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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ROBERT ALVAREZ,

Defendant and Appellant.

H038373

(Monterey County

Super. Ct. No. SS100419)

INTRODUCTION

Defendant Michael Robert Alvarez pleaded no contest to a felony count of carrying a loaded firearm (former Pen. Code, § 12031, subd. (a)(1))¹ and a misdemeanor count of participating in a street gang (§ 186.22, subd. (a)). The trial court suspended imposition of sentence and placed him on probation for his felony offense, but ordered him to serve 300 days for the misdemeanor. Thereafter, defendant admitted violating probation, and the court imposed but suspended a three-year prison sentence and reinstated his probation. A year later, the court found that defendant violated his probation by attending a rap concert where he knew other gang members would be present. The court terminated probation and ordered execution of the previously suspended three-year prison term.

¹ All further statutory references are to the Penal Code unless otherwise indicated.

On appeal, defendant contends there was insufficient evidence that he knew there would be other gang members at the rap concert. He also contends that the imposition of separate sentences for the misdemeanor and the felony violated section 654, and thus, he was entitled to have additional custody credits for time served on his misdemeanor offense apply towards his felony sentence. We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND²

A. The Underlying Offense

On January 1, 2010, members of Monterey County Joint Gang Task Force conducted a traffic stop on a vehicle occupied by defendant, a female, and an infant child. The officers conducted a search of the vehicle and found a loaded handgun concealed in a diaper bag located behind the driver's seat. The officers also found a baseball cap bearing the letter "W," which was a commonly used reference among local gang members for the West Side Locos gang. Additionally, the officers found defendant's cellular phone, which contained several text messages from him signed as "West Side," a moniker of the West Side Locos gang.

While speaking to defendant, the officers noticed tattoos on his neck and forearm that were associated with the West Side Locos gang. Defendant was also wearing a baseball cap bearing the letter "W." Defendant admitted to the officers that he had been a member of the West Side Locos gang for four years and that he was in good standing with the Norteño street gang.

On January 5, 2010, the District Attorney filed a complaint charging defendant with two counts of carrying a loaded firearm on his person or in a vehicle

² The facts as to the underlying offense and the first probation violation are based on the probation reports.

(former § 12031, subd. (a)(1); counts 1 and 2³) and being an occupant with a concealed firearm in a vehicle (former § 12025, subd. (a)(3); count 3). The complaint alleged that defendant committed all three counts “for the benefit of, at the direction of, or in association” with a criminal street gang. (§ 186.22, subd. (b)(1).) As to count 1, it was alleged that defendant committed the offense while being an active participant in a criminal street gang. (Former § 12031, subd. (a)(2)(C).) With respect to count 2, it was alleged that defendant was not the registered owner of the firearm. (Former § 12031, subd. (a)(2)(F).) Lastly, as to count 3, it was alleged that defendant was an active participant in a criminal street gang (former § 12025, subd. (b)(3)) and that defendant was not the registered owner of the firearm (§ 25400, subd. (c)(6)(B), former § 12025, subd. (b)(6)). On March 12, 2010, the District Attorney amended the complaint to add count 5, misdemeanor participation in a street gang. (§ 186.22, subd. (a).)

On March 12, 2010, defendant pleaded no contest to count 1, carrying a loaded firearm (former § 12031, subd. (a)(1)) and count 5, misdemeanor participation in a street gang (§ 186.22, subd. (a)). As to count 1, he admitted he was not the registered owner of the firearm. (Former § 12031, subd. (a)(2)(F).)

At the sentencing hearing on May 7, 2010, the trial court suspended imposition of sentence and placed defendant on felony probation. Three of defendant’s probation conditions are particularly relevant here. First, he was “[n]ot to be present in any area you know, suspect, or are told by the Probation Officer to be a gang-gathering area.” Second, he was “[n]ot [to] associate with any individuals you know or suspect to be gang members.” Lastly, as to count 5 (i.e., the misdemeanor offense) he was ordered to serve 300 days in jail, with 253 days of credit.

³ In counts 1 and 2, defendant was charged jointly with another defendant, Carolina Rosas. There was also a fourth count which related only to Rosas.

B. First Probation Violation

On April 23, 2011, Monterey Police Officers responded to a report of a fight and located two victims. The victims described their assailants as a group of five to eight “Mexicans” who were making gang references.

Subsequently, officers contacted members of a Norteño gang rap group called the “Salineros.” The officers determined that defendant was a member of the Salineros. The officers detained the Salineros group as suspects of the fight and conducted an infield lineup. The officers had to ask defendant and another group member 10 times to sit on the ground. They both complied only after a taser was used. Without being instructed to do so, defendant took off his shirt, showing off his tattoo of “SALAS” across his upper chest. Defendant then started to flex and make hostile faces at witnesses. The officers believed that defendant meant to display his gang-affiliated tattoo and that he was trying to frighten witnesses.

On May 25, 2011, defendant admitted violating probation by failing to timely register as a gang member and by associating with gang members. The trial court imposed the three-year upper term for the felony offense but suspended execution of the prison sentence and reinstated his probation. As to the misdemeanor offense, the trial court ordered defendant to serve 365 days in jail with 307 days of credit.

C. Second Probation Violation⁴

Salinas Police Officer Derek Gibson was assigned to the Monterey County Gang Task Force at the time the second violation occurred in January 2012. He had three years of training and field experience in investigating gang crimes and identifying street gangs. He had also testified as an expert on gangs.

⁴ The facts as to the second probation violation are based on the transcript of the probation revocation hearing held on March 16, 2012.

On January 6, 2012, Officer Gibson was on duty monitoring Facebook. He noticed the Salineros rap group had posted that it would be at Planet Gemini along with several other Bay Area rap artists for a concert that evening.

Officer Gibson contacted other members of the Monterey County Gang Task Force and they went to Planet Gemini. At the venue, he recognized several individuals walking into the concert as active Norteño gang members.

Officer Gibson was familiar with defendant. He knew defendant was a member of the Salineros group because he had seen music videos the group had posted online. These videos featured defendant, along with other active Norteño gang members, rapping in the front yard of a fellow gang member's home. In the videos, the group rapped about Norteño gang lifestyle, threw up gang signs, held firearms, and wore red rags and hats bearing the Boston Red Sox logo.

Officer Gibson stood near the ticket counter at Planet Gemini. He recognized and contacted several males from the Salineros rap group. At some point, he saw defendant walk up to the ticket counter with two females. Officer Gibson made contact with defendant and escorted him out of the establishment. The officer then read defendant his *Miranda*⁵ rights, searched him, and transported him to jail.

After Officer Gibson read defendant his *Miranda* rights, he asked whether defendant knew that other Salineros members were going to be present at the concert. Defendant responded that "he wasn't with them." He kept responding "he wasn't with them and he was with two females." Officer Gibson also inventoried defendant's property, which included a ticket to the concert. Officer Gibson recognized the names "J Stalin" (a Bay Area rapper), "J Blaze" (a promoter) and "Savage Proz" (an active Norteño rap group) on the ticket.

⁵ *Miranda v. Arizona* (1966) 384 U.S. 436.

On March 16, 2012, following a contested hearing, the trial court found defendant in violation of his probation by being in a location where he knew other gang members would be present. The court terminated defendant's probation and ordered execution of the previously suspended term of three years with 276 days of credit.

DISCUSSION

A. Probation Violation

Defendant contends that the trial court abused its discretion in finding he violated probation.

1. Proceedings Below

Defendant's probation violation hearing was held on March 16, 2012. Officer Gibson testified as a witness for the prosecution. At the conclusion of Officer Gibson's testimony, the prosecutor argued that defendant was a known member of the Salineros rap group and that it was not just a coincidence that the members of the Salineros and the Norteño gang were at the concert. Additionally, the concert ticket, which was entered into evidence, displayed that a Norteño rap group was performing that evening.

Defendant argued that the evidence showed he had attended the concert with two females, who were not Norteño gang members, and he did not have contact with any gang members that evening. There was also no proof that he knew anybody from the rap groups listed on the ticket. He claimed he was simply attending a Bay Area concert.

After argument, the trial court remarked that "one of the unique aspects of this case is sort of the history we already have." The trial court referenced the supplemental probation report filed on June 16, 2011, which related to defendant's first probation violation. In that report, the probation officer noted that defendant was listed as a member of the Salineros rap group. The court also highlighted certain excerpts of the

report, including the mention of defendant displaying his gang tattoos and making hostile faces at the witnesses on the night he was detained for his first probation violation.

The trial court commented, “when I evaluate the evidence that’s in front of me here today, I don’t do it in a vacuum.” The court then stated: “[t]here isn’t any question in this Court’s mind, based on the evidence that I have right now . . . that he had knowledge that they were going to be there. He had knowledge and expectations and hopes of the gang group coming in and supporting his – his group. [¶] It was a gang function. A police officer, with three years of experience, identified and recognized the gang people that were there just by standing and watching. He’s been in a lot longer than that. He’s a lot more committed to the gang lifestyle than the officer is, that’s for sure, and he has been, and he is committed to the group. There just isn’t any question . . . that there would be gang activity going on there, or a gang event going on there.”

The trial court concluded that based on a preponderance of evidence, defendant violated his probation “because he went to a location where he knew that there would be a gang gathering.”

2. Analysis

Defendant contends there was insufficient evidence that he knew gang members would be performing at or attending the concert. Specifically, he claims (1) there was no evidence proving he saw the same Facebook post that alerted Officer Gibson that the Salineros group would be attending the concert, and (2) there was no evidence he had any interaction with gang members or knew that any of the other individuals at the concert were gang members. We disagree.

Under section 1203.2, subdivision (a), a court is authorized to revoke and terminate probation “if the interests of justice so require and the court, in its judgment,

has reason to believe from the report of the probation or parole officer or otherwise that the person has violated any of the conditions of his or her supervision, . . .” (§ 1203.2, subd. (a).) The violation must be proven by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447.) “ “All that is required for the revocation of probation is enough evidence to satisfy the . . . judge that the conduct of the [defendant] has not met the conditions of probation.” ’ [Citations.]” (*Id.* at p. 442) “However, the evidence must support a conclusion the probationer’s conduct constituted a willful violation of the terms and conditions of probation.” (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982.)

“[W]here the trial court was required to resolve conflicting evidence, review on appeal is based on the substantial evidence test. Under that standard, our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court’s decision. In that regard, we give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence will be resolved in favor of the decision.” (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849, fns. omitted (*Kurey*)).

Here, one of defendant’s probation conditions was to “[n]ot be present in any area you know, suspect, . . . to be a gang-gathering area.” He also agreed to “[n]ot associate with any individuals you know or suspect to be gang members.” After a contested hearing, the trial court determined defendant violated probation by attending a rap concert where he knew gang members would be present.

We examine the trial court’s finding to see if it is supported by substantial evidence. (*Kurey, supra*, 88 Cal.App.4th at pp. 848-849.) First, from Officer Gibson’s

testimony, the trial court could reasonably infer that the rap concert at Planet Gemini was a “gang function.” Officer Gibson, who had three years of training and experience in investigating and identifying criminal street gangs, testified he went to Planet Gemini after learning from a Facebook post that the Salineros rap group and several other Bay Area artists would be at a concert there. From his experience, he knew that the Salineros group was a Norteño gang rap group. He was also familiar with the group members, including defendant, because of its online music videos. While Officer Gibson was at Planet Gemini, he recognized and contacted several individuals who were active Norteño gang members, including members of the Salineros rap group. Thereafter, the officer recognized defendant, contacted him, and transported him to jail. He booked defendant’s property, including a concert ticket from that evening. At the hearing, the officer examined the ticket and was able to identify one of the performers, “Savage Proz,” as an active Norteño gang rap group.

The trial court considered Officer Gibson’s testimony in light of defendant’s gang history, which shows that he was an active member of the Norteño gang. In the past, defendant admitted he was a member of the “West Side Locos, a Norteno affiliated street gang” and was in good standing. Defendant also had several gang tattoos and was featured in “gang-related videos” which were posted on the Internet. In 2010, when he was arrested for his underlying offense, defendant was wearing gang-affiliated clothing such as a baseball cap bearing the letter “W” and was in possession of a cell phone that contained text messages with references to the West Side Locos gang.

Defendant was also a member of the Salineros rap group, which was a Norteño rap group. On the evening of April 23, 2011, officers conducted a lineup of the Salineros group, including defendant. Of his own accord, defendant took off his shirt to reveal his gang tattoos, flexed his muscles, and made “hostile” faces at the witnesses so to intimidate them.

The evidence thus showed that defendant was entrenched in the Norteño gang culture and was a member of the Salineros rap group. Given defendant's level of involvement with the Salineros group and the Norteño gang, the trial court reasonably inferred that defendant's knowledge and recognition of gang members would have "far exceed[ed] the officer's." And here, the officer knew that the Salineros group would be at the concert by looking at a Facebook post; he was able to recognize and contact several Norteño and Salineros gang members while he was at Planet Gemini; and he was able to identify a Norteño rap group by looking at a concert ticket. Thus, the trial court rationally concluded that defendant, who was a rap artist and gang member from the same "local area" as other gang members attending and performing that evening, had "knowledge, and expectations and hopes of the gang group coming in and supporting his . . . group."

Furthermore, defendant's statements to Officer Gibson that evening indicated he knew other gang members were at the concert. After defendant was detained, Officer Gibson testified that he asked defendant whether he knew other Salineros members were going to be present at the concert. According to the officer, defendant "just said that he wasn't with them. He kept responding that he wasn't with them and he was with two females." Notably, defendant never stated that he did not know that other Norteño gang members were going to be at the concert. In fact, his response suggests that he was aware that other members were at the concert, but only denied he was associating with them.

In light of Officer Gibson's observations, defendant's gang history, and defendant's statements, the trial court reasonably inferred defendant's knowledge that other gang members would be present at the rap concert. Accordingly, we conclude that

there was substantial evidence to support the trial court's finding that defendant violated his probation by being at a location "where he knew that there would be a gang gathering." (See *Kurey, supra*, 88 Cal.App.4th at pp. 848-849.)

B. Section 654

Defendant contends that the trial court violated section 654 by imposing consecutive sentences for the felony offense and the misdemeanor offense. Based on this contention, defendant argues that he is entitled to have additional credits for the time served on his misdemeanor apply towards his three-year felony sentence.

1. Proceedings Below

On the condition that he receive probation, defendant pleaded no contest to a felony count of carrying a loaded firearm (former § 12031, subd. (a)(1); count 1) and a misdemeanor count of participating in a street gang (§ 186.22, subd. (a); count 5). At the change of plea hearing, the trial court explained to defendant that the "maximum penalty if you're placed on probation could be up to a year in jail" and that "if you fail to comply with your probation terms, your probation could be revoked and you could be required to serve up to three years . . . in prison." The court explained that the maximum penalty for the misdemeanor was up to one year in custody.

Defendant responded that he understood the terms and conditions. At sentencing, the trial court suspended imposition of sentence and placed him on felony probation. The court explained the terms and conditions of defendant's probation, which included serving 300 days in jail for the misdemeanor with 253 days of credit. The court specified that "Count 5 is consecutive to the sentence imposed for the felony offense" Defendant accepted these terms and conditions.

In May 2011, defendant admitted he violated his probation. The trial court advised defendant that for count 1, the maximum penalty he faced was up to three years

in prison followed by a minimum of three years on parole. In addition, the court explained that he could go to jail “for up to another year” for count 5. Defendant indicated he understood these statements and admitted the probation violation.

At the sentencing hearing on June 17, 2011, defendant requested that the trial court follow the probation officer’s recommendation of reinstating probation. The court advised defendant to memorize his probation conditions. The court cautioned, “[b]ecause if you come back here, and this is my promise to you, and you’re found in violation of probation for any reason, you’re going to prison.” Defendant indicated he understood. The court then stated the terms as follows: “As to the 12031, the Court imposes . . . the upper term of three years. Probation’s revoked. The Court imposes the upper term of three years. [¶] The execution of that sentence is suspended for the balance of the probationary period on the original terms and conditions, and on condition that you comply with all conditions *separately related* to the misdemeanor Count 5, which is going to be complying with the jail sentence for that. [¶] *No credits on the felony*, either now or if you’re committed to Department of Corrections . . . , except for any period of confinement that you might suffer by virtue of a future violation of probation.” (Italics added.)

Defendant indicated that he understood these terms. The trial court then reinstated probation and ordered defendant to serve 365 days in jail for the misdemeanor with 307 days of credit. Defendant accepted the terms as modified.

In May 2012, after the trial court found defendant violated probation, defendant filed a motion regarding sentencing credits. Defendant argued that the consecutive sentences for the felony and misdemeanor offenses violated section 654 because the “gun possession is a necessary element of the gang participation charge.” Defendant asserted that he was thus entitled to have the custody credits for time served on his misdemeanor offense apply towards his three-year felony sentence. At the sentencing hearing on May 23, 2012, the trial court stated that it had previously advised defendant that the

maximum penalty sentence was three years in state prison, which had “no application whatsoever for the misdemeanor.” The court recalled that when defendant accepted probation, “it was clear . . . that the credits were being applied to the misdemeanor only, and he was told that he would be given three years if he violated probation.” The court determined that defendant was estopped from raising a section 654 claim. The court then ordered defendant to serve the previously suspended three-year prison sentence with 276 days of credit.

2. Analysis

Section 654, subdivision (a) provides: “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” However, under California Rules of Court, rule 4.412(b), “[b]y agreeing to a specified prison term personally and by counsel, a defendant who is sentenced to that term or a shorter one abandons any claim that a component of the sentence violates section 654’s prohibition of double punishment, unless that claim is asserted at the time the agreement is recited on the record.”

The waiver rule in rule 4.412 has been applied to preclude the challenge of the imposition of a concurrent term when the defendant agrees to a specified term of sentencing as part of the plea bargain. In *People v. Hester* (2000) 22 Cal.4th 290 (*Hester*), our Supreme Court applied this rule where a defendant agreed to a four-year sentence, and then, on appeal, sought to challenge imposition of concurrent terms. (*Id.* at pp. 294-295.) The Supreme Court determined that “defendants are estopped from complaining of sentences to which they agreed.” (*Id.* at p. 295; see also *People v. Buttram* (2003) 30 Cal.4th 773, 776.) “Where the defendants have pleaded guilty in return for a *specified* sentence, appellate courts will not find error even though the trial court acted in excess of jurisdiction in reaching that figure, so long as the trial court did

not lack *fundamental* jurisdiction. The rationale behind this policy is that defendants who have received the benefit of their bargain should not be allowed to trifle with the courts by attempting to better the bargain through the appellate process. [Citations.] While failure to object is not an implicit waiver of section 654 rights, acceptance of the plea bargain here was. ‘When a defendant maintains that the trial court’s sentence violates rules which would have required the imposition of a more lenient sentence, yet the defendant avoided a potentially harsher sentence by entering into the plea bargain, it may be implied that the defendant waived any rights under such rules by choosing to accept the plea bargain.’ [Citation.] Rule 412(b) and section 654 are, therefore, not in conflict.” (*Hester, supra*, 22 Cal.4th at p. 295.)

In *People v. Ramirez* (2008) 159 Cal.App.4th 1412 (*Ramirez*), the Court of Appeal applied the reasoning in *Hester* where a trial court erroneously increased the defendant’s previously imposed prison sentence, but suspended execution of that sentence after he agreed to probation. (*Id.* at pp. 1427-1428.) There, the defendant pleaded guilty to selling cocaine base and the trial court sentenced him to four years in state prison. The trial court suspended execution of sentence and placed him on probation. (*Id.* at p. 1418.) Approximately two years later, the defendant admitted violating probation pursuant to a negotiated disposition. Under the negotiated disposition, the trial court increased the defendant’s sentence from four years to five years, suspended his sentence again, and reinstated probation. (*Id.* at pp. 1418-1419.) Thereafter, the defendant committed another offense, and the trial court revoked his probation and ordered execution of the five-year prison sentence. (*Id.* at pp. 1419-1420.) The defendant appealed, claiming that the trial court erred in increasing the term of his prison sentence from four to five years. (*Id.* at p. 1420.)

The *Ramirez* court determined that the trial court lacked authority to increase the defendant's sentence (*Ramirez, supra*, 159 Cal.App.4th at p. 1425-1426), but held that the defendant was estopped from challenging the five-year sentence because he had agreed to the terms in exchange for a reinstatement of his probation. (*Id.* at pp. 1427-1428.) The court determined that the "rationale justifying application of estoppel" applied because the defendant received the benefit of [the] bargain by being reinstated on probation and released from custody. (*Id.* at p. 1428.) "Having accepted the benefits of his plea, he should not now be able to better the bargain by scaling back the increased sentence that was a fundamental component of the plea deal." (*Ibid.*)

We determine *Ramirez* to be analogous in procedural posture to this case. Similar to the defendant in *Ramirez*, defendant agreed to specified terms (i.e., serving separate, consecutive sentences for the felony and the misdemeanor) in exchange for probation. Indeed, in 2010, defendant was fully advised and agreed to serve a 300-day sentence for the misdemeanor that was "consecutive" to the sentence imposed for the felony offense. He was also advised that he faced a maximum penalty of three years in prison for the felony offense if he violated probation. He accepted these terms and conditions. Then, after his first probation violation, defendant requested that the court reinstate his probation. The court advised him that it would suspend the three-year sentence for the felony "on the original terms and conditions, and on condition that you comply with all conditions *separately related* to the misdemeanor Count 5, which is going to be complying with the jail sentence for that." (Italics added.) It then explicitly stated, "[n]o credits on the felony, either now or if you're committed to Department of Corrections . . . , except for any period of confinement that you might suffer by virtue of

a future violation of probation.” (Italics added.) Defendant stated that he understood and agreed to those terms.

Defendant was thus aware when he first agreed to the plea, and at the time his probation was reinstated, that the misdemeanor sentence was a separate, consecutive sentence from the felony. At the time he accepted these terms, defendant did not raise a claim that the agreed upon terms violated section 654. Instead, as in *Hester* and *Ramirez*, defendant received the benefit of his plea bargain. He accepted these specified terms in exchange for being placed on probation and avoiding execution of his three-year prison sentence. Defendant may not now raise a section 654 claim as he had been fully advised, accepted, and then benefitted from his plea.

Because defendant is estopped from raising a section 654 claim, he is not entitled to have custody credits for time served on his misdemeanor apply towards the three-year felony sentence.

DISPOSITION

The judgment is affirmed.

BAMATTRE-MANOUKIAN, J.

WE CONCUR:

ELIA, ACTING P.J.

MÁRQUEZ, J.