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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

THE PEOPLE, Plaintiff and Respondent, v. GURSHINDER BAINS SINGH, Defendant and Appellant.	C071052 (Super. Ct. No. CRF112020)

Defendant Gurshinder Bains Singh entered a negotiated plea of no contest to resisting an officer by the use of force or violence (Pen. Code, § 69; count 2) in exchange for dismissal of the remaining counts. Count 1 (battery on an officer; Pen. Code, § 243, subd. (c)(2)) was dismissed with a *Harvey* waiver.[1] The court denied probation and sentenced defendant to county jail for the upper term of three years.

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

Defendant appeals, contending the trial court abused its discretion in denying probation and in imposing the upper term. We will affirm.

FACTS

About 1:00 p.m. on September 15, 2011, Sutter County Sheriff's Detective Bryan Simpson, not in uniform but wearing a badge and a gun on his right hip, investigated a report that a motorcycle was parked within two feet of the front doors to the county building and was considered to be a fire hazard. The detective removed the key from the motorcycle's ignition. While the detective spoke with dispatch concerning the license plate, a man later identified as defendant approached, wearing a motorcycle helmet. Defendant confirmed that he owned the motorcycle. After identifying himself, the detective twice asked defendant why he had parked the motorcycle in that location, and defendant responded each time that handicapped people parked there but admitted he was not handicapped. The motorcycle was not in a handicapped parking spot but in an entryway.

The detective did not see a handicapped placard or plate and asked for defendant's driver's license, registration, and proof of insurance. At first defendant balked at the request, stating that the detective was not a " 'cop,' " but when the detective pointed to his badge and identified himself as with the sheriff's department, defendant provided his driver's license. In talking with defendant, the detective noticed he exhibited signs and symptoms of being under the influence and had a strong odor of alcohol on his breath. Defendant at first denied that he had been drinking but when told he smelled of alcohol admitted he had " 'one shot, maybe.' "

The detective contacted dispatch for a uniformed officer. Defendant mumbled he wanted a " 'real cop' " and the detective's badge number. The detective stated that he did not have a number, and defendant stepped toward the detective to look at the badge. Defendant then lunged toward the detective, grabbed his wrist, and placed his arm around the officer's neck. The two struggled and they fell to the ground. The detective directed

defendant to stop resisting and stated he was under arrest. Defendant refused and said, " 'Is that all you got, big man? You're not going to win this one' " and " 'You are not strong. You're not going to win.' " When the detective used finger pressure below defendant's eyes, defendant asked, " 'That's it?' " About that time, other officers arrived and defendant was handcuffed and arrested.

The detective suffered a laceration on his hand and abrasions on his knee and elbow. Defendant apologized for fighting with the detective and admitted that he knew the detective was a law enforcement officer. He admitted drinking some wine earlier in the day. Two preliminary alcohol screening tests revealed blood alcohol content readings of .057 and .056 percent, and an Intoxilyzer test revealed .04 percent.

The probation officer reported that defendant was presumptively ineligible for probation because of his two prior felony convictions. (Pen. Code, § 1203, subd. (e)(4).) The probation officer's report listed seven factors weighing against a grant of probation and only one in favor, that defendant expressed a willingness to comply with probation terms and conditions.[2]

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[2] The factors listed:

1) The nature of the offense (defendant tried to choke the detective). (Cal. Rules of Court, rule 4.414(a)(1); all further rule references are to the California Rules of Court unless otherwise indicated.)

2) The infliction of physical injury (the detective suffered a laceration and abrasions). (Rule 4.414(a)(4).)

3) Defendant's criminal history indicated a pattern of regular or increasingly serious criminal conduct (1999 DUI and exhibition of speed; 2001 battery; 2002 felony grand theft; 2002 battery on a custodial officer; 2007 battery; 2007 DUI; 2008 battery; 2008 vandalism and obstruction of a business; 2008 driving on a suspended or revoked license; 2008 acting as a contractor without a license; 2008 illegal dumping; 2011 false imprisonment). (Rule 4.414 (b)(1).)

4) Defendant's prior performance on probation was unsatisfactory (eight violations of probation). (Rule 4.414(b)(2).)

5) Defendant's ability to comply with terms of probation was limited because of his alcohol abuse and mental illness (defendant claimed in his statement in mitigation that he

In recommending the upper term, the probation report listed five factors in aggravation and none in mitigation.[3]

In a statement in mitigation, defense counsel cited the immigration consequences to defendant if he were sentenced to one or more years in confinement: defendant arrived in the United States in 1992 at 20 years of age; he did not become a citizen but was lawfully admitted for permanent residence, and if his offense were deemed a deportable offense, he would lose his lawful status and be deported. Acknowledging that defendant was ineligible for probation except in an unusual case, defense counsel cited defendant's

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has a history of a serious mental disorder and admitted to the probation officer that he got drunk approximately one time per week). (Rule 4.414(b)(4).)

6) Defendant was not remorseful (defendant denied hurting the detective and asserted his conduct did not amount to battery). (Rule 4.414(b)(7).)

7) Defendant will be a danger to the community if not imprisoned (defendant had previously violated a restraining order, punching a hardware store employee and threatening that he had a gun; attacked and injured two correctional officers while in jail; slapped his in-laws and his sister-in-law; threatened his anger management instructor; harassed women and children at the temple; emptied his plumbing truck septic tank into an orchard; and touched and grabbed a woman without her consent). (Rule 4.414(b)(8).)

[3] The factors in aggravation:

1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness (defendant choked the detective, which threatened great bodily harm, and was aware of his actions as evidenced by his comments to the detective during the struggle). (Rule 4.421(a)(1).)

2) Defendant has engaged in violent conduct indicating a serious danger to society (choking the detective, driving under the influence, punching one and slapping others, attacking custodial officers, and threatening a counselor, and his conduct was undeterred by restraining orders, probation, and imprisonment). (Rule 4.421(b)(1).)

3) Defendant's prior convictions are numerous or of increasing seriousness (two prior felonies and 10 prior misdemeanor convictions). (Rule 4.421(b)(2).)

4) Defendant has served a prior prison term (defendant was sentenced to state prison for battery on a correctional officer and grand theft, and was paroled in March 2005). (Rule 4.421(b)(3).)

5) Defendant's performance on probation and parole has been unsatisfactory (eight violations of probation; the day before the current offense, defendant pleaded guilty to an offense). (Rule 4.421(b)(5).)

mental condition, which significantly reduced his culpability for his crime as did his alcohol use, and asserted that defendant would respond favorably to treatment for his mental disorders.

Defendant claimed that he was taking Depakote and Risperdal. Defense counsel quoted a psychologist who, evaluating defendant for a 90-day diagnostic study, stated that defendant has " 'a history of serious mental disorder.' " In 2002 the doctor diagnosed defendant as being bipolar and having a personality disorder, and suggested psychiatric treatment at that time if probation were granted. Defense counsel asserted that defendant acknowledged wrongdoing at an early stage in the proceedings; was willing and able to comply with probation conditions; had family in the area and none in India, where he may be deported; and was willing to waive his custody credits.

The court determined that defendant's case was not an unusual one, noting defendant "has had a long history of being a law breaker . . . and plenty of opportunities to learn from his mistakes and to learn how to control his anger and how to control his drinking and has not done that as of yet." The court denied probation, finding defendant was not a good candidate and, determining that the circumstances in aggravation outweighed those in mitigation, which included the mental health diagnosis, chose the upper term. The court ordered defendant to serve his time in county jail pursuant to Penal Code section 1170, subdivision (h).

DISCUSSION

Citing the virtual certainty of his deportation, his mental health issues, and the lack of serious injuries to the victim, defendant contends the trial court abused its discretion in denying probation and imposing the upper term, which defendant claims had the additional consequence of infringing upon his right to due process. Defendant attacks the probation officer's recommendation of the upper term, which was based on five circumstances in aggravation and none in mitigation. Assuming this court accepts his contention that the upper term is not supported, defendant claims that probation with

360 days in jail would be the same as the midterm of two years and that his case was an unusual one because of his mental illness, which warranted a grant of probation. We reject defendant's contention.

Because of his two prior felony convictions, defendant was presumptively ineligible for probation; a grant of probation is not permissible "[e]xcept in unusual cases where the interests of justice would best be served if the person is granted probation." (Pen. Code, § 1203, subd. (e)(4).) In determining whether a case is "unusual," the trial court uses the criteria listed in rule 4.413.[4] Rule 4.413(c) is interpreted narrowly. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178.) Even assuming criteria in

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[4] "Relevant criteria enumerated in [the Rules of Court] must be considered by the sentencing judge, and will be deemed to have been considered unless the record affirmatively reflects otherwise." (Rule 4.409.) Rule 4.413 provides, in relevant part, as follows:

"(c) **Facts showing unusual case** The following facts may indicate the existence of an unusual case in which probation may be granted if otherwise appropriate:

"(1) **Facts relating to basis for limitation on probation** A fact or circumstance indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case, including:

"(A) The fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence; and

"(B) The current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense.

"(2) **Facts limiting defendant's culpability** A fact or circumstance not amounting to a defense, but reducing the defendant's culpability for the offense, including:

"(A) The defendant participated in the crime under circumstances of great provocation, coercion, or duress not amounting to a defense, and the defendant has no recent record of committing crimes of violence;

"(B) The crime was committed because of a mental condition not amounting to a defense, and there is a high likelihood that the defendant would respond favorably to mental health care and treatment that would be required as a condition of probation; and

"(C) The defendant is youthful or aged, and has no significant record of prior criminal offenses."

rule 4.413(c) exist, the trial court may, but is not required to, find the case to be an unusual one. (*Stuart*, at p. 178.) If the trial court finds the case to be an unusual one, it decides whether to grant probation using the criteria listed in rule 4.414. We apply the abuse of discretion standard in reviewing both determinations. (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 831 (*Du*).)

" 'Probation is an act of clemency which rests within the discretion of the trial court, whose order granting or denying probation will not be disturbed on appeal unless there has been an abuse of discretion' " (*Du*, *supra*, 5 Cal.App.4th at p. 831), that is, whether a court's order is arbitrary or capricious, or " 'exceeds the bounds of reason, all of the circumstances being considered' " (*People v. Warner* (1978) 20 Cal.3d 678, 683).

In determining that defendant's case was not an unusual one, the trial court began by citing his lengthy criminal history. Defendant discounts his prior criminal history as involving convictions for "low level offenses" and his current offense as "fairly minor." The trial court obviously disagreed, and its determination is supported by the record. Defendant had two prior felony convictions and 10 prior misdemeanor convictions for conduct that involved attacking and injuring two custodial officers, hitting his sister-in-law, threatening a counselor with injury to her daughter, punching a store employee and threatening that he had a firearm, and driving under the influence, among other unlawful behavior. Defendant committed the current resisting with force or violence offense against the detective the day after defendant was released from custody for terrorizing a neighboring businesswoman, and he had been drinking.

Defendant's recent and significant record of criminal offenses, including similar crimes, and his recent custody precluded a finding under rule 4.413(c)(1)(A) and (B), and rule 4.413(c)(2)(A) and (C). The only possible factor applicable here was under rule 4.413(c)(2)(B), that is, defendant committed the crime "because of a mental condition," and "there is a high likelihood that the defendant would respond favorably to mental health care and treatment." Defendant never stated that he responded favorably to

mental health treatment, which had been recommended in 2002. The record reflects that he did not respond favorably to anger management, having threatened his instructor. The trial court could reasonably conclude that defendant would not cooperate with treatment and take prescribed medication. The trial court also noted defendant had had opportunities to learn from his mistakes and to control his anger and drinking but had failed to do so. He had previously been on probation but had eight violations and admitted that he had a problem with alcohol. Defendant has failed to demonstrate that the trial court abused its discretion in determining defendant's case was not an unusual one and in denying probation. Defendant complains denial of probation will result in his deportation. The trial court considered the immigration consequences (rule 4.414(b)(6)), presuming that defendant knew the same but committed the offense in any event.

Defense counsel did not object to the court's imposition of the upper term, so the claim is forfeited. (*People v. Scott* (1994) 9 Cal.4th 331, 354-355.) In any event, numerous factors supported the trial court's imposition of the upper term, including the fact that defendant had previously served a prison term. A single factor supports a sentencing choice. (*People v. Osband* (1996) 13 Cal.4th 622, 730.) We conclude the trial court did not abuse its discretion in imposing the upper term.

Having found no abuse of discretion, it follows that defendant suffered no due process violation.

DISPOSITION

The judgment is affirmed.

RAYE, P. J.

We concur:

BLEASE, J.

ROBIE, J.