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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. TAFILELE PO MAHA, Defendant and Appellant.	C086208 (Super. Ct. No. 13F04240)

In July 2013, in Sacramento County Superior Court, case No. 13F04240 (case No. 240), defendant Tafilele Po Maha pleaded no contest to assault by means of force likely to cause great bodily injury (Pen. Code, § 245, subd. (a)(4)) and was granted probation.[1]

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[1] Undesignated statutory references are to the Penal Code.

In November 2017, following a jury trial, defendant was convicted of assault in Sacramento County Superior Court, case No. 17FE013827 (case No. 827). (§ 240.) The trial court found defendant violated his probation in case No. 240, then revoked and terminated his probation, sentencing him to the middle term of three years in state prison.

On appeal, defendant contends the trial court abused its discretion in revoking and terminating his probation and sentencing him to the middle term. We conclude the trial court did not abuse its discretion.

Defendant also contends the trial court erred in increasing the previously imposed and suspended probation revocation fine. The People agree and we accept their concession. We modify the judgment accordingly and affirm the judgment as modified.

BACKGROUND

In July 2013 defendant argued with his mother; he shoved her, which caused her to fall and hit her head on the corner of a television, rendering her unconscious for several minutes. Defendant fled the scene. Defendant's mother required surgery to repair the spinal cord injury she suffered as a result of hitting the television. The People charged defendant with assault by means likely to produce great bodily injury. (§ 245, subd. (a)(4).) Defendant pleaded no contest to the charge.

In August 2013 the trial court suspended imposition of sentence and placed defendant on formal probation for five years upon specific terms and conditions, including the conditions that defendant obey all laws and participate in a drug rehabilitation program. The court ordered defendant to serve 365 days in county jail and awarded him 72 days of custody credit. The court also ordered defendant to pay various fines and fees, including a $280 restitution fine under section 1202.4, subdivision (b). The court imposed and stayed a $280 probation revocation fine pending defendant's successful completion of probation. (§ 1202.44.) At some point following the grant of probation, the court also issued a restraining order, protecting defendant's mother from defendant.

On April 25, 2014, the People filed a petition to revoke defendant's probation. In their petition, the People alleged defendant violated his probation by violating a restraining order. (§ 273.6.) Defendant admitted the violation; the court ordered him to serve 180 days in county jail and reinstated his probation. The court affirmed the previously issued restraining order, protecting defendant's mother.

On November 16, 2016, defendant served 180 days in county jail in Anchorage, Alaska, for stealing a car.

On July 27, 2017, the People filed a second petition to revoke defendant's probation. In their petition, the People alleged defendant violated his probation by committing an assault in violation of section 245, as charged in case No. 827. Defendant denied the allegation and agreed to have the hearing on the People's petition concurrent with the jury trial in case No. 827.

Following the submission of evidence in case No. 827, the jury found defendant guilty of the lesser included offense of simple assault. (§ 240.) The court thus found, by a preponderance of the evidence, that defendant violated his probation by failing to obey all laws.

Prior to sentencing in case No. 240, the probation department submitted a report and recommendation to the trial court. The department recommended the trial court revoke and terminate defendant's probation, noting defendant's poor performance on probation "as indicated by his continued criminal behavior." The department further recommended defendant be sentenced to the lower term of two years because defendant "had no prior record at the time of the 2013 offense."

The People submitted a sentencing brief prior to sentencing. In that brief, the People asked the court to revoke and terminate defendant's probation and impose the upper term. As aggravating factors related to the crime, the People noted the crime involved great violence, defendant was armed, and defendant took advantage of a position of trust. As aggravating factors related to defendant, the People noted defendant

was a danger to society, was on probation when the crime was committed, and his prior performance on probation was unsatisfactory.

At sentencing, the trial court noted that it received, reviewed, and considered the probation department's report and recommendation, as well as the People's sentencing brief. Defendant asked the court to reinstate probation or, alternately, to impose the low term as recommended by the probation department. The People submitted on their sentencing brief.

The court described how defendant violated his probation in case No. 240 less than a year after he was placed on probation. The court noted defendant's history of violence. The court expressed concern that despite a previous order directing defendant to attend drug rehabilitation, and evidence from trial in case No. 827 that he was abusing drugs, defendant continued to deny any drug use. The court expressed further concern that the victim in case No. 827 (defendant's brother) was manipulating the system by calling police to give defendant a "time out," then failing to appear in court and/or recanting his original story.

The court ruled as follows: "[I]n [case No. 240,] probation is revoked. He's already served a year, violated his probation within eight months, certainly there is absolutely no reason to keep the defendant on probation. Drug conditions are worthless, he's still using drugs apparently, according to the family, so probation is -- is a waste of everybody's time.

"Given the -- the violence and continued violence and continued contact with the family, defendant[] [is] ordered to serve the mid term of three years in state prison." The court then lifted the previously stayed probation revocation fine, which the court indicated was $600, and said all other fines and fees "previously imposed remain in effect . . . ."

DISCUSSION

I

Defendant contends the trial court abused its discretion in terminating his probation and sentencing him to state prison for the middle term of three years. Assuming defendant did not forfeit his contention by failing to object in the trial court, his contention fails.

A. The court did not abuse its discretion in revoking and terminating defendant's probation.

"Our trial courts are granted great discretion in determining whether to revoke probation." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445 (*Rodriguez*).) The level of certainty required to support a probation revocation is less than that required to support a criminal conviction. Section 1203.2, subdivision (a), authorizes probation revocation "if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the [probationer] has violated any of the conditions of his or her supervision . . . ." The California Supreme Court has interpreted "reason to believe" under section 1203.2, subdivision (a), to impose a "preponderance of the evidence" standard of proof. (*Rodriguez*, at p. 445.) A lower threshold is appropriate because " '[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special [probation] restrictions.' " (*People v. Coleman* (1975) 13 Cal.3d 867, 877, fn. 8.)

An appellate court will not disturb a decision to revoke a defendant's probation unless it finds the trial court abused its discretion. (*People v. Kelly* (2007) 154 Cal.App.4th 961, 965.) " '[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation . . . .' " (*Rodriguez, supra*, 51 Cal.3d at p. 443.) "A trial court abuses its discretion by revoking probation if the probationer did not willfully violate the terms and conditions of probation." (*People v. Galvan* (2007) 155 Cal.App.4th 978, 983.)

Here, a jury found defendant guilty of misdemeanor assault while he was on probation in case No. 240. That he violated his probation by failing to obey all laws has, therefore, been established beyond a reasonable doubt. Defendant does not argue his violation was not willful. Instead, defendant argues the court abused its discretion in revoking and terminating his probation because the court "may have relied upon improper factors"; factors that, to defendant's mind, were irrelevant or may not be supported by the record. The court's comments, defendant argues, "suggested a partial reliance upon improper factors" and created "uncertainty in the record."

This argument does not begin to approach the " 'very extreme case' " where we would interfere with the trial court's discretion. (*Rodriguez, supra*, 51 Cal.3d at p. 443.) On appeal, we presume the trial court " 'considered all relevant factors unless the record affirmatively shows the contrary. [Citations.]' " (*People v. Sperling* (2017) 12 Cal.App.5th 1094, 1102; see Cal. Rules of Court, rule 4.409.) And, here, there is nothing in the record to suggest the court did not consider relevant factors in terminating defendant's probation. Indeed, in terminating defendant's probation, the court observed this was defendant's second probation violation. The court noted that defendant had already spent one year in custody for his violent conduct and nevertheless refused to acknowledge his drug use, continued to break the law, and continued to act out violently toward his family members.

Thus, on this record, we conclude the trial court did not abuse its discretion in revoking and terminating defendant's probation.

B. The court did not abuse its discretion in sentencing defendant to the middle term.

"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 the trial court abused its discretion in imposing the middle term because the court considered factors that were either irrelevant or not supported by the record. We are not persuaded.

Whether the court considered any inappropriate factors in choosing the middle term, it is clear from the record the court relied on at least one appropriate aggravating factor: defendant's violence, rendering him a danger to society. (Cal. Rules of Court, rule 4.421(b)(1) [violent conduct is an aggravating factor].) That single factor, which is supported by the record, is sufficient by itself to support imposition of the middle term. (See *People v. Ortiz* (2012) 208 Cal.App.4th 1354, 1371 [a single aggravating factor is sufficient to support the upper term].)

II

Defendant further contends, and the People agree, the court's order that defendant pay a $600 probation revocation fine was an unauthorized sentence. In 2013, when the trial court suspended imposition of sentence and placed defendant on probation, the court ordered defendant to pay a $280 restitution fine and ordered, but stayed, a $280 probation revocation fine. The court had no authority to increase those fines in 2017. (See *People v. Perez* (2011) 195 Cal.App.4th 801, 805.) Accordingly, the probation revocation fine must be reduced to $280.

DISPOSITION

The judgment is modified to reduce the $600 probation revocation fine to $280. The judgment is affirmed as modified. The trial court is directed to prepare an amended abstract of judgment in accordance with this disposition and forward a certified copy to the Department of Corrections and Rehabilitation.

RAYE, P. J.

We concur:

ROBIE, J.

DUARTE, J.