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

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEXANDER LOPEZ,

Defendant and Appellant.

F063336

(Super. Ct. No. DF008455A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Larry A. Errea, Judge.

C. Athena Roussos, 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, Julie A. Hokans and J. Robert Jibson, Deputy Attorneys General, for Plaintiff and Respondent.

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

After finding that defendant Alexander Lopez violated the terms and conditions of probation, the trial court revoked probation and sentenced Lopez to three years in prison. On appeal, Lopez contends the trial court abused its discretion by not reinstating probation and remand is required to clarify the fines and fees the trial court imposed. We disagree with the first contention. With respect to the second contention, while we agree there are apparent errors in the reporter's transcript with respect to the fines and fees imposed, remand is unnecessary as we can correct the clerical errors by ordering the abstract of judgment be amended. We will order the trial court to amend the abstract of judgment, but otherwise affirm.

FACTUAL AND PROCEDURAL HISTORIES

On January 4, 2008, Lopez entered a negotiated plea of no contest to one count of assault by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(1).)¹ The count was based on two incidents that occurred on July 11 and 12, 2007. On the night of July 11, Lopez walked up to the victim, who was sitting in the driver's seat of his car, and struck him multiple times through the open driver's side window. When the victim got out of his car, Lopez and another person struck the victim with their hands and feet. The assault stopped only when someone said the police were coming. When the victim saw Lopez the following day near a market and started to talk to Lopez, Lopez struck the victim in the face. The trial court suspended imposition of sentence and placed Lopez on probation for three years on condition he serve one year in jail, with credit for 309 days already served. The trial court also imposed various fines and fees.

On January 21, 2011, the probation officer filed a declaration letter requesting that Lopez's probation be revoked as Lopez had violated his terms of probation by (1) committing new law violations; (2) failing to report an arrest to probation; and (3) admitting the use of marijuana. The officer explained that Lopez was arrested on

¹ Undesignated statutory references are to the Penal Code.

November 25, 2010, on violations of sections 148, subdivision (d), 243, subdivision (c)(1), 69, and 466. On January 7, 2011, the district attorney filed a new case charging violations of sections 69, 243, subdivision (b), 148, subdivision (a)(1), and 466. An arrest warrant issued on January 12, 2011. When Lopez spoke with a probation officer in person on January 12, 2011, he failed to disclose the incidents and admitted smoking marijuana the week before. On January 15, 2011, Lopez was arrested on the warrant; during the contact, Lopez was charged again with violating sections 148, subdivision (a)(1) and 466. The probation officer recommended that probation be revoked and Lopez sentenced to prison for the middle term of three years.

A contested revocation hearing was held on June 16, 2011, in conjunction with the preliminary hearing on the new case. Kern County Sheriff's Deputy Tae Park testified that, at about 10:10 p.m. on November 25, 2010, he was on duty, in uniform and in a marked patrol vehicle, when he saw Lopez wearing dark clothing and looking into a parked vehicle. When Park got out of his vehicle, Lopez ran away despite Park repeatedly yelling for him to stop. Park caught Lopez after he fell to the ground, but Lopez got away after his jacket and sweatshirt slipped off when Park grabbed him. Park caught Lopez a second time and forced him to the ground. When he tried to handcuff Lopez, Lopez hit him in the face with his hands and then got away. Park caught Lopez a third time as he tried to crawl into a gap between a building and the ground. As Park tried to pull Lopez out, Park fell to the ground. Lopez got on top of him, hit Park's face with his open arms and tried to grab his duty firearm from his belt. Park managed to get up and wave down his partner, while Lopez ran into an abandoned building. Park suffered bruising and facial contusions from the assault.

Deputy Sheriff Enrique Bravo responded to the scene after hearing a radio dispatch about the altercation. Bravo found Park lying in a dirt field with his vest off and shirt open. Bravo thought he was seriously injured or dying, as he appeared to be unconscious and unresponsive. Park eventually was able to tell Bravo where Lopez fled.

A police officer arrested Lopez about 100 feet from the scene of the fight. During the booking search, an officer found some porcelain chips in Lopez's pants pocket, which Bravo testified could be used to burglarize vehicles.

At the conclusion of the hearing, the court found Lopez violated the terms of his probation and revoked that probation. On July 14, 2011, the trial court again revoked probation, sentenced Lopez to prison for the middle term of three years, and imposed various fines and fees.

DISCUSSION

Denial of Request to Reinstate Probation

Lopez does not dispute that he was in violation of the terms and conditions of his probation. Instead, he contends the trial court abused its discretion as a matter of law when it denied his request to be reinstated on probation because, even though "the record shows undisputedly mitigating factors," the trial court found no mitigating circumstances.

The 2008 probation officer's report from the underlying case listed the following criminal history: (1) June 13, 2000 – a juvenile petition charging violation of section 647, subdivision (h) (loitering) on May 24, 2000, was found true, Lopez was made a ward and given probation; (2) May 21, 2003 – Lopez was continued on probation after a juvenile petition charging violation of section 647, subdivision (f) (public intoxication) on February 16, 2003, was found true, with probation terminating on April 5, 2005; (3) January 10, 2005 – Lopez was convicted as an adult of violating section 647, subdivision (f) on December 25, 2004; and (4) August 1, 2006 – Lopez was convicted of violating Vehicle Code section 23152, subdivision (a) (driving under the influence), and placed on five years misdemeanor probation. The report stated there were no circumstances in mitigation, and two circumstances in aggravation, namely (1) Lopez had numerous prior convictions as an adult and sustained petitions in juvenile delinquency proceedings, and (2) Lopez was on misdemeanor probation when the crime was committed. Lopez was evaluated as a suitable candidate for a grant of felony probation

as this was his first felony conviction and the victim's injuries were not "egregious." The probation officer recommended that if state prison should become a consideration, the midterm sentence was warranted based on the circumstances in mitigation and aggravation.

At the sentencing hearing, Lopez's attorney asked (1) for a continuance of the hearing to give Lopez time to prepare financially for his absence from his family, or (2) if that was denied, that Lopez be reinstated on probation, as he was "a month or so shy" of completing his three years' probation. Lopez's attorney further argued that if the court rejected both motions, then it should consider three circumstances in mitigation that were not listed in the 2008 probation officer's presentence report: (1) at the time of entry of the plea, Lopez had no prior felony convictions; (2) his criminal history did not contain any crimes of violence; and (3) he successfully completed probation in April 2005 following a sustained petition as a juvenile. He asked the court to find the circumstances in mitigation outweighed those in aggravation and impose a low term sentence.

The prosecutor objected to the continuance and argued that the upper term should be imposed. The probation officer explained Lopez's prior criminal record to the court. The probation Lopez was granted on June 3, 2000, had not ended when he incurred the section 647, subdivision (f) violation on February 16, 2003, of which he was convicted on May 21, 2003. While the criminal history stated that probation terminated on April 5, 2005, termination did not necessarily mean he had a successful probation and, in fact, he did not as he incurred another law conviction on January 1, 2005, for violating section 647, subdivision (f). The probation officer explained that this history actually showed an aggravating circumstance, namely that Lopez had unsatisfactory performance in the prior grants of juvenile and adult probation.

After the parties argued whether the court could consider post-conviction conduct in deciding whether to impose the low, middle or upper term, the court announced its decision. The court stated: "Well, the Court will find that the probation officer's report

from 2008, there were no circumstances in mitigation. The Court finds there's still no circumstances in mitigation and finds the two circumstances in aggravation, also finds the probation department at that time based upon that report found the base term to be the midterm of three years. [¶] At this time, the Court's going to deny any continuance in this matter. Probation is revoked. Defendant[] [i]s sentenced to Department of Corrections for the midterm of three years with custody credits."

"The discretion of the court to revoke probation is analogous to its power to grant probation, and the court's discretion will not be disturbed in the absence of a showing of abusive or arbitrary action." (*People v. Silva* (1966) 241 Cal.App.2d 80, 84; accord, *People v. Urke* (2011) 197 Cal.App.4th 766, 773 (*Urke*)). An appellate court will not interfere with the trial court's exercise of discretion in a decision to revoke and terminate probation so long as the court below "considered all facts bearing on the offense and the defendant to be sentenced." (*People v. Downey* (2000) 82 Cal.App.4th 899, 910.)

California Rules of Court, rule 4.414,² provides criteria for the court to consider in deciding whether to grant or deny probation.³ It describes a number of factors, related both to the underlying crime and to the defendant. These factors "must be considered by the sentencing judge[.]" (Rule 4.409.) Among the factors related to the defendant the court is required to consider are "[p]rior record of criminal conduct, whether as an adult or a juvenile, including the recency and frequency of prior crimes; and whether the prior record indicates a pattern of regular or increasingly serious criminal conduct[.]" "[p]rior

² Subsequent rule references are to the California Rules of Court.

³ In his opening brief, Lopez cited rule 4.423, which lists the circumstances in mitigation a sentencing court is required to consider when selecting the term of imprisonment, as the rule applicable to the court's decision to revoke probation in this case. (Rules 4.420, 4.423.) As the Attorney General pointed out, the criteria guiding a trial court's decision whether to grant or deny probation is contained in rule 4.414. In his reply brief, Lopez acknowledged this is the rule governing probation decisions.

performance on probation or parole and present probation or parole status,” “willingness to comply with the terms of probation[,]” and “[t]he likelihood that if not imprisoned the defendant will be a danger to others.” (Rule 4.414(b)(1), (2), (3) & (8).)

Lopez contends the court applied the wrong legal standard because it refused to consider three facts concerning him: (1) the absence of prior felony convictions; (2) that his prior convictions were not for violent crimes; and (3) he had nearly completed his probation. He asserts these facts fall under the criteria in rule 4.414(b)(1), as they concern his prior record of criminal conduct, and rule 4.414(b)(8), as they show he would not be a danger to others if not imprisoned.

Lopez’s argument is based on the court’s statements that no mitigating circumstances were listed in the 2008 probation officer’s report and there were “still no circumstances in mitigation.” The record reveals, however, that these statements were addressed to defense counsel’s argument that the court should find certain mitigating factors when deciding whether to impose the low, middle or upper term. While the court chose the middle term, Lopez does not claim the court abused its discretion in doing so. Rather, his focus is on the trial court’s decision whether to reinstate probation or sentence him to prison.

The record, however, does not show that the court refused or failed to consider any criteria when it decided to revoke probation. (See rule 4.409 [sentencing judge must consider relevant criteria, which “will be deemed to have been considered unless the record affirmatively reflects otherwise”].) Lopez asserts his lack of prior felony convictions or prior convictions for violent crimes falls within the criteria enumerated in rule 4.414 (b)(1). Even so, the court reasonably could find that those facts were outweighed by other aspects of his criminal history, namely the recency and frequency of those crimes and their increasing seriousness. For this reason, the facts he cites are not undisputed. (See, e.g., *In re Handa* (1985) 166 Cal.App.3d 966, 973 [“many alleged factors are disputable either because they may not be established by the evidence or

because they may not be mitigating under the circumstances of a particular case”; if an alleged mitigating factor is disputable, the court may find an absence of mitigating factors without explaining the reason for its conclusion].) The sentencing court has always been free to weigh mitigating factors in terms of both quality and quantity. (*People v. Jones* (1985) 164 Cal.App.3d 1173, 1181 [court may minimize or even dismiss mitigating factors without stating its reasons]; *People v. Roe* (1983) 148 Cal.App.3d 112, 119; *People v. Salazar* (1983) 144 Cal.App.3d 799, 813.)

Lopez’s reliance on *People v. Burney* (1981) 115 Cal.App.3d 497, which holds it is error not to *consider* mitigating factors, is misplaced since the record shows the court did consider factors within the relevant criteria. Moreover, the court in *Burney* noted that even if a trial court fails to consider factors in mitigation for purposes of determining the appropriate term, it does not follow that the defendant is entitled to a new hearing on an application for probation where probation was denied for other sufficient reasons. (*Burney, supra*, 115 Cal.App.3d at pp. 505-506.) Here, the trial court’s decision to revoke probation is amply supported by Lopez’s history of unsatisfactory performance on probation. (*People v. Jones* (1990) 224 Cal.App.3d 1309, 1316.) There was no abuse of discretion.

The Fines and Fees Imposed

At the original sentencing on February 4, 2008, the court ordered Lopez to pay the following fines and fees: (1) restitution under section 1202.4, subdivision (f), in an amount to be determined; (2) under section 1202.4, subdivision (f)(2), an amount to be determined to the restitution fund; (3) a \$20 court security fee under section 1465.8, subdivision (a)(1); (4) a \$200 restitution fine under section 1202.4, subdivision (b); (5) a \$200 probation violation restitution fine suspended pending completion of probation, under section 1202.44; and (6) \$40 per month supervision costs.

In the declaration letter filed on January 21, 2011, the probation officer reported the following with respect to the status of the fines and fees previously imposed: (1) an

unpaid balance of \$35.00 on the section 1202.4, subdivision (b) fine; and (2) an unpaid balance of \$20.00 on the section 1465.8 fine. The probation officer recommended Lopez pay the previously suspended \$200 probation revocation fine pursuant to section 1202.44, and the court impose a \$200 restitution fine pursuant to section 1202.45, payment of which would be suspended subject to parole revocation proceedings by the Department of Corrections.

At the subsequent sentencing hearing, the court ordered the following as to fines and fees: (1) “[t]he unpaid balance of the previously imposed fine of \$335” pursuant to section 1202.4, subdivision (b), “is reset at that amount”; (2) “[u]npaid balance previously imposed fin[e] pursuant to Penal Code Section 165.8, \$100 is previously set at that amount”; (3) Lopez is to pay the previously suspended revocation fine of \$200 pursuant to section 1202.44; and (4) Lopez is to pay a \$200 restitution fine pursuant to section 1202.45, payment of which is suspended subject to revocation proceedings by the Department of Corrections.

The clerk’s minutes reflect that the court ordered Lopez to pay (1) “\$35.00 for unpaid balance of previously imposed fine” pursuant to section 1202.4, subdivision (b), (2) \$20 court security fee pursuant to section 1465.8, subdivision (a)(1) as to count 2, (3) \$200 pursuant to section 1202.44, as he failed to successfully complete probation, and (4) a \$200 restitution fine pursuant to section 1202.45, which shall be suspended pending successful completion of parole. The abstract of judgment also reflects the unpaid balance of \$35 under section 1202.4, subdivision (b), and the other three fees or fines. The abstract, however, also states that a \$200 restitution fine was imposed pursuant to section 1202.4, subdivision (b). Neither the clerk’s minutes nor the abstract of judgment mentions a \$100 fine the court stated was imposed pursuant to “section 165.8.”

Lopez contends that the abstract of judgment contains a fee that the trial court did not impose, namely a restitution fine of “\$200 per PC 1202.4(b) forthwith per PC 2085.5.” The Attorney General concedes this was error, as the trial court imposed a

section 1202.4, subdivision (b) fine when probation was granted and did not have the authority to impose a second section 1202.4, subdivision (b) fine, citing *Urke, supra*, 197 Cal.App.4th at p. 779. We agree and will order that fine stricken from the abstract of judgment.

Lopez further asserts the amount and basis for each fine is unclear, as the trial court's oral pronouncement as reflected in the reporter's transcript shows the court stated that (1) a balance of "\$335" remained on the previously imposed section 1202.4, subdivision (b) fine, and (2) the court stated a \$100 fine was previously imposed on section "165.8." Lopez asserts, and the Attorney General agrees, the case should be remanded for the trial court to specify the statutory basis for these fines and fees, citing the general rule that the trial court's oral pronouncement controls where there is a conflict with the clerk's minutes. (See, *Urke, supra*, 197 Cal.App.4th at p. 779.)

The reporter's transcript, however, does not always automatically control. Where a record is in conflict and cannot be harmonized, the part of the record that prevails is the one entitled to greater credence. (*People v. Smith* (1983) 33 Cal.3d 596, 599 (*Smith*).) "Therefore whether the recitals in the clerk's minutes should prevail as against contrary statements in the reporter's transcript, must depend upon the circumstances of each particular case." (*Id.* at p. 599.) Here, with respect to the two inconsistencies Lopez points out, it is apparent that the trial court actually ordered Lopez to pay (1) \$35 for the unpaid balance of the previously imposed fine pursuant to section 1202.4, subdivision (b), and (2) a \$20 court security fee per section 1465.8. This is evident from the consistencies between the probation officer's recommendations and the clerk's minutes, as well as the apparent typographical errors in the reporter's transcript, e.g. "\$335" instead of "\$35," and ""165.8" instead of "1465.8." We view the errors in the reporter's transcript as clerical errors, not judicial errors. (*In re Candelario* (1970) 3 Cal.3d 702, 705 [appellate court has inherent power to correct clerical errors].) Since the abstract of judgment accurately states these fines, no correction is required.

DISPOSITION

The matter is remanded for the trial court to amend the abstract of judgment by striking the following restitution fine: “\$200 per PC 1202.4(b) forthwith per PC 2085.5.” The trial court shall forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respect, the judgment is affirmed.