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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Lassen)

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID LYNDEL EICHOR,

Defendant and Appellant.

C068630

(Super. Ct. No.
CR026807)

Defendant David Lyndel Eichor appeals from a judgment sentencing him to prison after he drove drunk and caused an accident in which three elderly people were injured. On appeal, he argues the trial court erred in failing to state reasons for its decision to deny him probation and impose the aggravated term of imprisonment, and that the error was not harmless. We agree with the People that defendant forfeited his claim of error.

FACTS AND PROCEEDINGS

Turning left from Highway 395 into a rest area, defendant struck Leroy Cramer's truck, sending it spinning into the path of a vehicle driven by James G., and causing a 55-gallon drum containing scrap metal to bounce out of Cramer's truck bed and onto James G.'s. Cramer's truck and James G.'s vehicle were totaled. Cramer suffered a spinal injury and major head trauma, and incurred over \$700,000 in medical expenses; James G. suffered major lacerations to his lower extremities, and James G.'s wife Juanita suffered a lacerated spleen, and required a hip replacement.

At the scene, defendant failed field sobriety tests, and preliminary screening tests indicated his blood alcohol content was 0.21 to 0.25 percent.

At the time of the accident, defendant was on probation from a conviction for a misdemeanor DUI. Defendant later reported he had also suffered a DUI conviction in Oklahoma in approximately 1980, for which he served 30 days in jail. He expressed remorse, and his belief the accident "would have happened even if I [were] not drinking."

In April 2010, in exchange for a sentence "lid" of nine years, defendant pleaded guilty to driving under the influence, causing injury (Veh. Code, § 23153, subd. (b)), and admitted that, in so doing, he inflicted great bodily injury upon the three victims (Pen. Code, § 12022.7, subd. (a)).

Prior to sentencing, defendant submitted a statement in mitigation, characterizing his life as "almost unblemished" and urging the court to grant probation.

The presentence probation report conceded defendant was statutorily eligible for probation, but recommended the court impose a prison sentence. Regarding the court's sentencing choice, the report recommended the aggravated prison term and identified three circumstances in aggravation: the victims' sustained medical and related costs exceeding \$700,000 (Cal. Rules of Court, rule 4.421(a)(9); subsequent references to rules are to the California Rules of Court), defendant was on probation when the crime was committed (rule 4.421(b)(4)), and his prior performance on probation was poor (rule 4.421(b)(5)). It also acknowledged two circumstances in mitigation: defendant's insignificant prior criminal record (rule 4.423(b)(1)) and his voluntarily admission of guilt and expression of concern for the victims in his presentence interview (rule 4.423(b)(3)).

The presentencing report contained statements from Cramer's family on his behalf and from James and Juanita G., all to the effect that defendant destroyed their lives and robbed them of their independence. It also contained several letters submitted on defendant's behalf from acquaintances and co-workers.

Before sentencing, matters got complicated. Defendant sought to withdraw his April 2010 plea but, when victim Cramer died while defendant's request was pending (the result of protracted complications from the accident), defendant tried to

withdraw his motion to withdraw the plea and moved instead to enforce the plea agreement. The People filed a new action, Lassen County case No. CR028020, alleging defendant committed vehicular manslaughter as to Cramer. The court withdrew its approval of the April 2010 plea agreement and denied defendant's motion to enforce it in the face of the changed circumstances of Cramer's death. In February 2011, defendant's guilty plea and admissions were withdrawn and the matter set for trial.

By April 2011, the parties reached the second plea agreement at issue in this appeal. In exchange for a sentence of 10 years, defendant pleaded guilty to driving under the influence, causing injury (Veh. Code, § 23153, subd. (b)), and admitted that, in so doing, he inflicted great bodily injury upon victims Cramer and James G. (Pen. Code, § 12022.7, subd. (a)), and inflicted bodily injury upon Juanita G. (Veh. Code, § 23558). For their part, the People dismissed all other charges alleged by the amended information, as well as the vehicular homicide case and the pending probation violation matter.

The parties agreed the court could rely at sentencing upon the existing probation report.

At the sentencing hearing, both sides argued at length about whether probation should be granted and, if not, what sentence should be imposed. After argument was completed, the court announced: "It's the judgment of the Court that probation is denied and the defendant is sentenced to the California

Department of Corrections and Rehabilitation for the aggravated term of" 10 years, in the aggregate.

When the Court finished imposing sentence, defense counsel spoke, reiterating his earlier argument that defendant's prior performance on probation cannot be counted as a circumstance in aggravation, because the Court must evaluate it independently from the instant offense, and the probation report's analysis to the contrary is error. Defense counsel asked for a certificate of probable cause because "an incorrect analysis" by the probation department created an issue for appeal.

The court indicated it would "research that in case you want to bring that up later" and then added "[F]or the record, I'm basing the sentence upon my analysis of the facts including whatever recommendation that the probation department made, but it's not solely on the probation department's recommendation, it's based upon the totality of the circumstances in this episode."

DISCUSSION

Defendant contends on appeal the trial court erred in failing to state reasons for its decisions to deny him probation and to impose the aggravated term of imprisonment.

This contention was forfeited by defendant's failure to raise the issues at the time of sentencing. Our Supreme Court has held that a defendant cannot complain for the first time on appeal about the trial court's failure to properly make or articulate its sentencing choices. (*People v. Scott* (1994) 9

Cal.4th 331, 352-353 (*Scott*.) The reason for this rule is "practical and straightforward. Although the court is required to impose sentence in a lawful manner, counsel is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Id.* at p. 353.)

"In essence, claims deemed [forfeited] on appeal involve sentences which, *though otherwise permitted by law*, were imposed in a procedurally or factually flawed manner." (*Scott, supra*, 9 Cal.4th at p. 354, italics added.)

This reasoning applies here. The original presentence report listed nine factors applicable to the court's analysis of whether to deny probation: defendant operated a motor vehicle with a blood alcohol content of 0.21 to 0.25 percent, i.e., the nature and seriousness of the crime (rule 4.414(a)(1)); caused serious injuries and extensive trauma to three victims and their families (rule 4.414(a)(4)); caused the victims to incur medical bills and related costs exceeding \$700,000 (rule 4.414(a)(5)); was an active participant in the crime (rule 4.414(a)(6)); had sustained a prior DUI for which he was on probation at the time of the instant offense (rule 4.414(b)(1)), and may present a danger to others if not incarcerated (rule 4.414(b)(8)). It also noted he stated a willingness (rule 4.414(b)(3)), and had the ability (rule 4.414(b)(4)) to comply with the terms and conditions of probation, and was remorseful (rule 4.414(b)(7)). These circumstances fully support the trial judge's order and

sentence denying probation, and defendant does not contend otherwise.

Nor was the choice of sentence not *permitted by law*. (*Scott, supra*, 9 Cal.4th at p. 354.) The court expressly stated it based its determination of defendant's sentence upon its "analysis of the facts including whatever recommendation that the probation department made" That report identifies three circumstances in aggravation. Defendant contends one of them was *not* a circumstance in aggravation: prior unsatisfactory performance on probation may not involve the present offense. (*People v. Towne* (2008) 44 Cal.4th 63, 82-83.) He does not dispute that two circumstances in aggravation were properly identified by the probation report, and a single valid circumstance in aggravation will support imposing an aggravated sentence. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433-434.)

To avoid application of the *Scott* rule, defendant argues on appeal it cannot apply unless there was "a meaningful opportunity to object" at sentencing to the court's failure to state the reasons for its decision, and such an opportunity can occur "only if, during the course of the sentencing hearing itself and before objections are made, the parties are clearly apprised of the sentence the court intends to impose and the reasons that support any discretionary choices." (*Scott, supra*, 9 Cal.4th at p. 356.) Here, defendant complains, he had no opportunity to object to the court's failure to state reasons for denying probation or choosing the aggravated sentence

because the court "gave the parties no hint whatsoever of what . . . sentence it intended to impose."

But the record shows that after the trial court imposed defendant's sentence, defense counsel *did* make additional argument, although he did not object on the grounds defendant now wishes to raise on appeal. Under such circumstances, the *Scott* forfeiture rule applies. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 755.) Where the court does not tell a defendant his postsentence objection is untimely or impermissible, it has given defendant a "meaningful opportunity to object" as required by *Scott*, and its rule applies to bar defendant from raising for the first time on appeal the court's failure to articulate the reasons for its sentencing choices. (See *ibid.*; *Scott, supra*, 9 Cal.4th at page 356; *People v. Downey* (2000) 82 Cal.App.4th 899, 916 [*Scott* bar applies when trial court allowed parties to interrupt to make objections while it was pronouncing sentence]; cf. *People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1223-1224 [prosecutor did not have a meaningful opportunity to object where, after trial court asked defendant who was presumptively ineligible for probation if he accepted probation terms, the court immediately took recess without hearing from either party].)

Had defendant asserted at the sentencing hearing that the trial court failed to state reasons for denying probation and selecting the aggravated prison term, the court would have had the opportunity to clarify its reasoning. In these circumstances, we agree with the People that the rule of *Scott*

applies, and we will not consider the issue for the first time on appeal.

DISPOSITION

The judgment is affirmed.

_____ HULL _____, Acting P. J.

We concur:

_____ BUTZ _____, J.

_____ MAURO _____, J.