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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. HENG TE, Defendant and Appellant.	H037087 (Santa Clara County Super. Ct. Nos. C1100570, CC788432)

Introduction

Pursuant to a negotiated plea agreement, defendant Heng Te pleaded no contest to one count of felony grand theft from a person and one count of misdemeanor battery, and admitted violating a prior order of probation. The trial court suspended imposition of sentence and placed defendant on probation for three years, conditioned on a one-year county jail term. On appeal, defendant challenges the trial court's imposition of drug-related probation conditions based entirely on a statement by his codefendant in her own probation report. For the reasons that follow, we will strike the three contested probation conditions.

Factual and Procedural Background

At about 6:50 a.m. on February 17, 2011, defendant and codefendant, Kelli Burriss, rang the doorbell of Melinda Chavez's apartment. Somebody was blocking the peephole with his or her finger, so Chavez did not initially know who was at her door. Eventually, Chavez saw Burriss' head through the peephole and recognized her from the

adjacent apartment complex. Chavez had previously seen Burriss a couple of times, but never in Chavez's apartment complex, and the two had never met. Chavez had never seen defendant before that day.

When Chavez opened the door, one of the defendants stuck his or her foot in the door to prevent her from closing it. Defendant and Burriss wanted Chavez to tell them the whereabouts of Chris Rodriguez, Chavez's ex-boyfriend, and the father of her children. They said that Rodriguez owed them money, $40 or $50, and Burriss wanted her makeup, or Rodriguez owed her money for makeup. Although Rodriguez had previously lived with Chavez, she did not know his current whereabouts. After yelling at each other back and forth, Burriss punched Chavez in the left eye. When Chavez punched her back, Burriss pushed Chavez into the house to the back of the kitchen, where they wrestled. Defendant followed them inside into Chavez's living room.

While Chavez and Burriss were struggling in the kitchen, defendant was "going around in circles like he didn't know what to do." Burriss, who "was in control of the whole [situation]," told defendant to "Take it. Just take it." Defendant immediately walked over to Chavez's desktop computer in the living room and began removing the cords and wires from the tower portion. After he had disconnected the computer, defendant left Chavez's apartment with the computer tower. Burriss followed defendant out.

Later that day, three police officers from the City of San Jose went to the apartment complex just north of Chavez's apartment and apprehended Burriss and defendant. Chavez identified Burriss and defendant in an in-field show-up and also identified her computer tower, which the police had found in Burriss' apartment.

On April 14, 2011, the Santa Clara County District Attorney charged defendant and his codefendant, by information, each with one count of first degree robbery (Pen.

Code, §§ 211-212.5, subd. (a))[1] and one count of first degree burglary (§§ 459-460, subd. (a), 667.5, subd. (c)(21)). Burriss was separately charged in count 3 with resisting a police officer (§ 148, subd. (a)). The prosecution orally amended the information on June 1, 2011, as to defendant, to allege a count 4, felony grand theft from a person (§§ 484, 487, subd. (c)) and count 5, misdemeanor battery (§§ 242, 243, subd. (a)). That same day, defendant pleaded no contest to counts 4 and 5, admitted violating a prior order of probation and agreed to a one year term in the county jail and three years of formal probation. Probation for defendant's prior case was reinstated and extended for an additional two years, running coterminous with his current term of probation.[2] The remaining charges, counts 1 and 2, were submitted for dismissal at the time of sentencing. The trial court inquired if there was "any basis for a full [probation] report," to which defendant's counsel replied, "I am of mixed emotions on that, Your Honor. Let me ask a question. [¶] I don't think it is--certainly it is not technically necessary since the sentence is just about victim notification and restitution. We might or might not learn something that would be relevant and useful down the line should it be necessary." The court concluded: "I think a waived referral. We will do a calculation of credit, notification of victims and . . . [¶] . . . [¶] . . . [j]ust a calculation of credits on the other matter as well because we're going to modify the terms and conditions of probation." The prosecution neither objected nor concurred.

On June 23, 2011, defendant and codefendant appeared for sentencing. Defendant was sentenced to the agreed upon sentence. In the waived referral memorandum, the probation officer recommended the imposition of three substance abuse conditions based

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[1] Further statutory references are to the Penal Code.

[2] On February 25, 2008, defendant pleaded no contest to felony second degree burglary (§§ 459-460, subd. (b)) in case No. CC788432. As part of that agreement, the court suspended imposition of sentence and placed defendant on three years of formal probation.

on "defendant's prior history with controlled substances . . . ." Defendant's counsel challenged the probation officer's justification for imposing substance abuse conditions, arguing that defendant's "one and only drug related offense" was from May of 2005, whereby "[h]e was given DEJ [deferred entry of judgment] and that docket was subsequently dismissed for successful completion of DEJ on February 1st of 2007." The court agreed that while "the defendant's prior history of controlled substance may be insufficient" for imposition of the substance abuse conditions, it nevertheless imposed the conditions based on its conclusion that "part of the motive in this particular case was to get drugs." Although counsel for defendant argued that "[t]here was no discussion or mention of drugs at all" in this case, the court pointed to the codefendant's probation report, which stated that she met the defendant "a short while prior to the offense and he told her he wanted to get high. He did not have any drugs and he asked her if anybody owed her money and she told [defendant] the victim's husband owed her money and he replied I will go collect it for you." The trial court concluded that the "statement seems to fit factually with what occurred, the motive trying to get the debt collected, so I think that statement fits in with what the factual pattern that we discussed prior to resolution of the case and does seem to give me a basis for drug conditions for Mr. Te."[3] Defense counsel objected to the court's finding, stating: "I have not received [a] copy of her probation report. There is nothing that I can do with that statement. I have no right to cross-examine her or ask her about that. It's a statement she chose to make to the probation officer for whatever reason. One has to assume that she felt it may have, hoped it might serve her own interest. I think often our clients, speaking broadly and generally, think that if they say it's about drugs, whether to get them or because they were under the

[3] At that hearing, the trial court also suspended imposition of the codefendant's sentence and granted probation for a period of three years with various conditions, including drug and mental health related conditions.

influence of them that is somehow a mitigated circumstance, which in some circumstances it can be. [¶] But if you look at it in that light my lack of knowledge, my inability to deal with the statement, and the high potential for a self-serving and not necessarily accurate representation by a co-defendant as to why an offense occurred, it's not appropriate or I think even frankly lawful to attribute that in any sense to my client."

The court imposed 17 probation conditions including, over defense counsel's objections: condition No. 6, defendant is to submit to "chemical tests as directed by the Probation Officer"; condition No. 8, the defendant "shall not possess or consume alcohol or illegal drugs or go to places where alcohol is the known primary item of sale" or where illegal drugs are used or sold; and condition No. 9, the defendant "shall enter and complete a substance abuse treatment program as directed by the Probation Officer."

Defendant filed a timely appeal in which he argues that the trial court abused its discretion in imposing the disputed probation conditions because in doing so, (1) the court relied on facts extraneous to defendant's record, i.e., his codefendant's probation report, (2) defendant was not given any notice of the contents of his codefendant's probation report and, therefore, was deprived of any meaningful opportunity to challenge its accuracy, and (3) the factual basis underlying the contested probation conditions is based on unreliable and inadmissible hearsay.

The Attorney General argues that defendant's waiver of a full probation report, which would "no doubt" have included his codefendant's statement about the reason for the robbery, estops him from now challenging the drug-related probation conditions because his conduct (i.e., opting for a waived referral memorandum) induced the error. Further, the Attorney General contends that defendant forfeited any challenge to the reasonableness of the alcohol terms in the probation conditions because he did not explicitly object to them in the trial court and on appeal. The Attorney General also contends that defendant's "fundamental fairness" claim should be forfeited, as he did not ask to review the codefendant's probation report during the sentencing hearing, nor did

he request that the matter be returned to his probation officer for preparation of a full report on his own behalf. In any case, the Attorney General argues that the challenged conditions were reasonable and any error committed by the trial court was harmless.

We conclude that because there was no oral or written waiver of a full probation report by defendant or the prosecution, the record does not contain any relevant factual information on which the trial court could have relied in imposing drug and alcohol related conditions. Moreover, the trial court's reliance on a codefendant's probation report, without more, to impose probation conditions on a defendant renders his sentencing fundamentally unfair. Accordingly, we will strike the three drug and alcohol related conditions.

Discussion

1. The Waived Referral

"[I]f a person is convicted of a felony and is eligible for probation, before judgment is pronounced, the court shall immediately refer the matter to a probation officer to investigate and report to the court, at a specified time, upon the circumstances surrounding the crime and the prior history and record of the person, which may be considered either in aggravation or mitigation of the punishment." (§ 1203, subd. (b)(1).) "The preparation of the report or the consideration of the report by the court may be waived only by a written stipulation of the prosecuting and defense attorneys that is filed with the court or an oral stipulation in open court that is made and entered upon the minutes of the court, except that there shall be no waiver unless the court consents thereto." (*Id*. subd. (b)(4); see Cal. Rules of Court, rule 4.411 [court should permit waiver of probation report only in unusual circumstances].)

Here, neither the prosecuting nor the defense attorneys expressly waived the preparation of a full probation report. Indeed, when the trial court inquired if there was "any basis for a full [probation] report," defendant's counsel expressed some uncertainty, stating: "I am of mixed emotions on that, Your Honor. . . . [¶] I don't think it is--

certainly it is not technically necessary since the sentence is just about victim notification and restitution. We might or might not learn something that would be relevant and useful down the line should it be necessary." Without confirming that defendant's counsel had agreed to waive preparation of a full probation report, nor inquiring as to the prosecutor's position on a waiver, the court unilaterally decided that a waived referral was appropriate: "I think a waived referral. We will do a calculation of credit, notification of victims and . . . [¶] . . . [¶] . . . [j]ust a calculation of credits on the other matter as well because we're going to modify the terms and conditions of probation." Without a full probation report, the trial court only had before it the probation department's waived referral memorandum, which contained cursory information about defendant and no information about the crime. Nor was there any evidence that defendant had a drug or alcohol problem, that he used drugs or alcohol or that drugs or alcohol were related to the crime in any way. Thus, there is no relevant factual information in the record or a reasonable basis to support imposition of any drug or alcohol related conditions. (Contra, *People v. Lindsay* (1992) 10 Cal.App.4th 1642, 1645 [defendant had an " 'alcohol problem' " and an " 'addictive personality' " and the crime related to selling drugs to support his addiction].)

2. The Codefendant's Probation Report

A court granting probation may impose "reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer." (§ 1203.1, subd. (j).) "Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled." ' [Citations.] Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*United States v. Knights*

(2001) 534 U.S. 112, 119.) Nevertheless, probationers are not divested of all constitutional rights.

"[A] sentencing court may consider a broad range of information in deciding whether to grant probation in a particular case. Due process does not require that a criminal defendant be afforded the same evidentiary protections at sentencing proceedings as exist at trial. (*Williams v. New York* (1949) 337 U.S. 241, 251; *People v. Arbuckle* (1978) 22 Cal.3d 749, 754.)" (*People v. Lamb* (1999) 76 Cal.App.4th 664, 683.) "Although not all the procedural safeguards required at trial also apply in a sentencing or probation hearing, such a hearing [nevertheless] violates due process if it is fundamentally unfair. (*People v. Peterson* (1973) 9 Cal.3d 717, 726.)" (*People v. Eckley* (2004) 123 Cal.App.4th 1072, 1080.) For example, "[a] sentencing judge may consider responsible unsworn or out-of-court statements concerning the convicted person's life and characteristics. (*Williams v. Oklahoma* (1959) 358 U.S. 576, 584; *People v. Arbuckle*, *supra*, 22 Cal.3d at p. 754.)" (*People v. Lamb*, *supra*, at p. 683.) "Fundamental fairness, however, requires that there be a substantial basis for believing the information is reliable." (*Ibid*.) "Reliability of the information considered by the court is the key issue in determining fundamental fairness." (*People v. Arbuckle*, *supra*, 22 Cal.3d at pp. 754-755.)

In this case, the trial court relied exclusively on the codefendant's probation report to impose drug conditions on the defendant. When defendant's counsel objected to those conditions, the court responded: "[T]he co-defendant's statement in the probation report indicates that she met the [defendant] a short while prior to the offense and he told her he wanted to get high. He did not have any drugs and he asked her if anybody owed her money and she told [defendant] the victim's husband owed her money and he replied I will go collect it for you. [¶] And I just think that that statement seems to fit factually with what occurred, the motive trying to get the debt collected, so I think that statement

fits in with what the factual pattern that we discussed prior to resolution of the case and does seem to give me a basis for drug conditions for Mr. Te."

Under sections 1203 and 1204, "the sentencing judge may receive information upon which to base his decision in either (1) a probation report, which must be provided to the defendant at least two days before sentencing, or (2) a hearing in open court on aggravating, or mitigating circumstances." (*In re Calhoun* (1976) 17 Cal.3d 75, 83.) Section 1204, which prohibits receipt of information from other sources, provides in part: "No affidavit or testimony, or representation of any kind, verbal or written, can be offered to or received by the court, or a judge thereof, in aggravation or mitigation of the punishment, except [a probation report or testimony under sections 1203 and 1204]." "The sentencing court's receipt of information adverse to the defendant without his knowledge and without affording him an opportunity to respond 'undermines the rationale of extending the defendant's protections: to guard against the inadvertent use of misinformation and to ensure the defendant an adequate opportunity to present his claims.' (*In re Calhoun*, *supra*, 17 Cal.3d 75, 84.) It undermines the appearance of fairness of the proceeding." (*In re Hancock* (1977) 67 Cal.App.3d 943, 948.)

The trial court only had before it the probation department's waived referral memorandum, which did not contain any information about the crime. The Attorney General's contention that defendant's waiver of the preparation of a full probation report induced error is unavailing, especially where, as explained above, neither defense counsel nor the prosecutor stipulated to waive a full probation report. Moreover, even assuming a full report had been prepared, there is no guarantee, as the Attorney General suggests, that the defendant would have discussed the circumstances or the motive, if any, for the crime. And, in this particular case, the codefendants were fortuitously sentenced at the same hearing.[4] Had defense counsel not been available on the date of the codefendant's

[4] Defendant appeared without the codefendant at his plea hearing on June 1, 2011.

sentencing hearing, it is unlikely that the trial court would have considered her probation report in conjunction with defendant's sentence.

In the trial context, when a codefendant makes an extrajudicial statement, his or her "credibility is inevitably suspect." (*Bruton v. United States* (1968) 391 U.S. 123, 136.) "The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." (*Ibid*.) Although the Confrontation Clause does not apply to sentencing hearings, there is no reason why a codefendant's credibility during sentencing, as to her codefendant's motives or actions, would be any less suspect. Common sense requires that a codefendant's statement to her probation officer, without more, cannot be the sole basis for the imposition of probation conditions. To hold otherwise would not only discourage codefendants from speaking openly to their probation officers about their own rehabilitative needs, but would also subject defendants to potentially unreasonable conditions that are neither "narrowly drawn" nor " 'specifically tailored to the individual probationer.' " (*People v. Smith* (2007) 152 Cal.App.4th 1245, 1250, quoting *In re Babak S*. (1993) 18 Cal.App.4th 1077, 1084; *In re Luis F*. (2009) 177 Cal.App.4th 176, 189.) For example, we would not expect a trial court to unwittingly impose probation conditions which impinge on a defendant's constitutional right of freedom of association solely predicated on a codefendant's unsubstantiated statement to his or her probation officer that the defendant is in a gang. (U.S. Const., 1st Amend.; Cal. Const., art. I, § 1; *People v. Lopez* (1998) 66 Cal.App.4th 615, 627-628.) In this case, the codefendant's statement that the crime was motivated by defendant's desire for drugs is not only inevitably suspect, but also is not supported by the victim's testimony, which tends to suggest that the *codefendant* was "in control of the whole [situation]" and that the *codefendant* demanded money from the victim. Thus, an unsubstantiated codefendant

statement to her probation officer, without more, cannot serve as the sole basis for imposition of specific probation conditions on a defendant.[5]

Disposition

Defendant's probation condition Nos. 6, 8, and 9 are stricken.

As modified, the judgment is affirmed.

Premo, J.

WE CONCUR:

Rushing, P.J.

Elia, J.

[5] As the trial court recognized, defendant's successful completion of the terms and conditions of deferred entry of judgment for a May 2005 drug related offense is "insufficient" for imposition of the substance abuse conditions.