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

THE PEOPLE,

Plaintiff and Respondent,

v.

GARY DEAN TACKETT,

Defendant and Appellant.

F062188

(Super. Ct. No. 08CM3917A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

Peggy A. Headley, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Michael A. Canzoneri and Charles A. French, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Cornell, Acting P.J., Kane, J. and Franson, J.

Gary Dean Tackett entered a no contest plea to one count of unlawful possession of methamphetamine for sale (Health & Saf. Code, § 11378) with a firearm enhancement (Pen. Code, § 12022, subd. (c)) and one count of possession of marijuana for sale (Health & Saf. Code, § 11359). The trial court granted the prosecution's motion to dismiss the remaining counts,¹ as well as counts in two additional cases,² with a *Harvey*³ waiver. At sentencing, the trial court denied Tackett's request for referral for commitment to the California Rehabilitation Center (CRC) and imposed a total of six years in state prison. On appeal, Tackett contends the trial court abused its discretion in denying his request for a referral to the CRC. As discussed below, we conclude there was no abuse of discretion and affirm the judgment.

BACKGROUND⁴

Case No. 08CM3917

On June 30, 2008, police received information that methamphetamine was being sold from a home in Riverdale, California. Tackett, the home owner, denied selling methamphetamine, but said that he had smoked methamphetamine earlier that evening. A subsequent search yielded 9.8 grams of methamphetamine, 8.4 pounds of marijuana, \$7,600 in currency, 53 firearms, digital scales and a smoking pipe.

¹ Case No. 08CM3917, possession of methamphetamine while armed with a loaded firearm (Health & Saf. Code, § 11370.1, subd. (a)); possession of stolen firearms (Pen. Code, § 496, subd. (a)); and misdemeanor possession of drug paraphernalia (Health & Saf. Code, § 11364).

² Case Nos. 09CM1991 and 08CM2099 (misdemeanor probation violation).

³ *People v. Harvey* (1979) 25 Cal.3d 754, 758. “*Harvey* waiver ... is a ‘contrary agreement’ permitting the sentencing judge to consider the facts relating to dismissed charges.” (*People v. Barasa* (2002) 103 Cal.App.4th 287, 291, fn. 3.)

⁴ The facts are taken from the probation report because they are not at issue on appeal.

Case No. 09CM1911 (Dismissed with Harvey waiver)

On May 7, 2009, police received information that Tackett might be in possession of stolen property. A stolen trailer, jack hammer, hoses, attachments, and compressor were found. Tackett admitted some knowledge that the compressor and trailer were stolen. When he was arrested, Tackett threw two bindles containing methamphetamine from his hands.

DISCUSSION

Welfare and Institutions Code section 3051, subdivision (a), provides, in relevant part:

“[U]pon conviction of a defendant for a felony ... and upon imposition of sentence, if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics the judge shall suspend the execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Secretary of the Department of Corrections and Rehabilitation for confinement in the narcotic detention, treatment, and rehabilitation facility unless, in the opinion of the judge, the defendant’s record and probation report indicate such a pattern of criminality that he or she does not constitute a fit subject for commitment under this section.”

In determining whether such a “pattern of criminality” exists, the court may consider “prior convictions, [the defendant’s] performance on probation or parole, and the circumstances of the present offense.” (See *People v. Jeffrey* (2006) 142 Cal.App.4th 192, 196.)

Tackett contends the trial court abused its discretion in declining to initiate CRC proceedings because it based its determination on his current offense, which failed to establish a “pattern of criminality.” According to Tackett, the trial court repeatedly stressed that his current offenses indicated he was in the business of narcotics sales and, as argued by Tackett, it is “illogical to disqualify a defendant from CRC on the basis that

his current offenses, which are mainly drug offenses, are all linked to drugs.” He also complains that the trial court used the phrase “excessive criminality” instead of the necessary statutory wording “pattern of criminality” in rendering its decision.

Whether criminal proceedings should be suspended under Welfare and Institutions Code section 3051 is “a matter left to the sound discretion of the trial court and will not be disturbed on appeal in the absence of a clear abuse of that discretion.” (*People v. Moreno* (1982) 128 Cal.App.3d 103, 107.) A determination by the court, “that a defendant is not a fit candidate for CRC[,] will not be upset where the decision is supported by the evidence.” (*Ibid.*)

At the February 1, 2011, sentencing hearing, defense counsel requested CRC commitment, arguing that Tackett was 54 years old and that he and his wife had operated a successful business for 25 years. After the dissolution of his marriage nine years ago, Tackett began to use methamphetamine. According to defense counsel, while Tackett had committed crimes and been charged with “more crimes than what his convictions reflect,” his criminal history began with his drug use.

The prosecutor argued against CRC commitment, emphasizing that Tackett had been an “ongoing criminal for at least eight years.” The prosecutor argued that, at the hearing on case No. 09CM1911, it was determined that Tackett had been in possession of stolen property for seven or eight years and had continued to use that property during the course of his possession of it, refuting any idea that he had the property in order to sell it to supply himself with drugs. As argued by the prosecutor, Tackett was not only a drug dealer, but also a thief.

The trial court stated that it had read the probation report filed September 8, 2010, as well as letters of judicial notice filed October 12, 2010, and November 18, 2010, and a Sentencing Memorandum filed by the defense September 1, 2010. The trial court then indicated that it would “assume that Mr. Tackett is a drug addict or in imminent danger of becoming one,” and that CRC was a “possible sentence in this case, and so the Court will

be considering Mr. Tackett for a CRC commitment.” The trial court then denied Tackett’s request for CRC, stating:

“[T]he circumstances of this offense indicate excessive criminality, and the Court would make that finding. The reason for the finding is, as discussed earlier, Mr. Tackett has a history of violence by virtue of a 242 conviction in 1975. Again, the Court will not consider that⁵, but he does have a history of theft, a theft by virtue of a 484 conviction in 2008, and a 1999 conviction for a fish and game violation. Further, and more importantly, the circumstances of the current offense and the receiving stolen property that was dismissed with a Harvey waiver demonstrates that Mr. Tackett was fully entrenched in a criminal enterprise in the sale of narcotics. Generally the type of drug addict that we see in individuals is one that commits crimes to feed his addiction. That is not the case with Mr. Tackett. Mr. Tackett was engaged in the business enterprise of the sale of narcotics. He possessed a firearm for the purpose of the protection of these firearms – or of these drugs, and in all likelihood possessed the stolen property as payment for the narcotics. [¶] Again, Mr. Tackett, although he may be a drug addict, he was also, and more importantly and more severely, fully entrenched in the criminal enterprise of the sale of narcotics. Therefore, the Court does find that Mr. Tackett is not a suitable candidate for CRC treatment based on excessive criminality.”

We note first that it was not necessary for the trial court to use the statutory words “pattern of criminality” in making its determination. (*People v. McGinnis* (2001) 87 Cal.App.4th 592, 597.) Instead, the important consideration for purposes of our review is whether the record shows that the trial court properly considered Tackett’s prior convictions, his prior performance on probation or parole, or other facts “evidencing criminality” when it determined not to make a referral to the CRC. (See *People v. Masters* (2002) 96 Cal.App.4th 700, 706.)

Here, the trial court’s comments reflect it was looking not only at Tackett’s prior criminal record but also the facts and circumstances surrounding the current charges,

⁵ Tackett objected at sentencing to the use of the 1975 misdemeanor, disputing its accuracy. In response, the trial court stated that it would give Tackett “the benefit of the doubt” and would not consider the 1975 conviction.

including those dismissed as part of the plea bargain. These facts, set forth in detail in the probation report, and amplified by the prosecutor at the time of sentencing, were accepted by the trial court as true and correct and unquestionably and properly formed the basis for the court's decision to deny Tackett a CRC evaluation on the basis of a pattern of criminality. We find no abuse of discretion in the trial court's denial of Tackett's request for a CRC referral.

DISPOSITION

The judgment is affirmed.