

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID RODRIGUEZ,

Defendant and Appellant.

D060721

(Super. Ct. No. SCD221107)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Szumowski, Judge. Affirmed.

I.

INTRODUCTION

In June 2009, David Rodriguez pled guilty to one count of making criminal threats (Pen. Code, § 422).<sup>1</sup> At sentencing, the trial court suspended imposition of sentence and placed Rodriguez on formal probation, subject to various conditions, including that he serve 365 days in local custody and that he participate in a 52-week domestic violence

---

<sup>1</sup> Unless otherwise specified, all subsequent statutory references are to the Penal Code.

prevention program. In February 2010, the probation department filed a supplemental report alleging that Rodriguez had violated the terms of his probation by failing to report to his probation officer on two occasions, and by failing to provide documentation of his enrollment in a domestic violence prevention program. The supplemental report also indicated that Rodriguez's whereabouts were unknown. The same day that the probation department filed the supplemental report, the trial court issued an order summarily revoking Rodriguez's probation and a bench warrant for his arrest.

In October 2011, after his arrest,<sup>2</sup> Rodriguez appeared in court and admitted violating the terms of his probation. The trial court denied probation and imposed an upper term sentence of three years on the underlying conviction for violating section 422.

On appeal, Rodriguez contends that the trial court abused its discretion in failing to reinstate probation at the October 2011 hearing because, he maintains, the interests of justice would not be served by the imposition of a prison sentence. Rodriguez argues that his failure to comply with the terms of the court's prior order granting probation stemmed from the fact that he had returned to Mexico because he had no place to reside in the United States. We affirm the judgment.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

In June 2009, Rodriguez pled guilty to one count of making criminal threats (§ 422.) The plea form indicates that Rodriguez admitted that he "willfully threatened to

---

<sup>2</sup> The record does not indicate when Rodriguez was arrested.

commit a crime which would result in death or [great bodily injury] causing [the victim] to be in immediate fear for her safety and the threat was specific and immediate."

In July 2009, the trial court entered an order granting Rodriguez probation. The order required Rodriguez to comply with various conditions, including completing a 52-week domestic violence prevention program and reporting to his probation officer as directed.

On February 11, 2010, the probation department filed a supplemental probation report indicating that Rodriguez had failed to comply with the terms of his probation by failing to report to his probation officer as directed and failing to provide documentation that he had enrolled in a domestic violence prevention program. That same day, the trial court issued an order summarily revoking probation and a bench warrant for Rodriguez's arrest.

Approximately a year and a half later, in October 2011, the trial court held a probation revocation hearing. At the outset of the hearing, Rodriguez admitted that he had violated the terms of his probation, including failing to report as directed and failing to attend the court ordered domestic violence prevention program. The trial court formally revoked its grant of probation.

The court proceeded to hear argument from counsel concerning disposition of the case. Defense counsel offered the following explanation for Rodriguez's failure to comply with the terms of the court's previous grant of probation:

"Your Honor, with regard to sentencing after revocation, it looks like initially Mr. Rodriguez did report and then he indicated to his probation officer that he was transient, had really nowhere to go

because this [incident] involved his girlfriend and he was not supposed to have contact with her anymore. So he took that seriously, but, unfortunately, had nowhere to go so he returned to his family in Tijuana.

"He was arrested . . . at the border coming over. He said he was trying just to survive. He wasn't committing any crimes, but he had nowhere to be here in San Diego. So that's why he did not report for the last year and a half and did not do the program."

The prosecutor responded:

"Your Honor, just pointing out indeed that the defendant does have a lengthy criminal record. He's been to prison before. Surely he should be aware of his requirements when placed on formal probation. He's done nothing at all in this case since he was sentenced to the maximum of local custody [365 days], back in 2009."

The court offered Rodriguez the opportunity to speak. Rodriguez stated, "If you could just give me another chance. As soon as [I] can find a job, I will start renting and do what I need to do. I just had no other option. That's all I ask is if I could have another chance."

The court denied probation and imposed a sentence of the upper term of three years in prison for Rodriguez's violation of section 422 (making a criminal threat). With respect to its denial of probation, the court stated:

"Well, let's see. I think we go back into the early '90s you with [*sic*]. Several encounters with [the] law, convictions, drugs, 10851s,<sup>[3]</sup> ex-felon with a gun, prison a couple of times. [California Rules of Court,] [r]ule 4.414(b)(2)<sup>[4]</sup> unsatisfactory performance on probation is the reason I'll deny probation."

---

3 Vehicle Code section 10851 prohibits the unlawful driving or taking of a vehicle.

4 All rule references are to the California Rules of Court.

### III.

#### DISCUSSION

*The trial court did not abuse its discretion in refusing to reinstate Rodriguez's probation*

Rodriguez claims that the trial court abused its discretion in refusing to reinstate his probation after he admitted violating the terms of his prior grant of probation.

A. *Governing law and standard of review*

Section 1203.2 governs the revocation and termination of probation and provides in relevant part:

"(a) At any time during the probationary period of a person released on probation . . . if any probation officer or peace officer has probable cause to believe that the probationer is violating any term or condition of his or her probation or conditional sentence, the officer may, without warrant or other process and at any time until the final disposition of the case, rearrest the person and bring him or her before the court or the court may, in its discretion, issue a warrant for his or her rearrest. Upon such rearrest, or upon the issuance of a warrant for rearrest the court may revoke and terminate such probation if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses. . . ."

"(b) Upon its own motion or upon the petition of the probationer, probation officer or the district attorney of the county in which the probationer is supervised, the court may modify, revoke, or terminate the probation of the probationer pursuant to this subdivision. . . . After the receipt of a written report from the probation officer, the court shall read and consider the report and either its motion or the petition and may modify, revoke, or terminate the probation of the probationer upon the grounds set forth in subdivision (a) if the interests of justice so require."

Rule 4.414 provides a list of criteria for a trial court to consider in determining whether to grant or deny probation. Rule 4.414(b)(2) provides that a defendant's "[p]rior performance on probation or parole and present probation or parole status," is among the criteria that a trial court may consider in making this determination.

In *People v. Urke* (2011) 197 Cal.App.4th 766, 773, the court outlined the applicable standard of review to be applied by an appellate court reviewing a trial court's denial or revocation of probation.

"The discretion of the court to revoke probation is analogous to its power to grant the probation, and the court's discretion will not be disturbed in the absence of a showing of abusive or arbitrary action. [Citations.] [Citation.] . . . "[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. . . ." [Citation.] And the burden of demonstrating an abuse of the trial court's discretion rests squarely on the defendant. [Citation.]"

#### B. *Application*

Rodriguez maintains that the trial court abused its discretion in refusing to reinstate probation because his prior failure to comply with the terms of the court's grant of probation stemmed from the fact that he "had nowhere to reside in the United States . . . [and] returned to his family in Mexico." Rodriguez contends that the trial court's refusal to reinstate probation in light of these circumstances was not in the interest of justice and, therefore, constituted an abuse of discretion. We disagree.

Rodriguez admitted that he violated the terms of his prior grant of probation by failing to report to his probation officer and failing to attend and complete a court ordered domestic violence prevention program. In addition to these failures, Rodriguez has a

lengthy criminal history, as well as a history of performing poorly on probation. The probation report prepared for the initial sentencing in this matter indicates that Rodriguez has suffered numerous convictions for drug and theft offenses, as well as convictions for making criminal threats and possessing a firearm as a felon. The report also states that Rodriguez has "returned to prison a total of ten times," and that "[h]is overall performance on probation and parole is considered poor." The trial court referred to this history in denying Rodriguez probation and Rodriguez does not contend that the probation report was inaccurate. In addition, there is nothing in the record that suggests that the problems that purportedly led to Rodriguez's failure to comply with the court's previous grant of probation have been ameliorated. On the contrary, Rodriguez stated at the probation revocation hearing that he would still need to "find a job," so that he could "start renting."

Accordingly, even assuming that the trial court found credible defense counsel's explanation for Rodriguez's most recent violations of probation, we conclude that the trial court clearly did not abuse its discretion in refusing to reinstate Rodriguez's probation.

IV.

DISPOSITION

The court's October 11, 2011 judgment is affirmed.

---

AARON, J.

WE CONCUR:

---

HUFFMAN, Acting P. J.

---

NARES, J.