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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.

SCOTT MITCHELL VALEUR,

Defendant and Appellant.

E060500

(Super.Ct.No. FMB1200064)

OPINION

APPEAL from the Superior Court of San Bernardino County. Rodney A. Cortez, Judge. Affirmed.

Jan B. Norman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Stacy Tyler, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Scott Mitchell Valeur pleaded guilty in April 2012 to a charge of receiving stolen property, and admitted two prior prison term enhancements. The pronouncement of judgment was withheld, and defendant was admitted to probation, with referral to drug court. Defendant's probation was revoked in November 2012, and the court entered judgment, sentencing defendant to the aggravated term of three years on the receiving stolen property charge, plus two years (one for each of the prison term priors), to be served in local prison custody. Defendant now appeals, contending that the trial court improperly relied on defendant's conduct while on probation in selecting the sentence. We reject the contention and affirm the judgment.

#### FACTS AND PROCEDURAL HISTORY

In the early morning hours of February 7, 2012, the San Bernardino County Sheriff's Department received a report of suspicious activity near a property in Morongo Valley. Deputy Latasha Rubalcava met with the person who had called in the report, Brad Smith. Smith told Deputy Rubalcava that he was watching a neighbor's property while the neighbor was away, and he had noticed some suspicious activity, namely, an unfamiliar truck parked at the neighbor's property.

Deputy Rubalcava went to the neighboring property and saw a pickup truck with running lights. The truck had a "big back to it," and carried "a bunch of things in the back." The hood of the truck was warm; Deputy Rubalcava also noticed that the ignition was "punched" and missing.

Deputy Rubalcava and Sergeant Hutchins, who was also present at the scene, saw approximately three sets of different shoe impressions around the truck. Tracking one set of shoe impressions, Deputy Rubalcava found codefendant Austin Toensing lying on the ground. Toensing claimed that he was a transient and that he was there by himself. Another officer followed another set of footprints and discovered defendant, also lying on the ground. Defendant told the officers that he was looking for parts for his truck. He stated that he and Toensing were “tweaking,” or using methamphetamine.

Defendant claimed that a third person had been driving the truck; Toensing denied that he had been driving the truck, and said that defendant had been driving. The third person, however, was never found.

Deputy Rubalcava used the license plate number on the truck to trace the owner. The owner went to his business property and discovered that his truck was missing. It had not yet been reported stolen, but the owner told Deputy Rubalcava that he had not given anyone permission to take the truck.

Detective Michael Walker interviewed defendant at the station. Defendant waived his rights and agreed to speak with Detective Walker. Defendant told Detective Walker that he and Toensing had been at the house of a friend when another man came to the house, driving the truck. The driver of the truck picked up defendant and Toensing. According to defendant, he told the driver that he wanted to get some parts for his own truck; the driver said he knew of a place where they could get parts, and took them to the property in Morongo Valley. As noted, no third man was found on the property.

As a result of these events, defendant was charged with one count of receiving stolen property (Pen. Code, § 496d, subd. (a)), i.e., the white pickup truck. The complaint also alleged that defendant had suffered two prison term priors (Pen. Code, § 667.5, subd. (b)). After a preliminary hearing, defendant was held to answer.

Defendant failed to appear at the next two hearings. When he did appear for arraignment on the information, defendant changed his plea. He entered a guilty plea on April 3, 2012, to the receiving stolen property charge and admitted the two prison term priors. The probation department recommended that the court withhold pronouncement of judgment for the offense, and that defendant be placed on 36 months' supervised probation through the drug court program. Defendant's plea agreement noted that he had applied for the drug court program.

About a week after defendant's change of plea, the trial court noted that defendant had been accepted into the drug court program. The court ordered defendant to report to the probation department immediately, and to meet with the drug court team. At the end of April 2012, the court formally admitted defendant to probation for three years, set the conditions of probation, and imposed various fines, fees, and other orders.

In the middle of May 2012, after only about two weeks on probation, the court found that defendant was in violation of his probation. He had failed to comply with the probation terms and he was a fugitive. The court revoked probation to maintain jurisdiction over defendant.

The next time defendant returned to court was in October 2012. He was then in custody on a no-bail warrant. After continuances for the calculation of credits, on November 19, 2012, the court found defendant was not amenable to treatment through the drug court. Defendant's drug court probation was terminated. The court proceeded to pronounce the judgment that had been previously withheld. The trial court denied probation, and denied admission to mandatory supervision. The court selected the aggravated term of three years for the receiving stolen property offense, and imposed one additional year, consecutively, for each of defendant's prison term priors. The total sentence was five years, to be served in "county prison."

Defendant, having been granted permission to file a late notice of appeal, attributable to counsel's inadvertence and mistake, has now appealed.

## ANALYSIS

### I. Standard of Review

Defendant has raised a single issue on appeal: he contends that the trial court improperly relied on defendant's post-conviction conduct—i.e., his poor performance on probation—in imposing the aggravated prison term on defendant's receiving stolen property conviction. Defendant argues that, when a court imposes sentence upon a revocation of probation, California Rules of Court, rule 4.435(b)(1) expressly requires reliance only on circumstances existing at the time probation was granted. Rule 4.435(b)(1) prohibits consideration of any subsequent events in selecting the base term.

Sentencing decisions by the trial court are reviewed for abuse of discretion. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 [“ ‘The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. . . . In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review’ ”].)

## II. Defendant’s Sentence Was Proper

Defendant claims that the trial court must have improperly considered his poor performance on probation in deciding to impose the aggravated term for his current offense. Defendant bases this claim in part on the asserted absence of any recitation in the record, at the time he was admitted to probation, of circumstances then existing that would justify imposing the aggravated term. He also bases the claim in part on certain remarks made by the trial court at the sentencing hearing.

At the sentencing, the trial court first determined that defendant had willfully violated his probation. Defendant failed to appear within a short time after he was placed on probation. Defendant was initially out of custody, and then he “went into the wind,” until he was apprehended. The court stated, “the court finds your failure to appear, and with the information that you were out of custody and you weren’t in custody in another county, you’re in direct violation and willful violation to appear.” [*Sic.*] Defendant’s “violation shows you’re not amenable to the drug court program, and he is now terminated from the drug court program . . . .”

The court properly, and necessarily, considered defendant’s post-probation conduct in determining whether or not to reinstate probation. (*People v. White* (1982) 133 Cal.App.3d 677, 681.)

The court then turned to the imposition of sentence, and the following exchange took place:

“[DEFENSE COUNSEL]: I made argument in chambers. The court indicated to me that the policy of the court was to impose the maximum and that was pretty much it. . . . [¶] . . . [¶] . . . Well, just to go over, I think that an appropriate term . . . might be the mid term rather than the aggravated term, and I would ask that the [c]ourt impose the mid rather than the aggravated. [¶] . . . [¶]”

“THE COURT: The court finds based upon the defendant’s prior history, including his prior prison commitments, that the aggravated term is the appropriate term. He didn’t even satisfy a single day of drug court. [¶] . . . [¶] . . . We’re going to sentence him to the aggravated term of 3 years for receiving stolen property. . . .”

Defendant points to the trial court’s comment that he “didn’t even satisfy a single day” of his drug court probation, and suggests that the court’s selection of the aggravated term must have been based, at least in part, on defendant’s post-probation conduct.

We disagree. The court’s remarks clearly indicate that it selected the aggravated term because of defendant’s “prior history, including his prior prison commitments.” The record of defendant’s prior history existed at the time of defendant’s conviction and admission to probation. Defendant had a 2006 conviction for stalking (Pen. Code,

§ 646.9), and a 2008 conviction for possession of controlled substances (Health & Saf. Code, § 11377, subd. (a)). In connection with the current offense, the record indicated, at the least, that defendant knowingly accepted a ride in the white truck; defendant admitted he knew the truck was stolen, because he had noticed the “punched” ignition.

Codefendant Toensing had told police that defendant was driving the truck, casting doubt on defendant’s claim that the mysterious third man had stolen or driven the truck. The property where defendant and the truck were found had a number of other vehicles on it; defendant’s story was that he intended to take parts for his own truck from the vehicles found at the property. Defendant also was “tweaking,” or using methamphetamine, with his codefendant while at the property. All these factors were more than sufficient to justify selecting the aggravated term. Only a single aggravating factor is necessary to make it lawful for the trial court to impose an aggravated prison term. (See Pen. Code, § 1170, subd. (b); *People v. Black* (2007) 41 Cal.4th 799, 815, overruled on other grounds in *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856].)

*People v. Colley* (1980) 113 Cal.App.3d 870, on which defendant relies, is distinguishable. There, the defendant had pleaded guilty to first degree burglary, and was admitted to probation. The defendant violated his probation and was sentenced to state prison for the middle term. (*Id.* at p. 871.) Later, the defendant’s sentence was recalled pursuant to Penal Code section 1170, subdivision (d), and the defendant was again granted probation. (*Id.* at pp. 871-872.) Then, the defendant was convicted of a new

crime and probation was again revoked on the original burglary charge. The trial court imposed the aggravated term in the second sentencing hearing. In imposing the aggravated term, the trial court stated that it had given the defendant “every conceivable break,” and selected the aggravated term because the defendant “has rejected the leniency of the court,” and because all the “rehabilitative tool[s]” that had been tried had failed to reform the defendant’s conduct. (*Id.* at p. 872.)

The reviewing court concluded that the trial court had based its selection of the aggravated term on the defendant’s post-conviction conduct, and modified the sentence to impose the middle term. (*People v. Colley, supra*, 113 Cal.App.3d 870, 873-874, citing California Rules of Court, former rule 435(b)(1), now rule 4.435(b)(1).) In *Colley*, the trial court initially revoked probation and imposed the middle term as the appropriate sentence for the crime. The court thus necessarily determined initially that the defendant’s prior record and other pre-probation circumstances did not warrant imposition of the aggravated term. The difference in the outcome at the second sentencing hearing—imposing the aggravated term—must have been based on the defendant’s conduct while on probation.

Here, by contrast, the trial court did not make an initial finding that the aggravated term was not warranted. *People v. Colley, supra*, 113 Cal.App.3d 870 provides no help to defendant.

In any case, reversal is not required. “The mere fact a trial court erroneously relies upon certain factors in imposing an upper term does not per se require reversal. Reversal

is only required where there is a reasonable probability the trial court would sentence the defendant differently absent the erroneous factors. [Citation.] Thus, where the trial court has stated several factors warranting the upper term, and only some of those factors are erroneous, the sentence is generally affirmed. [Citations.] Indeed, even one valid factor is sufficient to justify the upper term. [Citations.]” (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319.)

DISPOSITION

We affirm the judgment.

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McKINSTER  
Acting P. J.

We concur:

KING  
J.

MILLER  
J.