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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.

JOHN WAYNE CALHOUN, JR.,

Defendant and Appellant.

E059641

(Super.Ct.No. FBA12006365)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

David K. Rankin, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant John Wayne Calhoun, Jr., pleaded no contest in 2012 to a charge of corporal injury to a spouse and was granted probation. He now appeals after his probation was revoked and he was sentenced to state prison. We affirm.

FACTS AND PROCEDURAL HISTORY

In November 2012, defendant argued with the victim, his girlfriend, because he believed she had looked at private messages on his cell phone. At one point, he knocked the victim down, got on top of her, and twisted her arm. At another point, he struck her, causing her to hit her head on the refrigerator. During the disagreement, defendant also hit the victim's two-year-old child, leaving a hand-shaped red mark on the left side of the child's abdomen.

Defendant was charged with two counts of corporal injury to a spouse or cohabitant (Pen. Code, § 273.5, subd. (a)), and one count of child abuse (Pen. Code, § 273a, subd. (a)).

Defendant negotiated a plea bargain in which he agreed to plead no contest to one count of corporal injury to a spouse, with dismissal of the remaining charges. Defendant would be granted probation for three years; one of the conditions of probation was to serve 180 days in county jail on weekends. The court withheld pronouncement of judgment while defendant was on probation. Defendant's state prison exposure was two years, three years or four years.

Defendant pleaded no contest and was admitted to probation on December 5, 2012. About two months later, on February 19, 2013, the People filed a petition to revoke defendant's probation, alleging that defendant had violated condition no. 2, that he "violate no law." The basis of the petition was defendant's arrest on February 15, 2013, on a new misdemeanor charge of corporal injury to a spouse or cohabitant.

Defendant allegedly grabbed the victim by the throat and pushed her down onto the bed in their apartment. Ultimately, the new misdemeanor charge was dismissed, and defendant admitted a violation of probation based on the incident. Defendant was reinstated on probation with modified terms, e.g., he was now required to serve 270 days in the county jail on weekends or work release.

After another five months, on July 11, 2013, the People filed a second petition to revoke defendant's probation. This petition alleged that defendant had failed to report to the probation officer, failed to cooperate in a plan of rehabilitation, and had failed to keep the probation officer informed of defendant's current residence. The probation department recommended termination of probation and sentencing to state prison. Defendant admitted violating one term of his probation. The court sentenced defendant to the low term of two years in state prison.

Defendant filed a notice of appeal.

ANALYSIS

This court appointed counsel to represent defendant on appeal. Appointed counsel has now filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738 [87 S.Ct. 1396, 18 L.Ed.2d 493], setting forth a brief statement of the case, and asking this court to undertake a review of the entire record.

Counsel has identified a potential area of inquiry in conducting our review: whether defendant waived his right to a contested revocation hearing, and whether the trial court violated defendant's due process rights during the proceedings.

Defendant has been afforded an opportunity to file a personal supplemental brief, which he has not done.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, we have conducted an independent review of the entire record, and we find no arguable issues.

The record shows that the probation department recommended sentencing defendant to the "middle term of two years [*sic*]" in state prison on the original charge. The trial court pointed out that the middle term for the offense was actually three years in state prison; two years was the low term, and four years was the high term. If defendant wished to proceed to a revocation (*Vickers*) hearing (see *People v. Vickers* (1972) 8 Cal.3d 451), the court might sentence defendant to three years (the recommended middle term), or perhaps four years, rather than two years, depending on what the court found at the hearing. In addition, the standard of proof at the hearing was not beyond a reasonable doubt; the court would be required to make a finding of violation only by a preponderance of the evidence. Defendant piped up, "Just let me take the two years, your Honor. I will take it." Counsel waived formal arraignment and advisal of hearing rights. The parties agreed there was no legal cause why sentence should not be pronounced. The court sentenced defendant to the mitigated term of two years in state prison.

Defendant personally insisted that he wanted to take the two years, and not proceed to a hearing. There was no violation of defendant's due process rights in accepting his admission of the probation violation. (Cf. *People v. Martin* (1992) 3 Cal.App.4th 482, 486-487 [agreement to a sentencing proceeding and failure to object to failure to hold a violation of probation hearing can waive the right to a formal hearing to decide violation of probation].)

DISPOSITION

The judgment is affirmed.

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McKINSTER
J.

We concur:

RAMIREZ
P. J.

KING
J.