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

THE PEOPLE,

Plaintiff and Respondent,

v.

NICOLAS DAVID ANDERSON,

Defendant and Appellant.

C069115

(Super. Ct. No.
10F4280)

Defendant Nicolas David Anderson pleaded no contest to three counts of first degree residential burglary (Pen. Code, § 459),¹ and was sentenced to an aggregate term of 10 years in state prison. Defendant appeals without a certificate of probable cause. We affirm the judgment.

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

BACKGROUND

Sometime between April 4, 2010, and April 6, 2010, defendant broke a glass sliding door at the rear of William Morrison's residence, entered the residence, and stole numerous items, ransacking the home in the process.

On April 8, 2010, defendant pried open a sliding glass door at Jerry Butler's residence and entered the residence. Inside, defendant stole a computer monitor, a "Playstation 3," two collectible knives, a digital camera, a softball bag, a jewelry box containing antique watches, a bottle of coins, car keys, and "hygiene items."

Sometime between April 11, 2010 and April 13, 2010, defendant returned to Morrison's home. Defendant removed a board that was covering the door defendant broke previously and again entered the Morrison home. Once inside, defendant stole arrowheads, a set of keys, a train, and numerous collectible stamps.

On April 12, 2010, defendant entered the residence of Stewart and Lorraine Jankowitz through a rear sliding glass door. From the Jankowitz home, defendant stole numerous valuable items, including: \$2,500 in cash, jewelry, a laptop computer, several handguns, gun accessories, a television, credit cards, and a coin dish with gold dollars. The Jankowitzes estimated their total loss to be approximately \$14,240.98.

On April 20, 2010, defendant was arrested along with several others when Redding police officers served a search

warrant at the home of Daniel Luster. During the search of the Luster residence, officers found over 100 items of stolen property, .9 grams of crystal methamphetamine, two methamphetamine pipes, one digital gram scale, and two surveillance cameras.

Defendant was taken into custody and charged with four counts of receiving stolen property (§ 496, subd. (a)), five counts of first degree residential burglary (§ 459), one count of grand theft of a firearm (§ 487, subd. (d)), one count of possessing methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and two counts of possessing an injecting or smoking device (Health & Saf. Code, § 11364). The following day, defendant was released on his own recognizance with a promise to appear in court on June 4, 2010.

On June 4, 2010, defendant failed to appear in court and his release was revoked.

Nearly three months later, defendant was being held in custody at the Tehama County jail on unrelated charges.

On October 26, 2010, the preliminary hearing in this matter was held in Shasta County Superior Court.

On November 1, 2010, defendant resolved two pending criminal matters in Tehama County: (1) receiving stolen property (§ 496, subd. (a) -- Tehama County case No. 79350), and (2) violating probation in Tehama County case No. 77973.²

² In December 2009, defendant was sentenced to 36 months formal probation in Tehama County case No. 77973; he was

Defendant was sentenced to two years in state prison for his convictions in Tehama County and was sent to High Desert State Prison in January 2011.

Defendant returned to Shasta County Superior Court on July 28, 2011, and changed his plea, pleading no contest to three counts of first degree residential burglary. The remaining charges were dismissed with a *Harvey*³ waiver.

Prior to sentencing, the Probation Department (the Department) prepared a sentencing report and recommendation. The Department recommended imposing the upper term, noting defendant's crimes were carried out in a way that indicated planning, sophistication, or professionalism.

The Department also noted defendant's crimes "involved an attempted or actual taking or damage of great monetary value," defendant's prior convictions were numerous and increasing in seriousness, he was on probation or parole when he committed the crimes, and defendant's prior performance on probation or parole was unsatisfactory. The Department indicated there were no factors in mitigation.

At sentencing, defendant's father spoke in favor of imposing the middle term, telling the court that defendant's crimes were solely the result of his drug addiction.

convicted in that case of possessing a controlled substance (Health & Saf. Code, § 11377, subd. (a)).

³ *People v. Harvey* (1979) 25 Cal.3d 754.

Defendant's father also told the court that defendant was now drug-free and asked the trial court to be lenient.

Defense counsel also argued in favor of the middle term, saying there was nothing in defendant's criminal record that amounted to aggravation: "There is a reference to the Tehama County case as being a prior prison commitment, but actually that occurred after he was in custody here. So I'm not at all sure that that really qualifies as a prior prison commitment, as opposed to someone who is sent to prison, gets out and then commits a new offense."

The court agreed defendant's prison sentence in Tehama County case No. 79350 was not an appropriate factor in aggravation and struck it accordingly. The court then found "there was no mitigation." Defense counsel disagreed, noting defendant made an early admission of guilt and argued that should be considered a mitigating factor. The court acknowledged seeing that fact in the body of the sentencing report; it did not, however, change the court's opinion that the proper sentence was the upper term. Accordingly, the court sentenced defendant to an aggregate term of eight years eight months in state prison: the upper term of six years, plus two consecutive 16-month terms.

The court then recalled defendant's sentences in Tehama County and resentenced him on those convictions as subordinate counts. Defendant was thus sentenced to an additional consecutive one-third the middle term (eight months) on each conviction in Tehama County, to run consecutive to his sentence

for the current Shasta County convictions. As a result, defendant was sentenced to an aggregate term of 10 years in state prison.

Defendant appeals his conviction and sentence on the Shasta County charges; defendant did not obtain a certificate of probable cause.

DISCUSSION

Defendant contends the trial court abused its discretion in imposing the upper term sentence because the court relied on "improper aggravating factors" and the court "ignored relevant mitigating factors."

Objections to a sentence imposed must be sufficiently specific to provide the trial court a meaningful opportunity to correct any errors. (*People v. de Soto* (1997) 54 Cal.App.4th 1, 9.) Here, defendant raised only two objections at sentencing: (1) that the court could not rely on defendant's prison term in Tehama County case No. 79350 as an aggravating factor and (2) that defendant's early admission of guilt should be considered a mitigating factor.

The trial court considered each of these objections, struck the aggravating factor regarding defendant's prior prison term and acknowledged defendant's early admission of guilt. These are the only objections defendant preserved for appeal but are not the claims he raises here. The claims he raises here were not preserved in the trial court and thus are forfeited. (See *People v. Scott* (1994) 9 Cal.4th 331, 352-356.) Even if defendant had preserved his claims, however, they lack merit.

Sentencing courts have wide discretion in weighing aggravating and mitigating factors (*People v. Evans* (1983) 141 Cal.App.3d 1019, 1022) and may balance them in qualitative as well as quantitative terms. (See *People v. Lambeth* (1980) 112 Cal.App.3d 495, 501.) We presume the trial court has considered all relevant criteria in deciding a defendant's sentence. (Cal. Rules of Court, rule 4.409.) Furthermore, 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.)

A. *Aggravating Factors*

Here, defendant argues that his conviction in Tehama County case No. 79350, and probation violation in Tehama County case No. 77973, "were not part of [defendant's] prior record because they occurred *after* [defendant] had been arrested and incarcerated for the instant case, they . . . should not have been used by the court to support the aggravating factor alleged under [California Rules of Court,] rule 4.421(b)(2) & (5), i.e., [t]he defendant's *prior* convictions as an adult and sustained petitions as a juvenile are numerous; and the defendant's *prior* performance on probation and parole has been unsatisfactory." (Original italics.)

It is true defendant was charged with *violating* probation in Tehama County in case No. 77973 *after* he was charged with the crimes here. He was, however, already on probation in Tehama County case No. 77973 when he committed the crimes here. It was, therefore, reasonable for the trial court to consider the

fact that defendant was on probation when the crimes here were committed. Such conduct also supports a finding that defendant's performance on a prior grant of probation was unsatisfactory.

Additionally, setting aside defendant's 2010 convictions in Tehama County, defendant was convicted of driving under the influence in 2000 and again in 2002. Then, in 2009, defendant was convicted of possessing marijuana. Defendant thus had three convictions as an adult prior to his arrest in this case. Three convictions are "numerous" within the meaning of California Rules of Court, rule 4.421(b)(2). (See *People v. Searle* (1989) 213 Cal.App.3d 1091, 1098 [finding three convictions are numerous].)

Moreover, defendant's crimes are increasing in seriousness. Defendant's criminal activity escalated from DUIs, to possessing marijuana, to multiple counts of residential burglary. Thus, defendant's crimes went from misdemeanors, to a felony, to strike felonies. By any measure, this reflects an increasing seriousness in his crimes.

The trial court also found the crimes defendant committed here showed planning, sophistication, or professionalism, defendant was on probation at the time he committed the crimes, and his crimes resulted in the taking of property that had "great monetary value." Thus, even if the aggravating factors of which defendant now complains were eliminated, any one of these factors would have been sufficient to impose the upper

term. (*People v. Quintanilla* (2009) 170 Cal.App.4th 406, 413, *People v. Brown* (2000) 83 Cal.App.4th 1037, 1043.)

B. Mitigating Factors

Defendant also contends the trial court wrongly ignored relevant, mitigating factors in imposing the upper term. Again, we disagree.

It is error for a sentencing court to disregard an undisputed factor in mitigation. (*People v. Burney* (1981) 115 Cal.App.3d 497, 505 [the trial court erroneously failed to consider circumstances in mitigation enumerated in former [California Rules of Court, rule 423].) "However, many alleged factors in mitigation are disputable either because they may not be established by the evidence or because they may not be mitigating under the circumstances of a particular case. Where an alleged factor in mitigation is disputable, the court may find an absence of mitigating factors and need not explain the reason for its conclusion. [Citations.]" (*In re Handa* (1985) 166 Cal.App.3d 966, 973.)

Defendant claims the trial court ignored numerous mitigating factors: (1) defendant's early admission of guilt, (2) defendant's father's plea for mercy given defendant's untreated drug addiction, (3) defendant's "insignificant record of criminal conduct," (4) and defendant's decision to "exercise caution to avoid harm to persons by assuring no one was home during the burglaries."

The record reveals the trial court did not disregard defendant's early admission of guilt, considered defendant's

criminal record, and knew the burglaries occurred when no one was home.⁴

We also presume the court was listening when defendant's father spoke on defendant's behalf. That presumption is particularly sound here because, during his speech, defendant's father expressed particular concern with the amount of time defendant would serve in prison. In response, the court asked defendant's father if he understood defendant would get credit for the time he already served. It is apparent the court was listening.

Ultimately, however, the trial court disagreed with defendant's conclusion that these facts mitigated the seriousness of defendant's crimes. Instead, the court found "there was no mitigation." In doing so, the court apparently determined that after considering all the circumstances, the facts weighed in favor of the aggravated term. Given the record in its totality, we understand the court's statement that there was "no mitigation" to be a finding that the mitigating factors proposed by defendant were insignificant. (See *People v. Thompson* (1982) 138 Cal.App.3d 123, 127 [the trial court may reject defendant's proposed factors in mitigation as insignificant].)

⁴ On appeal, defendant contends he "did exercise caution to avoid harm to persons by assuring no one was home during the burglaries." There is no evidence in the record that defendant "assured" himself no one was home during the burglaries. The record indicates only that no one was home when the burglaries were committed.

C. Incorporation by Reference

Defendant also claims the trial court abused its discretion when, rather than identifying the aggravating factors on which the court relied in imposing the upper term, the court merely incorporated by reference the findings in the probation report.

On this point, defendant is correct on the law. The court's mere incorporation of the probation report violates the spirit of the sentencing laws and fails to properly explain the basis for the court's sentencing choice. (*People v. Fernandez* (1990) 226 Cal.App.3d 669 (*Fernandez*); *People v. Pierce* (1995) 40 Cal.App.4th 1317 (*Pierce*)). But, in *Pierce*, a judge simply would not follow the appellate court's admonition to follow proper sentencing procedures (*Pierce, supra*, at pp. 1319-1320), and in *Fernandez*, the court completely failed to understand the gravity and complexity of sentencing in a case involving 156 offenses. Thus, under those egregious circumstances, the sentencing errors were prejudicial to the respective defendants. (*Fernandez, supra*, at pp. 678-679.)

Here, by contrast, "it would be idle to remand to the trial court for a new statement of reasons, as it is not reasonably probable that a result more favorable to [defendant] would occur. [Citation.]" (*People v. Porter* (1987) 194 Cal.App.3d 34, 39; see *People v. Green* (1988) 200 Cal.App.3d 538, 543.) Defendant was on probation at the time he committed the crimes here. Thus, his probationary status alone justifies imposition of the upper term even if we ignore the other aggravating factors, including: his three prior convictions (each

increasing in seriousness), the crimes involved a taking of property with great monetary value, and the crimes showed planning, sophistication, or professionalism. Accordingly, any error was harmless.

DISPOSITION

The judgment is affirmed.

NICHOLSON, Acting P. J.

We concur:

DUARTE, J.

HOCH, J.