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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL MILBAUER,

Defendant and Appellant.

2d Crim. No. B235014
(Super. Ct. No. NA075342)
(Los Angeles County)

Daniel Milbauer appeals the order revoking probation following his no contest plea to possession of a firearm with a prior battery conviction (Pen. Code,¹ former § 12021, subd. (c)(1)).² The trial court sentenced him to 16 months in state prison. Appellant contends the court abused its discretion by revoking probation and imposing a prison sentence. We affirm.

FACTS AND PROCEDURAL HISTORY

In March 1998, appellant was convicted of battery. Pursuant to that conviction, he was prohibited from possessing firearms or ammunition for a period of 10 years. On August 7, 2007, appellant contacted an employee at his bank and threatened to

¹ All statutory references are to the Penal Code.

² Effective January 1, 2012, former section 12021, subdivision (c)(1) was repealed and reenacted as section 29805 without substantive change.

get a shotgun and start shooting people. In subsequently executing a search warrant at appellant's residence, officers found several assault rifles and other firearms along with ammunition and other weapon components. Five of the assault rifles had been previously registered to appellant. Appellant claimed he did not know that he was prohibited from possessing firearms. He later claimed that his attorney had advised him of this, but also told him to lie if anyone asked him about it.

Appellant was charged with five counts of possessing an assault weapon (former § 12280, subd. (b)),³ one count of possession of a firearm with a prior battery conviction, and one count of possessing ammunition (former § 12316).⁴ Pursuant to a plea agreement, appellant pled no contest to the charge of possession of a firearm with a prior battery conviction and the remaining counts were dismissed. Imposition of sentence was suspended and appellant was placed on three years formal probation. The terms and conditions of probation required appellant to comply with all laws and prohibited him from owning, using, or possessing any firearms.

Probation officer Juan Ruddy was assigned to supervise appellant. Appellant was given forms to report to probation on a monthly basis. He originally listed an address in Long Beach as his residence. A few months later, he listed his address as 3876 Ocean View Avenue in Los Angeles. A few months after that, he listed his address as 3768 Ocean View Avenue.

On September 4, 2008, appellant sought permission from Ruddy to travel to Maine. Appellant said he intended to move to Maine with his girlfriend, Veronica Stauffer. Ruddy granted the request, and appellant travelled to Maine from September 15, 2008, until September 24, 2008.

³ Effective January 1, 2012, former section 12280, subdivision (b), was repealed and replaced by section 30605 without substantive change.

⁴ Effective January 1, 2012, former section 12316, subdivision (b)(1) was repealed and replaced by section 30305 without substantive change.

When appellant reported to Rudda at the beginning of October 2008, he requested permission to travel to Maine again in order to help Stauffer move into the house they had recently purchased. Rudda told appellant he needed to seek permission from the court. The court granted appellant permission to travel to Maine from October 15, 2008, until November 3, 2008. Rudda thereafter granted numerous additional requests for appellant to travel to Maine.⁵

In June 2009, Rudda received appellant's monthly reporting form by mail. This time, appellant listed his address as 6873 Ocean View Avenue in Los Angeles. The postmark, however, was from Houlton, Maine. When Rudda asked appellant about the different address on Ocean Avenue, appellant said he was using a friend's address in California.

On February 5, 2010, Rudda sought early termination of appellant's probation. Rudda subsequently informed appellant that the court had denied the request.

Appellant reported to Rudda in person on June 4, 2010. He listed his employer as Aroostock County Pickers Antiques at 3768 Ocean Avenue in Los Angeles. He told Rudda, however, that the business was in Maine. Rudda granted appellant permission to work in Maine, but "told him most likely he needed to come back to court and request either termination or permission at that time." Appellant made no such request.

In October 2010, Agent Kenneth Stengel from the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATFE) was conducting a routine inspection of a gun store in Maine when he discovered documents indicating that Stauffer had bought several large caliber assault weapons. When Agent Stengel interviewed Stauffer at her residence on October 21, 2010, Stauffer said "we" had bought the guns even though they were

⁵ At the probation violation hearing, Rudda testified that he had "assumed" he could continue granting appellant's travel requests "because the court had given [appellant] permission before" When asked whether he had tried to verify this, Rudda responded, "No. He was one of over 200 cases I [was] supervising at that time." A probation department supervisor testified that a probationer who wants to travel out of state must follow the Interstate Compact Policy, which allows probationers to leave the state for no more than 30 days. Requests to leave the state were in appellant's file, but the supervisor had not approved any of them.

registered solely in her name. Stauffer told Agent Stengel that although the weapons were not at the house, he could look at them if he returned later that day. When the agent returned, appellant was there. Appellant said he occasionally stayed with Stauffer but had his own residence. Agent Stengel said he wanted to verify the serial numbers on the weapons. Stauffer came out onto the front porch, handed the weapons to appellant, and went back inside. Appellant handed the weapons to Agent Stengel and said "we" had bought them as an investment. Appellant also said the weapons were stored in a safe inside the house and that only Stauffer knew the combination. Appellant then assisted the agent in locating the serial numbers on the weapons.

On December 27, 2010, the probation department submitted Agent Stengel's report of his interview with appellant and requested that appellant's probation be revoked and a bench warrant issue. The court granted the request. On June 16, 2011, appellant moved to recall and quash the bench warrant and terminate probation. On June 22, 2011, the court recalled and quashed the warrant, reinstated appellant on probation with the same terms and conditions, and set the matter for further proceedings.

In the meantime, on June 20, 2011, ATFE Special Agent Daniel Woolbert and an agent from the Maine Drug Enforcement Agency conducted an undercover investigation of appellant while he was working at the Aroostock County Pickers Antique Store. Appellant said that he was in business with his wife. He also said he was recently off probation in California and that the police had seized all of his firearms. He further stated that an ATFE agent had recently visited him and said he knew that agents tried to trick people.

Appellant had a Maine medical marijuana card and said he wanted to smoke some marijuana in his vehicle. Appellant gave Agent Woolbert a "chunk of product" and said he would feel better if he smoked with him. Agent Woolbert declined. As appellant smoked marijuana, he said he had moved to Maine because of the "wide open" gun market and "relaxed" marijuana laws.

On June 29, 2011, the People moved the court to revoke probation and sentence appellant to state prison. Appellant testified that he had never travelled to

Maine during his probation without first obtaining permission from either the court or Rudda. He used his ex-girlfriend's address on Ocean Avenue in Los Angeles as his local residence, but accidentally inverted the street numbers on a few occasions. He admitted that although Rudda had ostensibly given him permission to live in Maine, he "had a good indication that it was wrong."

Appellant also admitted knowing he could not possess firearms, but believed it was acceptable to advise Stauffer regarding her investments in firearms. He consulted with an attorney in Maine, who told him it was okay to advise Stauffer so long as no firearms were kept on his property and he did not "have access, control, or possession in any way, shape, or form." Appellant claimed he did not live with Stauffer and that the antique store was his primary residence.

Appellant denied handling the firearms that Agent Stengel inspected when he came to Stauffer's residence. He also denied offering marijuana to Agent Woolbert, and claimed he knew the agent and his partner were from the ATFE when they asked him to sell guns.

At the conclusion of the hearing, the court found appellant in violation of his probation. The court stated: "The first [violation] is offering drugs to another. You had no business doing that. [¶] The second ground is that you moved to the state of Maine without the permission of the court or of the probation officer. [¶] It seems to me that Mr. Rudda wasn't quite paying attention the way he should have been. Maybe he was overwhelmed with his case load. Maybe he was lazy. I have no idea. But there is no doubt in my mind that you knowingly took advantage of his neglect and moved to the state of Maine. Your intention was to move to the state of Maine as early as late 2009 [sic] and you said that. You moved to the state of Maine and your presence here in California was a sham address of a mailing address, if you will. [¶] The third violation is that you are in possession of firearms. I don't agree with [defense counsel] that this was a setup by ATF Agent Stengel. His description of Miss Stauffer rushing those firearms out to you, putting them in your arms and then closeting [sic] herself behind the door just tells me that those firearms were your charge. They were in your possession and this was

your business." The court added: "I have no idea what else you are doing in the state of Maine. I have no doubt that you are still fooling around with guns when you have no right to be; that you were there in the state of Maine without the permission of the court; and that you were pushing drugs onto somebody else for whatever purpose that you had in your mind. For those three reasons I find you in violation of probation."

The prosecution asked the court to terminate probation and sentence appellant to no less than the midterm of two years in state prison. Appellant argued that a prison sentence was unwarranted and urged the court to convert his formal probation to summary probation and extend it for one to two years. Appellant noted that he had a home and business in Maine and stated he "has been a law abiding, upstanding and productive citizen in the state of Maine without any trouble at all, without any additional arrest, without any additional detentions."

In addressing appellant, the court stated: "[I]t appears to me that you have had no intention of cooperating with the probation authorities here in the state of California. You didn't want to be on probation. You didn't want to conform your conduct to a probationary grant." The court proceeded to revoke probation and sentenced appellant to the low term of 16 months in state prison. This appeal followed.

DISCUSSION

Appellant contends the court abused its discretion by revoking probation and sentencing him to state prison. We disagree.

"Trial courts are granted great discretion in deciding whether or not to revoke probation. [Citation.]" (*People v. Kelly* (2007) 154 Cal.App.4th 961, 965.) Section 1203.2, subdivision (a) states, in relevant part, "the court may revoke and terminate [probation] if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her [probation]" Subdivision (c) of that section provides, in relevant part: "Upon any revocation and termination of probation the court may, if the sentence has been suspended, pronounce judgment for any time within the longest period for which the person might have been sentenced." At a

probation revocation hearing, proof of facts supporting the revocation of probation may be made by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447.) "[O]nly in a very extreme case should [a reviewing] court interfere with the discretion of the trial court in the matter of . . . revoking probation." (*Id.* at p. 443.)

This is not one of those "extreme cases" in which it can be said the court's decision to revoke probation and impose a state prison sentence amounts to an abuse of discretion. As appellant effectively concedes, the undisputed fact that he gave marijuana to Agent Woolbert is sufficient by itself to support the court's decision. (§ 1203.2, subd. (a); *People v. Galvan* (2007) 155 Cal.App.4th 978, 981.) Contrary to appellant's claim, the evidence is also sufficient to support the findings that he willfully violated his probation by moving to Maine and possessing firearms. Although Rudda gave appellant permission to travel to and work in Maine, appellant conceded at the probation violation hearing that he "had a good indication that it was wrong." Moreover, Rudda made clear to appellant that if he wanted to permanently move to Maine, he had to obtain permission from the court and seek early termination of his probation. Appellant was also notified that the court had denied Rudda's request for early termination of probation. This evidence supports the court's finding that appellant "knowingly took advantage" of Rudda's lack of supervision and moved to Maine even though he knew he was prohibited from doing so without the court's permission.

The court's finding that appellant had been in possession of firearms is supported by Agent Stengel's eyewitness testimony to that effect. Although appellant characterizes his possession as merely "temporary," the court did not have to find that appellant possessed the weapons for any particular period of time in order to find that said possession amounted to a willful violation of his probation.

Appellant also fails to establish the court abused its discretion by sentencing him to state prison instead of reinstating him on probation. In arguing to the contrary, appellant merely offers that the evidence demonstrates he "is capable of reformation and rehabilitation, which is consistent with the purpose of probation." We are not persuaded. "When the question on appeal is whether the trial court has abused its

discretion, the showing is insufficient if it presents facts which merely afford an opportunity for a difference of opinion. An appellate tribunal is not authorized to substitute its judgment for that of the trial judge. [Citation.]" (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) Based on the evidence, the court reasonably found that appellant "had no intention of cooperating with the probation authorities here in . . . California." This finding supports the court's decision to sentence appellant to state prison rather than reinstate him on probation. (Cal. Rules of Court, rule 4.414(b)(3).) The court's "determination that a prison term was required . . . is one which any other judicial officer might well have made under the same circumstances In the absence of any showing that the court's decision was arbitrary or capricious, we will uphold it on appeal." (*People v. Downey* (2000) 82 Cal.App.4th 899, 910.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Arthur Jean, Jr., Judge
Superior Court County of Los Angeles

Hart J. Levin, under appointment by the Court of Appeal, for Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Alene M. Games, Deputy Attorney General, for Respondent.