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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

THE PEOPLE,

Plaintiff and Respondent,

v.

TERRIN MICHAEL RICEHILL,

Defendant and Appellant.

C076610

(Super. Ct. No. SF124950A)

Defendant Terrin Michael Ricehill entered a no contest plea to hit-and-run resulting in death or injury in violation of Vehicle Code section 20001, subdivision (a), and admitted inflicting great bodily injury as described in Penal Code section 12022.7, subdivision (a). In exchange, the prosecutor dismissed the remaining counts and allegations (another hit-and-run with a great bodily injury enhancement and two counts of reckless driving causing injury also with great bodily injury enhancements) with a waiver pursuant to *People v. Harvey* (1979) 25 Cal.3d 754.

The trial court denied probation and sentenced defendant to state prison for an aggregate term of five years, which was the midterm of two years for the offense plus three years for the great bodily injury enhancement.

On appeal, defendant contends the trial court failed to understand its discretion in imposing the sentence because it misstated the law at the sentencing hearing. In the alternative, defendant contends his trial counsel provided ineffective assistance in failing to object. We will affirm.

FACTS

At about 9:35 p.m. on August 4, 2013, defendant's truck crossed the double yellow line on East 99 Frontage Road and crashed head-on into a car occupied by two teenagers. The driver of the other car, Stefan G., and his passenger, Nathan H., were trapped inside their car. Defendant was able to get out of his truck and walk over to the two teenagers trapped in the wrecked car. He apologized and asked if they were all right. Defendant smelled of alcohol, appeared drunk or confused, making wild hand gestures, and said, "Oh shit, oh shit, oh shit. I fucked up, I really fucked up," and "I am fine but this is bad." The two trapped teenagers screamed for help but defendant did not render aid. Instead, he walked away from the scene.

Stefan suffered severe injuries, including a broken nose which was missing a significant amount of flesh and lacerations to his face, hand, and chest. He required surgery and plastic surgery to his nose. Nathan suffered lacerations to his leg and chest and a seatbelt bruise.

The next day, defendant called his former spouse who picked him up at a gas station. Defendant then called an attorney. The former spouse drove defendant to a hospital. Defendant had minor lacerations to his arms and face and complained of pain. On August 6, 2013, two days after the collision, an officer contacted defendant at the hospital. Defendant's sobriety at the time of the collision could no longer be evaluated.

A complaint charging defendant with the various driving offenses and enhancements was filed on August 8, 2013. On January 17, 2014, the probation officer prepared a pre-plea report. The report set forth the facts of the offense and recounted defendant's background.

At a "pre-preliminary" hearing on March 11, 2014, defense counsel stated that defendant was prepared to enter his plea "after working with [the prosecutor]." The court responded, "And, [defendant], what I've indicated is if you did enter a plea to Count 1, you would receive the midterm, which is two years state prison, to run consecutive to the enhancement, that's three years, for a total sentence of five years state prison. That would be my indicated. However, we would have a sentencing hearing on the matter to determine what the sentence would be. But again, I'm indicating that unless there's something different, it would be the five years state prison." Defendant stated that he understood. After setting forth the maximum sentence defendant could receive for the hit-and-run ("sixteen months, two years, or three years" and "an additional three years" for the enhancement), the court reiterated that it would impose "the midterm two, plus three, for a total of five." Defendant understood and thereafter entered his plea.

At the entry of plea hearing, Nathan was allowed to ask defendant how he could leave two injured teenagers pleading for help without responding. At sentencing, about three weeks later, the prosecutor read a letter from Stefan's parents, explaining their and Stefan's absence from the sentencing hearing (they did not want any more stress; it would be detrimental to Stefan's healing and health to face defendant; the effect of Stefan's injuries upon his last year of high school; and possible long-term effects of his injuries).

Defendant spoke at sentencing. He claimed he was a good person who made a mistake and that he was sorry, and he asked for forgiveness. Defendant's mother was allowed to speak, expressing her opinion about what happened and her disappointment with the court system which, she claimed, had shown so "little regard" for defendant. Defendant's stepfather also spoke, suggesting that defendant "simply had an accident"

and it should have been dealt with in the “civil system” rather than the “criminal system.” Defense counsel claimed that defendant left the scene because he was suffering from a concussion caused by the accident. Defense counsel also argued that the “sentence” was not “in proportion to his involvement or his culpability.”

The prosecutor argued that defendant fled the scene because he had been drinking, and that witnesses stated that defendant smelled of alcohol and acted like he was intoxicated. The prosecutor also argued that the most significant aggravating factor was the fact that the two victims, who were trapped in the car, screamed for help but defendant only thought of himself and walked away, leaving the scene. The prosecutor stated that the “offer” was “fair and proportionate, even taking into account the defendant’s record or lack thereof.”

The court denied probation. In doing so, the court considered the factors as set forth in California Rules of Court, rule 4.414¹. With respect to the crime (rule 4.414(a)), the court cited five factors in aggravation: the nature and circumstances of the offense given the injuries; the vulnerability of the victims who were pinned in the car; defendant’s infliction of not only physical but also emotional injury; the ongoing monetary loss to the victims; and defendant’s active participation in the crime. The court noted that the crime was not committed due to unusual circumstances or with criminal sophistication. With respect to defendant, the court found “[t]he B factors [rule 4.414(b)]” weighed “in favor of probation for the defendant.” The court did not outline each of the factors in mitigation. Rule 4.414(b) includes defendant’s criminal history, willingness and ability to comply with probation, the effect and consequences of the conviction and imprisonment on defendant, defendant’s remorse, and whether defendant would be a danger if not imprisoned. The court stated that it did not believe defendant

¹ Undesignated rule references are to the California Rules of Court

was a “bad person,” noting the letters submitted reflected he was a “good person,” but “[s]ometimes good people make bad decisions or bad mistakes.” The court concluded the factors in aggravation outweighed those in mitigation and denied probation.

The court then proceeded to choose the term: “If it’s a state prison sentence, at that point, the court must determine if it’s low term, midterm, or upper term that would be the appropriate term. *The law requires the court start at the midterm and then either go down if there’s a factor in mitigation or go up if there’s [sic] factors in aggravation. Given the defendant’s prior history, I would not find aggravation. So it wouldn’t be a situation I would go up from midterm. ¶¶ So the next issue is whether the court is required to go down from midterm. And that’s Rule of Court 4.423. And those are the circumstances in mitigation.*” (Italics added.) The court then went through the factors in mitigation related to the crime, finding none applied. With respect to mitigation related to defendant, the court found defendant lacked a prior criminal history and accepted responsibility at an early stage of the proceedings. The court stated, “Weighing those factors, I don’t see a reason to go below the midterm, which is the two years” before the addition of the three years for the enhancement. After the court announced its tentative ruling, neither party objected. The court then imposed the two-year midterm for the base offense and a three-year enhancement and imposed various fees and fines.

DISCUSSION

Defendant contends the trial court abused its discretion and failed to apply the correct law in imposing sentence.

“As a general rule, only ‘claims properly raised and preserved by the parties are reviewable on appeal.’ [Citation.] [The California Supreme Court] adopted this waiver rule ‘to reduce the number of errors committed in the first instance’ [citation], and ‘the number of costly appeals brought on that basis’ [citation]. In the sentencing context, [the California Supreme Court has] applied the rule to claims of error asserted by both the People and the defendant. [Citation.] Thus, all ‘claims involving the trial court’s failure

to properly make or articulate its discretionary sentencing choices' raised for the first time on appeal are not subject to review. [Citations.]" (*People v. Smith* (2001) 24 Cal.4th 849, 852.)

Here, defense counsel did not object to the manner in which the trial court imposed sentence. Defendant's claim is thus forfeited.

Defendant argues that his claim is not forfeited because the court failed to exercise its legally required discretion by applying the previous version of the sentencing law. Defendant relies upon *In re Sean W.* (2005) 127 Cal.App.4th 1177. In *Sean W.*, the juvenile court believed it had *no* discretion at all and was required to impose the maximum term of confinement. (*Id.* at pp. 1181-1182.) In contrast, here, the trial court recognized it had discretion to impose any of the three possible terms for the offense but exercised its discretion in a flawed manner, starting at the middle term. For this reason, defendant's reliance upon *Sean W.* is misplaced.

We reach the issue of whether the trial court abused its discretion, however, because defendant contends in the alternative that his trial counsel rendered ineffective assistance by failing to object at sentencing. Since defendant has not shown prejudice, we will reject his claim.

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 688, 691-692 [80 L.Ed.2d 674] (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-217 (*Ledesma*)). To show prejudice, defendant must show a reasonable probability that he would have received a more favorable result had counsel's performance not been deficient. (*Strickland*, at pp. 693-694; *Ledesma*, at pp. 217-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland*, at p. 694; accord, *Ledesma*, at p. 218.)

A trial court has the discretion to select one of the three specified terms for an offense based on a consideration of the factors in aggravation or mitigation, and any other factor reasonably related to the sentencing choice. (Rule 4.420.) Under both the earlier version of the law, and the law at the time defendant was sentenced, the trial court was tasked with weighing the aggravating and mitigating circumstances but was not required to impose either the low or upper term based on the outcome of that process. Under the earlier version of the law, the trial court was required to impose the midterm unless: (1) the aggravating factors outweighed the mitigating factors in which case the court would impose the upper term or (2) the mitigating factors outweighed the aggravating factors in which case the court would impose the low term. Under the law at the time defendant was sentenced, the trial court was not required to begin at the midterm.

While the court expressly recognized that it had to impose the low, mid, or upper term, the trial court also stated it needed to “start” at the midterm. The trial court’s comments indicate it was under a mistaken impression that it was required to begin at the midterm and consider mitigating and aggravating factors to determine whether to mitigate or aggravate the sentence. When a trial court does not understand its discretion in sentencing, the appropriate action generally is to remand the matter for the trial court to exercise its sentencing discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.)

The People argue that defense counsel’s performance was not deficient in failing to object. Although the record fails to show the reason for counsel’s omission, the People suggest counsel was motivated not to “open[] the door to a potentially enhanced sentence in the form of an upper term.” Defendant replies that defense counsel had no conceivable justification for failing to object given the strong mitigating factors the court found in denying probation. While we do not resolve the issue, the aggravation inherent in defendant’s decision to leave two injured teenagers trapped in a wrecked car suggests the People’s argument could have merit.

Absent a demonstration of prejudice, we need not resolve whether counsel's performance was deficient to reject defendant's claim of ineffective assistance of counsel. (*Strickland, supra*, 466 U.S. at p. 697; *In re Alvernaz* (1992) 2 Cal.4th 924, 945.) Even assuming defense counsel's performance was deficient in failing to alert the trial court that it no longer had to start at the midterm, there is no reasonable probability the defendant would have received a lesser sentence. (*Strickland*, at pp. 691-692; *Ledesma, supra*, 43 Cal.3d at pp. 216-218.)

At the entry of plea hearing, the court indicated a sentence of the midterm of two years plus three years for the enhancement but the indicated sentence could change if something new was revealed at sentencing; that did not happen. The court had the benefit of the probation report *prior to* defendant entering his plea. The pre-plea probation report attached defendant's statement, his parents' statements, as well as the statements from many others. At sentencing, defendant and his parents reiterated much of what appeared in their written statements. Defense counsel's claim that defendant had suffered a concussion, causing him to act out of character and leave the scene, had been suggested by defendant's parents as well as defendant and was reflected in the pre-plea probation report. A statement submitted at sentencing, which the court did not have prior to defendant entering his plea, was the letter from Stefan's parents that referred to long-term and possibly permanent injuries (scars and post-traumatic concussion headaches) and missed opportunities.

Defendant received the very sentence that was indicated prior to entry of his plea. There was no new evidence revealed to the court at sentencing. In denying probation, the court cited in aggravation the nature and circumstances of the offense given the injuries, the vulnerability of the victims who were trapped in the car, defendant's infliction of not only physical but also emotional injury, and the ongoing monetary loss to the victims. These are very serious aggravating factors. So serious, that the trial court determined they were not outweighed by numerous mitigating factors related to defendant. On this

record, we will not remand since there is no reasonable probability the court would impose the lightest term for the underlying offense on remand. Defendant has failed to demonstrate prejudice from defense counsel's failure to correct the trial court in its approach to sentencing.

DISPOSITION

The judgment is affirmed.

RENNER, J.

We concur:

RAYE, P. J.

HULL, J.