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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Calaveras)

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THE PEOPLE,  
  
Plaintiff and Respondent,  
  
v.  
  
KERRY CARLTON ATKINS,  
  
Defendant and Appellant.

C066265  
  
(Super. Ct. No. 10F4778)

Defendant Kerry Carlton Atkins appeals the trial court's revocation of Proposition 36<sup>1</sup> probation and imposition of a state prison sentence. Defendant claims the court committed reversible error in allowing him to represent himself without proper admonishment. He also claims the court abused its

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<sup>1</sup> Proposition 36 (Prop. 36) is an initiative measure passed in the November 2000 general election that enacted the Substance Abuse and Crime Prevention Act of 2000 (the Act). In general, the Act mandates drug treatment, rather than incarceration, for defendants, probationers, and parolees who commit qualifying offenses or violate qualifying conditions of probation or parole. The Act is largely codified at Penal Code sections 1210 and 1210.1.

discretion when it rejected the recommendation of the probation department. We affirm.

#### FACTUAL AND PROCEDURAL BACKGROUND

Defendant and another individual were arrested after sheriff's deputies observed them acting suspiciously in a parked pickup truck in a Jamestown parking lot. The deputies found three methadone pills in the bed of the truck. Defendant admitted being in possession of a pipe used for smoking methamphetamine and two small baggies containing 0.9 grams (combined) of methamphetamine.

Defendant pled guilty on November 30, 2009, in Tuolumne County Superior Court to one count of possession of methadone in exchange for dismissal of the remaining charges. The court suspended imposition of sentence, admitted defendant to Prop. 36 probation for five years subject to specified terms and conditions, and ordered that the case be transferred to Calaveras County, defendant's county of residence.

Three and one-half months later, the probation department filed a petition to revoke and modify defendant's probation based on his alleged failure to abstain from use of a controlled substance after he tested positive for methamphetamine on March 9, 2010. Defendant, appearing on his own behalf on March 18, 2010, admitted the violation. The court reinstated defendant on Prop. 36 probation on the same terms and conditions with "intensified treatment."

Ten days later, the probation department filed a second petition to revoke and modify defendant's probation based on his

alleged failure to abstain from using controlled substances after he tested positive for methamphetamine on March 15, 2010, and March 23, 2010. On April 1, 2010, defendant again appearing without counsel, admitted the violation. The court reinstated him on Prop. 36 probation on the same terms and conditions with "intensified treatment."

Five months later, the probation department filed a third petition to revoke or terminate probation based on defendant's alleged failure to abstain from using controlled substances after he tested positive for methamphetamine on June 21, July 15, 19, 22, and August 3, 2010.

On August 19, 2010, defendant, again appearing on his own behalf, admitted the alleged violations.

At the September 16, 2010, sentencing hearing, the defendant was still without counsel but was admonished of his right to appointed counsel. The court acknowledged receipt of a probation report which recommended defendant's admission to the drug court program and, "[i]f [defendant] refuses Drug Court, or if he is found ineligible for Drug Court, it would be recommended he be sentenced to two years state prison." Noting defendant's prior performance on Prop. 36 probation, and questioning whether the drug court program in Calaveras County could provide defendant anything not already provided by Tuolumne County's drug court program, the court terminated probation, found the circumstances in aggravation outweighed those in mitigation, and sentenced defendant to the upper term of three years in state prison.

Defendant filed a request to modify his sentence. The court appointed counsel on defendant's behalf, and counsel filed a motion to recall the sentence. The district attorney's "response to motion to recall sentence" was filed the day prior in anticipation of defendant's motion.

After hearing the testimony of several witnesses on defendant's behalf, the court again expressed concern that "there's really nothing in our program that is any different then [sic] the Tuolumne County program" and denied defendant's motion to recall the sentence. Defendant filed a timely notice of appeal.

#### DISCUSSION

##### I

##### *Right To Counsel*

Defendant claims he never unequivocally stated his request to represent himself, nor did he knowingly, intelligently and voluntarily waive his right to be represented by counsel at the probation revocation hearings and sentencing. As we shall explain, the record as a whole demonstrates defendant gave a valid waiver of his right to counsel.

##### A

##### *The Proceedings*

Defendant was represented by counsel at the initial sentencing hearing when he was first admitted to Prop. 36 probation. Thereafter, he appeared without counsel on his own behalf at all subsequent hearings, including three probation violation hearings and a sentencing hearing. At the first

probation revocation hearing on March 18, 2010, defendant was orally advised of the right to appointed counsel and told that if he admitted the violation he would be giving up his right to an attorney.

At the second probation revocation hearing on April 1, 2010, defendant was again told he had a right to a court-appointed attorney and he was giving up that right by admitting the violation.

The last probation revocation hearing was on August 19, 2010. In conjunction with this proceeding, defendant signed a document entitled "Legal Rights of a Defendant Charged with a Felony, Misdemeanor or Infraction," which contains an explanation of, among other things, defendant's "right to be represented by an attorney at all stages of your case, including this arraignment," the right to appointment of an attorney if one cannot otherwise be afforded, the right to confront and cross-examine witnesses, and the right to remain silent.

At the outset of the August 19, 2010, hearing, the court noted that the current allegation was that defendant had "tested positive for methamphetamine on . . . June 21, July 15th, 19th, 22nd, and August 3, 2010," that defendant had "two prior probation violations," and that the probation department was recommending that defendant's probation "be revoked and terminated as unsuccessful and [that] the matter be referred to probation for preparation of a pre sentence report." The following colloquy then took place between defendant and the court:

"THE COURT: And Mr. Atkins did you understand your rights including your right to a -- to a court hearing and a court appointed attorney?

"THE DEFENDANT: Yes, sir.

"[¶] . . . [¶]

"THE COURT: Mr. Atkins, if you admitted the violation I would refer it to probation for the preparation of a report which means that you could be looking at state prison. You could be looking at a different type of probation.

"[¶] . . . [¶]

"THE COURT: -- But you have to understand that is a possibility.

"THE DEFENDANT: Yes, sir.

"[¶] . . . [¶]

"THE COURT: In this matter Mr. Atkins what did you wish to do? Did you wish to admit it, deny it, have me appoint an attorney, hire your own attorney, set the matter for hearing, what do you wish to do?

"THE DEFENDANT: Admit.

"THE COURT: Okay. Mr. Atkins if you admit the violation there will not be a hearing, you have a right to a hearing, if you admit it, there will not be a hearing. Do you understand and give up your right to the hearing?

"THE DEFENDANT: Yeah.

"THE COURT: And at that hearing you would have the right to have an attorney represent you, and again the Court would appoint one at no cost to you, if you admit the violation there

is nothing for the attorney to do because you are admitting the violation. You understand and give up that right?

"THE DEFENDANT: Yes, sir.

"[¶] . . . [¶]

"THE COURT: And Mr. Kerry Carlton Atkins in case number 10F4778, do you admit or deny you failed to abstain from the use of a controlled substance in that you drug tested positive for methamphetamine on June 21, July 15, 19, 22nd and August 3, 2010, do you admit that or deny that?

"THE DEFENDANT: I admit.

"THE COURT: Court accepts the admission, Court finds the admission freely, voluntarily, knowingly and intelligently made and the waivers freely[, ] voluntarily[, ] knowingly[, ] and intelligently made."

B

#### *Validity Of Waiver*

A criminal defendant has a constitutional right to represent himself if he "'knowingly and intelligently' forgo[es] those relinquished benefits" associated with the right to counsel. (*Faretta v. California* (1975) 422 U.S. 806, 819, 835 [45 L.Ed.2d 562, 572, 581-582].) "'In order to deem a defendant's *Faretta* waiver knowing and intelligent,' the trial court 'must insure that he understands 1) the nature of the charges against him, 2) the possible penalties, and 3) the "dangers and disadvantages of self-representation.'" ( *People v. Sullivan* (2007) 151 Cal.App.4th 524, 545, quoting *U.S. v. Erskine* (9th Cir. 2004) 355 F.3d 1161, 1167.) However, "[t]he

test of a valid waiver of counsel is not whether specific warnings or advisements were given but whether the record as a whole demonstrates that the defendant understood the disadvantages of self-representation, including the risks and complexities of the particular case." (*People v. Bloom* (1989) 48 Cal.3d 1194, 1225.) Thus, *Faretta* does not require the court to specifically advise a defendant of the possible penal consequences of the charges against him. (*People v. Harbolt* (1988) 206 Cal.App.3d 140, 149-150 [court not required to inform defendant of the increased penal consequences of the amended information].) "As long as the record as a whole shows that the defendant understood the dangers of self-representation, no particular form of warning is required." (*People v. Pinholster* (1992) 1 Cal.4th 865, 928-929.)

On appeal, the burden is on the defendant to demonstrate that he did not knowingly waive his right to counsel. (*People v. Sullivan, supra*, 151 Cal.App.4th at p. 547.) "[W]e independently examine the entire record to determine whether the defendant knowingly and intelligently waived the right to counsel." (*People v. Burgener* (2009) 46 Cal.4th 231, 241.)

Defendant complains that the trial court "failed to issue any form of *Faretta* warning" and "never warned [him] that self-representation was unwise." As we have noted, however, no particular form of warning is required; the real question is simply whether the record shows that defendant knowingly and intelligently waived his right to counsel.

Moreover, "the scope of a proper advisement of the right to counsel depends on the particular facts and circumstances of the case as well as the stage of the proceedings." (*People v. Burgener, supra*, 46 Cal.4th at p. 242.) Certain circumstances may justify "a less searching or formal colloquy in response to defendant's request to represent himself." (*Ibid.*) Thus, for example, in *Bloom*, the California Supreme Court concluded that a defendant who sought to represent himself in the penalty phase of a capital case, and who intended to actively seek the death penalty for himself, "was sufficiently aware of the dangers and disadvantages of self-representation" even though the trial court "gave few specific warnings or advisements regarding the risks of self-representation" because the defendant "would be assisting rather than opposing the prosecutor and not only appreciated the risk of a death verdict but actively sought it." (*People v. Bloom, supra*, 48 Cal.3d at p. 1225.)

We believe a similar conclusion is warranted here. The record shows that defendant was advised of the violation of probation that was being alleged against him (five different positive drug tests in the space of a month and a half) and was advised that the probation department was recommending revocation and termination of probation as unsuccessful, which meant he "could be looking at state prison." When the court asked him if he wanted to "admit it, deny it, have [the court] appoint an attorney, hire [his] own attorney, set the matter for hearing," defendant stated that he wanted to admit the violation. Given that defendant had expressed a desire to admit

the probation violation -- as he had done twice before while unrepresented -- the trial court did not have to engage in a lengthy advisement of the "dangers and disadvantages" of self-representation to determine whether defendant's waiver of the right to counsel was knowing and intelligent. Indeed, given defendant's expressed desire to forego a probation violation hearing and simply admit that he had repeatedly tested positive for methamphetamine in violation of his Prop. 36 probation, it does not readily appear what "dangers and disadvantages" the trial court *could* have advised defendant of, other than the risk of a prison sentence, of which the trial court *did* advise defendant.

On this record, we conclude that defendant unequivocally waived his right to an attorney and that he has failed to show he did not knowingly, intelligently, and voluntarily do so. There was no error.

## II

### *The State Prison Sentence*

Defendant contends that, in rejecting the recommendation of the probation department to continue him on Prop. 36 probation and instead sentencing him to state prison, the trial court abused its discretion. He claims the trial court did not recognize its discretion, and that there was insufficient evidence that he was unamenable to drug treatment and that he would not benefit from participation in drug court. For the reasons set forth below, we reject defendant's contentions.

Giving what it characterized as a tentative ruling, the court noted defendant's lack of success in Prop. 36 probation, drug court in Tuolumne County and a 10-month California Rehabilitation Center (CRC) commitment, and further noted that defendant's "several felony convictions" made him statutorily ineligible for probation "unless the court makes specific findings." The court explained as follows:

"Mr. Atkins[,] in terms of the findings that the Court would have to make which would be that you [defendant] are suffering from a mental condition[,] i.e., addiction, and that there is a . . . high probability that treatment could -- can -- could be effective[,] this Court's concern Mr. Atkins is that I don't know anything that our Drug Court program could do that Tuolumne County could not have done. You certainly would have received all of the structure, introduction into resources such as 12 step meetings or other community support meetings, group process, the services that are available in the county such as behavioral health, mental health, um and a support system in terms of the other members in Drug Court. That is the other participants, the other, other drug defendants as a support group. [¶] In addition you have been to CRC which also offers drug treatment in the corrections setting. [¶] With all due respect Mr. Atkins I just don't know what Drug Court could offer you that hasn't already been offered. [¶] . . . [¶] But Mr. Atkins I would not refer you to Drug Court because quite frankly I don't know what drug court could offer you."

The court heard argument from defendant who asked for reinstatement of probation and from the People who sought revocation of probation and imposition of the aggravated term. The court then found as follows:

"This is the third violation of probation and under Proposition 36 and as such he [defendant] is no longer eligible for Proposition 36. [¶] The Court has read and considered the report of the probation officer, the Court finds -- Court finds again based upon the statement . . . the Court has previously made that probation is not appropriate. The Court finds that the aggravated term is the appropriate term based upon the number of convictions, the number of felony convictions. [¶] The Court does not find that at this time Mr. Atkins is amenable to treatment, based upon his prior violation and the prior treatment episodes. [¶] The Court . . . finds that the aggravated term of three years is the appropriate term."

Penal Code section 1210.1, subdivision (f)(3)(C) provides, in relevant part: "If a defendant receives probation under subdivision (a), and for the third or subsequent time violates that probation . . . , and the state moves for a third or subsequent 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) unless the court determines that the defendant is not a danger to the community and would benefit from further treatment under subdivision (a).* . . . ." (Italics added.)

Subdivision (f)(3)(F) of Penal Code section 1210.1 provides, in relevant part: "If a defendant on probation at the effective date of this act for a nonviolent drug offense violates that probation a third or subsequent time . . . , and the state moves for a third or subsequent 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), unless the court determines that the defendant is not a danger to the community and would benefit from further treatment under subdivision (a) . . . .*" (Italics added.)

If probation is revoked pursuant to either of the preceding subdivisions, "the defendant may be incarcerated pursuant to otherwise applicable law without regard to the provisions of this section. The court may modify or revoke probation if the alleged violation is proved." (Pen. Code, § 1210.1, subd. (f)(1).)

A trial court possesses extensive discretion in making the decision to revoke probation. (*People v. Angus* (1980) 114 Cal.App.3d 973, 988.) "'A denial or a grant of probation generally rests within the broad discretion of the trial court and will not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary or capricious manner.' [Citation.] A court abuses its discretion 'whenever the court exceeds the bounds of reason, all of the circumstances being considered.' [Citation.] We will not interfere with the

trial court's exercise of discretion 'when it has considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899, 909-910.)

The trial court's remarks reflect that it understood its discretion. Defendant admitted the alleged probation violation. Thus, he was not eligible for continued Prop. 36 probation under either subdivision (f)(3)(C) or (f)(3)(F) unless the court determined he did not pose a danger to the community and would benefit from further treatment. In its tentative ruling, the court noted defendant's "treatment episode[s]" on Prop. 36 probation, Tuolumne County drug court and CRC had been unsuccessful, and expressed doubt as to whether drug court could offer defendant anything "that hasn't already been offered." The court also recognized that "for many addicts recovery is a long and difficult process with many fits and starts which may involve many unsuccessful treatment episodes," but told defendant it "would not refer [defendant] to Drug Court because quite frankly I don't know what drug court could offer you." In its final ruling, the court found probation was not appropriate "based upon the statement . . . the Court has previously made" and further found defendant was not amenable to treatment "based upon his prior violation and the prior treatment episodes."

Defendant claims the court's statement that "[t]his is the third violation of probation and under Proposition 36 and as such [defendant] is no longer eligible for Proposition 36" was an incorrect statement of the law and therefore an abuse of

discretion. It is clear from the entire context, however, that the court understood that three violations of probation alone did not render defendant ineligible for Prop. 36 probation and properly exercised its discretion accordingly.

The record contains sufficient evidence to support the court's findings that defendant was unamenable to drug treatment and would not benefit from participation in drug court. As the court noted, the probation report reflected that defendant's substance abuse treatment history included "a 10-month stay at CRC in 2002-2003," "a return to CRC from September to December 4, 2004," "Tuolumne County's Dependency Drug Court from December 2004 to December 2005, ending in an unsuccessful termination," and "participation in Calaveras County Behavioral Health Services' Intensive Outpatient Program from March 4 to August 19 [date of incarceration on present violation of probation], 2010."

While on the one hand, the probation report states defendant's presumed ineligibility for probation under Penal Code section 1203, subdivision (e)(4), "appears to be overridden" by the fact of "defendant's drug addiction and the likelihood of favorable response to treatment," and notes that defendant "appears willing" to comply with the "terms of probation," on the other hand the report notes that although defendant "has reported for drug testing and counseling as directed; . . . he has been unable to abstain from the use of methamphetamine," and is "a marginal candidate for continued probation, based on his performance thus far."

The court also noted that defendant was unsuccessful in treatment despite having already been afforded access to "all of the structure, introduction into resources such as 12 step meetings or other community support meetings, group process, the services that are available in the county such as behavioral health, mental health, um and a support system in terms of the other members in Drug Court."

Defendant claims testimony given during the subsequent hearing on his motion to recall the sentence provides additional evidence that he was amenable to, and likely to benefit from, further treatment. However, that testimony was not before the trial court when it rendered its sentencing decision. Even assuming we were compelled to consider that subsequent evidence, the trial court rejected the opinions of the defense witnesses that defendant was amenable to further Prop. 36 treatment, and we do not find the court's determination to be an abuse of discretion.

DISPOSITION

The judgment is affirmed.

\_\_\_\_\_  
ROBIE, J.

We concur:

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HULL, Acting P. J.

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MAURO, J.