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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.

VINCENT GERARD FARMER,

Defendant and Appellant.

E064555

(Super.Ct.No. FVI1501063)

OPINION

APPEAL from the Superior Court of San Bernardino County. John M. Tomberlin, Judge. Affirmed.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Kathryn Kirschbaum, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Vincent Gerard Farmer guilty of the unlawful driving or taking of a vehicle (Veh. Code, § 10851, subd. (a), count 1) and misdemeanor petty theft (Pen. Code,<sup>1</sup> § 484, subd. (a), count 2). Defendant subsequently admitted that he had suffered one prior strike conviction (Pen. Code, §§ 1170.12, subd. (c)(1), 667, subds. (c) & (e)(1)) and two prior prison terms (Pen. Code, § 667.5, subd. (b)). A trial court sentenced defendant to a total term of eight years in state prison, as follows: the upper term of three years on count 1, doubled because of the prior strike, plus two years on the prior prison allegations. The court also awarded 288 days of presentence custody credits.

On appeal, defendant contends the court abused its discretion in imposing the upper term. We affirm.

#### FACTUAL BACKGROUND<sup>2</sup>

The victim was on her way to the hospital when she made a quick stop at a market to get a snack. She left her car running with the keys in the ignition and ran into the store. She noticed a man, later identified as defendant, and his codefendant sitting in a white van, looking in her direction as she walked into the store. Once the victim was inside the store, defendant got out of the van, walked over to the victim's car, got into the

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

<sup>2</sup> Because this appeal concerns a sentencing issue, we will only give a brief summary of the facts relevant to defendant's conviction.

driver's seat, and drove away. The codefendant left the parking lot in the white van, and defendant followed him in the victim's car.

A police officer subsequently located the victim's car parked a couple miles away from the market. It was unoccupied. He observed the car for about 15 minutes to see if anyone would return to it. When no one came, he went to the car to see if any evidence was inside. At that time, he noticed a white van pull into the parking lot, come close to him, and then make a U-turn. He followed the van, since it matched the description of the suspects' vehicle, and conducted a traffic stop. There were three people inside the van, including defendant. Some of the victim's property was found inside the van, including her identification cards.

### ANALYSIS

#### The Trial Court Properly Imposed the Upper Term

Defendant argues the court abused its discretion when it imposed the upper term because it improperly relied on the fact that he was the driver of the vehicle that was stolen. He contends the fact that he drove the vehicle was actually an element of the offense and, thus, could not be used to aggravate the sentence. Defendant also argues that since his counsel proceeded without the benefit of a probation report or the presentation of mitigating circumstances, he was denied the right to a fair sentencing hearing. We conclude that the court properly sentenced defendant to the upper term.

### A. *Standard of Review*

“When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . The court shall select the term which, in the court’s discretion, best serves the interests of justice.” (§ 1170, subd. (b).) Sentencing courts have wide discretion in weighing aggravating and mitigating factors. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582.) A single factor in aggravation is sufficient to justify the imposition of the upper term. (*People v. Cruz* (1995) 38 Cal.App.4th 427, 433 (*Cruz*)). ““The burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] 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.’ [Citation.]” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978.)

### B. *Relevant Background*

After receiving the verdicts in this case, the court continued the matter to allow the parties to brief a Proposition 47 issue, with regard to the codefendant. At the outset of the next hearing, the court asked: “We’re going to continue this case?” Counsel for the codefendant agreed, but counsel for defendant stated that defendant wanted to be sentenced. Defense counsel said he had no Proposition 47 issues and stated that defendant just wanted to be sentenced. He requested the middle term, doubled pursuant

to the strike conviction, plus the prior prison allegations. Both the court and the prosecutor stated that they were caught off guard since they were only planning on discussing the Proposition 47 issues that day. The court added that it never referred the matter to the probation department. Defense counsel said he was sure that a probation report would not benefit defendant at all, since he was aware of defendant's record. He stated that defendant was prepared to admit the prior allegations and be sentenced. The court said it recalled this case and stated that if defendant wanted to be sentenced that day, it intended to impose the aggravated term, since defendant was the person who was the driver of the stolen car. The court added that it would be happy to look at any mitigating circumstances that might be brought to its attention, if it referred the matter to the probation department for a recommendation. Defense counsel confirmed with defendant that he (defendant) heard the discussion with the court and then asked if he was ready to admit the prior allegations and be sentenced. Defendant confirmed. The court asked defense counsel if he also was ready to go, and he said yes. Defendant waived his right to trial and admitted the prior strike and two prior prison allegations. The court reiterated that the sentence would be three years for the offense, doubled pursuant to the strike, plus two years on the prison priors. It then asked if defendant waived further formal arraignment and advisal of rights. Defense counsel waived and said there was no legal cause why judgment should not be pronounced. He added that defendant had a petty theft conviction for count 2 and asked the court to make a terminal disposition since defendant had custody credits for 144 actual days. The court proceeded to order that

probation be denied and sentenced defendant to the aggravated term of three years on count 1, doubled for the strike, plus one year on each of the prison priors, for a total of eight years in state prison. The court awarded him a total of 288 days of custody credits.

*C. Defendant Forfeited His Claim by Failing to Object*

Citing our Supreme Court's decision in *People v. Scott* (1994) 9 Cal.4th 331 (*Scott*), the People argue that we should not consider defendant's claim because he forfeited it by failing to object at the time of sentencing. We agree.

In *Scott, supra*, 9 Cal.4th 331, our Supreme Court held that a defendant must object at the time of sentencing to the trial court's failure to properly make or articulate sentencing choices. (*Id.* at p. 353.) Defendant did not object at the sentencing hearing when the trial court sentenced him to the upper term. Because he did not object, he has forfeited the claim on appeal. (*Id.* at p. 356.) Defendant admits that "[i]t is of some concern that counsel made no argument in [his] favor other than to request the midterm nor did counsel present any information on [his] behalf." At the same time, he argues that the issue was not forfeited because his counsel "made it clear that he thought that the appropriate term" was the midterm. Again, defense counsel did not *object* to the court's imposition of the upper term or the reasons for its choice. (*Id.* at p. 353.) Thus, his claim is forfeited.

*D. The Court Properly Sentenced Defendant*

Assuming arguendo that defendant did not forfeit his claim, we conclude that the court properly sentenced him to the upper term. Defendant asserts that his participation

in the offense was “situational and opportunistic,” as it arose solely due to the victim leaving the keys in the car with the engine running. He further notes that the only factor the court cited for imposing the upper term was that he drove the stolen car from the store. He claims that court could not rely on this fact because “the act of driving the vehicle” was an element of the crime of taking or driving a vehicle. However, reading the court’s reference to the fact that he was the driver in context, the court was apparently stating that defendant’s act of driving the vehicle made his conduct aggravated compared to his codefendant’s conduct. Under California Rules of Court, rule 4.421(a)(4), circumstances in aggravation include the fact that a defendant “occupied a position of leadership or dominance of other participants in its commission.” Defendant claims that the evidence indicated he “got in the vehicle at the urging of his codefendant.” However, the evidence showed that once the victim went into the store, the codefendant merely looked over toward defendant. Defendant then got out of the van, walked over to the victim’s car, and drove it away. The circumstances supported a finding that defendant occupied a position of leadership over the codefendant, as he was the one who actually took and drove the victim’s car away. Because a single factor in aggravation is sufficient to justify the imposition of the upper term, the court properly sentenced defendant. (*Cruz, supra*, 38 Cal.App.4th at p. 433.) We note that defendant admitted he had served two prior prison terms. Although not mentioned by the court, such factor was a proper aggravating circumstance that the court could have cited. (Cal. Rules of Court, rule 4.421(b)(3) [“The defendant has served a prior prison term.”])

As to defendant’s contention that he was denied the right to a fair hearing because his counsel proceeded without the benefit of a probation report or the presentation of mitigating circumstances, such claim is disingenuous. At the sentencing hearing, the court expressed its concern that it had not referred the matter out for a probation report. However, defense counsel responded that he was certain a probation report would “not benefit [defendant] at all,” in light of his record. The court again offered to refer the matter to the probation department, in order for any mitigating circumstances to be brought to its attention. However, defendant and his counsel both confirmed that they were ready to proceed to sentencing immediately. We further note that, in his reply brief, defendant even acknowledges that “there is nothing on this record to show a probation report would have uncovered any mitigating factors.”

We conclude that the trial court did not abuse its discretion in imposing the upper term on count 1.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST  
J.

We concur:

RAMIREZ  
P. J.

MILLER  
J.