on the probation officer's report, which discussed defendant's prior performance on probation. The trial court's statements at sentencing made clear he understood defendant had been on probation, stating its belief that defendant has shown "he wants to do the things he wants to do and he's not really willing to follow through with what a probation officer tells him to do[.]"⁵

Defendant also argues that he was "denied due process of law by being arbitrarily deprived of a state-created liberty interest," and was "further denied his federal

history (rule 4.414(b)(1)), including a prior felony conviction for the same kind of conduct—fleeing from a police officer—that led to his felony conviction in this case.

⁴ Defendant admits that it is a "possibility" that the court misspoke, but argues "[i]t is also a possibility that the court was confusing [defendant] with another defendant." Any suggestion that the trial court mistook defendant for another person is fatuous.

⁵ Defendant did not make any of these objections at the sentencing hearing. Anticipating that the Attorney General might raise a forfeiture argument, defendant argues his trial counsel did not have a reasonable opportunity to object to the reasons the trial court gave for denying probation. The Attorney General, however, has not argued forfeiture on appeal, and for good reason. Our Supreme Court has made clear that a defendant forfeits a challenge to a discretionary sentencing decision on appeal only if the trial court "clearly apprised" the parties "of the sentence the court intend[ed] to impose and the reasons that support any discretionary choices." (*People v. Scott, supra*, 9 Cal.4th at p. 356.) This means the trial court must "describe[] the sentence it intends to impose and the reasons for the sentence," and "thereafter consider[] the objections of the parties before the actual sentencing." (*People v. Gonzalez* (2003) 31 Cal.4th 745, 752.) It is not clear that the trial court followed the Supreme Court's guidance in this case. After hearing from the parties, the court asked if there were "[a]ny final comments from the defense" and whether the matter was "submitted." At that point, the court announced defendant's sentence, albeit with a brief interjection of a "response" by defendant's counsel that we described earlier. Although the trial judge permitted defense counsel to be heard again at that point, he commented that "the matter was submitted on both sides." Under these circumstances, we consider all of defendant's arguments on the merits, and need not reach defendant's alternative argument that if he was required to object before the trial court, his counsel's failure to do so amounted to ineffective assistance of counsel.

constitutional right to fairness in having a sentencing hearing based on reliable information.” Because we find that the trial court did not abuse its discretion in imposing sentence, we need not address these arguments.

Presentence custody credits

Defendant argues he was entitled to 260 days of presentence custody credits instead of the 237 days awarded by the trial court, and asks us to modify the judgment to reflect 260 days of credits. The Attorney General agrees.

A defendant who was in custody prior to his conviction is entitled to credit for “all days of custody . . . upon his or her term of imprisonment.” (§ 2900.5, subd. (a).) He or she is also entitled to receive four days of custody credit for every two days spent in actual custody, including the day of arrest and the day of sentencing. (§ 4019, subs. (a)(1), (f); *People v. Bravo* (1990) 219 Cal.App.3d 729, 735.) Here, defendant was taken into custody on September 24, 2014, then released 21 days later after posting bail on October 14, 2014. He was taken into custody again on February 28, 2015, and remained in custody until he was sentenced on June 16, 2015, for 109 additional days in custody. In total, defendant spent 130 days in custody before sentencing. Under Penal Code section 4019, he is entitled to an additional 130 days of conduct credit, totaling 260 days of presentence custody credits.

DISPOSITION

The matter is remanded to the trial court to amend the abstract of judgment to reflect 260 days of presentence custody credits. As so modified, the judgment is affirmed.

Miller, J.

We concur:

Kline, P..J.

Richman, J.

A145493, *People v. Hanania*