Filed 11/28/12 P. v. Vargas CA5

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JESSE JOHN VARGAS, JR. Defendant and Appellant.	F062643 (Super. Ct. No. F08906679) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. James M. Petrucelli, Judge.

Alex Coolman, 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, and Louis M. Vasquez, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Wiseman, Acting P.J., Cornell, J. and Kane, J.

The trial court found Jesse John Vargas, Jr., in violation of his probation after he failed to test for drugs when ordered to do so by his probation officer. He argues the trial court erred because he presented evidence that he could not afford to pay the $12 fee for each test. We conclude there was no error and affirm the order finding he violated probation.

FACTUAL AND PROCEDURAL SUMMARY

Original sentencing

A jury found Vargas guilty of armed robbery (Pen. Code, § 211) and making criminal threats (*id.*, § 422). It also found true the enhancement that a firearm was used in the robbery within the meaning of Penal Code section 12022, subdivision (a)(1). Sentencing was held on June 24, 2009, at which time the trial court sentenced Vargas to six years in prison (upper term on the robbery, plus one year for the enhancement, all other terms to run concurrent). The trial court then stayed the term of commitment and placed Vargas on five years' probation.

The trial court spoke at length to Vargas about the leniency it was extending him and encouraged him to take advantage of that leniency by turning his life around. It imposed numerous conditions of probation, including a search condition, a requirement that he obtain gainful employment, and a requirement that he not use or possess any dangerous drugs or narcotics without a lawful prescription. Vargas also was ordered to submit to drug testing at the discretion of the probation department.

Probation modification hearing

On November 29, 2010, a hearing was held on Vargas's request to have the terms of his probation modified. Vargas's counsel explained that the vehicle Vargas was driving had been stopped the preceding July and a small amount of marijuana was found in the vehicle. Vargas discussed the matter with his probation officer and determined that it was necessary to request a modification of the terms of his probation so that he could use marijuana for medicinal purposes. Counsel explained that Vargas met with a doctor

who did assessment and evaluations through Fresno County mental health services. The report apparently did not recommend any medications, although Vargas concluded from this report that he needed Wellbutrin and Abilify to help with his mood swings and anxiety. Vargas, however, could not afford these prescriptions, so he obtained an evaluation from Dr. Daniel Brubaker for medicinal marijuana, which apparently provided the same benefits as the other medications at one-tenth the cost.

The People opposed the requested modification primarily based on the fact that Vargas was under the influence of marijuana at the time he committed the armed robbery.

Vargas addressed the trial court and stated he was trying to do things the right way, and he was "doing really good things in [his] life right now." He explained the July vehicle stop as a mistake.

The trial court made it clear it was not considering whether Vargas had violated probation, but was considering only the requested modification. It expressed its concerns about the psychiatric diagnosis and ordered the probation department to assist Vargas in any way it could to get the necessary treatment and/or medications. The trial court, however, denied his requested modification.

Violation of probation petition

The petition alleged that Vargas had failed to drug test as directed beginning on January 7, 2011, and continuing through April 1, 2011. In addition, Vargas was alleged to have violated Vehicle Code section 23222, subdivision (b), possession of marijuana while driving a vehicle, which related to the July 25, 2010, vehicle stop.

Violation of probation hearing

Chhoeuth Bou was a probation officer for Fresno County and was assigned to supervise Vargas. Bou reviewed the conditions of probation with Vargas on September 11, 2009. One of the conditions was a requirement that Vargas test for drugs. Bou reviewed his records before testifying and found no evidence that Vargas ever submitted a drug test.

Bou first instructed Vargas to test every month for drugs on July 28, 2010. Bou again instructed Vargas to test for drugs on December 6, 2010.

Bou talked with Vargas on August 18, 2010, about finding the money to test for drugs. Vargas said he would try to do so. When Bou instructed Vargas to test twice a month on December 6, 2010, Vargas agreed to do so and did not inform Bou that he could not afford to test. The fee for each drug test was $12.

Vargas was arrested on April 8, 2011. At that time he looked like he had not been sleeping well and was not looking healthy. He had never looked malnourished.

Dominic Alvarado was a police officer with the Fresno Police Department. He stopped the vehicle Vargas was driving on July 25, 2010, because the taillights and brake lights were not functioning. Alvarado confirmed that Vargas was on felony probation and then searched his vehicle. He found a marijuana bud on the floor of the driver's side, as well as a plastic baggie of marijuana in the driver's side door panel. It was a small amount of marijuana. When asked if he had anything illegal in the vehicle, Vargas stated he had a weed pipe in the vehicle. Vargas was taken into custody. He volunteered that he worked at a marijuana dispensary and had a cannabis card.

Vargas did not appear to be under the influence of marijuana when he was stopped.

Robert Gonzales was a detective with the Fresno Police Department. He performed a presumptive test on the items booked by Alvarado, and the test was positive for marijuana. The weight of the material in the plastic baggie was .14 grams.

Vargas moved in with his father when he was released from custody. About one year before the hearing, financial difficulties caused them to lose their residence, which required them to live with different friends. Vargas looked for work. Because he did not have a vehicle, it was difficult for him to find a job. Vargas's father was with Vargas twice when Vargas went into the building to be drug tested, but he could not recall when that occurred. Vargas's father occasionally would give Vargas $10 to $15 for gas for the

vehicle and sometimes friends would help. Vargas's father earned money by recycling cans and would give Vargas money once or twice a week, if possible.

Alicia Medina de Torres testified that she took care of Vargas's father and met Vargas through his father. Vargas would stay with her on occasion. Vargas did not have any money, but Torres would see him fill out job applications at times. At times she would take Vargas to job interviews.

Vargas testified in his own defense. He claimed to not know how marijuana got into his vehicle when he suffered the traffic stop, but inferred that his passengers may have brought it into the vehicle. Vargas admitted that he started using marijuana in February 2010, after he "went to a doctor and got a cannabis card." Vargas was using marijuana for anxiety, although he never informed his probation officer of this fact. After the traffic stop and arrest, Vargas discussed the subject with his probation officer and was informed the probation officer would not honor the cannabis card unless it was authorized by the trial court. The probation officer informed Vargas he was not to use marijuana unless the trial court authorized him to do so. The probation officer also ordered Vargas to commence drug testing.

Vargas recalled that he tested for drugs on two occasions. He was never told the results of the tests.

Vargas also was instructed to test for drugs every other week after the November 2010 court hearing. Vargas never did so because his finances "came to a sudden stop and [he] became homeless at the same time." Vargas never mentioned his finances to his probation officer because he thought the problem would be resolved quickly, but it was not. His father's income also was reduced at this time for some reason.

Since the problems developed, Vargas had been staying "in [his] car off and on." Sometimes he would stay with friends.

Vargas admitted he had not tested for drugs in 2011, but explained the reason he did not do so was because he did not have any money. Vargas was not aware if the probation department could have helped him with the testing.

Vargas claimed he was constantly looking for any kind of job, but mainly applied to restaurants or for sales positions. He submitted applications to restaurants where he had worked previously, as well as a packing house. He also tried to get work in the fields.

Vargas admitted his father provided him with money for gas on a fairly regular basis. He admitted he never attempted to collect cans for recycling.

Trial court findings and order

The trial court heard argument from the parties and then explained its decision. First, it confirmed that it did not consider the May 2010 arrest when it ruled on the probation modification, and therefore any argument that the issue could not be considered as a violation of probation was rejected.

Next, the trial court identified the issue as whether Vargas had proven by a preponderance of the evidence that he was indigent and unable to pay for drug tests. The trial court found that Vargas did not put much effort into finding a job, apparently as a result of "just plain laziness."

Further, there was no effort made to drug test, nor any effort to communicate with his probation officer. The trial court concluded that based on the evidence, Vargas had the financial ability to pay for at least one drug test per month, which would have satisfied the trial court. Accordingly, Vargas was in violation of probation for failing to test for drugs as ordered by the probation department.

Finally, the trial court also concluded the arrest with marijuana in his possession also was a violation of probation. It lifted the stay on the previously imposed sentence and ordered Vargas to prison.

DISCUSSION

Vargas argues the trial court erred because it found he violated probation by failing to test for drugs when there was evidence that he could not afford to pay for the drug tests. According to Vargas, there was not substantial evidence that he could pay for his tests.

A substantial evidence argument requires us to review the record in the light most favorable to the judgment and determine if there is evidence that is reasonable and credible that supports the factual findings made by the trier of fact. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) The violation of probation petition alleged that Vargas failed to tests for drugs at any time in 2011. The probation officer testified that Vargas did not test for drugs, and Vargas admitted he failed to test for drugs in 2011. This is overwhelming evidence that Vargas violated his probation because he failed to test for drugs in 2011.

Vargas's argument, both in the trial court and here, is that he should have been excused from the drug test requirement because he was indigent. The evidence of his indigency was almost exclusively from his testimony.

Assuming, without deciding, the prosecution bore the burden of establishing Vargas had the financial wherewithal to pay for the drug tests, we are convinced there was sufficient evidence to support the trial court's findings.

When the trier of fact rejects the evidence submitted by the defendant to prove a fact, on appeal the defendant must establish that as a matter of law his fact was true, i.e., that as a matter of law he was indigent and could not afford to pay for drug tests. (*Horn v. Oh* (1983) 147 Cal.App.3d 1094, 1099 (*Horn*).)

In *Horn*, the plaintiff sued the defendant for negligence, and the jury returned a verdict in the defendant's favor. On appeal, the plaintiff argued there was not substantial evidence to support the verdict. This court correctly concluded that "[b]y asserting that there was no substantial evidence to support the jury's verdict for [defendant], [plaintiff]

is in fact claiming that he proved negligence as a matter of law." (*Horn, supra,* 147 Cal.App.3d at p. 1099.) The analysis is the same here. By asserting there was no substantial evidence he had the funds to pay for drug testing, Vargas is asserting that as a matter of law the evidence established he was unable to do so.

The evidence before the trial court did not establish that Vargas was indigent as a matter of law. To prove a fact as a matter of law, Vargas was required to establish that reasonable persons following the law could reach only one conclusion from the evidence. (*Romo v. Southern Pac. Transportation Co.* (1977) 71 Cal.App.3d 909, 915.) It is only where no fact is left in doubt and no deduction or inference can be drawn, except that Vargas was indigent, can we say that Vargas proved this fact as a matter of law. (*Id*. at pp. 915-916.)

The trial court found that Vargas had the financial ability to pay for at least one drug test per month. In making this finding, the trial court rejected Vargas's claims that he was attempting to find a job, and that he had no money to test for drugs. Vargas's father testified that he gave Vargas money once or twice per week. In addition, there was evidence that Vargas could have earned money to test for drugs had he seriously attempted to do so. Instead, his efforts to find a job were minimal. The trial court properly could have concluded from this evidence that Vargas chose to avoid work, and thus avoid paying for the fee to test for drugs. Indeed, Vargas's expenses appeared to be minimal since he was not paying for lodging and obviously was well nourished. Moreover, the trial court apparently found unpersuasive Vargas's claim that he could not find work because he did not have money for gas. This testimony ignores the option of utilizing public transportation. Finally, Vargas made no effort to obtain a waiver of the fee through the probation department. This evidence strongly suggests Vargas was attempting to avoid testing for drugs.

The trial court had before it the testimony of Vargas that he did not have any money for drug testing. However, a fact finder is not required to accept direct evidence

of a fact (*People v. Nunez* (1983) 144 Cal.App.3d 697, 705), nor is it required to draw an inference of fact from circumstantial evidence, even though the circumstantial evidence rationally may support such an inference (*Blank v. Coffin* (1942) 20 Cal.2d 457, 461-462; *Antonovich v. Superior Court* (1991) 234 Cal.App.3d 1041, 1051-1052). Since the trial court explicitly rejected Vargas's testimony, concluding that he did not put sufficient effort into finding a job or to find the money to take the drug tests, we cannot conclude that as a matter of law Vargas was indigent.

There also was sufficient evidence that Vargas violated his probation by failing to obey all laws because of the arrest for possession of marijuana. The undisputed testimony established that marijuana was found in Vargas's vehicle. The trial court logically could have inferred that the marijuana belonged to Vargas since it was found in the driver's side door and footwell.

Once again, Vargas argues he had a defense to this accusation, i.e., his testimony established that he had a medical prescription for the marijuana. However, he did not present any supporting evidence, simply his testimony. The trial court could have rejected the self-serving testimony since there was no evidence to support the claim.

For both reasons, we conclude there was no error at the violation of probation hearing.

DISPOSITION

The order finding that Vargas violated his probation is affirmed.