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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.

BRYAN DONN,

Defendant and Appellant.

2d Crim. No. B255507
(Super. Ct. No. PA075021)
(Los Angeles County)

Bryan Donn appeals the trial court's order terminating his Proposition 36 probation (Pen. Code,¹ § 1210.1) and imposing formal felony probation for three years with various terms and conditions. The court issued the order after finding appellant had violated probation for a third time, as provided in subdivision (f)(3)(C) of section 1210.1. Appellant contends the order is erroneous because he had not received notice of the second violation when he committed the conduct giving rise to the third violation. We agree and accordingly reverse.

FACTS AND PROCEDURAL HISTORY

In October 2012, appellant pled no contest to possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)). He was placed on Proposition 36 probation with various terms and conditions including that he participate in a residential

¹ All further undesignated statutory references are to the Penal Code.

drug treatment program. Probation was revoked and a bench warrant was issued after he failed to appear for a December 2012 progress report hearing. The court recalled and quashed the warrant after discovering that appellant had missed the hearing because he was in federal custody on another matter. The court also declined to find appellant in violation of probation and reinstated probation, in exchange for appellant's agreement that it be extended for one year. Appellant expressed his understanding that his duties under federal probation were to be performed concurrently with his duties under Proposition 36 probation.

In October 2013, appellant informed the court he had been expelled from the CRI-HELP drug treatment facility for possession of a "Whizzinator," a device used to alter the results of a urinalysis test. Appellant admitted a violation of his probation and recognized it as his first violation under section 1210.1. The court ordered appellant to complete the Sober Souls drug treatment program (Sober Souls) and provide written progress reports. Appellant was also ordered to complete two days of Caltrans community service by December 19, 2013. The court admonished appellant, "You obviously have something going on in the federal courts that [is] causing you some issues. But all of that is your issue, not mine."

At the December 19, 2013, progress report hearing, the court stated that evidence of two additional probation violations had been presented. Evidence of the first violation consisted of a letter from the clinical director of Sober Souls indicating that appellant had voluntarily left the program on November 1st. The second violation was based on evidence indicating that appellant had only completed one day of Caltrans community service. With regard to the latter violation, defense counsel offered that appellant "had intended to do his last day yesterday" but the office was closed. With regard to the former violation, counsel stated, "my understanding is that on October 31st the [federal] court, in conference with the probation officer, determined that the events that were going on at the program and the phone messages that had been sent to [appellant] from the program director were inappropriate and were not conducive to

completing a good program. So my understanding is that the federal court gave him permission on October 31st to leave the program, that he left on Friday, November 1st, and entered his new program on the following Sunday."

Appellant admitted that his failure to timely complete his Caltrans community service consisted of a second violation of his Proposition 36 probation. Appellant challenged the other alleged violation on the ground that the federal court had given him permission to switch from the Sober Souls to another program. At defense counsel's request, the matter was set for a probation violation hearing on February 20, 2014. Appellant was also ordered to provide a written progress report from Progress in Motion, the program he had entered after leaving Sober Souls.

At the February 20th hearing, defense counsel asserted that appellant's decision to leave Sober Souls was merely a "technical violation" of his Proposition 36 probation because he had received permission from the federal court to transfer from Sober Souls to Progress in Motion. Counsel further asserted that appellant's failure to complete two days of Caltrans community service was "subsumed within the first violation" of probation because it "was imposed as a consequence of that first violation." The court rejected both assertions and found that appellant's exit from Sober Souls constituted a third violation of his Proposition 36 program. The court then terminated appellant's Proposition 36 probation and placed him on formal felony probation with terms and conditions.

DISCUSSION

Appellant contends the court erred in terminating his Proposition 36 probation because the conduct giving rise to his third violation of probation was committed before he received notice of the second violation. We agree.

Proposition 36 provides, with exceptions not relevant here, that any person convicted of a nonviolent drug possession offense must receive probation conditioned on participation in and completion of a drug treatment program. (§ 1210.1, subd. (a).) Upon the successful completion of treatment and the terms of probation, the charge against the

defendant is dismissed and "both the arrest and the conviction shall be deemed never to have occurred." (*Id.* at subd. (e)(1).)

"Anticipating that drug abusers often initially falter in their recovery, Proposition 36 gives offenders several chances at probation before permitting a court to impose jail time. The first time an offender violates a *drug-related* condition of probation, he is entitled to be returned to probation unless he poses a danger to others. [Citation.] The second time he violates a drug-related condition of probation, he is entitled to be returned to probation unless he poses a danger to others or is unamenable to treatment. [Citation.] Only upon a third violation of a drug-related condition of probation does an offender lose the benefit of Proposition 36's directive for treatment instead of incarceration. [Citation.] Upon such a violation, the court regains its discretion to impose jail or prison time.' [Citations.]" (*People v. Hazle* (2007) 157 Cal.App.4th 567, 572-573 (*Hazle*).)

"Section 1210.1, subdivision [(f)](3) has three subsections corresponding to the first, second and third nonviolent and drug-related probation violations. [¶] On the first violation, if 'the state moves to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. The trial court shall revoke probation if the alleged probation violation is proved and the state proves . . . that the defendant poses a danger to the safety of others.' [Citation.] [¶] On the second violation, if 'the state moves for a second time to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. The trial court shall revoke probation if the alleged probation violation is proved and the state proves . . . either that the defendant poses a danger to the safety of others or is unamenable to drug treatment.' [Citation.] [¶] On the third violation, if 'the state moves for a third time to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. If the alleged probation violation is proved, the defendant is not eligible for continued probation under subdivision (a).' [Citation.] . . . [¶] A recurring requirement in each of these three subsections is that the state must 'move [] . . . to revoke probation[.]'" (*Hazle*,

supra, 157 Cal.App.4th at p. 574.) Three separate motions or petitions to revoke probation are required. (*Id.* at p. 577.) "[W]here, as in this case, no notice of one petition is given *before the conduct underlying the next petition occurs* . . . , it would be improper to treat the result as if the People had made separate noticed motions." (*Ibid.*)

Here, it is undisputed that the conduct upon which appellant's third alleged probation violation is based—i.e., his decision to leave Sober Souls without the court's permission—was committed before he received notice of the second violation. As *Hazle* makes clear, the court thus erred in treating appellant's exit from Sober Souls as a third violation of his Proposition 36 probation. (*Hazle, supra*, 157 Cal.App.4th at p. 577.) The People nevertheless assert that reversal is not required because (1) appellant has forfeited the issue by failing to raise it below; and (2) his decision to leave Sober Souls "stemmed from refusal to accept the court's clear legal admonitions, not from a lack of willpower over his drug addiction." Neither position is well taken.

Appellant did not forfeit his right to raise the issue on appeal because he essentially asserts that the court issued an unauthorized sentence in terminating his Proposition 36 probation. (See *People v. Scott* (1994) 9 Cal.4th 331, 354, fn. 17.) Moreover, *Hazle* directly supports this assertion. (*Hazle, supra*, 157 Cal.App.4th at p. 577.) The People urge us to "hold that the *Hazle* rule does not apply when the alleged violation is unrelated to drug relapse, but rather stems from willful disregard of an explicit court order." The express terms of section 1210.1, however, preclude us from making such a distinction. "Proposition 36 broadly defines drug-related conditions of probation. One such condition includes a 'drug treatment regimen.' (§ 1210.1, subd. (f).)" (*In re Taylor* (2003) 105 Cal.App.4th 1394, 1398.) In light of this broad definition, leaving a drug treatment program without the court's permission plainly qualifies as a violation of a drug-related condition of probation. (See, e.g., *People v. Davis* (2003) 104 Cal.App.4th 1443, 1447 ["[I]t is beyond question that [Prop. 36] defendant's acceptance into and ordered participation in the court's substance abuse program . . . was part of defendant's drug treatment regimen and a drug-related condition of his probation".])

Because appellant committed this conduct before he received notice of his second violation of probation, "the possibility or likelihood of losing Proposition 36 eligibility [was not] brought home to him . . . , providing an incentive to stop the errant behavior." (*Hazle, supra*, 157 Cal.App.4th at p. 576.) The court thus erred in finding that the conduct constituted a third violation of appellant's Proposition 36 probation. (*Id.* at p. 574.)

DISPOSITION

The order terminating appellant's Proposition 36 probation is reversed. The superior court shall reinstate appellant on Proposition 36 probation in accordance with subdivision (f)(3)(B) of section 1210.1.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Donald B. Feldstern, Judge
Superior Court County of Los Angeles

Julia J. Spikes, under appointment by the Court of Appeal, for Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Idan Ivri, Deputy Attorney General, for Respondent.