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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.

WALTER JOHN BRAKE,

Defendant and Appellant.

E059964

(Super.Ct.No. BLF1200275)

OPINION

APPEAL from the Superior Court of Riverside County. Dale R. Wells, Judge.

Affirmed.

Benjamin B. Kington, 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, Charles C. Ragland, Robin Urbanski, and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Walter John Brake guilty of driving under the influence of alcohol (Veh. Code, § 23152, subd. (a); count 1) and driving with a blood alcohol level of 0.08 percent or higher (Veh. Code, § 23152, subd. (b); count 2). In a bifurcated proceeding, defendant admitted that he had suffered three prior convictions for driving under the influence of alcohol within the past 10 years (Veh. Code, § 23550). The trial court sentenced defendant to the upper term of three years on count 1 and stayed his sentence on count 2 pursuant to Penal Code section 654. Defendant's sole contention on appeal is that he received ineffective assistance of counsel when counsel failed to object to the trial court's use of his right to silence in imposing the upper term. We reject this contention and affirm the judgment.

I

FACTUAL BACKGROUND

On August 27, 2012, at around 2:00 a.m., California Highway Patrol Officer Joel Ray was driving his marked patrol car on Interstate 10 in Riverside County when he saw a white van parked on the shoulder on the side of the freeway. Defendant was standing outside the van talking on his cellular telephone. Officer Ray pulled up and asked defendant if he was okay and whether he was the person who had been driving the van. Defendant stated that he was the driver of the van and that he had run out of gas 10 to 15 minutes earlier and was on the phone requesting roadside assistance. Officer Ray touched the hood of the van. The van felt warm, indicating to the officer it had recently been driven.

When Officer Ray got closer to defendant, he smelled of alcohol, his speech was slurred, and his eyes were red and watery. The officer also noticed a half-empty can of beer in the van's center console. Defendant claimed the beer can was old and that he had drunk it between 1:00 p.m. and 1:30 p.m. The can, however, was cool to the touch and still had condensation on it. The officer also saw inside the van an 18-pack case of beer with 14 cans inside. No empty beer cans were found around or inside the van.

Officer Ray performed field sobriety tests on defendant. Defendant performed poorly. Based upon all the factors, Officer Ray believed defendant had driven the van under the influence of alcohol and placed him under arrest. At 3:20 a.m., defendant's blood was drawn. His blood alcohol level was 0.14 percent. The criminalist opined defendant would have been too impaired to operate a vehicle at that level.

II

DISCUSSION

Prior to sentencing, defendant was referred to the probation department for a presentence report. Although his attorney told defendant to be an " 'open book' and to fully cooperate with [p]robation," defendant chose not to speak with the probation officer about the circumstances surrounding his offenses.

At the sentencing hearing, defense counsel requested defendant be placed in a drug rehabilitation program and noted defendant would like to make a statement. Defendant stated: "Your Honor, I could tell you try to be a good person, and it probably takes a very special person to be a judge. The way I see it, there is two questions here.

Can you rehabilitate me? Maybe, maybe not. Can you punish me? Yeah, you can. I know I did wrong, but I believe excessive punishment will probably create more problems. Right now I actually got a lot of other big problems right now. If you can, please go easy on me.”

The trial court, following the probation officer’s recommendation, imposed an upper term of three years in state prison. In imposing the upper term, the trial court stated: “There are several things that entered into my thinking on this, one of which is that notwithstanding the fact that the defendant now states he knows he did wrong, but when the probation officer was assured by defense counsel that the defendant would be forthcoming in talking to him, nevertheless when asked to provide his investigation of the offense he said, ‘Maybe I shouldn’t,’ and was not forthcoming.

“He then minimized his out-of-state felony convictions saying he had issues living in Michigan. In fact, he left Michigan prior to successfully completing probation. Even though that was a long time ago, and, yes, it is true, the offense that he has been convicted of at this time is a certainly less serious offense, and yet it makes him presumptively ineligible for probation unless an unusual case could be found because he was twice convicted of a felony or public offense in another state which if he was convicted in this state would have been punished as a felony. The unusual case would be that the prior felony convictions a long time ago were less serious, and they were a long time ago.

“I am deeply concerned about the fact that [defendant] apparently made reference casually to the fact that his uncle was arrested for DUI some 15 times, and nothing ever happened to him, and it just seems to me that [defendant] has minimized and failed to take responsibility for his conduct until now when it is time for sentencing. . . .”

Defendant thereafter interrupted and stated, “When I referred to my uncle, I was just talking about how times had changed. Back then how it was, and—it wasn’t my uncle, it was a friend of my dad’s. I was talking about how back in the ‘70’s, it is so much different than what it is now.”

The court continued: “If it were just that statement, I might accept that representation. But that statement combined with the fact that even though you had been convicted, you still did not accept culpability for driving under the influence of alcohol. You described your issues as—well, you denied having issues with alcohol according to the probation report, even though this is your fourth DUI conviction.

“The letter of support that you provided just talks about how you helped people, and you are a caring person, really does not reflect on the offense. It appears you have tried to play down the seriousness of your conduct, but not only referring to your uncle, but also the facts that some of the jurors and prospective jurors had their own issues with past DUI’s. And, yes, you have stayed free of a DUI for a good long while.”

Defendant replied, “I think the probation interview, there was a lot of misunderstanding between us. She said if I don’t feel comfortable about something, don’t talk about it. So that’s one of the reasons why I didn’t talk much about it.” The

court responded, “I understand that. As I said, I believe that it is the combination of those things. [¶] And for the reasons set forth in the probation report”

Defendant reported to the probation officer that he considered himself a “ ‘casual drinker,’ ” who “ ‘now and then again (gets) out of control.’ ” Defendant did not consider himself an alcoholic. The probation report listed the following factors in aggravation: (1) defendant’s prior convictions as an adult are numerous or of increasing seriousness (Cal. Rules of Court, rule 4.421(b)(2)); and (2) defendant had served a prior prison term (Cal. Rules of Court, rule 4.421(b)(3)). No factors in mitigation were found.

Defendant argues that his trial counsel was ineffective for failing to object to the court’s reliance on his lack of remorse in imposing the upper term. Specifically, he argues, because he had a Fifth Amendment right to remain silent about the instant offenses during his discussion with the probation officer, the trial court should not have drawn an adverse inference, i.e., his lack of remorse, from that silence; and therefore, his counsel should have objected when the trial court relied on that factor in aggravation.

A defendant claiming ineffective assistance of counsel under the federal or state Constitution must show both deficient performance under an objective standard of professional reasonableness and prejudice under a test of reasonable probability of a different outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 686; *People v. Ochoa* (1998) 19 Cal.4th 353, 414.) In other words, “[t]o be entitled to relief based on ineffective assistance of counsel, [defendant] has the burden of showing counsel’s performance was inadequate and of affirmatively demonstrating he was prejudiced by

trial counsel's errors. [Citation.]” (*People v. Hayes* (1991) 229 Cal.App.3d 1226, 1234-1235.) Prejudice exists when there is a reasonable probability that, but for counsel's deficient performance, the result would have been more favorable to defendant and rendered the proceedings fundamentally unfair. (*Lockhart v. Fretwell* (1993) 506 U.S. 364, 372.) A reasonable probability is one sufficient to undermine confidence in the outcome. (*In re Neely* (1993) 6 Cal.4th 901, 908-909.) To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment unless counsel was asked for an explanation and failed to provide one or unless there simply could be no satisfactory explanation. (*People v. Hart* (1999) 20 Cal.4th 546, 623-624.)

In the instant case, even if we assume trial counsel rendered ineffective assistance in dealing with his client's alleged lack of remorse at the sentencing hearing, defendant has not demonstrated prejudice, i.e., a reasonable probability that, but for counsel's failure to object, defendant would have obtained a more favorable result. Absent such a showing, his claim of ineffective assistance must be rejected.

“A trial court is vested with abundant discretion in sentencing. An abuse is found only where its choice is ‘arbitrary or capricious or “ ‘exceeds the bounds of reason, all of the circumstances being considered.’ ” [Citations.]’ ” (*People v. Trausch* (1995) 36 Cal.App.4th 1239, 1247.) A court may consider circumstances in aggravation or mitigation or any other factors in imposing sentence. (Cal. Rules of Court, rule 4.420(b).) Factors in aggravation include the fact that “[t]he defendant's prior

convictions as an adult . . . are numerous or of increasing seriousness”; “[t]he defendant has served a prior prison term”; and “[t]he defendant’s prior performance on probation or parole was unsatisfactory.” (Cal. Rules of Court, rule 4.421(b).)

In imposing sentence, a trial court has broad discretion to weigh any aggravating and mitigating circumstances and to select the appropriate sentence. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) A single aggravating circumstance is sufficient to justify the imposition of an upper term sentence. (*People v. Williams* (1991) 228 Cal.App.3d 146, 153; *People v. Castellano* (1983) 140 Cal.App.3d 608, 615; *People v. Piceno* (1987) 195 Cal.App.3d 1353, 1360.) The record in the instant case shows that the trial court considered not only defendant’s failure to recognize the seriousness of his offense, but three factors in aggravation when it imposed the upper term sentence—defendant’s numerous prior convictions, his prior prison term, and his poor performance while on probation.

The trial court’s sentencing choice in this case is supported by the record and was not arbitrary or capricious, nor did it exceed the bounds of reason. (*People v. Trausch, supra*, 36 Cal.App.4th at p. 1247.) Defendant thus failed to meet his burden of demonstrating a reasonable probability that, but for defense counsel’s failure to object to the trial court’s reliance on defendant’s right to remain silent or refusal to discuss the offense with the probation officer, he would have obtained a more favorable sentence. (*Strickland v. Washington, supra*, 466 U.S. at pp. 687-696.) The failure to object was therefore not reversible for ineffective assistance of counsel.

III
DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

HOLLENHORST
J.

KING
J.