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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICIA HIGGINS,

Defendant and Appellant.

D060212

(Super. Ct. No. SCD231665)

APPEAL from a judgment of the Superior Court of San Diego County, Gale E. Kaneshiro, Judge. Affirmed.

A jury found Patricia Higgins guilty of battery with serious bodily injury (Pen. Code, § 243, subd. (d); all statutory references are to this code) and misdemeanor elder abuse (§ 368, subd. (c)). The trial court sentenced Higgins to prison for the upper term of four years.

Higgins contends that her constitutional right to due process was denied because the trial court considered her criminal history during sentencing after making a statement that led her believe it would not do so, and therefore dissuaded her from correcting a purported error in the probation officer's report. We conclude that Higgins's argument is without merit, and accordingly we affirm the judgment

I

FACTUAL AND PROCEDURAL BACKGROUND

During an afternoon in downtown San Diego, witnesses saw Higgins — who was intoxicated — tackle and knock over a 68-year-old man as he walked down the street. The victim, who suffered a fractured pelvis, identified Higgins to police a short time after the incident.

An information charged Higgins with battery causing serious bodily injury (§ 243, subd. (d)) and willful cruelty to an elder (§ 368, subd. (b)(1)). Higgins testified on her own behalf at trial, disputing the eyewitness accounts of the incident and denying that she pushed the victim.

A jury found Higgins guilty of battery with serious bodily injury (§ 243, subd. (d)) and the lesser included offense of misdemeanor elder abuse (§ 368, subd. (c)). The trial court denied probation and sentenced Higgins to the upper term of four years in prison.

II

DISCUSSION

Higgins's sole contention on appeal is that she was not afforded due process because the trial court relied on her criminal history in sentencing her after purportedly

stating that it would not do so, and as a result relied on inaccurate information about her criminal history.

At the sentencing hearing, Higgins requested that the court hold a *Marsden*¹ hearing to release the public defender's office and appoint new counsel because Higgins was not satisfied with defense counsel's response to Higgins's claim that the probation officer's report inaccurately described her criminal history.

Before holding a *Marsden* hearing, the trial court stated, "Will it make a difference that my basis for sending you to prison is not based upon your criminal record, it's based upon the incident itself . . . [¶] . . . and the callous manner in which it was handled?" Higgins replied, "I'm still requesting a *Marsden* hearing," and the trial court proceeded accordingly. During the *Marsden* hearing, Higgins did not discuss any errors in the probation officer's report.

After denying relief at the *Marsden* hearing, the trial court sentenced Higgins. It explained that it was denying probation and cited numerous circumstances weighing against a grant of probation, among which was that "[d]efendant does have a significant prior record of criminal conduct, albeit misdemeanor conduct and convictions, and it appears to be increasing in severity." In addition, when explaining its decision to impose an upper term sentence the trial court cited several circumstances in aggravation, including that "[d]efendant's prior convictions are numerous and will increase in

¹ *People v. Marsden* (1970) 2 Cal.3d 118.

seriousness. Defendant has eight prior cases [in] which she was convicted of 12 misdemeanors."

There is no dispute that a trial court may consider a defendant's criminal history when making sentencing decisions, including deciding whether to grant probation and to impose an upper term sentence. (Cal. Rules Ct., rules 4.414(b)(1), 4.421(b)(2)-(5).) Higgins contends that, in this case, "[t]he trial court should not have told [Higgins] it was not going to base its sentencing decision on [her] criminal history when, in fact, it intended to do so." Higgins claims that she was "dissuaded" from challenging the facts concerning her prior convictions because of the trial court's statement prior to the *Marsden* hearing, and she was therefore denied her constitutional right to due process. Specifically, Higgins cites case law stating that "[a] court's reliance, in its sentencing and probation decisions, on factually erroneous sentencing reports or other incorrect or unreliable information can constitute a denial of due process." (*People v. Eckley* (2004) 123 Cal.App.4th 1072, 1080 (*Eckley*).)

The factual premise for Higgins's due process argument is that the trial court made its sentencing decision based on erroneous information that she was dissuaded from correcting. However, that premise fails because Higgins does not identify any erroneous information about her criminal history in the probation officer's report that the trial court relied on in imposing sentence. In the absence of erroneous information forming the basis for Higgins's sentence, Higgins has not identified a violation of due process premised on the use of incorrect sentencing information. (*Eckley, supra*, 123 Cal.App.4th at p. 1080.)

In addition, although Higgins's argument is not completely clear, she also appears to argue that the sentencing proceeding was fundamentally unfair because the trial court effectively denied her the right to present evidence and argument challenging the accuracy of the probation officer's report. (See *Eckley, supra*, 123 Cal.App.4th at p. 1080 [procedure at sentencing hearing violates due process if it is "fundamentally unfair"].) We find no support in the record for that contention. The trial court afforded both Higgins and defense counsel a full opportunity to present arguments and information at the sentencing hearing. The trial court's statement that "my basis for sending you to prison is not based upon your criminal record" was directed at trying to persuade Higgins that a *Marsden* hearing was unnecessary. When placed in context, the statement cannot reasonably be understood as communicating the trial court's intention to prevent Higgins from challenging information about her criminal history in the probation officer's report.

Finally, we note that although Higgins argues she was improperly dissuaded by the trial court from challenging the accuracy of the probation officer's report, Higgins has not established any resulting prejudice. Specifically, because Higgins has not identified any errors in the probation officer's report that she would have corrected had she been given an opportunity, she has failed to establish that the trial court's sentencing decision would have been different had the trial court heard from her regarding her criminal history. (See *People v. Price* (1991) 1 Cal.4th 324, 492 [sentence based on improper factor will be set aside only if it is reasonably probable that the trial court would have chosen a lesser sentence had it not relied on that factor].) Higgins's appellate claim

therefore fails for the independent reason that she has not established the required prejudice.

DISPOSITION

The judgment is affirmed.

IRION, J.

WE CONCUR:

O'ROURKE, Acting P.J.

AARON, J.