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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIE LEE HOWARD,

Defendant and Appellant.

C064350

(Super. Ct. No.
CM029130)

Following a traffic stop, officers searched a vehicle occupied by defendant Willie Lee Howard. The search yielded two packages of cocaine and one package of methamphetamine. An amended complaint charged defendant with two counts of possession of cocaine and one count of possession of methamphetamine for sale. (Health & Saf. Code, §§ 11350, 11351, 11378.) Defendant entered a no contest plea to one count of cocaine possession and the other counts were stricken.

The court placed defendant on three years' probation. Subsequently, the probation department filed three probation

violation petitions against defendant. The court found defendant in violation of probation and sentenced him to three years in state prison. Defendant appeals, contending he was entitled to a hearing prior to sentencing and the court's failure to hold a hearing violated Penal Code section 1210.1.¹ We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In July 2008 officers stopped defendant in a vehicle. A subsequent search revealed two packages of cocaine (7.48 and 6.52 grams, respectively) and one package of methamphetamine (2.7 grams).

A complaint charged defendant with possession of cocaine (count 1) and methamphetamine for sale (count 2). (Health & Saf. Code, §§ 11351, 11378.) The complaint also alleged defendant suffered a prior serious felony conviction and served a prior prison term. (§§ 667, subd. (b)-(i), 1170.12, subd. (a)-(d), 667.5, subd. (b).) Defendant entered a plea of not guilty.

An amended complaint included an additional charge of possession of cocaine (count 3). (Health & Saf. Code, § 11350.) Defendant entered a no contest plea to count 3; the court dismissed counts 1 and 2 and struck the allegations. The court placed defendant on formal probation for three years pursuant to certain terms and conditions.

¹ All further statutory references are to the Penal Code unless otherwise designated.

First Violation

In May 2009 the probation department filed a probation violation petition alleging defendant failed to provide a urine sample. Defendant admitted the allegation, and the court continued the term of probation but modified it to include eight hours of community service.

Second Violation

In July 2009 the department filed a second probation violation petition alleging defendant failed to report to his probation officer. Defendant admitted the allegation, and the trial court again continued defendant on probation but modified it to include 16 hours of community service.

Third Violation

In August 2009 the department filed a third probation violation petition alleging defendant failed to appear for drug testing. The court held a hearing on the probation violation on September 8, 2009. Defendant waived formal arraignment, reading of the petition, and advisement of rights.

The parties agreed that the time for defendant to admit or deny the allegation would be waived, probation revoked, and that, if defendant remained out of trouble and did not commit any additional violations, the petition would be withdrawn. The parties also agreed that the court would order 100 hours of community service in an unrelated case.

Defendant admitted he failed to appear for his scheduled drug test. The court found defendant was in violation of the terms of his probation, and that the violation was a drug-

related strike and his third strike. Defendant waived time for sentencing.

During the hearing the court stated: ". . . what I am going to do is give you the chance to get yourself together here in lieu of custodial time. I am going to order that as a condition of your OR [own recognizance release] you are to abide by the terms and conditions of your probation even though it's in revoked status. I am going to revoke probation in your other case and add that you perform 100 hours of community service. And that will be in the SCR case. Okay. And that you get a calendar so that you can keep track of all of your dates; that you look at the calendar every night so you know what you have got to do the next day and you know when you have to do them and you double-check it so that you know what you have got to do and that you have those community service hours completed . . . by October 6th at 9:30 in the morning. [¶] If you're able to do that and not sustain any other violations of your OR, the intent is to reinstate you when you come back on your probation and the violation would be withdrawn so that you could continue in Prop 36. What you have got to do is just finish paying your fines and then I think you're eligible to graduate."

On October 6, 2009, defense counsel stated defendant had completed 100 hours of community service. The prosecution informed the court that defendant had presumptively tested positive on a September drug test, which could be confirmed in two weeks. The matter was rescheduled for October 13, 2009.

At the October 13 hearing, the prosecution confirmed defendant tested positive for hydrocodone. Defendant presented a letter from Dr. Thomas Neuschatz stating he had prescribed Norvasc, clonidine, lisinopril, hydrochlorothiazide, Prilosec, Norco, Soma, Viagra, Flomax, and Avodart to defendant. Dr. Neuschatz checked the box stating that certain medications were required for defendant's medical needs but did not specify which medications were required.

The trial court noted that the file did not contain a health care letter, but also noted defendant was not ordered to provide such a letter. The court concluded Dr. Neuschatz's letter did not provide sufficient information. The court referred the matter to the department for a sentencing report pending sentencing on the probation violation. Defendant remained out of custody.

Subsequent Events

In December 2009 the court revoked and terminated defendant's probation and sentenced him to the upper term of three years. The court told defendant: "There were times that you did try hard, and I appreciate that. There are times that it was clear you weren't cooperating. You were thumbing your nose at the process. You were not doing what you needed to do and it was difficult to get you to comply. And ultimately your continued failures is [sic] what got you here. I hope that you're able to get yourself into some treatment while you're at CDC because you are clearly on the road to doing the right thing

and I want you to continue to do that. I do. I want you to be successful."

Defendant stated the court could have given him probation. The court replied defendant had not earned it because defendant "didn't do it soon enough or often enough."

Defendant filed a timely notice of appeal.

DISCUSSION

I.

Defendant argues that, prior to sentencing, he was entitled to a hearing on his alleged use of hydrocodone. He contends that the court's failure to hold such a hearing violated section 1210.1 and defendant's right to due process.

Under Proposition 36, qualifying defendants convicted of nonviolent drug possession are entitled to probation and drug treatment instead of prison. (§ 1210.1, subd. (a); *People v. Sizemore* (2009) 175 Cal.App.4th 864, 873 (*Sizemore*)). If a defendant is guilty of a first or second drug-related violation of probation, the defendant is entitled to remain on probation and in drug treatment unless the prosecutor proves the defendant poses a danger to the safety of others or, after a second violation, is unamenable to treatment. (§ 1210.1, subd. (f)(3)(A), (B); *People v. Guzman* (2005) 35 Cal.4th 577, 585.)

After a third drug-related violation of probation, the mandatory probation provision is inapplicable. (*Sizemore, supra*, 175 Cal.App.4th at pp. 874-875.) Only when there is an established third drug-related violation of probation does the

court regain its discretion to impose prison time. (*People v. Tanner* (2005) 129 Cal.App.4th 223, 234 (*Tanner*); *In re Taylor* (2003) 105 Cal.App.4th 1394, 1398 (*Taylor*).)

Section 1210.1, subdivision (f)(3)(C) states: "If a defendant receives probation under subdivision (a), and for the third or subsequent time violates that probation either by committing a nonviolent drug possession offense, or by violating a drug-related condition of probation, and the state moves for a third or subsequent time to revoke the 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) unless the court determines that the defendant is not a danger to the community and would benefit from further treatment under subdivision (a). The court may then either intensify or alter the treatment plan under subdivision (a) or transfer the defendant to a highly structured drug court. If the court continues the defendant in treatment under subdivision (a), or drug court, the court may impose appropriate sanctions including jail sanctions as the court deems appropriate."

Preliminarily, defendant argues the court found him eligible for continuation of probation under section 1210.1 at the September 8, 2009, hearing on his third probation violation because the court released him on his own recognizance. According to defendant, the court in effect determined he was not a danger to the community and would benefit from further

treatment. Defendant concedes: "That the superior court did not recite the exact words of the statute quoted above [§ 1210.1, subd. (f)(3)(C)] does not render the order anything less than a finding of continued eligibility as permitted under subdivision (f)(3)(C). The superior court's order to continue to release [defendant] on his own recognizance implies a finding that he was not a danger to the community."

In support, defendant cites *Taylor, supra*, 105 Cal.App.4th 1394. In *Taylor*, the appellate court found the trial court, in incarcerating the defendant, violated Proposition 36, which provides that a defendant who violates a drug-related condition of probation for the second time is entitled to be returned to probation unless the defendant poses a danger to others or is not amenable to treatment. The trial court found the defendant's failure to report to his probation officer for a drug test did not involve a drug-related condition of probation. The appellate court disagreed, finding the defendant's failure to appear for testing was drug related. (*Taylor*, at p. 1399.)

The People argued the trial court implicitly found the defendant was not amenable to further treatment, a circumstance under which Proposition 36 would not apply. The appellate court rejected this argument: "But the record belies respondent's contention. After modifying Taylor's conditions of probation to impose jail time for his second violation, the court otherwise reinstated probation on the same terms and conditions. Among those conditions was Taylor's participating in a drug treatment program. It makes no sense for the court to order continued

treatment if the court believed Taylor was unamenable."

(*Taylor, supra*, 105 Cal.App.4th at p. 1399.)

The present situation does not mirror that of *Taylor*. Here, at the hearing, defendant admitted he failed to appear for a drug test. The court found defendant in violation of probation for the third time and revoked probation. The court did not find defendant amenable to treatment, nor did the court determine he was no danger to society. Instead, the court trailed sentencing to give defendant a final opportunity to demonstrate to the court that he was amenable to treatment.

The court told defendant that, although he had made some attempts at treatment, he had "thumb[ed his] nose at the process" and failed to comply with treatment. In addition, the court noted defendant's repeated failures were "what got you here." Nothing in the court's statements reflects a belief that the court found defendant amenable to treatment following his third probation violation. Instead, the court allowed defendant one more chance to prove the court wrong, and defendant again failed.

Defendant also argues the court deprived him of due process in sentencing him without a hearing to determine whether the use of hydrocodone was a violation of probation. We disagree.

"As a matter of due process, a defendant facing a formal traditional probation revocation hearing is entitled to written notice of the claimed violations, disclosure of the evidence against him, opportunity to be heard and to present evidence, the right to confront and cross-examine adverse witnesses . . .

a neutral and detached fact finder and a written statement of the evidence relied on and the reasons for revoking probation.” (*Tanner, supra*, 129 Cal.App.4th at p. 234.)

A probation revocation hearing does not require all the procedural safeguards of a criminal trial. Instead, the procedures should be flexible depending on the factual scenario. (*People v. Abrams* (2007) 158 Cal.App.4th 396, 400; *People v. Buford* (1974) 42 Cal.App.3d 975, 981.)

The trial court revoked defendant’s probation at the September 8, 2009, hearing. The court trailed sentencing and released defendant on his own recognizance to allow him another chance at demonstrating amenability to drug treatment. In addition, the court required defendant to perform 100 hours of community service and to avoid “other violations of OR” as a condition of reinstatement of probation.

Defendant agreed to the court’s request. Shortly thereafter, defendant tested positive for hydrocodone. Although defendant attempted to establish that his physician prescribed the medication, the trial court was not convinced. Subsequently, the court terminated defendant’s probation and imposed sentence.

Defendant argues the positive drug test constituted an alleged violation of probation. However, at the time he tested positive for hydrocodone, the court had already revoked defendant’s probation. The prosecution raised defendant’s drug test failure as additional proof of his failure to successfully pursue treatment. Under these circumstances, defendant was not

entitled to another hearing on the issue of the failed drug test.

II.

Defendant contends he entered into an agreement with the court for release on his own recognizance and that he was entitled to specific performance of the agreement in the form of a hearing on the hydrocodone use. In defendant's version of events, he agreed to "'abide by the terms and conditions of your probation even though it's in revoked status'" and his failed drug test necessitated a hearing under this agreement.

The court stated that defendant could remain on probation if he complied with the court's directive to abide by the terms of his probation. Defendant's positive test for hydrocodone broke this agreement. As the court informed defendant at the hearing, a failure to live up to the terms of the agreement resulted in the court's revocation of probation.

However, defendant argues the court sentenced him to prison "after the mere allegation that he violated the agreement between the parties" and that the court's "unfounded presumption that the hydrocodone allegation established that [defendant] was 'in trouble.'" According to defendant, "[i]f the trial court felt the informal information provided by the defense was not detailed enough, the answer was to have a formal hearing with the safeguards provided by due process"

We disagree with defendant's gloss on the record. After the prosecution confirmed defendant tested positive for hydrocodone, defendant provided a letter from a physician

confirming he had been prescribed a variety of drugs. The physician noted some medications were medically necessary but failed to specify which medications those were. The court found defendant failed to substantiate his claim that the hydrocodone was medically mandated. Defendant's positive drug test was not a "mere allegation" or an "unfounded assumption" that defendant failed to comply with the terms of his probation. The court acted within its discretion to sentence defendant to prison following his positive drug test.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

DUARTE, J.