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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ALLEN ROBERTSON,

Defendant and Appellant.

B242673

(Los Angeles County
Super. Ct. No. KA093781)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daniel S. Lopez, Judge. Affirmed.

Jasmine Patel, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

After being granted probation pursuant to Proposition 36, appellant failed to return to court as ordered. A bench warrant was issued and the warrant remained outstanding for almost eight months. Appellant ultimately appeared in court because he was arrested on the warrant. He admitted he was in violation of probation for failing to return to court as ordered. The trial court found appellant had made no progress in the Proposition 36 program and that his absence from court demonstrated he was no longer a viable candidate for the program. Proposition 36 probation was terminated and a state prison sentence was imposed.

Appellant contends the trial court erred by refusing to reinstate Proposition 36 probation. We affirm the judgment because appellant's lengthy absence from court and his failure to enroll in a drug treatment program supported the trial court's decision.

II. DISCUSSION

“By its terms, Proposition 36 requires the court to grant probation with a drug treatment condition to any person convicted of a nonviolent drug possession offense and prohibits incarceration as a condition of probation.” (*People v. Davis* (2003) 104 Cal.App.4th 1443, 1446.) There are, however, five categories of defendants who are statutorily ineligible for the program. They include, those who ““(1) have committed serious or violent offenses within the last five years; (2) are convicted in the same proceeding of a felony or misdemeanor not related to the use of drugs; (3) possessed or were under the influence of a specified drug while using a firearm; (4) refuse drug treatment as a condition of probation; or (5) have twice failed drug treatment as a condition of probation and been found not to be amenable to drug treatment. ([Pen. Code,] § 1210.1.)’ [Citations.]” (*People v. Guzman* (2003) 109 Cal.App.4th 341, 347 (*Guzman*).)

Appellant's supplemental probation report was considered by the trial court. It indicated he there was no proof appellant enrolled in a drug program and that appellant “made no effort to gain compliance with a single condition of probation”

The trial court's comments are telling. "Here we are, . . . with no progress to speak of. I'm inclined to make findings under *Guzman*. I don't see [appellant] making a good faith effort here. [¶] [¶] . . . You didn't show up when you were supposed to [be] back on September 14, 2011, and here we are. May 21, 2012, we're nowhere. No progress whatsoever in [Proposition] 36. . . . Time is up." Prior to imposing a prison sentence, the trial court noted, appellant's absence for over eight months demonstrated he "[was] not amenable to any and all forms of drug treatment," and Proposition 36 was "no longer an option."

The trial court's reliance on *Guzman* was appropriate. *Guzman* absconded after being granted Proposition 36 probation. (*Guzman, supra*, 109 Cal.App.4th at p. 344.) When he failed to appear in court the following month, a bench warrant issued. (*Ibid.*) Approximately seven months later, he was arrested on the warrant and admitted he was in violation of Proposition 36 probation. (*Ibid.*) The trial court terminated the Proposition 36 program indicating it could "conclude that by his actions, [Guzman] has refused to accept treatment and that he's therefore, no longer amenable to treatment under Proposition 36." (*Id.* at p. 345.)

In rejecting an appellate claim that *Guzman* was entitled to reinstatement of Proposition 36 probation, Division One of this District held the five eligibility requirements (Pen. Code, § 1210.1) remain applicable even after the initial grant of probation. (*Guzman, supra*, 109 Cal.App.4th at p. 350.) Thus, "the trial court can terminate the probation of a defendant who, by his conduct following the grant of probation refuses to undergo drug treatment." (*Ibid.*) Such conduct demonstrates the defendant is ineligible for drug treatment under Proposition 36. (*Ibid.*)

We agree with the analysis in *Guzman* and apply it here. Because there was substantial evidence that appellant had a lengthy absence from the court with no progress whatsoever in a treatment program, the trial court justifiably terminated Proposition 36 probation and imposed sentence. As in *Guzman*, "[a]lthough the trial court stated that defendant was 'no longer amenable to treatment,' for all intents and purposes, it

concluded that defendant was ineligible for drug treatment under Proposition 36. This finding is unassailable.” (*Guzman, supra*, 109 Cal.App.4th at p. 350.)

III. DISPOSITION

The judgment is affirmed.

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KUMAR, J. *

We concur:

TURNER, P.J.

KRIEGLER, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.