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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

VIRGIL POPESCU,

Defendant and Appellant.

D058202

(Super. Ct. No. SCD209122)

APPEAL from a judgment of the Superior Court of San Diego County, Melinda J. Lasater, Judge. Affirmed.

A jury convicted appellant Virgil Popescu of one count of stalking (Pen. Code, § 646.9, subd. (a),<sup>1</sup> count 1), two counts of possession of a deadly weapon (§ 12020, subd. (a)(2), a sawed-off rifle & a billy club in counts 2 & 3, respectively), two counts of possession of a firearm silencer (§ 12520, counts 4 & 5), and possession of an assault weapon (§ 12280, subd. (b), count 6). The court denied probation and sentenced Popescu

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

to a total term of three years eight months. In Popescu's first appeal, this court reversed the conviction on the stalking charge and remanded the matter for resentencing. (*People v. Popescu* (Jan. 11, 2010, D053536) [nonpub. opn.], (*Popescu I*.) On remand, the court again sentenced Popescu to prison. Popescu argues the sentence was an abuse of discretion.

## FACTUAL BACKGROUND

### A. Trial Evidence

#### *Pagan/Popescu Conflict*

Robert Pagan was a Parking Enforcement Officer for The City of San Diego (City) and was charged with enforcing City's parking rules. After Pagan ticketed Popescu's car, Popescu wrote to him at his workplace stating Pagan was incompetent and ignorant and that Popescu would neither move the car nor pay the ticket.

Popescu filed a lawsuit in federal court against Pagan and City, alleging Pagan had unlawfully targeted Popescu for parking tickets because Popescu had Christian bumper stickers on his car. In April 2007, in connection with his federal lawsuit, Popescu propounded written interrogatories asking for Pagan's home address and other identifying personal information, Pagan's religious affiliation, political affiliation and how he had voted on the "Mount Soledad cross issue." Although Pagan objected to the questions and declined to give the information, Popescu subsequently wrote a letter to the City attorney defending against the federal lawsuit and said Popescu "already know[s] where Pagan [lives]." When Pagan saw the letter, he "took it as a threat against [his] family."

### *The Verbal Threat*

In the early afternoon of June 7, 2006, United States Postal Inspectors Villareal and Sprague went to Popescu's apartment.<sup>2</sup> Popescu appeared upset that Villareal had found him and had come to his apartment without invitation and remarked that "people who come uninvited could get shot." Popescu told Villareal the area was a high crime neighborhood and that Popescu normally carried a gun after dark when he went to the parking garage. Villareal asked, "would you shoot me," and Popescu replied, "You never know," and at the end of their conversation said, "Who knows. I might show up at your front door." During their conversation, Popescu also told Villareal that Pagan had put a parking citation on Popescu's car and said if he "had seen [Pagan] writing that ticket, [Popescu] would have shot him." Popescu did not seem to be joking during his conversation with Villareal.

Villareal was "concerned" for Pagan because Villareal interpreted Popescu's comments as a threat to Pagan's safety, and Villareal reported Popescu's remarks to police. A short time later, Pagan was working in his patrol area when he received a call from a detective who told Pagan there was a "life threat against [him]" and that Pagan was to stay out of Popescu's area along Estrella Avenue until further notice. Pagan, who understood that his life was threatened, took the warning seriously and left the area immediately.

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<sup>2</sup> Villareal and Sprague went to Popescu's apartment because of complaints lodged against Popescu by two local post office employees. Popescu apparently had been involved in heated exchanges with those employees, and they felt threatened by his comments.

### *Popescu's Subsequent Conduct*

On June 28, 2007, Popescu came to Pagan's apartment. Pagan was not home, and Pagan's wife (Lleana) answered the door. Popescu asked for Pagan by name and wanted to know whether Pagan worked for City. When Lleana stated that Pagan was not home but did work for City, Popescu asked what time Pagan would be home. When Lleana stated Pagan would not be home until between 6:00 and 6:30 p.m., Popescu said he would be "back later on," turned to leave and began walking away. Lleana, realizing she had not gotten the name of the visitor, called out to Popescu and asked for his name, and Popescu responded "John Roman." A few minutes later, Lleana went outside to collect the mail and saw Popescu standing outside in front of a grey house near Pagan's apartment. Lleana asked Popescu why he wanted to speak with Pagan, and Popescu responded it was in regard to a donation to the Catholic Church.

Lleana called Pagan and told him of the visitor and asked Pagan if someone was looking for him. Pagan immediately assumed it was Popescu, and gave his description to Lleana. She confirmed the description matched the visitor, and Pagan then told Lleana about Popescu and his lawsuit. She became frightened when she learned about Popescu. Lleana contacted police because she did not feel safe, and Pagan contacted his captain and reported that Popescu had come to his home. When Lleana spoke with the detective who responded to her call, she reported that she recalled seeing Popescu in front of her home a few days earlier. Lleana had seen Popescu walking down their street, looking around as though he was looking at numbers. Shortly after Popescu's visit to their apartment, Pagan began receiving a magazine called "Southern Cross," a Catholic

magazine to which they had not subscribed, and a copy of a subscription coupon to the magazine in Pagan's name was later seized from Popescu's apartment. Pagan later received a postcard from Popescu, dated September 12, 2007, and addressed to Pagan at his home address, which said, "Happy Rosh Hashanah. To let you know that I will miss you, and every time I see a parking enforcement officer, I think of you. I would like to see you back in the City Heights area."

### *The Search*

On September 13, 2007, police searched Popescu's apartment. They seized numerous items from his home, garage and cars, including the subscription card to Southern Cross and an arsenal of weapons. Among the weapons seized was an expandable metal baton normally used by law enforcement and military personnel as an "impact weapon," a Tec-22 semi-automatic rifle with a high capacity magazine, two tubular devices with threaded ends matching the threads on the assault rifle that could be used to silence the report of a fired weapon, and a sawed-off rifle.

### *Defense Evidence*

Popescu testified to a background of hardship, persecution and personal loss. Over the course of his life, he developed a life-long fascination with firearms. He kept the weapons for personal protection because he lived in a rough neighborhood.

Popescu admitted he went to Pagan's apartment. Popescu admitted he sent the Southern Cross magazine to Pagan, but did so to test Popescu's suspicion that Pagan was an atheist who had targeted Popescu's car because of Popescu's Christian bumper stickers, and also because Popescu wanted to convert Pagan to Catholicism. The other

correspondence Popescu sent to Pagan's work and home was because Popescu believed Pagan was an atheist and "also a Jew." Popescu denied threatening Pagan or agent Villareal when Popescu spoke with Villareal.

#### B. Evidence from Sentencing Hearings

Because Popescu claims the decision to deny him probation was an abuse of discretion,<sup>3</sup> we detail the information available to the trial court at the time the sentencing decisions were made.

##### *The 2008 Original Sentencing Hearing*

The probation report stated Popescu was eligible for probation, had no prior record, and he was able to comply with reasonable terms of probation considering his age, education and military service. However, the probation report cited two factors militating against probation. First, Popescu had inflicted emotional injury on the victims. Second, Popescu had no remorse for his conduct. The probation report specifically expressed concerns that Popescu's "escalating level of harassment" against Pagan,

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<sup>3</sup> Popescu also challenges the decision to select the upper term, asserting that sentencing choice was an abuse of discretion. However, the People claim this argument has become moot because the People assert (and Popescu does not dispute) that Popescu has already been released on parole. The People argue Popescu's release on parole renders moot Popescu's challenge to the selection of the upper term, while Popescu contests that argument, contending the matter is not mooted because reversal would eliminate the case as a "prison prior." Although Popescu is correct that the decision to *deny him probation* (rather than to sentence him to prison) has potential future consequences (e.g. because it creates a "prison prior") and is therefore not mooted by his parole, the selection *among* the available terms of imprisonment apparently does *not* have any additional collateral consequences. Accordingly, although we agree that the decision to deny him probation is *not* moot, we agree with the People that the decision to select *among* prison terms has been mooted by Popescu's release on parole.

coupled with Popescu's affirmation that he would continue to "fight for what was right" and would be willing to die for his beliefs, made his suitability for probation "highly questionable." The probation report recommended Popescu be referred to a diagnostic evaluation under section 1203.03.

The diagnostic study reported the institutional counselor and the institutional clinician disagreed on Popescu's potential for successfully functioning on probation and over the level of threat to the community were Popescu unsuccessful. The counselor concluded Popescu was an unlikely candidate for probation because he (1) had the potential to follow through on threats of violence, (2) appeared to behave erratically and would be a threat to those who come into contact with him, and (3) displayed no remorse and (had he not been apprehended) would have continued to harass and possibly escalate his conduct. The clinician stated Popescu "clearly has a problem with impulse control[,] . . . is very quick tempered and very much in need of anger management." However, the clinician did not feel he was a threat to the community, and therefore recommended Popescu be given formal probation "with a strong recommendation he seek anger management training."

Because of the disagreement between the counselor and the clinician, an administrative review was conducted and that review concluded Popescu "would pose too great a risk if he were to be released at this time." The reviewer, after noting Popescu's "poor judgment, poor impulse control and aggressive tendencies," stated:

"The administrative team at this facility is in agreement that [Popescu] is at . . . risk of re-offending and[,] until he can control his anger issues, he remains a threat to those who come in contact with

him. He did not express concern [or] regret for his actions[;] he does not appear to understand the extent of his violent outbursts and continuous terrorization [; and] [h]e should be considered a high risk to the community . . . . [¶] It is respectfully recommended . . . that [Popescu] be denied felony probation and [be imprisoned]. It is hopeful that he will take advantage of the programs offered to assist him in learning self-control and gaining insight into his disturbances so that[,] upon his eventual release, he may no longer pose a threat to the community

At the original sentencing hearing, the prosecution argued against probation noting, among other things, that Popescu expressed no remorse for his conduct, and had continued issuing veiled threats directed at various persons, including letters he wrote in May 2008 (while in custody undergoing his diagnostic study) to a witness and a police officer whom Popescu perceived to have wronged him. The court at the sentencing noted its dismay that Popescu, during the precise time he was given the opportunity to "show me where he was mentally with . . . curtailing his behavior . . . showed me that he hasn't relented." The court ultimately concluded Popescu would be unlikely to succeed on probation, and therefore denied probation. The court also sentenced Popescu to the three-year upper term on the stalking conviction, and to an eight-month consecutive term on one count of the weapons charges, and stayed execution of concurrent sentences on the remaining weapons charges.

*The 2010 Sentencing Hearing*

After this court reversed the conviction for violation of the stalking statute, concluding the evidence at trial was insufficient to show Popescu had the requisite mens rea required by the statute, this court remanded to the trial court for resentencing on the remaining convictions. (*Popescu I, supra*, D053536.)

On remand, the court again considered the material submitted at the original sentencing hearing. At the second hearing, neither the defense nor the prosecution argued the propriety of probation in lieu of prison. Instead, the parties disputed only the appropriate length of imprisonment.

At that hearing, Popescu stated the detective had lied (to obtain a search warrant), the psychologist who evaluated him had lied about his mental state, and said "I'm not going to apologize" and "I'm a fighter and you know by now I'm not going to give up." He asked that his confiscated weapons be returned to him, and that the court issue a 10-year restraining order against the San Diego Police Department requiring the police to use state or federal law enforcement officials if they wish to arrest Popescu.

The court reiterated it had the same concerns as existed at the original sentencing hearing, and the fact that Popescu remained unremorseful and was asking for his weapons back "is exactly part of the concern that I had before . . . ." Accordingly, the court again sentenced him to state prison, and adopted the reasons stated at the previous sentencing hearing.

## ANALYSIS

### A. Legal Standards

"All defendants are eligible for probation, in the discretion of the sentencing court [citation], unless a statute provides otherwise." (*People v. Aubrey* (1998) 65 Cal.App.4th 279, 282.) "The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion." (*Ibid.*) In reviewing a trial court's decision to grant or deny probation, "it is not our

function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances." (*People v. Superior Court (Du)* (1992) 5 Cal.App.4th 822, 825.)

California Rules of Court, rule 4.414 sets forth certain criteria relevant to the trial court's decision to grant or deny probation. The court may consider facts relating to the defendant, including his willingness to comply with the terms of probation (Rule 4.414, subd. (b)(3)), whether he is remorseful (*id.* at subd. (b)(7)), and the likelihood that if not imprisoned he will be a danger to others (*id.* at subd. (b)(8)). "In deciding whether to grant or deny probation, a trial court may also consider additional criteria not listed in the rules provided those criteria are reasonably related to that decision. (Rule 4.408(a).) A trial court is generally required to state its reasons for denying probation and imposing a prison sentence, including any additional reasons considered pursuant to rule 4.408. (Rules 4.406(b)(2) & 4.408(a).) Unless the record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice. (Rule 4.409.) [¶] . . . [I]n determining whether a trial court abused its discretion by denying probation, we consider, in part, whether there is sufficient, or substantial, evidence to support the court's finding that a particular factor was applicable." (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1313.)

## B. Denial of Probation Was Not an Abuse of Discretion

On appeal, Popescu asserts the trial court erred because it reimposed the same sentence, even after the stalking conviction was dismissed, without even considering whether to grant Popescu probation. Although the court did not expressly rearticulate (during the 2010 sentencing hearing) the reasons it elected to sentence Popescu to prison rather than to grant him probation, it adopted the statement of reasons from the 2008 hearing that *did* explain its sentencing decision, including the choice to deny him probation. Popescu did not object that such statement was inadequate to support the denial of probation, and we conclude any complaint about the statement of reasons is waived. (*People v. Zuniga* (1996) 46 Cal.App.4th 81, 83-84.)

Even had Popescu preserved the issue, we conclude the court's failure to expressly articulate the reasons for electing to impose a prison term rather than probation was harmless error. The trial court's principal concerns, articulated at both the original and subsequent sentencing hearings, was the court's overarching concern that Popescu posed a potential danger if granted probation. When the court expressly denied probation in 2008, it specifically noted Popescu lacked remorse for his actions, and that he had demonstrated poor impulse control and aggressive tendencies (by writing to two persons suggesting he intended to seek retribution against them once he was released from incarceration) at the precise time when he should have been trying to demonstrate his ability to comply with social norms. Popescu's volatility, and his express efforts to recover his weapons coupled with his avowed intent to continue to "fight for what was right" and expressed willingness to die for his beliefs, amply supported the trial court's

2008 conclusion Popescu was not suitable for probation. At the time of the new sentencing hearing, the court observed it had the *same* concerns as existed at the original sentencing hearing, and the fact Popescu remained unremorseful and was asking for his weapons back "is exactly part of the concern that I had before . . . ." Accordingly, the court again sentenced him to state prison, and adopted the reasons stated in the previous sentencing hearing. Because the reasons stated in 2008 clearly support the trial court's conclusion Popescu was not suitable for probation, and the court's statements in 2010 reiterated that its prior concerns over Popescu's suitability for release into the community remained unabated, any failure to expressly restate in 2010 that probation was inappropriate (or the reasons for that conclusion) was harmless error.

#### DISPOSITION

The judgment is affirmed.

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McDONALD, Acting P. J.

WE CONCUR:

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McINTYRE, J.

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AARON, J.