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

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN MICHAEL SCHARF,

Defendant and Appellant.

C074251

(Super. Ct. No. 13F5832)

Defendant Steven Michael Scharf was sentenced to four years in state prison after assaulting several individuals with a firearm. He contends his sentence must be reversed and the matter remanded because the trial court failed to exercise its discretion under Penal Code section 1170.9.¹ He also contends the trial court erroneously imposed a

¹ Undesignated statutory references are to the Penal Code.

\$100, rather than \$30, conviction assessment. We reject his first contention but agree with his second contention, and modify the judgment accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of April 19, 2013, defendant and his wife were at a bar where defendant got into a physical altercation with David Walsh. Defendant and his wife then left the bar and waited outside for Walsh, Dakota Serva, Brittany Banford, and Shelby Grant to leave the bar. Defendant and his wife followed these individuals to a house in Vallecito, then returned home where defendant changed into his military uniform and got a handgun and his wife got a shotgun.

Defendant and his wife then returned to the residence in Vallecito. Defendant and his wife got out of their car with their firearms and defendant walked up to Grant, who was with Serva and Banford. Defendant asked where Walsh was and, when Grant asked what he was talking about, defendant raised his gun and pointed it at her chest. Defendant then pointed his gun toward the sky and fired it. Defendant and his wife got in their car and left.

Defendant pleaded no contest to assault with a firearm (§ 245, subd. (a)(2)) and the trial court ordered preparation of a probation report. The probation report noted that defendant was presumptively ineligible for probation due to his use of a deadly weapon upon another person (§ 1203, subd. (e)(2)) but recommended unusual circumstances be found and defendant be placed on probation. The probation report discussed defendant's prior military service and subsequent posttraumatic stress disorder (PTSD) diagnosis and alcohol abuse. Defendant had sought and was receiving counseling and medication through the Department of Veterans Affairs (VA), and was on the waiting list for inpatient treatment.

At sentencing, defense counsel argued (both orally and in writing) that the trial court should consider defendant's PTSD and his subsequent commencement of treatment with the VA in sentencing defendant, and place defendant on probation to continue treatment.

The trial court amended the probation report to reflect that the present offense was committed because of a mental condition not amounting to a defense, noting defendant was diagnosed with PTSD in May 2013, and found that "th[e] diagnosis would have applied to this event." The trial court found, however, that defendant's PTSD and alcoholism did not alter its conclusion that prison was warranted in this case—specifically noting the numerous opportunities defendant had in this case to end the event prior to assaulting the victims with the firearm.

Defense counsel requested the court reconsider its position and instead refer defendant for a 90-day evaluation. The trial court denied the request, with the following remarks, "[T]his Court finds that this act was really a terrorist act that is intended to terrify these people. I recognize [defendant] is a veteran. I recognize that he has honorably served his country. I recognize he has PTSD. I recognize that he is an alcoholic. Having said that, I recognize that this man is a danger to society. He intended to terrorize these people, and he was successful at it. He planned to do it. He followed them. He stalked them. He armed himself, and he changed clothes to make himself more intimidating. By his actions he let them know he could kill them at any time he . . . chose. . . . The Court finds that he is a danger to society." The trial court sentenced defendant to the upper term of four years in state prison.

DISCUSSION

I. Section 1170.9

Defendant argues the trial court failed to exercise its discretion under section 1170.9. That section gives the trial court discretion to order a treatment program as an alternative to either probation or imprisonment in the case of military members or veterans who allege they committed their offense as a result of their military service-related PTSD, substance abuse, or psychological problems. Citing and relying heavily on *People v. Bruhn* (1989) 210 Cal.App.3d 1195 (*Bruhn*), defendant claims “ ‘the trial court should affirmatively indicate an exercise of discretion under section 1170.9 wherever a prima facie showing of eligibility under that section has been made’ [(quoting *Bruhn*, at p. 1200)], that is, whenever the defendant has made ‘an initial showing that he served . . . while a member of the United States Armed Forces and that he suffers from substance abuse or other psychological problems resulting from that service’ ” (quoting *Bruhn*, at p. 1199). Defendant’s reliance on *Bruhn* is misplaced.

The preconditions of section 1170.9 (then § 1170.8) at the time of *Bruhn* differed from those of the current statute. Some background is necessary. In 1982, the statute read, “In the case of any person convicted of a felony who would otherwise be sentenced to state prison the court shall consider whether the defendant was a member of the military forces of the United States who served in combat in Vietnam and who suffers from substance abuse or psychological problems resulting from that service. If the court concludes that the defendant is such a person, the court may order the defendant committed to the custody of federal correctional officials for incarceration for a term equivalent to that which the defendant would have served in state prison. The court *is authorized to* make such a commitment only if the defendant agrees to such a commitment, the court has determined that appropriate federal programs exist, and

federal law authorizes the receipt of the defendant under such conditions.” (Stats. 1982, ch. 964, § 1, p. 3466, italics added.)

In 1983, section 1170.8 was renumbered as section 1170.9 and amended in one particular—the last sentence of subdivision (a) deleted the phrase “The court *is authorized to* make such a commitment” to read “The court *may* make such a commitment” so that the sentence read: “The court *may make* such a commitment only if the defendant agrees to such a commitment, the court has determined that appropriate federal programs exist, and federal law authorizes the receipt of the defendant under such conditions.” (Stats. 1983, ch. 142, § 121, p. 373, italics added.)

Thus, in 1989 the *Bruhn* court explained that, “[i]n order to trigger the provisions of section 1170.9 [as then written], the defendant must make an initial showing that he served in combat while a member of the United States Armed Forces and that he suffers from substance abuse or other psychological problems resulting from that service. Once that occurs, however, the trial court *must then* consider his suitability for federal incarceration for the term imposed. (*People v. Enriquez* (1984) 159 Cal.App.3d 1, 6.)” (*Bruhn, supra*, 210 Cal.App.3d. at p. 1199, second italics added.)

Since *Bruhn* in 1989, section 1170.9 has been amended several times—initially in 2006 to expand coverage to all combat veterans, regardless of where or when they served. (Stats. 2006, ch. 788, § 1(d), (e), p. 6289.) Subdivision (a) of section 1170.9 now requires, in relevant part, “In the case of any person convicted of a criminal offense who could otherwise be sentenced to county jail or state prison and who alleges that he or she committed the offense as a result of sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military, *the court shall, prior to sentencing, make a determination as to whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-*

traumatic stress disorder, substance abuse, or mental health problems as a result of his or her service.” (Stats. 2010, ch. 347, § 1(a), italics added.) The trial court complied with this provision, expressly finding that defendant is a veteran of the military and suffered from PTSD and substance abuse.

Section 1170.9 next states that “[i]f the court concludes that a defendant convicted of a criminal offense is a person described in subdivision (a), *and if the defendant is otherwise eligible for probation and the court places the defendant on probation*, the court may” order the defendant to participate in a treatment program. (§ 1170.9, subd. (b)), italics added.) Subdivision (d) provides, “[w]hen determining the ‘needs of the defendant,’ for purposes of Section 1202.7, the court shall consider the fact that the defendant is a person described in [section 1170.9,] subdivision (a) in assessing whether the defendant should be placed on probation” (§ 1170.9, subd. (d).)

Here, defendant was *not* eligible for probation absent a finding that this was an unusual case. (§ 1203, subd. (e)(2).) The trial court, however, expressly considered, as required by section 1170.9, subdivision (d), defendant’s status under section 1170.9, subdivision (a) in determining whether it was an unusual case where the interests of justice warranted probation. The trial court also heard defense counsel’s request that defendant be placed on probation and provided treatment through the VA. The trial court found that even considering defendant’s veteran status and mental condition, prison was warranted. Accordingly, the trial court did *not* place defendant on probation, effectively terminating the further application of section 1170.9. (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1093 (*Ferguson*) [“Alternative sentencing under section 1170.9 is not triggered unless the court actually decides to grant probation.”].)

Defendant appears to argue that the trial court was required under section 1170.9 to consider the possibility of alternative sentencing prior to making a decision whether probation is appropriate. To the contrary, subdivision (d) specifically requires the court

to consider only “the fact that the defendant is a person described in subdivision (a).” The consideration of alternative programs is not triggered *unless* the court grants probation. Indeed, “[i]n amending the statute in 2006 to include PTSD and to expand its coverage from Vietnam combat veterans to all combat veterans, the Legislature made clear its intent was not to expand probation eligibility, but only ‘to ensure that judges are aware that a criminal defendant is a combat veteran with these conditions at the time of sentencing and to be aware of any treatment programs that exist and are appropriate for the person at the time of sentencing *if a sentence of probation is appropriate.*’ ” (*Ferguson, supra*, 194 Cal.App.4th at p. 1093, quoting Stats. 2006, ch. 788, § 1(g), p. 6289.) In any event, the trial court *did* hear defense counsel’s request that defendant be placed on probation and provided treatment through the VA prior to denying probation, so it was clearly aware of the alternative sentencing option.

In sum, we find the trial court fully complied with the requirements and policy concerns of section 1170.9. The *only* thing the trial court (and parties) did not do was expressly cite to the statutory code section. Express citation or reference to the Penal Code section is not required.

II. Criminal Conviction Assessment

Defendant also contends, and the People concede, that the trial court incorrectly imposed a \$100 assessment, rather than a \$30 assessment, pursuant to Government Code section 70373. Government Code section 70373, subdivision (a)(1) provides for a \$30 assessment on each felony conviction. Defendant was convicted of a single felony and was, therefore, subject to a single \$30 assessment. We shall order the judgment modified accordingly.

DISPOSITION

The judgment is modified to reduce the criminal conviction assessment pursuant to Government Code section 70373, subdivision (a)(1) from \$100 to \$30. As modified, the judgment is affirmed. The trial court is directed to prepare an amended abstract of judgment and forward a certified copy thereof to the Department of Corrections and Rehabilitation.

BUTZ, Acting P. J.

We concur:

MAURO, J.

HOCH, J.