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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

HARRY STANLEY WALLS,

Defendant and Appellant.

E054143

(Super.Ct.No. FSB800277)

OPINION

APPEAL from the Superior Court of San Bernardino County. J. David Mazurek, Judge. Affirmed.

John L. Dodd, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Kevin Vienna, Deputy Attorney General, for Plaintiff and Respondent.

Pursuant to a plea agreement, defendant and appellant Harry Stanley Walls pled guilty to driving with a .08 percent blood-alcohol level and causing injury. (Veh. Code,

§ 23153, subd. (b).)¹ Defendant was released on his own recognizance under a *Cruz*² waiver, subject to various terms and conditions. The trial court later found that defendant violated his *Cruz* waiver by failing to appear for sentencing. The court issued a bench warrant for his arrest. Defendant was later arrested, and the court placed him on probation for a period of three years. He subsequently violated his probation. The court extended his probation for two years.

On appeal, defendant contends that the court erred in extending his probation period for two years, rather than one year, as the court originally intended. We affirm.

PROCEDURAL BACKGROUND

On February 22, 2008, defendant was released on a *Cruz* waiver with orders to report for sentencing on April 11, 2008. He failed to appear.

On April 15, 2008, defendant admitted violating his *Cruz* waiver and was placed on probation for three years, under specified terms.

On March 22, 2011, defendant reported for a scheduled office appointment and failed his preliminary alcohol screening test. He signed an admission form, stating that he drank alcohol earlier that morning. The probation department filed a probation revocation petition, alleging that defendant violated four probation conditions, including the condition that he not consume any alcoholic beverages.

¹ All further statutory references will be to the Vehicle Code, unless otherwise noted.

² *People v. Cruz* (1988) 44 Cal.3d 1247.

At a hearing on April 13, 2011, defendant denied the allegations in the revocation petition. The court revoked his probation and scheduled a revocation hearing for May 11, 2011.

On May 11, 2011, defendant waived his right to a hearing and admitted that he violated his probation by consuming alcohol. The court reinstated his probation under the original terms with the modification that he now serve 365 days in local custody, with credit for time served. Defendant requested that his local custody time be served on weekends, and the court granted that request. His terms were also modified to include the requirement that he have an ignition interlock device installed within 30 days, and that he cooperate with Scram alcohol monitoring requirements, as directed by the probation officer. When the court asked whether defendant accepted reinstatement with the modified conditions, defense counsel interjected with concerns and questions about the modifications. After some discussion, the court ordered that defendant report to the probation department to have the Scram alcohol monitoring device implemented.³

On May 19, 2011, defense counsel came before the court and attempted to argue that defendant's probation expired on May 13, 2011, that the court did not actually extend defendant's probation, and that there was no discussion as to how long it was to be extended. The court called defense counsel's argument disingenuous, as both the court and the prosecutor recalled discussing the extension of defendant's probation in chambers. The court recalled that defendant requested to serve the balance of his time on

³ The Scram monitoring device was an arm bracelet.

the weekends, and stated that it would not have ordered defendant to install an ignition interlock device and to wear a Scram bracelet if defendant's probation had expired. The court asserted that "[i]t was clearly within the contemplation of everybody involved that he would be put back on probation."

After a break, the court stated it had done some cursory research, and that "probation [could] last up to five years." The court said it "was only intending to put [defendant] on probation for an additional year." However, if the court went by the research it had found, "then he'd be on probation for two additional years." The court then asked defense counsel what he wanted it to do. Defense counsel requested a continuance to research the matter. The court agreed and ordered defendant to continue with his probation terms until the next court date. Defendant agreed.

On May 27, 2011, defense counsel again argued that defendant's probation had expired and, since the court did not extend it at the hearing on May 11, it could not "retroactively go back and extend [it] from that period." The court stated that it gave defendant probation conditions that could not be fulfilled within the original probation period. It then stated, "If it was an oversight that we didn't extend probation, well, it's extended for him to do [*sic*]. [¶] He wanted to be reinstated on probation. . . ." The court repeated that defendant could not have completed the 365 days in jail that it ordered him to serve on the weekends by May 13. It then extended his probation two years from May 11, 2011. The court confirmed that that was its order, and added that if defendant did not want probation, the parties could "always address that."

The prosecution summarized the case, stating that there was a violation of probation, and the parties discussed the case at length. The prosecution added that it was very disturbing that defense counsel would suggest that what they discussed in chambers did not include an extension of probation. The court agreed. Defense counsel began his response that there were no discussions or inquiries from the court as to when defendant's probation was set to expire. The court cut defense counsel off, and stated that it was disingenuous to argue for defendant to be put back on probation and have the court follow the terms recommended by probation, and then tell the court it could not put defendant back on probation. The court confirmed that defendant's probation was extended to 2013.

ANALYSIS

There Was No Error in Extending Defendant's Probation for Two Years

Defendant argues that the court erred in extending his probation by two years, rather than the one year that was discussed and originally contemplated. He argues that the court lacked jurisdiction to extend the term by two years. In the alternative, he contends that the court abused its discretion in extending his probation by two years. We disagree with both claims.

As the California Supreme Court has explained, a trial court has jurisdiction to revoke, modify, or extend probation at any time until the term of probation expires. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095 (*Cookson*)). Defendant was convicted of driving with a .08 percent blood-alcohol level and causing injury, in violation of

section 23153, subdivision (b). A person convicted of this offense is subject to a probation term of three to five years. (§ 23600, subd. (b)(1).)

Defendant does not dispute that the court had the statutory authority to extend his probation by an additional two years, or a total term of five years. Rather, he claims that the court somehow exceeded its jurisdiction in ordering an additional two years of probation. He points out that the intent of the court and the prosecutor at the May 11, 2011 hearing was to extend the term by only one year. He then contends that, “Because the trial court did not state on May 11 that it was going to extend probation for two years nor did it subsequently state that it had intended to do so, it had no jurisdiction on May 27 to do anything other than extend the term of probation for the one year it intended to order on May 11.” He additionally argues that, “Because the trial court indicated it believed it had extended the term of probation by one year—to which the prosecution agreed—it [only] had the authority [on May 27] to enter . . . an order nunc pro tunc.” He explains that “[t]he function of a *nunc pro tunc* order is merely to correct the record of the judgment and not to alter the judgment actually rendered—not to make an order now for then, but to enter now for then an order previously made.” (*Estate of Eckstrom* (1960) 54 Cal.2d 540, 544.)

Defendant’s claims are meritless. The court initially revoked his probation on April 13, 2011, based on his alleged violation of probation. He denied the allegation, and the court set a revocation hearing for May 11, 2011. At the May 11, 2011 hearing, defendant admitted the probation violation, and the court reinstated him on probation, setting forth modifications to the terms. On May 19, 2011, the court stated that all the

parties had clearly discussed and contemplated that defendant would be put back on probation, but the court inadvertently failed to specify the period of probation. The court expressed that it originally *intended* to put him back on probation for one year. It then informed defense counsel that it *could* extend probation for two additional years. We note that defense counsel did not object to the two-year extension, but merely asked for time to research the matter, which the court granted. At the next hearing, defense counsel still did not proffer any arguments as to why the court could not extend defendant's probation two more years, as opposed to one. Defense counsel merely asserted the same disingenuous claims the court previously rejected. Although the court originally intended to extend probation by one year, there was no reason it could not decide to extend it by two years. The court clearly had the authority and jurisdiction to do so. (See § 23600, subd. (b)(1); *Cookson, supra*, 54 Cal.3d at p. 1095.)

Furthermore, the record does not support defendant's apparent claim that the court could only order a one-year extension, since it was making an order nunc pro tunc on May 27, 2011 to "correct" the previous order on May 11, 2011. The record reflects, as defendant argued below, that the court did not actually make an order regarding the length of his probation on May 11, 2011.

Moreover, the court did not abuse its discretion in extending defendant's probation for two more years. "The granting and continuance of probation is an act of grace and clemency." (*People v. Matranga* (1969) 275 Cal.App.2d 328, 331-332.) When defendant violated his probation terms, the court was authorized to revoke and terminate his probation, and pronounce judgment. (Pen. Code, § 1203.2, subs. (a) & (c).) Instead,

it chose to reinstate defendant on probation and give him more time to rehabilitate. We see no reason to disturb the order of the court.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

KING
J.