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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.

MASON CONNER STOTTSBERRY,

Defendant and Appellant.

A147031

(Mendocino County
Super. Ct. No. 1371144)

This is an appeal from judgment after the trial court revoked the probation of defendant Mason Conner Stottsberry and sentenced him to the upper term of three years in state prison following his commission of several probation violations. Defendant was initially placed on probation as part of a negotiated disposition after pleading guilty to felony forgery. Defendant challenges his upper sentence as an abuse of the trial court's discretion due to the lack of sufficient evidence to support it. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On January 24, 2013, a complaint was filed charging defendant with the following crimes: felony forgery (Pen. Code, § 470, subd. (a)) (count one), grand theft (Pen. Code, § 487, subd. (a)) (count two), and theft or embezzlement from an elder (Pen. Code, § 368, subd. (d)) (count three).¹ These charges arose from the following events set forth in the probation report.

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

In early January 2013, defendant's grandmother, Christine, discovered fraudulent activity in her checking account. Between January 4, 2013 and January 9, 2013, several checks totaling \$2,343.34 were written to defendant's girlfriend, Anastassia. After being confronted by Christine, defendant, who enjoyed full access to her house, admitted taking the checks and depositing them in Anastassia's account. Defendant then promised Christine he would repay her. Christine warned defendant that, if he stole from her again, she would notify the police.

Nonetheless, a few weeks later, Christine discovered that, between January 17, 2013 and January 22, 2013, several more of her checks, this time totaling \$6,459.00, had been written to Anastassia. Christine thus contacted the Sheriff's department, which, in turn, contacted Anastassia, who denied knowing defendant had used her bank account to unlawfully deposit his grandmother's checks.

On June 5, 2013, defendant pleaded guilty to count one, felony forgery, pursuant to a negotiated disposition calling for his placement on probation and payment of restitution, with a maximum sentence of three years in county jail, to be suspended so long as he remained in compliance with the terms of his probation. Among other such terms, defendant was ordered to receive mental health counseling and abstain from all mind-altering substances (including drugs, alcohol and marijuana). Sentence was thus imposed in accordance with this negotiated disposition on July 22, 2013.

On September 20, 2013, a notice of probation violation was filed by the probation department alleging that defendant had tested positive for marijuana and methamphetamine, acknowledged snorting the prescription drug, Adderall, without a prescription, and failed to report to his probation officer as directed. On October 1, 2013, defendant admitted testing positive for marijuana and methamphetamine, and the court revoked and reinstated his probation on the condition that he serve 80 days in county jail or successfully complete a 90-day term at a substance abuse rehabilitation facility.

On January 27, 2015, another notice of probation violation was filed, this time alleging that defendant had failed to report to his probation officer as directed since August 6, 2014, had left the state to travel to Washington without permission and, while

there, had been convicted of domestic violence and malicious mischief and ordered to stay away from Anastassia and their son. This petition also advised the court that plaintiff had failed to provide any proof of substance abuse treatment, to provide proof of mental health counseling or medication since June 2013, and had failed to comply with court orders to pay restitution, complete community service and submit to DNA testing. The probation department thus recommended revoking probation and sentencing defendant to the upper three-year term in county jail.

On February 17, 2015, defendant admitted the alleged violations and the court, after finding him in violation, referred the matter to the probation department for a supplemental report before releasing him on his own recognizance, noting for the record that, “I understand there are some mental health issues at play and I need to get some more information about that.”²

Defendant appeared before the court several times between March 2015 and July 2015, each time addressing the issue of his mental health and substance abuse treatment. Several times, the court prevailed upon defendant the importance of addressing these issues and warned him that, should he continue to violate probation, he faced the possibility of three years in jail.

On July 29, 2015, the court issued a warrant for defendant’s arrest after he failed to appear in court. When defendant did appear on August 5, 2015, the court noted he had admitted using “illicit substances and prescription medication that was not prescribed to him.” The court also noted its preference that he enter into a residential substance abuse treatment program rather than go into custody.

On August 19, 2015, defendant appeared again, and the court expressed concern that he had moved out of his mother’s home, leaving his mental illness medication behind. Defendant denied that he was not taking his medication, and explained that he had been kicked out of his mother’s house and was living with a friend. He

² During the hearing, defense counsel had advised the court that defendant had been taking medication for mental health issues, but had “[gone] off his medications and his life kind of spiraled out of control when he was off the medication.”

acknowledged having failed to report this move to his probation officer. The court urged him to reconnect with probation and continue mental health treatment.

On November 9, 2015, a third notice of probation violation was filed alleging that defendant had failed to report at a scheduled court hearing on September 2, 2015. It was also noted that misdemeanor complaints had been filed alleging that defendant committed petty theft on September 8, 2015 and resisted or obstructed an officer on November 8, 2015.

On November 30, 2015, following a contested hearing, the court revoked defendant's probation based on his previously admitted violations and sentenced him to the upper term of three years. This timely appeal followed.

DISCUSSION

Defendant raises one argument on appeal – to wit, that the trial court abused its discretion by sentencing him to the upper three-year term after revoking his probation following several violations of its mandatory terms. Defendant reasons that the two aggravating factors relied upon by the trial court in rendering this sentence were not supported by the evidentiary record. We begin with the relevant factual background before turning to the governing law.

At the sentencing hearing, the trial court noted the probation department's recommendation to revoke probation and order defendant to serve the upper three-year term in prison. Agreeing with this recommendation, the prosecutor noted as aggravating factors that defendant had used his girlfriend as a "straw man" to deposit forged checks worth over \$8,000 stolen from his elderly grandmother (to wit, a vulnerable victim). The prosecutor also noted that defendant had multiple probation violations, including failure to pay court-ordered restitution, and described his mental health problems as "purely self-inflicted by his ongoing substance abuse, alcohol abuse, drug abuse."

Defense counsel, in turn, sought the midterm of two years in county jail, describing defendant's mental health as a mitigating factor rather than an aggravating factor, and as the reason for his failure to successfully complete probation. The

prosecutor offered to stipulate to the middle term if defendant agreed to waive his 158 days of credit. Defendant, however, rejected this offer.

After hearing further argument, the trial court ultimately decided upon the upper term, concluding several key aggravating factors – including the sophistication of the crime and abuse of a trust relationship with the victim, “an elderly family member,” coupled with defendant’s multiple probation violations and ongoing drug abuse – outweighed factors in mitigation.

According to defendant, the aggravating factors relied upon by the trial court to impose the upper term lacked the requisite support of substantial evidence. At the same time, however, defendant acknowledges the trial court has wide discretion in weighing aggravating and mitigating factors, and its exercise of discretion will be disturbed on appeal only if it has been abused. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) “As under the former [statutory] scheme, a trial court will abuse its discretion under the amended scheme if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. (See, e.g., *People v. Colds* (1981) 125 Cal.App.3d 860, 863 [178 Cal.Rptr. 430] [it is improper to consider a waiver of jury trial in mitigation, or an exercise of the right to jury trial as aggravation]; *People v. Johnson* (1988) 205 Cal.App.3d 755, 758 [252 Cal.Rptr. 302] [‘defendant’s alienage is not a proper factor when considering the length of his term’].) A failure to exercise discretion also may constitute an abuse of discretion.” (*People v. Sandoval* (2007) 41 Cal.4th 825, 847-848.)

On appeal, we review the record only for substantial evidence supporting the aggravating factors relied upon by the trial court to support its sentencing decision. “Under the DSL, a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions. (See, e.g., Cal. Rules of Court, rule 4.420(c) [fact underlying an enhancement may not be used to impose the upper term unless the court strikes the enhancement]; *id.*, rule 4.420(d) [fact that is an element of the crime may not be used to impose the upper term].” (*People v. Sandoval, supra*, 41 Cal.4th at p. 848.) Moreover, in reviewing the court’s exercise of

discretion, we keep in mind that just one valid aggravating factor will justify imposition of an upper term. (*People v. Black* (2007) 41 Cal.4th 799, 815 (*Black*); see also *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043 [“a single factor in aggravation is sufficient to justify a sentencing choice”].) 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.’ (Cal. Rules of Court, rule 4.408(a).)” (*People v. Sandoval, supra*, 41 Cal.4th at p. 848 [fn. omitted].) In determining “ ‘whether there are circumstances that justify imposition of the upper or lower term,’ ” the trial court may consider, among other things, “the record of the trial, the probation officer’s report, and statements submitted by the defendant, the prosecutor, and the victim or victim’s family. (§ 1170, subd. (b).)” (*People v. Sandoval, supra*, 41 Cal.4th at p. 848.)

Here, we conclude the record is sufficient to support the aggravating factors relied upon by the trial court to justify imposition of the upper term. Most significant to our conclusion, as the trial court noted, the victim was not only a trusted family member who had granted defendant open access to her home, she was an elderly family member, reflective of a particular vulnerability, as well as defendant’s particularly egregious abuse of trust. (See *People v. Price* (1984) 151 Cal.App.3d 803, 814 [“vulnerability” in this context means “ ‘. . . [of] a special or unusual degree, to an extent greater than in other cases.’ [Citation.] It is proper to focus upon the total milieu in which the commission of the crime occurred in assessing vulnerability pursuant to Rule 421. [Citation.] Both the personal characteristics of the victim and the setting of the crime may be considered”].) In addition, also noted by the trial court, defendant’s crime reflects a “pretty sophisticated” scheme of using his girlfriend to deposit multiple forged checks in her bank account in order to consummate the thefts against his grandmother. (Cal. Rules of Court, Rule 4.421, subd. (a)(8) [evidence of “planning, sophistication, or professionalism” constitutes a factor in aggravation].)

While defendant insists his crime was simply a typical felony forgery rather than particularly sophisticated, the trial court had discretion to conclude otherwise based upon the evidence that he used his girlfriend as a “go-between” to consummate his theft of

over \$8,000 worth of stolen checks. (See *People v. Carmony* (2004) 33 Cal.4th 367, 376-377 [trial court does not abuse its discretion unless the sentencing choice is “so irrational or arbitrary that no reasonable person could agree with it”].)

Moreover, and in any event, as stated above, even a single appropriate factor is sufficient to support an aggravated term. (*People v. Williams* (1991) 228 Cal.App.3d 146, 153.) Here, we have sufficient evidence of at least one (if not two) aggravating factor – to wit, the vulnerable nature of the elderly victim and defendant’s abuse of his position of trust with her – to support the court’s imposition of the upper term. Thus, even assuming for the sake of argument that the trial court erred when finding his crime to be notably sophisticated, any such error would have to be deemed harmless in this case.³ (E.g., *People v. Dancer* (1996) 45 Cal.App.4th 1677, 1695, disapproved on another ground in *People v. Hammon* (1997) 15 Cal.4th 1117, 1123.)

DISPOSITION

The judgment is affirmed.

Jenkins, J.

³ Given the evidence supporting at least one of the factors relied upon by the trial court to impose the upper term, we need not address defendant’s additional claim that “there is no substantial evidence supporting the trial court’s finding the offenses on probation coupled with the claimed drug use constituted an aggravating factor.” We note, however, that, contrary to defendant’s suggestion, the record as described above (pp. 3-4, *ante*) does in fact reflect the trial court’s consideration of, and appreciation of, the seriousness of his mental health concerns. However, as defendant’s probation officer noted, these concerns were exacerbated by his ongoing substance abuse and refusal to take prescribed medication, factors that defendant understood, yet refused, to adequately address. (See *People v. Hubbell* (1980) 108 Cal.App.3d 253, 259-260 [while defendant’s history of psychiatric problems is a mitigating factor, “[t]he sentencing court was fully aware of defendant’s mental condition and presumably deemed this factor outweighed by the factors cited in aggravation”].)

We concur:

Pollak, Acting P. J.

Siggins, J.

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