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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.

TIMOTHY R. CLINE,

Defendant and Appellant.

E055854

(Super.Ct.No. FSB1000637)

OPINION

APPEAL from the Superior Court of San Bernardino County. Bridgid M.

McCann, Judge. Affirmed.

Marilee Marshall, 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, James D. Dutton and Donald W. Ostertag, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Timothy R. Cline entered a plea agreement in which he pled guilty to possession of a controlled substance. (Health & Saf. Code, § 11377,

subd. (a).) Defendant also admitted that he had served three prior prison terms. (Pen. Code, § 667.5, subd. (b).)¹ The trial court placed defendant on probation for three years. Following numerous probation violations, the court terminated defendant's probation and sentenced him to a total term of four years four months in county prison.

On appeal, defendant contends: (1) his admission to his most recent probation violations was improperly induced; and (2) the court erred in declining to give him a *Marsden*² hearing. Defendant filed a notice of appeal and request for certificate of probable cause, which the court granted. We affirm.

PROCEDURAL BACKGROUND³

Pursuant to a plea agreement, defendant pled guilty to one count of possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a), count 1) and admitted that he had served three prior prison terms (§ 667.5, subd. (b)); in exchange, he was placed on formal probation pursuant to Proposition 36 for a period of 36 months.

At some time prior to December 29, 2011, a petition for revocation of probation was filed.⁴ The probation officer filed a supplemental report, stating that defendant had violated his probation conditions that he violate no law (he was arrested for battery

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

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

³ The facts of the underlying case are not relevant to the issues on appeal. Therefore, we will not include a statement of the facts.

⁴ The record on appeal does not appear to contain a copy of the petition.

(§ 242)), cooperate with the probation officer in a plan of rehabilitation and follow all reasonable directives, keep the probation officer informed of his place of residence, and register his address with the local law enforcement agency as a narcotics offender. The supplemental report specifically stated that on September 29, 2011, when probation officers went to defendant's listed address, the resident said defendant had never lived at that address.

The court held a probation revocation hearing on February 7, 2012. The court acknowledged that defendant wanted another chance to be on probation; however, it stated that it was not going to give him another opportunity. The court informed defendant that the People had agreed to give him custody credits that he would not otherwise be entitled to. It then explained that he had the right to have a hearing, or he could waive that right and be sentenced that day with the extra credits. Defendant continued to argue for his position, stating that he had made progress. He admitted that he "just made a mistake on the residential thing," and he understood that that was "a major, major violation." However, he still asked for the "opportunity to prove [himself]." The court recounted defendant's history on probation, stating that, by that time, defendant had repeatedly violated the terms of his probation, and the court had already revoked and reinstated his probation numerous times. The court stated that the fact that defendant was not at the residence listed and the probation officer was informed that he did not live there, "[was] the final straw for the Court."

The court reiterated that defendant had the right to have a hearing on whether or not he had violated probation, and it reviewed the current probation violation allegations

with him. The court also stated that the district attorney's office had agreed to give him a stipulated 190 days' custody credit, which "would be doubled to be three hundred and eighty days against [his] three year, four month sentence." The court said it needed to know whether defendant wanted to have the hearing he was entitled to, or if he wanted to admit that he was in violation of his probation.

Defendant responded with, "Guess I'm going to have to admit." However, the court stated, "You don't have to do anything If you want to fight the violation you have every right to do so."

Defendant then stated, "Well, I'm guilty of the violation, I understand that."

The court responded with, "Well then, that's how it has to be. In terms of that if you would like to admit the violation then I will accept that admission. [¶] Is that what you'd like to do?" Defendant replied, "Yes," and his counsel joined. The court stated that defendant's probation was revoked, and that the judgment that had been withheld was now imposed. The court sentenced defendant to the low term of 16 months on count 1, plus one year consecutive on each of the three prison priors, for a total of four years four months. The court further indicated that defendant was eligible for stipulated credits of 190 actual plus 190 conduct, for a total of 380 days.

Defendant then stated that his attorney told him he would receive enough credits that he would only have to serve about one year in prison. The court agreed that, on the four-year four-month term, assuming he would "get good time conduct credits," his term would be two years two months, minus the current credits of over one year granted by prosecution, and would result in him serving about one year. Defendant immediately

stated, “I am taking the *Vickers*^[5] hearing then because I’ve already got that much credit in. I withdraw my plea.” Defendant asked what the maximum sentence could be if he had a hearing, and the court replied eight years. Defense counsel then asserted that defendant wanted a *Marsden* hearing.

At that point, the court explained that it had an admission and had sentenced defendant, and that it was not inclined to give him a *Marsden* hearing since he had failed to ask for it in a timely fashion.

Defendant next asked the court if there was any possible way he could get a *Vargas*⁶ or *Cruz*⁷ waiver, because he had an 85-year-old grandmother and wanted to take care of matters. The court declined to release him, since he had failed to appear before.

The court asked defendant if he had any other questions about his sentence, and defendant said, “No.” At that point, the court remanded defendant to the sheriff’s custody for immediate delivery to the county jail to serve out his term. Defendant then asked, “What was the total term?” The court stated, “. . . We already told you about a year or more. Three years, four months. I mean four years, four months, sorry.” Defendant said, “Now, I agreed on three years, four months, though.” The court again explained that defendant had 16 months, plus one year each for the three prison priors. Defendant replied, “Whatever”

⁵ *People v. Vickers* (1972) 8 Cal.3d 451.

⁶ *People v. Vargas* (1990) 223 Cal.App.3d 1107.

⁷ *People v. Cruz* (1988) 44 Cal.3d 1247.

ANALYSIS

I. Defendant Was Not Entitled to Withdraw the Admission That He Was in Violation of His Probation

Defendant argues that he has good cause to withdraw his admission to the probation violations because his admission was induced by the court's misstatement that he would receive a sentence of three years four months. In other words, he claims he was operating under the mistake that he would be given a three-year three-month term. (The court actually imposed a four-year four-month term.) We disagree.

Defendant specifically argues that he "did not knowingly, intelligently, or voluntarily waive his constitutional rights when he entered his admission, as he was specifically told and believed his sentence would be three years and four months." Defendant relies on cases such as *Boykin v. Alabama* (1969) 395 U.S. 238 (*Boykin*), *People v. Howard* (1992) 1 Cal.4th 1132 (*Howard*), and *People v. Cruz* (1974) 12 Cal.3d 562 (*Cruz*), in support of his argument. However, the cases cited by him involve either the acceptance of a guilty plea on a criminal charge or an admission of a prior conviction, while the instant case involves defendant's admission to violations of probation. (See *Boykin*, at pp. 242-244; *Howard*, at pp. 1174-1178; *Cruz, supra*, at p. 564.) What defendant's argument fails to recognize is that "a formal probation revocation hearing is substantially different from a criminal prosecution. [Citation.]" (*People v. Clark* (1996) 51 Cal.App.4th 575, 582, overruled on other grounds as stated in *People v. Mendez* (1999) 19 Cal.4th 1084, 1098.) "A probation revocation hearing involves some, but by no means all, of the fundamental rights afforded a defendant at trial. Its purpose is not to

determine guilt or innocence but is whether conditions attached to an act of clemency have been met.” (*People v. Dale* (1973) 36 Cal.App.3d 191, 195.) The issue at a probation revocation hearing is different from that presented at a hearing on the original charge; “ ‘the procedure is different, and the method of proof is different, to such an extent that the forms of procedure prescribed in *Boykin* [] have little relevance.’ [Citation.]” (*Clark*, at p. 583.)

Furthermore, the record does not support defendant’s contention that his admission was induced by the court’s misstatement that he would receive a sentence of three years four months. Rather, it reflects that defendant admitted because he knew he was “guilty of the violation.” Defendant admitted that he “made a mistake” by not informing the probation officer of his residential address and that he knew that was “a major, major violation.” Then, when the court was explaining the credits being offered by the prosecution, it misspoke and told him that the credits would be applied “against [his] three year, four months sentence.” Defendant responded by saying, “Guess I’m going to have to admit.” The court reiterated, “You don’t have to do anything You have choices here. If you want to fight the violation you have every right to do so.” Defendant replied, “Well, *I’m guilty of the violation*, I understand that,” to which the court stated, “Well then, that’s how it has to be. In terms of that if you would like to admit the violation then I will accept that admission.” (Italics added.) At that point, defendant admitted his violations, and his counsel joined in his admission. The court immediately ordered probation revoked and sentenced defendant to a term of four years four months. Neither defendant nor his attorney objected to the term imposed.

Moreover, defendant never mentioned that he thought he was being sentenced to three year four months, and/or that he admitted because of that belief. It was only when the court remanded him to the sheriff's custody that defendant asked the court to repeat what the total term was. The court again misspoke and said three years four months, but immediately caught itself. When the court corrected itself, defendant said he had agreed on three years four months. When the court explained why the sentence added up to four years four months, defendant merely replied, "Whatever"

We note that defendant did attempt to withdraw his plea. However, he did so after the court sentenced him, and he asked how much time he would actually have to serve, in light of his credits. When the court confirmed defendant's understanding that with credits, he had "about a year to do," defendant stated, "I am taking the *Vickers* hearing then because I've already got that much credit in." After that, defendant's counsel asserted that defendant wanted a *Marsden* hearing. After the court denied that request, defendant asked for a *Vargas* or *Cruz* waiver. Defendant appeared to just be spouting out any requests to see what the court would allow.

Finally, we note that "at a probation revocation hearing the violation is ordinarily established by the probation officer's report. [Citation.] A plea of guilty relieves the prosecution of the need to prove its case, but at a probation revocation hearing it is usually *inconsequential* whether the defendant admits his violation or stands mute. The probation report alone, if not rebutted or impeached, is a sufficient showing to support a revocation and sentence." (*People v. Garcia* (1977) 67 Cal.App.3d 134, 138 (*Garcia*), italics added.) The probation report here was not rebutted or impeached.

In sum, the record does not support defendant's contention that his admission was induced by the court's statement that he would receive a sentence of three years four months. Furthermore, defendant's violation of his probation was firmly established. We see no reason to allow him to withdraw his admission.

II. The Court Properly Denied Defendant's Request for a *Marsden* Hearing

Defendant next claims that the court erred by failing to conduct a proper *Marsden* inquiry. We disagree and also conclude that any error was harmless.

A. *Background*

Right after defendant asserted that he wanted to "tak[e] the *Vickers* hearing," and that he wanted to withdraw his plea, he asked what his maximum sentence would be if he had a hearing. His counsel responded with five years, and then informed the court that defendant wanted a *Marsden* hearing. The court responded that, at that point, it had an admission, and it had already sentenced defendant. The court declined to grant defendant a *Marsden* hearing because he failed to ask for it in a timely fashion.

B. *The Court Properly Denied Defendant's Request, and Any Error Was Harmless*

The court properly denied the motion as untimely. The proceeding was nearly completed. The trial court had already pronounced sentenced. "The court was not required to stop the nearly completed proceeding in its tracks in order to allow another attorney to completely familiarize himself with the case. Denial of the *Marsden* motion was within the court's discretion." (*People v. Whitt* (1990) 51 Cal.3d 620, 659.)

Furthermore, any error in denying defendant's request for a *Marsden* hearing was harmless. Defendant asserts that he was asking for a hearing "because he had not been adequately advised regarding the potential sentence if he admitted the probation violation." His argument appears to be based on the premise that he would not have admitted his violations if he had been "adequately advised regarding the potential sentence." However, since it was inconsequential whether defendant admitted his probation violations or not (see *Garcia, supra*, 67 Cal.App.3d at p. 138), we cannot see how defendant would have obtained a result more favorable had the court granted him a *Marsden* hearing. (See *People v. Washington* (1994) 27 Cal.App.4th 940, 944.)

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.