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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JANET REBECCA WEISS,

Defendant and Appellant.

C069563

(Super. Ct. No. 091895)

Defendant Janet Rebecca Weiss pleaded no contest to transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a)), and driving without a valid driver's license (Veh. Code, § 12500, subd. (a)), and admitted enhancements for a prior drug-related offense conviction (Health & Saf. Code, § 11370.2, subd. (c)) and a prior prison term (Pen. Code, § 667.5, subd. (b))<sup>1</sup>. The trial court sentenced defendant to seven years in state prison.

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<sup>1</sup> Subsequent undesignated statutory references are to the Penal Code.

On appeal, defendant contends that the prospective application of the Criminal Justice Realignment Act of 2011 (Realignment Act; Stats. 2011, ch. 15) violates her right to equal protection of the law, the seven-year state prison term was an abuse of discretion, and there was insufficient evidence to support the denial of her suppression motion. We affirm.

## **BACKGROUND**

The facts of defendant's crimes are taken from the combined preliminary hearing and suppression motion.

### **A. The Offense**

At around 12:18 p.m. on April 17, 2009, Davis Police Officer Daniel Beckwith spotted a car passing through an intersection. The vehicle was about two car lengths away, and crossed the intersection perpendicular to Officer Beckwith's patrol car. As the car passed by him, Officer Beckwith could not see a license plate on it, and the area where the license plate should be was not lit.

Officer Beckwith pursued the car and executed a traffic stop about a block from the intersection. He contacted the driver, defendant; told her the reason for the stop; and asked for her driver's license. Defendant gave the officer an expired license. Officer Beckwith obtained her consent to search the car and discovered methadone pills inside a baggie on the front passenger seat. Defendant claimed to have a prescription for the methadone at home.

Officer Beckwith told defendant that she could look for the prescription at her house. He took defendant to her home and accompanied her to her bedroom, where she looked for the prescription. She could not find the prescription but gave Officer Beckwith a number to call to confirm its existence. When he was unable to confirm the prescription, Officer Beckwith arrested defendant.

Defendant was taken to the Yolo County jail and searched. The search revealed a glass pipe in her bra that contained .08 gram of methamphetamine. Defendant also had a

plastic baggie containing 1.45 grams of methamphetamine. She admitted owning the pipe and baggie.

Diana Barrett gave the car to defendant about a month before her arrest. Barrett had no trouble with the license plate light when she owned the car. After defendant's arrest, Barrett started the car and determined that the light worked.

A defense investigator who photographed defendant's car found the license plate light was working. He videotaped the rear of the car as it drove through Davis and was able to see the license plate through the video camera.

A video examiner looked at the police video from the traffic stop and determined that the light over defendant's license plate was illuminated when the stop was made. However, the examiner could not determine whether a license plate was present on the car by looking at the video.

#### **B. The Suppression Motion**

The trial court found all of the witnesses were credible. The license plate light may have been illuminated, but Officer Beckwith nonetheless could not see the license plate when defendant's car passed. The trial court also noted that Officer Beckwith got behind defendant's car, stopped her, and told her that her rear plate was not lit, which was consistent with his believing that he could not adequately read the plate. The court saw a picture of defendant's car as it passed through the intersection and could not see the license plate.

#### **C. Sentencing**

Defendant's plea agreement did not include a stipulated sentence.

Defendant was 50 years old at the time of the probation report. She was taking medication for chronic depression, bipolar disorder, and posttraumatic stress disorder. She had used methamphetamine since she was 17 years old.

Defendant had five prior felony convictions for drug-related offenses. She completed a seven-day drug treatment program in 1987, and participated in another

program between 1985 and 1987. In 1996 she completed a 180-day residential treatment program with the Salvation Army in San Francisco. In 2004 she left one program after a couple of days and was terminated from another program.

Defendant also failed a prior grant of felony drug court. The probation report noted that “[i]n each probation report, past and present, the defendant maintains she wants to reunite with or make amends to her family for the problems that her addiction has caused.”

The probation report noted that defendant was ineligible for probation absent unusual circumstances. (§ 1203, subd. (e)(4).) It identified as aggravating factors defendant’s numerous prior convictions, a prior prison term, and unsatisfactory performance on probation. Finding no mitigating factors, the report recommended an eight-year prison term.

In an assessment prepared for the trial court by the probation department and reviewed by drug court coordinator Florence Gainor, the probation officer declared that defendant would not be a good candidate for the program in light of her dishonesty about drug use, failure to enroll in a treatment program when she was out of custody, and prior failure in drug court.

At the August 24, 2011, sentencing hearing, defense counsel informed the court that defendant had interviewed for the Delancey Street Foundation drug treatment program, which did not think its program was suitable for her. The trial court indicated that drug court and Delancey Street were the available exceptions to prison, and noted Gainor’s recommendation regarding drug court.

Gainor then testified that defendant was not suitable for drug court based on her history and current readiness. Defendant contacted the Delancey Street Foundation only because she had been ordered to do so by the court. According to Gainor, defendant’s willingness to participate in the Delancey Street program did not indicate her suitability for drug court.

Defense counsel stated that defendant had contacted two other programs, including a 60-day residential program in Oakland called Chrysalis. The trial court indicated it was unwilling to place defendant in that type of program and continued sentencing to allow defense counsel to make further arguments.

At the September 7, 2011, sentencing hearing, the trial court denied defendant's request to continue sentencing to October 1, 2011, denied defendant's motion to strike the Health and Safety Code section 11370.2 enhancement, and imposed a seven-year state prison term.

## **DISCUSSION**

### **I**

Defendant was sentenced to state prison on September 7, 2011. Under the Realignment Act, felons are confined to county jail instead of state prison unless they have a current or prior serious or violent felony conviction, or are required to register as a sex offender, or are subject to the aggravated white collar crime enhancement. (§ 1170, subd. (h)(1)-(3).)

The Realignment Act would apply to defendant but for the date of her sentencing. "The sentencing changes made by the act that added this subdivision shall be applied prospectively to any person sentenced on or after October 1, 2011." (§ 1170, subd. (h)(6).) Defendant contends this violates her right to equal protection of the law.

We rejected an identical contention in our opinion in *People v. Lynch* (2012) 209 Cal.App.4th 353, 362. We reject defendant's contention for the reasons stated in *Lynch*.

### **II**

Defendant contends it was an abuse of discretion to deny probation, and that the seven-year term was an abuse of discretion. She argues that the trial court erred by failing to consider probation, improperly delegated authority to the drug court coordinator, did not consider the full extent of the mitigating factors, should have stricken

the enhancements, and should have reduced the driving without a license offense to an infraction. Her contentions are without merit.

**A.**

“The trial court enjoys broad discretion in determining whether a defendant is suitable for probation. [Citations.]” (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1256.) “To establish abuse, the defendant must show that, under the circumstances, the denial of probation was arbitrary or capricious. [Citations.] A decision denying probation will be reversed only on a showing of abuse of discretion. [Citation.]” (*Id.* at p. 1257.)

Defendant did not qualify for Proposition 36 probation because one of her offenses, driving without a license, was not a nonviolent, drug possession offense. (§ 1210.1, subd. (b)(2).) Since defendant had more than one prior felony conviction, she was ineligible for probation absent unusual circumstances. (§ 1203, subd. (e)(4).)

Noting that courts “routinely” grant probation to defendants who are not eligible for Proposition 36, defendant asserts the trial court abused its discretion by considering only two alternatives to prison, drug court and the Delancey Street Foundation treatment program, while ignoring her proposal, the Chrysalis program. Defendant further asserts the trial court improperly ceded its authority to the drug court coordinator, as it was unwilling to consider drug court without the coordinator’s approval. Finally, defendant argues that the trial court failed to consider “the full extent of the mitigating factors in this case,” specifically her participation in drug treatment, that she would have been eligible for Proposition 36 but for the driving without a license conviction, and the small amount of contraband.

Defendant’s criminal record includes four prior felony convictions for drug-related offenses, each in a separate proceeding. She failed probation in three of her prior cases. She has an extensive history of failed treatment programs, including drug court. The drug court coordinator stated that she was not appropriate for that program.

It was not an abuse of discretion for the trial court to deny probation under these circumstances. Defendant was presumptively ineligible for probation. Arrayed against this presumption and her history of felony drug convictions, failed treatment, and limited treatment options, defendant's claimed mitigating factors do not support a finding of the unusual circumstances necessary for a grant of probation.

Defendant's contention that the trial court reached its decision in the wrong way is likewise without merit. The court did not, as defendant suggests, cede its authority to the drug court coordinator by following the recommendation that defendant was ineligible for drug court and deferring to the coordinator's credibility. Rather, the trial court properly relied on program personnel in deciding whether defendant was suitable for that program.

Nor was the trial court compelled to reduce the driving without a license offense to an infraction so that defendant would be eligible for Proposition 36 probation. Reducing an offense to a lower level of culpability in order to render a defendant eligible for probation is a quintessential exercise of a trial court's discretion. Defendant's circumstances are far from those that would compel a court to grant leniency. She was given favorable treatment in each of her four prior felony adjudications and yet continued to offend. The trial court did not have to give her favorable treatment yet again.

**B.**

“When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court's discretion, best serves the interests of justice.” (§ 1170, subd. (b).) We review the trial court's sentencing choice for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.)

Defendant argues that the trial court should have imposed a lower term rather than the middle term for the principal offense of transportation of methamphetamine, and

should have stricken the prior drug conviction enhancement. In support of her argument, defendant claims the trial court did not give proper weight to the mitigating factors of her participation in treatment, that she would have been eligible for Proposition 36 but for the driving without a license conviction, and the small amount of contraband found on her.

Defendant's participation in treatment in this case consisted primarily of her attending AA/NA meetings and contacting the Delancey Street Foundation program for possible treatment. In light of her history of failed rehabilitation, the trial court was not compelled to give this factor any weight.

Defendant's near eligibility for Proposition 36 is not a mitigating factor as a matter of law. Proposition 36 is quite clear that any misdemeanor conviction other than a nonviolent drug possession offense disqualifies the defendant. (§ 1210.1, subd. (b)(2).) Sentencing is not a game of horseshoes where getting close to the mark counts. The trial court did not have to consider defendant's Proposition 36 status when selecting the appropriate prison term.

The amount of drugs found on defendant did not compel a mitigated term. The drugs found on defendant would be small if she were convicted of possession or transportation for sale, but she was convicted of simple possession of methamphetamine. The arresting officer testified that a 10th of a gram is a useable quantity of methamphetamine. Defendant possessed over 1.4 grams, or 14 times the useable amount.

In light of defendant's extensive criminal history and the minimal mitigating circumstances, it was not an abuse of discretion for the trial court to impose the middle term and deny the motion to strike the enhancement.<sup>2</sup>

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<sup>2</sup> Defendant is wrong when she claims the record "strongly suggests" that the trial court was unaware of its discretion to strike the enhancement. After defense counsel asked the court to strike the enhancement, the trial court stated it had considered the request. The court did not formally reject the request but nonetheless imposed the enhancement. The

### III

Defendant contends there is insufficient evidence to support the trial court's finding that Officer Beckwith had reasonable suspicion to stop her car.

On appeal from the denial of a suppression motion, all presumptions are in favor of the trial court's factual findings, whether express or implied, where supported by substantial evidence, and we review de novo the facts favorable to the People to determine whether the officer's conduct was reasonable under the Fourth Amendment to the United States Constitution. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

“The Fourth Amendment's protection against unreasonable searches and seizures dictates that traffic stops must be supported by articulable facts giving rise to a reasonable suspicion that the driver or a passenger has violated the Vehicle Code or some other law. [Citation.]” (*People v. Durazo* (2004) 124 Cal.App.4th 728, 731.) “A traffic stop is lawful at its inception if it is based on a reasonable suspicion that any traffic violation has occurred, even if it is ultimately determined that no violation did occur. [Citations.]” (*Brierton v. Department of Motor Vehicles* (2005) 130 Cal.App.4th 499, 510, italics omitted.) Reasonable suspicion requires only that “the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.” (*People v. Souza* (1994) 9 Cal.4th 224, 231.)

Defendant asserts that while Officer Beckwith testified as to what he saw when defendant's car was at a 90-degree angle to him, he never testified as to whether he could see her license plate when his car was directly behind hers. Since defense witnesses testified that the car's license plate light was working, defendant concludes that the trial

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trial court's actions demonstrate an awareness of its authority to strike the enhancement pursuant to section 1385 and an implicit rejection of defendant's request.

court should have found that the prosecution had not met its burden of showing reasonable suspicion for the traffic stop.

The trial court found credible Officer Beckwith's statement that he could not see the license plate as the car passed by him in the intersection. The court found that while the license plate may have been illuminated, the illumination may have been insufficient for Officer Beckwith to see the plate. This conclusion is supported by the testimony of defendant's video expert, who testified that he could not see whether defendant's car had a license plate when reviewing the patrol car video. Also, the court recognized that Officer Beckwith got behind defendant's car and stopped her. This supported an inference that he had more than a perpendicular view of defendant's car.

The power to judge the credibility of witnesses at a suppression motion hearing is vested in the trial court, and "[o]n appeal all presumptions favor the exercise of that power." (*People v. Lawler* (1973) 9 Cal.3d 156, 160.) This is particularly true in this case, where the trial court saw a picture of defendant's car as it passed through the intersection and could not see whether it had a license plate.

Defendant essentially asks us to ignore the trial court's credibility finding and view the evidence in a light more favorable to her. We decline her invitation to ignore well-established standards of appellate review.

**DISPOSITION**

The judgment is affirmed.

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RAYE, P. J.

We concur:

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BLEASE, J.

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HULL, J.