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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

PEDRO ZUNIGA CRUZ,

Defendant and Appellant.

F062037

(Super. Ct. No. BF134359A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. David R. Lampe, Judge.

Jagdish J. Bijlani, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Stephen G. Herndon, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Levy, Acting P.J., Poochigian, J., and Franson, J.

A jury convicted appellant, Pedro Zuniga Cruz, of transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and possession of drug paraphernalia (Health & Saf. Code, § 11364).

On February 28, 2011, the court suspended imposition of sentence and placed Cruz on probation on condition that he serve nine months' local time.

On appeal, Cruz contends: 1) the court erred by its failure to place him on Proposition 36 probation; and 2) one of his conditions of probation is unconstitutionally vague and overbroad because it does not contain a knowledge requirement. We will find that the clerk's minute order for Cruz's sentencing hearing erroneously omitted the knowledge requirement for the probation condition at issue. In all other respects, we affirm.

FACTS

On October 29, 2010, Bakersfield Police officers contacted Cruz, who appeared fidgety, at a park in Bakersfield. The officers asked Cruz if he had any weapons or anything illegal and Cruz replied that he had a pipe. The officers recovered the pipe and arrested Cruz. During an interview at the police station, Cruz told the officers that he had methamphetamine concealed in a seam of his jacket. The officers searched his jacket and recovered a small plastic bindle containing methamphetamine. The methamphetamine recovered from the bindle and the pipe weighed a combined total of approximately 0.95 grams.

Cruz's probation report stated that he was ineligible for Proposition 36 probation because the United States Immigration and Customs Enforcement (ICE) placed a hold on him and he might be unavailable for treatment.¹ The report recommended that the court

¹ The probation report stated, "It appears the defendant possessed methamphetamine for personal use and therefore would be eligible for Prop 36; however, given the

place Cruz on regular probation for three years on condition that he serve nine months' local time.

On February 28, 2011, at the beginning of Cruz's sentencing hearing, the court announced that it was inclined to agree with the probation report's recommendation. After the People submitted the matter on the report, defense counsel stated, "Your Honor, based on Mr. Cruz's limited criminal history and the minimal amount of contraband in this case, I do believe the recommendation is appropriate. We will submit on the report."

The court then placed Cruz on probation for three years on condition that he serve nine months' local time. In so doing, the court stated, "I do note that although the possession here was for -- apparently by the verdict and by the facts for personal use, the defendant is unavailable for treatment in light of his immigration status and therefore ineligible for Proposition 36; and, therefore, I will pronounce judgment." Neither Cruz nor his defense counsel objected to the court's failure to place him on Proposition 36 probation.

DISCUSSION

The Failure to Place Cruz on Proposition 36 Probation

Cruz contends the probation report used the wrong standard to conclude that he was ineligible for Proposition 36, i.e., that he *might be unavailable* for Proposition 36 treatment because of the ICE hold, and that the court adopted this erroneous standard in refusing to place him on Proposition 36 probation. He also appears to contend that the record does not contain any evidence to support a finding that there was a substantial likelihood that his deportation was imminent. Thus, according to Cruz, the "court erred in finding that [he] would be unavailable for Proposition 36 treatment and that [his]

defendant has a USICE Hold, he may be unavailable for treatment and, therefore ineligible."

immigration status rendered him ineligible for [Proposition 36] probation[.]” We will reject these contentions.

Preliminarily, we conclude that Cruz forfeited these issues on appeal by his failure to raise them in the trial court. (*People v. Scott* (1994) 9 Cal.4th 331, 353 [the failure to object in the trial court forfeits claims involving sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner].)

However, even if these claims were properly before us, we would reject them.

“Proposition 36, the Substance Abuse and Crime Prevention Act of 2000, took effect on July 1, 2001. The act added numerous provisions to the Penal Code, including section 1210.1. Section 1210.1, subdivision (a) provides in part: ‘Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program....’ ‘When a defendant is eligible for Proposition 36 treatment, it is mandatory unless he is disqualified by other statutory factors’ [Citation.]

“The purpose of the Substance Abuse and Crime Prevention Act is “[t]o divert from incarceration into community-based substance abuse treatment programs non-violent defendants, probationers and parolees charged with simple drug possession or drug use offenses.” [Citations.] [Citation.]

“Section 1210.1, subdivision (b) sets forth five exceptions for otherwise eligible defendants. The exceptions are: ‘1) conviction of prior strike offense within five years; 2) convictions in the same proceeding for a nondrug misdemeanor or for any felony; 3) firearm involvement; 4) refusal of drug treatment; and 5) two prior failures in Proposition 36 treatment programs and proof of unamenability to drug treatment. [Citation.]’ [Citation.]” (*People v. Muldrow* (2006) 144 Cal.App.4th 1038, 1042-1943.)

However, “where the defendant faces a substantial likelihood of imminent deportation, such that his probation cannot effectively be conditioned on completion of a drug treatment program, ... section 1210.1 does not preclude the trial court from

exercising its discretion to deny probation.” (*People v. Espinoza* (2003) 107 Cal.App.4th 1069, 1076.)

In *Guzman v. Swarthout* (E.D. Cal., Oct. 18, 2011, No. CIV S-11-1385 GGH P) __ F.Supp. __ [2011WL 4954204, 2011 U.S. Dist. LEXIS 120451], fn. 4, the court explained the effect of an ICE hold on an inmate:

“[The] CDCR [California Department of Corrections and Rehabilitation] is housing thousands of inmates for whom [ICE] has placed a hold, a first step toward deporting these inmates when they have completed their sentences.... [¶] At a minimum, CDCR has approximately 9,500 inmates eligible for deportation[.]

“The ICE process is straightforward. An ICE hold is put on an inmate upon reception to CDCR when it is verified that he/she is not a naturalized citizen.... Upon completion of the inmates [sic] California sentence, ICE takes custody of the inmate and transports him/her to a deportation center. If the inmate has been previously deported and/or been convicted of an aggravated felony and does not contest the proceeding and the inmate is from a country with a Prisoner Transfer Treaty he/she is deport[ed] without a hearing. About 60–70 percent of the ICE cases meet these criteria. If the inmate contests the deportation he/she is transferred to the deportation center until an administrative hearing is completed.”

Further, as noted by the Supreme Court in *Padilla v. Kentucky* (2010) __ U.S. __, __ [130 S.Ct. 1473, 1480, 176 L.Ed.2d 284], “Under contemporary law, if a noncitizen has committed a removable offense ... his removal is practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General to cancel removal for noncitizens convicted of particular classes of offenses.” (Fn. omitted.)

Title 8 United States Code Annotated section 1227 provides that the following aliens are deportable: “Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C.A. § 802), other than a single

offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." (See 8 U.S.C.A. § 1227(a)(2)(B)(i).) Methamphetamine is a controlled substance within the meaning of title 8 United States Code Annotated section 1227. (21 U.S.C.A. § 802(6); 21 U.S.C.A. § 812(c)(schedule III)(a)(3).)

It is clear from the foregoing that Cruz's conviction for possession of methamphetamine made him deportable even though he was a permanent resident alien. Further, Cruz did not dispute the probation report's assertion that he was subject to an ICE hold. Therefore, the ICE hold on Cruz supports the court's implicit conclusion that Cruz would not be able to comply with a grant of Proposition 36 probation because he faced a substantial likelihood of imminent deportation.

Moreover, since the trial court is presumed to know the law (*People v. Torres* (1950) 98 Cal.App.2d 189, 192), absent an affirmative showing to the contrary, we must presume that the court was aware of and applied the appropriate standard in deciding not to place Cruz on Proposition 36 probation (*People v. Gutierrez* (2009) 174 Cal.App.4th 515, 527). In any event, the probation report did not purport to set forth the legal standard the court was required to apply in order to find Cruz ineligible for Proposition 36 probation in light of the ICE hold on him. Instead, the report's language indicates that it was merely alerting the court to an issue that arose by virtue of the ICE hold on Cruz if the court intended to place Cruz on Proposition 36 probation which, absent the hold, he was clearly eligible for. Thus, there is no merit to Cruz's claim that the court used an erroneous standard in finding him ineligible for Proposition 36 probation.

Additionally, as noted earlier, the court is not required to place a defendant on Proposition 36 probation if the defendant refuses such placement. Here, defense counsel did not challenge the probation report's statement that there was an immigration hold on Cruz. Nor did he attempt to show that the immigration hold would not result in Cruz being deported. Instead, defense counsel acquiesced to the probation report's statement

that the immigration hold on Cruz might result in Cruz's deportation and he submitted on the probation report's recommendation that Cruz be placed on regular probation. By not arguing or presenting evidence that there did not exist a substantial likelihood that he would be deported and by submitting on the report's recommendation, Cruz effectively refused placement on Proposition 36 probation. Accordingly, we reject Cruz's contention that the court erred by denying him a grant of Proposition 36 probation.

The Probation Condition at Issue

As one condition of probation, the court ordered that Cruz "not be in or around or about anyplace known to him where any [narcotic, restricted dangerous drug, marijuana, or hallucinogenic drug] is illegally sold, supplied, stored, or is present[.]" The minute order of Cruz's sentencing hearing memorialized this condition as requiring Cruz not to "be in, around or about any place where any controlled substance is illegally sold, supplied, stored or is present." (Original all in capital letters.) Cruz cites this probation condition as memorialized in the court's minute order to contend that the condition is unconstitutionally vague and overbroad because it does not contain a knowledge requirement and that its prohibition against the use of controlled substances is overbroad because it encompasses controlled substances like prescription medicines. Alternatively, Cruz contends that the minute order should be amended to conform to the trial court's oral pronouncement of judgment. We agree with this latter contention.

"'Rendition of judgment is an oral pronouncement.' Entering the judgment in the minutes being a clerical function [citation], a discrepancy between the judgment as orally pronounced and as entered in the minutes is presumably the result of clerical error. Nor is the abstract of judgment controlling. 'The abstract of judgment is not the judgment of conviction. By its very nature, definition and terms [citation] it cannot add to or modify the judgment which it purports to digest or summarize.' [Citation.]" (*People v. Mesa* (1975) 14 Cal.3d 466, 471.)

Therefore, since the court's oral pronouncement of judgment is controlling, we conclude that the probation condition at issue is not unconstitutionally vague or overbroad as Cruz contends because it contains a knowledge requirement. Nevertheless, we will direct the trial court to correct the minute order of Cruz's sentencing hearing to accurately reflect the court's oral pronouncement of judgment.

DISPOSITION

The trial court is directed to issue a corrected minute order that accurately memorializes the court's oral pronouncement of judgment and which indicates that as one condition of probation Cruz shall "not be in or around or about anyplace known to him where any narcotic, restricted dangerous drug, marijuana, or hallucinogenic drug is illegally sold, supplied, stored, or is present." In all other respects, the judgment is affirmed.