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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

HASTI FAKHRAI-BAYROOTI,

Defendant and Appellant.

G052157

(Super. Ct. No. 13HF2830)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory W. Jones, Judge. Affirmed.

Gerald J. Miller, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, and Eric A. Swenson, Deputy Attorney General, for Plaintiff and Respondent.

* * *

Hasti Fakhrai-Bayrooti appeals from the trial court's imposition of the aggravated four-year prison term for vehicular manslaughter while intoxicated without gross negligence. (Pen. Code, § 191.5, subd. (b); all statutory citations are to the Penal Code.) Fakhrai-Bayrooti contends the trial court abused its sentencing discretion by relying on factually unsupported aggravating circumstances and ignoring mitigating circumstances. For the reasons expressed below, we affirm the judgment.

I

FACTUAL AND PROCEDURAL BACKGROUND

On the evening of March 15, 2013, Fakhrai-Bayrooti struck bicyclist Eric Billings from behind with her car in Mission Viejo.¹ Billings died at the scene from multiple traumatic injuries. Officers found six mostly empty prescription pill bottles in Fakhrai-Bayrooti's car. Blood tests showed she had 0.18 mg/L of Alprazolam in her system after the incident, far above therapeutic levels. Text messages sent to her phone 11 to 12 hours before the collision warned, "DO NOT DRIVE PLEASE," "Get a Taxi. I beg you. You're drowsy. W," I "hope to god you're not driving right now," and "Sober up and call me." One of the senders, who worked at the same law firm as Fakhrai-Bayrooti, stated she had refused to give Fakhrai-Bayrooti pills and suggested she enter rehabilitation for her addiction to Vicodin. She observed Fakhrai-Bayrooti to be "paranoid" and "lethargic."

In September 2013, the Orange County District Attorney filed a criminal complaint charging Fakhrai-Bayrooti with vehicular manslaughter while intoxicated without gross negligence. (§ 191.5, subd. (b).) In March 2015, Fakhrai-Bayrooti waived

¹ Because Fakhrai-Bayrooti pleaded guilty, the facts are drawn from the probation department's presentencing report.

her rights and pleaded guilty to the charged offense.² She provided the following factual basis for her plea: “In Orange County, California, on 3/15/13 I unlawfully killed Eric B., a human being, without malice aforethought, in the driving of a vehicle, where the driving was in violation of Vehicle Code sections 23140, 23152 and 23153 and the killing was the proximate result of the commission of an unlawful act, not amounting to a felony, namely [Vehicle Code section] 22107, [Vehicle Code section] 21209 and the commission of a lawful act that might produce death, in an unlawful manner, but without gross negligence: INATTENTION TO DRIVING.” The trial court directed preparation of a probation report and set a sentencing hearing for May 8, 2013.

On May 8, defense counsel moved to continue the sentencing hearing. Counsel stated the probation department submitted a late and incomplete report. The trial court continued the matter to June 10, but exercised its discretion to revoke bail (§ 1272, subd. (3)) and take Fakhrai-Bayrooti into custody over defense counsel’s objection. The court stated Fakhrai-Bayrooti represented a threat to public safety.

The prosecutor filed a new complaint on May 13, 2015, alleging Fakhrai-Bayrooti possessed the tranquilizer Clonazepam, a controlled substance, while in jail (§ 4573.6). On June 10, the trial court granted defense counsel’s motion to continue the sentencing hearing to allow the defense to assess a recently completed psychological report.

On June 19, 2015, Fakhrai-Bayrooti pleaded guilty to possessing a controlled substance in jail. The trial court imposed the upper term of four years for

² Fakhrai-Bayrooti agreed to waive her right to appeal as part of her guilty plea. She initialed a paragraph on the plea form that acknowledged she “waive[ed] and [gave] up my right to appeal from *any legally authorized sentence the court imposes which is within the terms and limits of this plea agreement.*” (Italics added.) But at the plea hearing, the court advised Fakhrai-Bayrooti she would not “be giving up [her] right to appeal any sentencing issues that might arise down the road; but, you would give up your right to appeal your guilty plea.” The Attorney General does not assert Fakhrai-Bayrooti waived her right to appeal from the sentencing issues presented in this appeal.

vehicular manslaughter, and imposed a three-year concurrent term for possession of Clonazepam.

II

DISCUSSION

The Trial Court Did Not Abuse Its Discretion in Sentencing Fakhrai-Bayrooti to the Upper Term

Fakhrai-Bayrooti contends the trial court abused its discretion in sentencing her to the aggravated four-year term, arguing the record does not support the court's finding of "callousness." She also complains "the remaining factors on which the trial court relied were equally inapposite or ignored [her] conceded lack of a criminal history and other mitigating factors"

Under the Determinate Sentencing Act (§ 1170), most felonies qualify for one of three terms of imprisonment, often referred to as the lower, middle, and upper terms. Section 1170, subdivision (b), provides in relevant part, "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, or the family of the victim if the victim is deceased, and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice. The court shall set forth on the record the reasons for imposing the term selected and the court may not impose an upper term by using the fact of any enhancement upon which sentence is imposed under any provision of law."

Section 191.5, subdivision (c)(2), provides "[v]ehicular manslaughter while intoxicated [without gross negligence] in violation of subdivision (b) is punishable by

imprisonment in a county jail for not more than one year or by imprisonment pursuant to subdivision (h) of Section 1170 for 16 months or two or four years.”

The Legislature has directed the Judicial Council to adopt rules providing guidance to the sentencing judge. (§ 1170.3.) California Rules of Court, rule 4.410 specifies the general objectives of sentencing. These include protecting society, punishing the defendant, encouraging the defendant to lead a law-abiding life in the future and deterring him or her from future offenses, deterring others from criminal conduct by demonstrating its consequences, preventing the defendant from committing new crimes by isolating him or her for the period of incarceration, securing restitution for the victims of crime, and achieving uniformity in sentencing. “[T]he sentencing judge must consider which objectives are of primary importance in the particular case. The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case.” (Cal. Rules of Court, rule 4.410(b).)

Selecting one of the three authorized prison terms referred to in section 1170, subdivision (b), for an offense is a sentencing choice that generally requires a statement of a reason. (Cal. Rules of Court, rule 4.406 (b)(4).) “In exercising . . . discretion in selecting one of the three authorized prison terms referred to in section 1170(b), the sentencing judge may consider circumstances in aggravation or mitigation, and any other factor reasonably related to the sentencing decision.” Rule 4.421 lists circumstances in aggravation, and includes factors relating to the crime and to the defendant. Rule 4.423 lists circumstances in mitigation, and also includes factors relating to the crime and to the defendant. Relevant criteria enumerated in the rules must be considered by the sentencing judge, and will be deemed to have been considered unless the record affirmatively reflects otherwise. (Cal. Rules of Court, rule 4.409.) But the enumeration in the rules of criteria for the making of discretionary sentencing decisions does not prohibit the application of additional criteria reasonably related to the decision being made. (Cal. Rules of Court, rule 4.408.)

We review a trial court's sentencing decision for abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) This means the trial court's sentencing discretion must be exercised in a way that is "not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.'" (*Ibid.*) A trial court abuses its discretion when the decision "exceeds the bounds of reason." (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1225.)

Here, the trial court considered the probation department's sentencing report, sentencing briefs from both counsel, oral statements from several of Billings's family members, a statement from defendant and her relatives, and a psychological report prepared at the defense's behest. The court provided a statement of its reasons for denying probation and imposing the upper term after concluding factors in aggravation outweighed those in mitigation.

The court cited the victim's vulnerability, noting Billings was "riding his bicycle lawfully in the bicycle lane in the direction he was supposed to be going" and Fakhrai-Bayrooti was "driving a 5,000 pound vehicle with a near fatal dosage of prescription medication in her system and was totally incoherent and ended his life with no warning." The court stated "it is hard to imagine someone more vulnerable than Mr. Billings . . . riding a bicycle with his back to oncoming traffic and his life suddenly ends."

The court also cited Fakhrai-Bayrooti's lack of credibility concerning "knowing what happened. She at various, different times has denied ever knowing that these drugs would impair her ability to drive. I find those statements to be totally lacking in credibility." The court discounted Fakhrai-Bayrooti's statements because she had been taking the medications frequently and for a long time.

The court noted Fakhrai-Bayrooti did not call 911 after the crash, but rather called her pharmacist within a minute to ask about the medications prescribed for her.

“One can speculate as to why an individual who just was involved in a fatal collision would call her pharmacist. I don’t know how many people even know who their pharmacists are. But when I think of the reasons why you would call . . . none of them are good.” The court noted after the crash before Fakhrai-Bayrooti pleaded guilty “[s]he had ample opportunity . . . to pursue a course of rehabilitation to deal with her substance abuse, and it appears she did not,” noting she possessed drugs in custody.

The court declared the most significant factor in denying probation was “that if she is not in prison she will continue to be a danger to the public,” explaining Fakhrai-Bayrooti was “totally incapable or totally unwilling to deal with her substance abuse” and “upon release from custody she will once again pose a danger, a serious danger, to anyone who is sharing the road with her.” The court also cited the emotional injury to Billings’s family members and questioned Fakhrai-Bayrooti’s “level of remorse.”

The court cited as an aggravating factor the high degree of “callousness” (Cal. Rules of Court, rule 4.421(a)(1)) involved in the crime, noting after the incident “it appeared that her concerns were more with her own welfare,” and she had ignored the warnings of her friends that she was incapable of driving safely.

The court also found Fakhrai-Bayrooti had been convicted of other crimes for which consecutive sentences could have been imposed (Cal. Rules of Court, rule 4.421(a)(7), citing her guilty plea to possessing a controlled substance in jail.

The court found Fakhrai-Bayrooti was engaged in “violent conduct that indicates a serious danger to society” (Cal. Rules of Court, rule 4.421) and the court was concerned her “substance abuse will continue to be out of control” and “when released from custody she is going to resort to the same substance abuse; and anyone driving on the highway, sharing the roadway with her, is going to be at risk.”

The court found Fakhrai-Bayrooti’s clean record to be the only mitigating factor.

Fakhrai-Bayrooti argues the court erred by relying on callousness as an aggravating factor. (Cal. Rules of Court, rule 4.421(a)(1) [“crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness”].) As noted, the court stated after the incident “it appeared that her concerns were more with her own welfare,” and she had been warned by friends not to drive. The court cited the text messages “begging her not to drive and to sober up.” Fakhrai-Bayrooti faults the probation officer’s statement she acted callously because she “failed to contact emergency personnel or attempt to render aid to the victim; instead, she contacted her pharmacist.”

Fakhrai-Bayrooti states “the undisputed facts of the case . . . indicated that the victim was either already dead when [she] got out of her car, or that witnesses were already attending to the victim, and that any assistance by [her] would have, therefore, been futile or even counterproductive.” She claims she was in “shock or panic” in the immediate aftermath of the incident, did not flee the scene, and made no comments suggesting a lack of remorse. She emphasizes her other “acknowledgment and acceptance of responsibility, as evidenced by her guilty plea, her expression of sympathy toward the victim’s family during sentencing, and her attempt to make restitution, within her ability, to them.”

The trial court did not abuse its discretion in relying on Fakhrai-Bayrooti’s actions before and after Billings’s death to determine Fakhrai-Bayrooti acted callously. The record supports the court’s view Fakhrai-Bayrooti ignored her friends’ pleas not to drive, and called her pharmacist after the crash with a view toward protecting her own interests rather than those of her victim or his loved ones. A trial court’s ruling will not be overturned simply because reasonable people might have drawn different inferences from the evidence. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) The court did not abuse its discretion in concluding the crime involved a high degree of callousness. (*People v. Superior Court (Dorsey)* (1996) 50 Cal.App.4th 1216, 1225

[appellate court’s task on review is to determine whether the trial court’s ruling ““exceeds the bounds of reason””].)

Fakhrai-Bayrooti also asserts the court ignored numerous mitigating factors and erred by concluding aggravating factors outweighed mitigating factors. As noted, the court acknowledged Fakhrai-Bayrooti had no criminal record. (Cal. Rules of Court, rule 4.423(b)(1).) She states she “overcame a difficult childhood as well as domestic abuse to become a law school graduate, attorney, and mother” and “acknowledged culpability by pleading guilty – with no guarantee as to the sentence to be imposed – prior to the preliminary hearing” Nothing suggests the trial court ignored her background or acceptance of legal responsibility in selecting the upper term. (Cal. Rules of Court, rule 4.409 [relevant criteria enumerated in the rules is deemed to have been considered unless the record affirmatively reflects otherwise]; *People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637 [“trial court may minimize or even entirely disregard mitigating factors without stating its reasons.”]) Her claim the crime was committed “because of an unusual circumstance, such as great provocation, that is unlikely to recur” (Cal. Rules of Court, rule 4.423(a)(3)) finds no support in the record.

Finally, Fakhrai-Bayrooti states her “difficulties in general, were largely caused by a longstanding addiction to painkillers and other prescription medications. That addiction, which was undisputed and reflected in the probation report [] constitutes a mental or physical condition that, while not amounting to a defense, significantly reduced culpability for the crime” (Cal. Rules of Court, rule 4.423(b)(3).) She states this condition precluded the court from relying on the aggravating factor she had been convicted of other crimes for which consecutive sentences could have been imposed (Cal. Rules of Court, rule 4.421(a)(7)), and she represented a serious danger to society because she would use substances and drive when released from custody. (Cal. Rules of Court, rule 4.421(b)(1).)

Addiction may be considered a mental or physical condition reducing culpability for a crime (*People v. Simpson* (1979) 90 Cal.App.3d 919, 927, fn. 7), but a defendant who fails to deal with a substance abuse problem despite opportunities to do so suggests “a longer sentence should be imposed, not a shorter sentence.” (*People v. Reyes* (1987) 195 Cal.App.3d 957, 963 [felony drunk driver who is suffering from an uncontrolled alcoholism should be sentenced to a longer term, not a shorter one, to prevent him from driving under the influence again]). Here, the trial court pointed to evidence Fakhrai-Bayrooti knew of her substance abuse problem before the incident, yet continued to drive and she “had ample opportunity during those two years [following the crash] to pursue a course of rehabilitation to deal with her substance abuse, and it appears that she did not.” The trial court did not abuse its discretion in citing substance abuse as an aggravating factor.

Fakhrai-Bayrooti does not dispute she was convicted of a crime for which she could have received consecutive sentences, but for which she received a concurrent term, which is a circumstance in aggravation. (Cal. Rules of Court, rule 4.421(a)(7)). This circumstance alone sufficed to impose the upper term. (*People v. Osband* (1996), 13 Cal.4th 622, 728 [“Only a single aggravating factor is required to impose the upper term”]; *People v. Zamora* (1991) 230 Cal.App.3d 1627, 1636-1638 [one aggravating factor may offset several mitigating factors]). No basis exists to overturn the sentence.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.