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

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THE PEOPLE,  
  
Plaintiff and Respondent,

v.

DARIN DEMETRIUS GREENE,  
  
Defendant and Appellant.

C068894

(Super. Ct. No. 10F05762)

Defendant Darin Demetrius Greene was sentenced to state prison after failing to complete drug diversion. He contends the matter must be reversed because the trial court failed to order preparation of a probation report. Finding any error harmless, we shall affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

On January 12, 2011, defendant was charged by an amended consolidated complaint with two felony counts of possession of a controlled substance. (Health & Saf. Code, § 11350, subd. (a).) It was alleged that he had committed at least one of these offenses while released from custody pending judgment on a primary offense. (Pen. Code, § 12022.1; further undesignated section references are to the Penal Code.)

On the same date, defendant pleaded no contest to both counts and admitted the special allegation.<sup>1</sup> The trial court suspended criminal proceedings and committed defendant to drug diversion (§ 1000), explaining that if he did not successfully complete the program, he would be sentenced to state prison for a minimum of three years four months or a maximum of five years eight months.

On February 23, 2011, the trial court re-referred defendant to diversion. On March 16, 2011, the court terminated diversion but then reinstated it. On July 6, 2011, after defendant's third failure in diversion, the court permanently terminated diversion and reinstated criminal proceedings.

On July 20, 2011, the trial court ordered a transcript of the plea proceedings and continued the matter for judgment and sentence to July 27, 2011. The court did not order the preparation of a probation report.

On July 27, 2011, defense counsel filed a statement in mitigation, claiming and attaching documentation to prove that defendant failed to complete diversion because he had been forced to go out of state on short notice to assist his mother during a medical emergency.

At sentencing on July 27, 2011, the trial court stated it had reviewed the statement in mitigation. Defense counsel asked the court to consider that defendant had not incurred any new charges other than his failures to complete diversion and one failure to appear. Defendant then read a statement purporting to explain further why he had failed to complete diversion.<sup>2</sup>

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<sup>1</sup> The parties stipulated that on or around September 6, 2010, defendant possessed a usable amount of tar heroin, and while out on bail on that offense, on or around November 3, 2010, he possessed a usable amount of cocaine base.

<sup>2</sup> In addition to his mother's out-of-state medical emergency, as to which he claimed he had notified his drug diversion counselor, he said he had inadvertently failed to enroll in

The prosecutor stated that defendant's lengthy criminal history included multiple felonies, including a 2003 strike for a violation of section 422, along with parole violations in 2005 and 2006 and "two additional offenses in [20]07 as well as 2006 which was an additional [section] 236[.]" Given the chance to respond, defense counsel did not dispute the prosecutor's account. Nor did counsel mention the trial court's failure to obtain a probation report.

The trial court stated:

"... I took the plea in January.

"After reviewing the transcript too -- ... I made it abundantly clear ... to the defendant that[,] especially in light of the fact that ... the People had amended before the plea to add the bail enhancement. So the understanding [was that] he was pleading to these charges with the bail enhancement.

"And has [*sic*] just obviously horrendous record up to that point and was given a great opportunity to have all of this removed from his record.

"I made clear that he had to go and -- that's all he had to do.

"At one point he even asked for clarification on the issue of whether or not he'd have to go to prison. And the Court indicated ... we'd only have a sentencing if you fail to complete the diversion program.

"And the defendant even thanked me for clarifying that issue ... He was definitely going to be on top of this.

"And the first date he's supposed to show up with proof, just proof that he actually enrolled in the class ... [¶] ... [¶]

"... He didn't do it. ...

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diversion on time at the outset because of confusion about the time limit, then was evicted and had been living on the streets and in motels.

“And was given another date. An extension for a month to come in and again show proof. But he FTA’ed on that day. That was March 16. Failed to appear.

“Next date was March 22nd and it was on calendar. . . .

“Came back again on March 29 and the judge reinstated him on probation, and bench warrant was recalled. Supposed to come back to show that he’s completed that.

“And then the next date . . . is July. Goes months without showing up. . . . [H]e was referred three separate times.

“I . . . did everything but beg and plead with Mr. Greene . . . just to go to the thing. It’s easy. . . .

“It’s not as hard as drug court or even Prop. 36. You just go to a few classes and the whole case could have been dismissed.”

The trial court rejected defense counsel’s request for probation or the low term, then imposed a sentence of four years eight months (the two-year midterm on count one, plus eight months (one-third the midterm) on count two, plus two years for the on-bail enhancement, all to run consecutively).

## **DISCUSSION**

Defendant contends (1) he was statutorily eligible for probation; (2) a probation report was therefore mandatory unless counsel stipulated to waive it, which they did not; and (3) the absence of a probation report prejudiced defendant because a report might have shown that he qualified for probation. We disagree.

As we shall explain, the record suggests defendant was not statutorily eligible for probation. If he was not, a probation report was not mandatory, regardless of whether or not counsel stipulated to waive it. Finally, even assuming a report should have been prepared, defendant cannot show prejudice because the record makes it clear that the court would not have considered probation in any event.

Defendant relies on the following provisions of section 1203, subdivision (b):

“(1) [I]f a person is convicted of a felony *and is eligible for probation*, before judgment is pronounced, the court shall immediately refer the matter to a probation officer to investigate and report to the court, at a specified time, upon the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment.

“(2)(A) The probation officer shall immediately investigate and make a written report to the court of his or her findings and recommendations, including his or her recommendations as to the granting or denying of probation and the conditions of probation, if granted. [¶] . . . [¶]

“(4) The preparation of the report or the consideration of the report by the court may be waived only by a written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court, except that there shall be no waiver unless the court consents thereto.” (Italics added; see also Cal. Rules of Court, rule 4.411(a).)

However, defendant overlooks two other relevant statutory provisions. Section 667, subdivision (c) provides: “Notwithstanding any other law, if a defendant has been convicted of a felony and it has been pled and proved that the defendant has one or more prior felony convictions as defined in subdivision (d) [i.e., strikes], . . . [¶] . . . [¶] (2) [p]robation for the current offense shall not be granted . . . .” Where this provision applies, the preparation of a probation report is discretionary. (*People v. Dobbins* (2005) 127 Cal.App.4th 176, 180; *People v. Johnson* (1999) 70 Cal.App.4th 1429, 1431-1432 [citing § 667, subd. (b)(2)]; *People v. Llamas* (1998) 67 Cal.App.4th 35, 39 [same].) Furthermore, section 1203, subdivision (k) provides: “Probation shall not be granted to, nor shall the execution of, or imposition of sentence be suspended for, any person who is convicted of a violent felony, as defined in subdivision (c) of Section 667.5, or a serious felony, as defined in subdivision (c) of section 1192.7, and

who was on probation for a felony offense at the time of the commission of the new felony offense.”

The Attorney General asserts that defendant was statutorily ineligible for probation because the prosecutor stated without contradiction that defendant was convicted of a strike in 2003 (§ 422 [defined as a serious felony in § 1192.7, subd. (c)(38)]). In both his opening brief and his reply brief, defendant asserts repeatedly that he was statutorily eligible for probation, but he provides no record support for this assertion, ignores sections 667, subdivision (c)(2) and 1203, subdivision (k), and passes over the prosecutor’s statement in silence. We conclude that defendant was statutorily ineligible for probation.

But even assuming a probation report should have been prepared, defendant cannot show that its absence prejudiced him. As we have explained above, the trial court was thoroughly familiar with the case, including defendant’s criminal history. The court clearly explained to defendant when it accepted his plea that if he failed on diversion he would certainly be sentenced to prison. Defendant’s statement in mitigation and his oral statement in allocution presumably furnished the court with all the information that could possibly count in defendant’s favor. Under all the circumstances, we see no possibility that a probation report, if prepared, could have produced a more favorable outcome for defendant.

**DISPOSITION**

The judgment is affirmed.

We concur: \_\_\_\_\_ RAYE \_\_\_\_\_, P. J.

\_\_\_\_\_ NICHOLSON \_\_\_\_\_, J.

\_\_\_\_\_ DUARTE \_\_\_\_\_, J.