

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

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

THE PEOPLE,

Plaintiff and Respondent,

v.

CARLOS QUIROZ,

Defendant and Appellant.

F062382

(Super. Ct. No. BF133189)

OPINION

THE COURT*

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

Derek K. Kowata, 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, Louis M. Vasquez and Rebecca Whitfield, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

* Before Wiseman, Acting P.J., Levy, J. and Detjen, J.

Carlos Quiroz appeals from a judgment entered on a jury verdict convicting him of second degree burglary, a felony (Pen. Code, § 460, subd. (b)¹) and driving with a suspended license, a misdemeanor (Veh. Code, § 14601.1, subd. (a)). The only issue on appeal is whether the court abused its discretion in refusing to reduce the burglary to a misdemeanor. We affirm.

FACTS and PROCEDURAL HISTORY

Karen Rascoe was the executor of her mother's estate, which included the house at 1601 Fairview Road. The house was vacant, but there were various construction items from remodeling the house in the locked garage: cabinet doors, closet doors, screwdrivers, hammers and the like. Quiroz did not have permission to enter or take property from the garage. Candice Canfield lived next door. On August 23, 2010, Mrs. Canfield saw a blue truck stop in the alley by the garage of the Rascoe house. Quiroz and another man left the truck. The other man wrapped a red bandanna around his hand, broke the five by six foot garage window, crawled inside and opened the garage door. Both men loaded items from the garage into the truck. Mrs. Canfield had seen the men and the truck at the house several times on different days.

On September 2, 2010, Mrs. Canfield saw the truck pull up again with Quiroz driving. She noted the license plate number and called 911. She described the men and the truck to the dispatcher.

Bakersfield Police Officer Glen Davis and his partner were dispatched to the scene. They saw a truck matching the description they had been given and pulled it over. Quiroz was driving. Quiroz told Davis he had been collecting recyclables, cans and bottles, but there were no cans or bottles in the truck. Quiroz admitted being at 1601 Fairview Road on August 23, 2010. He said a man in the backyard of the residence, whom he assumed was the owner or occupant, gave him permission to take items from

¹ Unless otherwise stated, all further statutory references are to the Penal Code.

the sheds in the backyard. When Officer Davis told him the neighbor had seen him break the garage window, Quiroz said he had not been there and did not know what the officer was talking about. At an infield showup, Mrs. Canfield identified Quiroz as the man who had stolen items from her neighbor and his truck as the one used in the burglary.

A records check showed that Quiroz's driving privileges had been suspended or revoked in 2009.

The jury convicted Quiroz of burglary and driving on a suspended or revoked license. At sentencing, the court denied Quiroz's motion to reduce the burglary to a misdemeanor and placed Quiroz on probation for three years subject to specified conditions including that he serve one year in county jail. The court imposed a concurrent term of 30 days on the misdemeanor and various fines and fees.

DISCUSSION

Quiroz contends the trial court abused its discretion when it denied his motion to reduce his felony burglary conviction to a misdemeanor. (§ 17, subd. (b).) We disagree.

Standard of Review

On appeal, the burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. 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 absent a clear abuse of discretion. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978 (*Alvarez*).

Section 17(b) Discretion

Second degree burglary may be punished either as a felony or as a misdemeanor. (§ 461, subd. (b).) Section 17(b) grants trial courts discretion to treat a crime punishable either as a felony or a misdemeanor as a misdemeanor after a judgment imposing a punishment other than imprisonment in the state prison. (§ 17, subd. (b)(1).) A court has broad discretion in ruling on a motion to reduce a felony conviction to a misdemeanor.

(*Alvarez, supra*, 14 Cal.4th at p. 977.) Factors relevant to the determination are the nature and circumstances of the offense, the defendant's appreciation of and attitude toward the offense, the defendant's character traits as shown by his behavior and demeanor at trial, and when appropriate, the general objectives of sentencing that include the defendant's potential for rehabilitation and the community's need for protection. (*Id.* at p. 978 and fn. 5.)

Quiroz contends the evidence did not support the felony characterization of his burglary. His arguments on appeal track those he made in the trial court. He minimizes his role in the burglary, describing himself as a mere aider and abettor, and argues that nothing of value was taken because the owner could not identify with specificity what items were missing from the garage. Further, his prior offenses were all non-violent, victimless misdemeanors. He adds, the court appeared to believe that all burglaries should be classified as felonies no matter what the circumstances.

The relevant circumstances of this case show that while the circumstances of Quiroz's burglary were less egregious than many, he nevertheless participated in a break-in that resulted in property damage and property loss, albeit probably minimal, to the homeowner. And, the neighbor reported that he had broken into another vacant house in the neighborhood. Further, Quiroz lied to the police when confronted about the crime and showed no remorse. At sentencing, he said he wanted to see the evidence against him because he never saw anything at trial that proved what he took from the garage. Finally, Quiroz had a record of misdemeanor convictions, including two driving while intoxicated, three driving without a license, two making false representations to police and one possession of drug paraphernalia. Despite a number of brief incarcerations in the last 10 years, he had failed to reform.

We find no abuse of discretion. The trial court stated that it had read the motion to reduce and the opposition, had considered the contents of the probation report and was present for the trial. It had considered the circumstances in mitigation (none) and the

circumstances in aggravation (numerous prior convictions as an adult and unsatisfactory performance on misdemeanor probation in that he continued to reoffend). After listening to counsel argue the motion, the court stated, “I’m persuaded by the factors that have been addressed in the motion that probation is warranted in this case but not for a reduction of the charge to a misdemeanor.”

There is no suggestion in the record that the court believed all burglaries should be classified as felonies. Rather, the court’s comments make it clear that it did consider the proper relevant factors: Quiroz’s criminal history, the nature and circumstance of the current offense, his appreciation of and attitude toward the offense, and his traits or characteristics as evidenced by his behavior and demeanor at trial. Quiroz has not shown that the court’s denial of his motion was arbitrary or irrational. We will therefore not set it aside.

DISPOSITION

The judgment is affirmed.