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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTHONY JOSEPH TRZUPEK,

Defendant and Appellant.

H036763

(Santa Clara County

Super. Ct. No. CC959160)

Defendant Anthony Joseph Trzupek pleaded no contest to an information charging him with vehicular manslaughter with gross negligence (Pen. Code, § 191.5, subd. (a)), driving under the influence causing injury (Veh. Code, § 23153, subd. (a)), and driving with a blood alcohol level over .08 causing injury (Veh. Code, § 23153, subd. (b)), and he admitted allegations that he had personally inflicted great bodily injury in the commission of these offenses (Pen. Code, §§ 1203, subd. (e)(3), 12022.7, subd. (a)). He asked the court to sentence him under Penal Code section 1170.9, which applies only when a defendant is granted probation. The court denied defendant probation and imposed a nine-year state prison term. On appeal, defendant contends that the court abused its discretion in failing to grant him probation. We find no abuse of discretion and affirm the judgment.

## I. Background

On October 23, 2009, at about 7:30 p.m., defendant's Mercedes SUV rear-ended a vehicle that had been stopped at a stop light. Defendant's SUV was travelling at 76 to 84 miles per hour when it struck the victims' vehicle. The vehicle's driver was killed, and the passenger was severely injured. Although defendant initially told the police that he had consumed no alcoholic beverages since that morning, his blood alcohol level was found to be .13.

After entering his pleas and admissions, defendant described the circumstances that led to the accident.<sup>1</sup> He was out in his SUV looking for a Target store. He could not find it. Defendant became frustrated and anxious. He stopped at a liquor store, bought "two very large malt liquors," and drank them before resuming driving. He saw a red light, and he hit the brake with his "wide and heavy" "diabetic shoe[]." Defendant "think[s]" that his shoe "slid[] off the brake and onto the gas pedal." "[M]y SUV accelerated and by the time I got my right foot off of the gas pedal and fully applied the brakes, it was too late, [and] I crashed" into the rear of the victims' vehicle. He told the probation officer that "[t]his had happened to him before," that his diabetic shoe had caused his foot to slide off of the brake.

Defendant, who was 59 years old at the time of the accident, had been an alcoholic for more than 25 years. While he had occasionally been able to maintain his sobriety for a few years, he had always relapsed. Defendant had suffered from posttraumatic stress disorder (PTSD) since 1970, during his military service. The probation officer stated that

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<sup>1</sup> The prosecutor argued at the sentencing hearing that, three days before the fatal accident, defendant caused a three-car collision while under the influence of Vicodin and Prozac. The prosecutor stated that defendant was arrested, but he was not charged. Although the defense did not object to this argument below, defendant argues on appeal that it was inappropriate and the court could not rely upon it. There is no indication in the record that the court relied on this argument, so we need not address it.

he “cannot reason how PTSD relates to driving while intoxicated.” He recommended that the court deny probation and impose a nine-year prison term.

Before sentencing defendant, the trial court entertained both evidence and argument regarding the potential application of Penal Code section 1170.9. The defense presented substantial evidence that defendant was a military veteran who suffered from PTSD as a result of his military service, and that his PTSD had led to his alcoholism. The defense’s argument acknowledged that the decision was within the court’s discretion: “This is not an easy case. It’s a difficult case, and primarily because of what happened to these victims.” The trial court took a recess after hearing argument, explaining that “I have to do a lot of heavy thinking.”

After the recess, the court noted that “[t]his was a tough call.” The court explicitly found that defendant had served in the military and suffered from PTSD as a result of his service and that his alcoholism arose from his PTSD. “The elephant in the room is whether or not the presumption for state prison is overcome . . . . That is, under Section 1203(e) this is an unusual case where the interest of justice would best be served if the person is granted probation and the Court was willing to do so. If so, then 1170.9 would apply. [¶] The problem for the defense is convincing the Court that probation is merited notwithstanding the horrendous crime. Nowhere in the criteria for post traumatic stress disorder is there a component that calls for one to drive a car. The disorder may explain the basis of poor judgment but not the necessity to drive.” “Frankly, I’m afraid that if another psycho stressor occurs others will be in danger. . . . The underlying facts are just too much in the Court’s mind to justify a grant of probation.” The court then denied probation and imposed a prison term.

## **II. Analysis**

“The decision whether to grant or deny probation is reviewed under the abuse of discretion standard. [Citations.] ‘An order denying probation will not be reversed in the

absence of a clear abuse of discretion. [Citation.] In reviewing the matter on appeal, a trial court is presumed to have acted to achieve legitimate sentencing objectives in the absence of a clear showing the sentencing decision was irrational or arbitrary.

[Citations.]” (*People v. Ferguson* (2011) 194 Cal.App.4th 1070, 1091.)

“In the case of any person convicted of a criminal offense who could otherwise be sentenced to county jail or state prison *and who alleges that he or she committed the offense as a result of* sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems stemming from service in the United States military, the court shall, prior to sentencing, make a determination as to whether the defendant was, or currently is, a member of the United States military and whether the defendant may be suffering from sexual trauma, traumatic brain injury, post-traumatic stress disorder, substance abuse, or mental health problems as a result of that service.”

(Pen. Code, § 1170.9, subd. (a), italics added.) “If the court concludes that a defendant convicted of a criminal offense *is a person described in subdivision (a)*, and if the defendant is otherwise eligible for probation *and the court places the defendant on probation*, the court may” order the defendant to participate in a treatment program.

(Pen. Code, § 1170.9, subd. (b), italics added.)

“[T]he provision of probation services is an essential element in the administration of criminal justice. The safety of the public, which shall be a primary goal through the enforcement of court-ordered conditions of probation; the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant shall be the primary considerations in the granting of probation.”

(Pen. Code, § 1202.7.) “When determining the ‘needs of the defendant,’ for purposes of Section 1202.7, the court shall consider the fact that the defendant is a person described in [Penal Code section 1170.9,] subdivision (a) in assessing whether the defendant should be placed on probation . . . .” (Pen. Code, § 1170.9, subd. (d).)

Since defendant admitted the Penal Code section 1203, subdivision (e) allegation, he was *ineligible* for probation unless the trial court found that this was an “unusual case[] where the interests of justice would best be served if the person is granted probation.” (Pen. Code, § 1203, subd. (e).)

Thus, we must uphold the trial court’s decision to deny probation unless it was irrational or arbitrary for the court to conclude that this was *not* an unusual case where the interests of justice would best be served by a grant of probation.

Defendant acknowledges that it was a discretionary decision for the trial court whether to grant him probation. He also acknowledges that the trial court held the requisite hearing and considered whether his status as a military veteran with PTSD merited a grant of probation. His appellate contention is that the trial court “abused its discretion by requiring appellant to prove driving a car while under the influence was a ‘component’ of PTSD and because its conclusion of appellant’s likelihood to reoffend was not supported by the evidence.”

Defendant reads too much into the trial court’s statement that “[n]owhere in the criteria for post traumatic stress disorder is there a component that calls for one to drive a car.” The trial court’s statement was simply its observation that defendant’s decision to consume the liquor he had purchased *before driving home* and then to *drive under the influence* was substantially independent of his PTSD and his related alcoholism. As the court explained, “[t]he disorder may explain the basis of poor judgment but not the necessity to drive.” Since the evidence did not establish a link between defendant’s PTSD and his decision to drink the alcohol *before driving home*, the trial court’s observation was supported by the evidence. The court’s observation also was an appropriate consideration because the lack of a link between defendant’s PTSD and his crime weighed against a sentencing alternative that would rely on treatment of defendant’s disorder to rehabilitate him.

Defendant suggests that the dispositive issue before the trial court was whether defendant's "mental illness" mitigated his offense. The evidence before the court supported a finding that defendant's PTSD played no significant role in his decision to drink and then drive, rather than to take his alcohol home with him before drinking it. Since his offense was the result of this decision, the court could have properly concluded that defendant's "mental illness" did not mitigate his offense.<sup>2</sup>

Defendant also claims that there was no evidence to support the trial court's fear "that if another psycho stressor occurs others will be in danger. . . ." No unusual incident led to defendant's decision to drink and then drive on the night of the accident. He simply became frustrated after failing to find the Target store and went to a liquor store instead. There was simply no explanation for his decision to drink before driving home rather than to take the liquor home before drinking. Although defendant stopped drinking after the accident, his history of relapsing combined with the lack of a rational explanation for the decision he made that led to the accident created a foundation for the trial court's fear that defendant's alcoholism and "another psycho stressor" would combine again in the future and create a danger to the public.

Defendant has failed to establish that the trial court abused its discretion in denying him probation.

### **III. Disposition**

The judgment is affirmed.

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<sup>2</sup> Even if the trial court had found that defendant's PTSD mitigated his offense, the existence of this mitigating circumstance would not have required the court to grant defendant probation. The trial court manifestly took into account the fact that defendant suffered from PTSD. It simply did not find that this circumstance tipped the balance in favor of a grant of probation.

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Mihara, J.

WE CONCUR:

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Premo, Acting P. J.

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Elia, J.