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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE,

Plaintiff and Respondent,

v.

JIMMY CANDIDO FLORES,

Defendant and Appellant.

C067644

(Super. Ct. No.
CM033646)

Defendant Jimmy Candido Flores pled no contest to gross vehicular manslaughter while intoxicated (Pen. Code,¹ § 191.5, subd. (a)) and possession of marijuana for sale (Health & Saf. Code, § 1359). The trial court sentenced him to 10 years and eight months in state prison with 294 days of presentence credit (196 actual and 98 conduct).

¹ Further undesignated statutory references are to the Penal Code.

On appeal, defendant contends that the trial court abused its discretion when it imposed the upper term for gross vehicular manslaughter while intoxicated, and also that the prospective application of the Criminal Justice Realignment Act of 2011 (Realignment Act) (Stats. 2011, ch. 15) violates his right to equal protection of the law. We disagree and shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The Traffic Collision

On the morning of July 22, 2010, the California Highway Patrol (CHP) responded to a report of a traffic injury collision in Chico. The victim was located in a ditch and transported to the hospital, where she was declared dead. An autopsy report determined the cause of death was "multiple trauma due to pedestrian versus motor vehicle collision."

Defendant was at the scene, pacing back and forth while talking on his cell phone. His vehicle was on the shoulder of the road, with damage to the hood, bumper, right headlight, and turn signal. Defendant claimed he was driving on the highway when he noticed the victim jogging in the gravel part of the road. According to defendant, one of his dogs jumped on his arm and its paws landed on the steering wheel. He struck the victim before he could take evasive action. Defendant then turned back and called 911. He did not render aid because he "freaked out" over the incident.

Defendant's eyes were bloodshot, with droopy lids. His speech was slow, he smelled of marijuana, and he could not stand

still for more than a few seconds. He admitted taking a "hit" of marijuana earlier that morning (he said he had been issued a medical marijuana recommendation for "back pain and sleep issues"; it was expired on the date of his crime). Defendant failed a field sobriety test, and his blood tested positive for methadone, cannabinoids, and multiple prescription drugs.

Witnesses described defendant as "panicked" at the scene of the incident. One witness said defendant drove erratically before the collision. The CHP officer at the scene observed defendant showed no remorse.

The Marijuana Case

In August, authorities heard the incarcerated defendant discussing marijuana sales in a phone call with his girlfriend, and law enforcement officers spotted an apparent marijuana grow at a house associated with defendant. In November, an undercover agent bought two ounces of marijuana from defendant's girlfriend, who was then arrested and told agents that she and defendant grew marijuana at a residence in Durham. Agents later executed a search warrant at the Durham residence and at another residence, and found a total of 36 pounds of marijuana, marijuana plants, ammunition, a video surveillance system, a police scanner, 24 marijuana plants, and medical marijuana recommendations for four subjects.

Plea and Sentencing

On November 23, 2010, defendant pled no contest to gross vehicular manslaughter while intoxicated (§ 191.5, subd. (a)) and possession of marijuana for sale (Health & Saf. Code,

§ 1359). The matter was set for a "lengthy sentencing hearing," ultimately held on February 2, 2011.

A forensic toxicologist retained by the defense reviewed the police and toxicology reports. The toxicologist opined the toxicology results were consistent with defendant's having smoked marijuana within seven hours or more of the 10:40 a.m. blood draw. The other drugs were present in low levels, which was consistent with therapeutic use, possibly more than 24 hours prior to the collision. The toxicologist concluded that the results of the blood test and the field sobriety test were "consistent with Marijuana influence but are not conclusive evidence of Marijuana impairment." The toxicologist would not rule out marijuana impairment at the time of the collision, but concluded it "is not ruled out, it is not proven, either."

The trial court recited defendant's record at sentencing: a 2001 violation for an illegal U-turn in a business district (Veh. Code, § 22102), a 2004 violation for operating a motorcycle without a helmet (Veh. Code, § 27802, subd. (b)), a 2004 violation for driving on a levee without permission (Veh. Code, § 21116) coupled with a conviction for misdemeanor possession of marijuana (Health & Saf. Code, § 11357, subd. (b)), a 2004 misdemeanor conviction for driving under the influence causing injury (Veh. Code, § 23153, subd. (a)), a 2006 citation for driving without a seatbelt (Veh. Code, § 27315), and two 2008 citations for speeding (Veh. Code, § 22349).

In imposing the upper term for vehicular manslaughter, the trial court found four aggravating circumstances: defendant's

decision to drive while impaired displayed callousness in light of his prior conviction for driving under the influence causing injury; the victim, who was off the road with her back to traffic, was particularly vulnerable; the prior driving under the influence causing injury conviction demonstrates that defendant had engaged in violent conduct that indicates a serious danger to society; and his prior convictions were numerous and of increasing seriousness.

Finding one mitigating factor, defendant's satisfactory performance on probation for his 2004 misdemeanor conviction, and also noting that defendant resolved his case early in the process, the trial court found that these considerations were outweighed by those factors supporting imposition of the upper term.

DISCUSSION

I

Imposition of the Upper Term Sentence

Defendant first contends the trial court's decision to impose the upper term for vehicular manslaughter while intoxicated was an abuse of discretion.

A. Standard of Review

We review a trial court's decision to impose an upper term for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) We must affirm unless there is a clear showing that the chosen sentence was arbitrary or irrational. (*People v. Hubbell* (1980) 108 Cal.App.3d 253, 260.) Even a single aggravating factor is sufficient to support an upper term

sentence. (*People v. Steele* (2000) 83 Cal.App.4th 212, 226.)

B. Analysis of Aggravating Factors

Defendant claims the four aggravating factors cited by the trial court were invalid. As we explain *post*, we see error only in reliance on one of the four factors, and thus no abuse of discretion in selecting an upper term sentence.

1. Callousness

The first factor cited by the trial court was defendant's "high degree" of "callousness" (Cal. Rules of Court, rule 4.421(a)(1)) because he drove while impaired despite having sustained a prior conviction for driving under the influence causing bodily injury. Defendant concludes that because the People did not challenge the toxicologist's report, the trial court's finding that defendant failed to learn from his 2004 conviction and callously became intoxicated and drove "is speculative and not supported by the evidence."

Conviction for gross vehicular manslaughter while intoxicated requires the killing of another while driving under the influence and with gross negligence. (§ 191.5, subd. (a).) Defendant pled no contest to the offense, which admits every element of the charge. (See *People v. Wallace* (2004) 33 Cal.4th 738, 749.) Thus defendant cannot now claim that he was *not* under the influence when he drove. While defendant may have switched his drug of choice from alcohol to marijuana, he nonetheless drove while under the influence--the same conduct as his prior conviction. Defendant's contention that the absence of alcohol in his system shows "that he apparently *had* learned a

lesson about driving under the influence" borders on offensive in light of his conviction for killing his victim while driving under the influence of marijuana. His callousness was a valid factor for the trial court to consider.

2. Vulnerable Victim

The second factor cited by the trial court was that the victim was particularly vulnerable (Cal. Rules of Court, rule 4.421(a)(3)). This factor generally does not apply to driving while intoxicated offenses because victims of such crimes share a general vulnerability; cases restrict this aggravating factor to violent felonies where the characteristics of the victim or circumstances of the crime render the offense particularly reprehensible. (*People v. Piceno* (1987) 195 Cal.App.3d 1353, 1357-1358; *People v. Bloom* (1983) 142 Cal.App.3d 310, 321-322.) The trial court's reliance on this factor was error.

3. Violent Conduct/Danger to Society

The third factor cited by the trial court was that the defendant was a serious danger to society based on his prior conviction for driving under the influence causing injury (Cal. Rules of Court, rule 4.421(b)(1)). Defendant argues that because vehicular manslaughter necessarily involves violence, the taking of another's life, reliance on this factor constituted an improper dual use of facts. (Cal. Rules of Court, rule 4.420(d).) The People concede error.

We see no error and decline to accept the concession. Although rule 4.420 prohibits improper dual use of facts, defined as the use of a fact "that is an element of a crime upon

which the punishment is being imposed" to impose a greater term, this rule pertains only to the facts of the *offense for which the trial court is imposing sentence*. Conduct such as defendant's prior convictions or uncharged misconduct is not subject to this rule. A defendant's *prior* violent conduct can support an upper term sentence for a violent offense, as long as the prior conduct shows defendant's danger to society. Here, the trial court clearly found that defendant's "conviction in 2004 demonstrates that [defendant] has engaged in violent conduct that indicates a serious danger to society," a finding that was well within its discretion. Further, defendant's prior and current conduct showed a pattern of violent behavior on the road posing a threat to society. A pattern of violent behavior is not an element of gross vehicular manslaughter while intoxicated, and the trial court's reliance on this factor was permissible.

4. Prior Convictions

The fourth factor cited by the trial court was that defendant's prior convictions were of increasing seriousness. (Cal. Rules of Court, rule 4.421(b)(2).) We have summarized defendant's prior convictions *ante*; they include a 2004 violation for driving on a levee without permission coupled with a conviction for misdemeanor possession of marijuana, as well as a 2004 misdemeanor conviction for driving under the influence causing injury and a series of driving-related infractions. "The offense for which a defendant is being sentenced may be considered in determining that his or her convictions were of

increasing seriousness. [Citations.]” (*People v. Clark* (1993) 12 Cal.App.4th 663, 666.) As defendant’s most recent offense, vehicular manslaughter while intoxicated, is related to and more serious than defendant’s prior offenses, the trial court did not err in relying on this aggravating factor.

II

Realignment Act

Defendant committed his crimes in 2010, and was sentenced on February 2, 2011.

Under the law in effect at the time of defendant’s crimes and sentencing, a defendant with a current or prior serious or violent felony conviction was entitled to two days of conduct credit for every four days of presentence custody. (Former § 4019.) Defendant pled no contest to vehicular manslaughter while intoxicated, a serious felony. (§ 1192.8, subd. (a).)

The Realignment Act subsequently amended the law to entitle defendants to two days of conduct credits for every two days of presentence custody. (§ 4019, subs. (b), (c), (f).) The award of credits is not reduced by a defendant’s prior conviction for a serious or violent felony. This provision applies prospectively, to defendants serving presentence incarceration for crimes committed on or after October 1, 2011. (§ 4019, subd. (h).)

Defendant argues that the prospective application of the conduct credit provisions of the Realignment Act violates his right to equal protection under the law. The California Supreme

Court has rejected this contention. (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn.9.) We are bound to reject it as well.

DISPOSITION

The judgment is affirmed.

DUARTE, J.

We concur:

BUTZ, Acting P. J.

MURRAY, J.