Filed 1/30/07 P. v. Dissinger CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Shasta)

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM EDWARD DISSINGER, Defendant and Appellant.	C050329 (Super. Ct. No. 05F1154, 03F9381)

A jury found defendant William Edward Dissinger guilty of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)),[1] possession of a controlled substance (Health & Saf. Code, § 11350, subd. (a)) and bringing a controlled substance into jail (§ 4573), all of which were committed while defendant was on probation in another case.

On appeal, defendant contends the trial court erred by (1) failing to conduct further inquiry regarding two jurors' ability

[1] Hereafter, undesignated statutory references are to the Penal Code.

to be fair and impartial given their employer-employee relationship, (2) failing to instruct the jury, sua sponte, with CALJIC No. 2.23, (3) imposing separate but concurrent sentences for the two drug-related offenses rather than staying the sentence for possession pursuant to section 654, (4) imposing a 10 percent administrative fee, and (5) imposing consecutive sentences in violation of defendant's constitutional rights to a jury trial and due process. We shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Defendant reported to the Shasta County Jail Annex to participate in the sheriff's work release program while on probation for a felony conviction for transportation of a controlled substance in case No. 03F9381. A search of his person revealed two Soma pills and seven Vicodin pills. Defendant told sheriff's deputies he had a prescription for the pills, but that he had left the prescription bottles at home.

Deputies searched defendant's car, which was registered to his father, and found an unregistered, unloaded handgun in the trunk. Defendant assured deputies the gun was not stolen, and told them he bought it at a garage sale from a friend named "Mark," but had put it in the trunk of his car the previous night because he was going to get rid of it.

Inside the car, deputies also found a prescription bottle labeled "Hydro-Aceta" in the name of Renee Moreland, defendant's girlfriend. The bottle contained 92 Vicodin pills and two Soma pills. Defendant told deputies the bottle belonged to his girlfriend.

Defendant was charged with possession of a firearm by a felon (count 1), possession of a controlled substance (count 2) and bringing a controlled substance into jail (count 3). The parties stipulated to the following: (1) defendant was previously convicted of a felony, (2) the term "Hydrocodone" is synonymous with Vicodin, (3) the yellow pills found in defendant's pocket and car were Vicodin and the white pills were Soma, and (4) a single tablet of Vicodin is a usable quantity.

At trial, Moreland testified that defendant acted as her caregiver, helping her take her pills and keeping her prescriptions in the car and away from her to make sure she did not overdose. She also testified that she purchased the handgun at a garage sale to be used for protection, but did not tell defendant about it, hiding it in her garage. She said she planned to "get rid of it" after defendant completed his jail sentence, and that she put the gun in the trunk of defendant's father's car one or two days before the defendant reported to the work release program so that she could sell it to "one of [defendant's] friends." Moreland admitted she knew defendant drove his father's car, but denied knowing anything about his prior felony conviction. She could not remember the location of the garage sale where she bought the gun.

Defendant testified that he was surprised there was a gun in the trunk, and that he only told deputies it was his to protect his father and Moreland, even though he did not know Moreland had purchased the gun. He also testified that he kept Moreland's medication in the car on various occasions "for her

protection," and that he "forgot they were in the glove box" the day of the search.

The jury found defendant guilty on all counts. The court sentenced defendant to the midterm of three years in state prison for bringing a controlled substance into the jail, one-third the midterm, or eight months, for possession of a firearm by a felon, to run consecutively, and the midterm of two years for possession of a controlled substance, to run concurrently, for an aggregate sentence of three years eight months in state prison. The court also imposed fees and fines, including a $600 restitution fine pursuant to section 1202.4, a $600 restitution fine (suspended) pursuant to section 1202.45, and a 10 percent administrative fee pursuant to section 1202.4, subdivision (1), and ordered defendant to register as a drug offender.

As for the violation of probation in case No. 03F9381, the court revoked probation and imposed a sentence of three years in state prison, to run concurrently with the sentence imposed in the present case.

Defendant filed a timely notice of appeal.

DISCUSSION

I

Juror Inquiry

Defendant contends the trial court abused its discretion by not making further inquiry regarding the ability of two jurors who were in an employer-employee relationship to be fair and impartial.

The People argue that there was no basis for further inquiry and no abuse of discretion because there was neither evidence nor an accusation of improper influence or other juror misconduct. We agree.

Defendant suggests that the mere fact that an employer-employee relationship existed between the two jurors put the court on notice that good cause existed to discharge either one or both of the jurors, thus triggering the need for further, more extensive inquiry as to the jurors' ability to be fair and impartial. He cites *People v. Farnam* (2002) 28 Cal.4th 107, *People v. Burgener* (1986) 41 Cal.3d 505 and *People v. McNeal* (1979) 90 Cal.App.3d 830 as support for that contention. We are not persuaded.

The cases cited by defendant address the court's duty of inquiry once an allegation of misconduct has been made. *Burgener* dealt with allegations of juror intoxication during deliberations. (*People v. Burgener, supra,* 41 Cal.3d at pp. 516-517, overruled on other grounds in *People v. Reyes* (1998) 19 Cal.4th 743, 753-754.) In *McNeal,* the court addressed a statement by a juror during deliberations that her personal knowledge about the case would affect how she voted. (*People v. McNeal, supra,* 90 Cal.App.3d at p. 835.) At issue in *Farnam* was the ability of a juror to be fair and impartial in a case involving robbery after having been robbed walking back to the courthouse after a lunch break during trial. (*People v. Farnam, supra,* 28 Cal.4th at pp. 140-142.) Those cases are inapposite.

Here, the court delivered jury instructions prior to opening statements and, in an apparent response to those instructions, Juror No. 175001 thought it prudent to let the court know he employed Juror No. 177998 as his nanny. When the court inquired whether Juror No. 175001 had discussed the case with Juror No. 177998, Juror No. 175001 replied, "Not at all. I will see her in the evening." The court then explained the importance of each juror making up his/her own mind, and that jurors, particularly those who have "some relationship outside of court, like husband and wife, or employer and employee," were not to "let that relationship in any way influence their decision."

There was never any indication or accusation of improper conduct between the two jurors. Indeed, there was an express representation that they had not discussed the case at all. While defendant may speculate as to what might or could have occurred, there is no evidence in the record that any misconduct *did* occur such that the kind of inquiry contemplated by *Burgener* was necessary or required. (See *In re Hamilton* (1999) 20 Cal.4th 273, 294 [juror misconduct occurs when there is a direct violation of the oaths, duties, and admonitions imposed on jurors, such as when a juror conceals bias on voir dire, consciously receives outside information about the case on which she sits, discusses the case with nonjurors, or shares improper information with other jurors].) The record is also devoid of any evidence that defendant raised the issue or stated an objection at trial, and he cannot do so for the first time now.

(*In re S.B.* (2004) 32 Cal.4th 1287, 1293; *People v. Saunders* (1993) 5 Cal.4th 580, 590.) We conclude that the trial court did not abuse its discretion.

II

Sua Sponte Instruction to Jury

Defendant contends the evidence of his prior conviction for transportation of a controlled substance was highly prejudicial, requiring the court to instruct the jury, sua sponte, with CALJIC No. 2.23 directing them to limit their use of the prior conviction to assess defendant's credibility only. We disagree.

As defendant properly concedes, a trial court generally "'is under no duty to instruct sua sponte on the limited admissibility of evidence of past criminal conduct.'" (See *People v. Padilla* (1995) 11 Cal.4th 891, 950, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, quoting *People v. Collie* (1981) 30 Cal.3d 43, 64.) However, defendant relies on the very limited exception to that rule set forth in *People v. Lang* (1989) 49 Cal.3d 991, that a duty arises where "unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*Id.* at p. 1020.) He urges that, because the case "turned entirely on the credibility of [defendant] and the girlfriend with medical problems that he cared for and whose prescription bottle had been found in the glove box of [defendant's] car," the prior conviction for transportation of a controlled substance was "highly prejudicial and not admissible for any other valid

purpose." Not so. Defendant was charged with possession of a firearm by a felon, making the issue of his prior conviction directly relevant to prove an element of that charge. Although the parties stipulated to the existence of the prior conviction, defendant elected to testify on direct examination regarding the specific nature of that offense and the fact that he pled guilty to the charge. Evidently, defendant concluded the relevance of that information outweighed any prejudicial effect it might possibly have.

It is also worth noting that defendant made no request that the court give the instruction to the jury. "If defendant believed the instructions were incomplete or needed elaboration, it was his obligation to request additional or clarifying instructions." (*People v. Dennis* (1998) 17 Cal.4th 468, 514.) The court had no duty further to instruct sua sponte. (*Ibid.*; *People v. Saille* (1991) 54 Cal.3d 1103, 1120.) We conclude the court had no duty to give CALJIC No. 2.23 on its own volition to limit the application of the prior conviction.

We are similarly not persuaded by defendant's alternative argument that his trial counsel's failure to request CALJIC No. 2.23 amounted to ineffective assistance of counsel. To establish ineffective assistance, defendant bears the burden of showing (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms, and (2) absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him. (*Strickland v. Washington* (1984) 466 U.S. 668

[80 L.Ed.2d 674]; *People v. Hawkins* (1995) 10 Cal.4th 920, 940, disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

In order to show trial counsel's performance was deficient, defendant must show that counsel "failed to act in a manner to be expected of [a] reasonably competent attorney[] acting as [a] diligent advocate[]." (*People v. Pope* (1979) 23 Cal.3d 412, 425.) If the record fails to show why counsel acted or failed to act as he did, the contention fails unless counsel failed to provide an explanation upon request or there could be no satisfactory explanation. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-268; *People v. Pope, supra,* 23 Cal.3d at p. 425.)

We accord great deference to counsel's reasonable tactical decisions. (*People v. Weaver* (2001) 26 Cal.4th 876, 925; see also *People v. Freeman* (1994) 8 Cal.4th 450, 484.) "'Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts.' [Citation.]" (*People v. Weaver, supra*, at p. 926.)

Here, the record is silent as to why trial counsel did not request CALJIC No. 2.23. As for whether a satisfactory explanation exists for counsel's conduct, defendant concludes there "could be no satisfactory explanation," but fails to explain why. It is, of course, entirely possible trial counsel recognized that a request for such a limiting instruction would be futile where defendant's status as a convicted felon was an element of one of the counts against him, and defendant himself

testified regarding the nature and disposition of that conviction as part of his defense.

Because we find defendant has not met his burden with respect to the first prong of the test, we need not address the second. (*Strickland v. Washington, supra*, 466 U.S. at p. 697 [80 L.Ed.2d at p. 699].) We reject defendant's claim of ineffective assistance of counsel.

III

Penal Code Section 654

Defendant contends the sentence for possession of a controlled substance should have been stayed pursuant to section 654 because both drug-related offenses were "committed pursuant to one objective--to have drugs available while [defendant] participated in the work release program." We disagree.

The search of defendant's person revealed seven Vicodin and two Soma tablets. For that, he was charged with bringing a controlled substance into the jail. The discovery of 92 additional Vicodin tablets and two Soma tablets in defendant's car led to the additional possession charge. Given the absence of evidence to demonstrate whether or not the pills defendant took with him into the jail were part of those found in his vehicle, the trial court could have inferred that the two were unrelated. We conclude there was no error in sentencing.

IV

Imposition of 10 Percent Administrative Fee

Defendant contends the 10 percent administrative fee imposed by the court must be stricken because "the county will

not incur any costs in collecting restitution where [the defendant] has been sentenced to state prison," and because, defendant argues, it was not imposed by the court at the time of sentencing. Again, we disagree.

Section 1202.4, subdivision (l) gives the court clear authority to impose an administrative fee not to exceed 10 percent of the restitution amount ordered. (§ 1202.4, subd. (l).) The record reflects the court's imposition of that fee. When the court imposed sentence, and particularly when it calculated restitution fines, the clerk sought clarification, asking, "is it 600 for both cases or should there be 600 for the fresh case *plus the ten percent* and then stay 600 and for the violation should it be 600 stayed? I believe I have to have two different funds." The probation officer responded, "I think that's fine." The court responded, "Let me make sure, I –- yeah. That's right." We conclude from that discussion that the court imposed a 10 percent administrative fee and, given its authority to do so and defendant's failure to object, we reject defendant's contention that the fee should be stricken.

V

Jury Trial on Consecutive Sentences

Finally, defendant contends the court's "imposition of the consecutive term" violated his Fifth, Sixth and Fourteenth Amendment rights to a jury trial on "the factors upon which his punishment was increased beyond the prescribed statutory maximum." Defendant is incorrect.

The jury found defendant guilty of three separate offenses. The court exercised its discretion by imposing sentence as to each offense, and by ordering that the terms for counts 1 and 3 run consecutively and the term for count 2 run concurrently, rendering a total aggregate sentence of three years and eight months. "[A] jury trial is not required on the aggravating factors that justify imposition of consecutive sentences. Under section 669, the judge has discretion to determine whether to impose sentences consecutively or concurrently. 'Judicial factfinding in the course of selecting a sentence within the authorized range does not implicate the indictment, jury-trial, and reasonable-doubt components of the Fifth and Sixth Amendments.'" (*People v. Black* (2005) 35 Cal.4th 1238, 1262, overruled in part by *Cunningham v. California* (Jan. 22, 2007, No. 05-6551) ___ U.S. ___, ___ L.Ed.2d ___, 2007 U.S. LEXIS 1324, quoting *Harris v. United States* (2002) 536 U.S. 545, 558 [153 L.Ed.2d 524].) In any event, the three-year eight-month sentence did not exceed the statutory maximum of four years possible for defendant's conviction on count 3. We reject defendant's contention.

We note, however, that the abstract of judgment incorrectly reflects the sentence pronounced by the trial court, attaching the wrong term to the wrong offense. Under our inherent authority to correct such clerical errors, we order the abstract of judgment be corrected to reflect a three-year term as to count 3 (bringing a controlled substance into jail), an eight-month consecutive term as to count 1 (possession of a firearm by

a felon), and a two-year concurrent term as to count 2 (possession of a controlled substance). (*People v. Mesa* (1975) 14 Cal.3d 466, 471 [pronouncement of judgment is a judicial function, while entry into minutes and abstract of judgment is a clerical function; therefore, any inconsistency is presumed to be clerical error]; *People v. Rowland* (1988) 206 Cal.App.3d 119, 123 [appellate court has authority to correct such clerical errors].)

DISPOSITION

The judgment is affirmed. The trial court shall prepare an amended abstract of judgment as directed in this opinion, and shall forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation.

CANTIL-SAKAUYE, J.

We concur:

BLEASE, Acting P.J.

BUTZ, J.