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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

ELIZABETH KAY RAY,

Defendant and Appellant.

F050229

(Super. Ct. No. BF104552-A)

OPINION

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. James M. Stuart, Judge.

William I. Parks, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and John G. McLean, Deputy Attorney General, for Plaintiff and Respondent.

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[*] Before Harris, Acting P.J., Cornell, J. and Dawson, J.

INTRODUCTION

Appellant Elizabeth Kay Ray pleaded guilty to felony possession of methamphetamine and was placed on probation pursuant to Proposition 36. She violated probation three times and failed to appear for the sentencing hearing. The court subsequently imposed the upper term of three years in state prison. On appeal, she contends the court abused its discretion and improperly imposed the upper term.

FACTUAL AND PROCEDURAL HISTORY

Around 1:33 a.m. on December 1, 2003, Kern County sheriff's deputies were on patrol when they saw appellant walking on the side of the road. Appellant told the deputies that she did not have any identification and gave them permission to search her purse. The deputies found a piece of plastic inside appellant's wallet, which contained an off-white granular substance. Appellant was arrested for possession of methamphetamine. Appellant was searched incident to her arrest, and a glass pipe was found in her jacket pocket. The inside of the pipe was covered with a white residue believed to be methamphetamine. The laboratory analysis of the seized contraband revealed it was 0.15 gram of a substance containing methamphetamine.

On December 3, 2003, a complaint was filed in the Superior Court of Kern County charging appellant with count I, felony possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)); count II, misdemeanor possession of drug paraphernalia (Health & Saf. Code, § 11364); and count III, misdemeanor giving a false identification to a police officer (Pen. Code, § 148.9, subd. (a)). Appellant pleaded not guilty.

The Probation Report

According to the probation report, appellant (born 1957) was a high school graduate, and completed three and a half years of college and a two-year program to be licensed as a psychiatric technician. Appellant had been employed as a psychiatric technician at Atascadero State Hospital from 1986 to 2001.

Appellant stated she started to drink alcohol when she was 17 years old but claimed she was not an alcoholic. She started to use cocaine and marijuana when she was in her early 20's. She moved on to ingesting and then injecting rock cocaine. Appellant claimed she became "'clean'" when she was 40 years old, but admitted that she was using methamphetamine when she was arrested in this case. She was interested in receiving treatment.

Appellant's Prior Convictions

Appellant had a lengthy criminal history of misdemeanor offenses, consisting of driving under the influence (Veh. Code, § 23152 (former Veh. Code, § 23102, subd. (a))) in 1977, 1987 and 1988; driving with a suspended or revoked license (Veh. Code, §§ 14601.1, subd. (a), 14601.2, subd. (a)) in 1988, 1989, 1990, 1994, 1996, 2001, 2002, and 2003; passing a check on insufficient funds (Pen. Code, § 476a, subd. (a)) in 1994 and 2000; possession of narcotics without a prescription (Bus. & Prof. Code, § 4060 (former Bus. & Prof. Code, § 4230); *People v. Kennedy* (2001) 91 Cal.App.4th 288, 292, fn. 1) in 1990 and 2003; battery (Pen. Code, § 242) in 1998; willfully causing or permitting harm to a child (Pen. Code, § 273a, subd. (b)); possession of narcotics (Heath & Saf. Code, § 11377, subd. (a)) in 2002 and 2004; receiving stolen property (Pen. Code, § 496, subd. (a)) in 2002; and trespass (Pen. Code, § 602, subd. (*l*)) in 2003. The offenses occurred in San Luis Obispo, Paso Robles, and Bakersfield. She was placed on misdemeanor probation but repeatedly violated nearly every grant of probation, either by reoffending or failing to appear, with bench warrants issued for her arrest. She was on misdemeanor probation when she was arrested in this case.

The Plea and Probation Terms

On December 15, 2003, appellant pleaded no contest to count I, and the court placed her on probation for three years pursuant to Proposition 36 (Pen. Code, § 1210.1), and dismissed counts II and III on condition the plea remain in effect. The parties stipulated to the police report as the factual basis.

The court explained the possible consequences of appellant's plea included a maximum punishment of three years; appellant said she understood. The court noted she had "seven holds out of San Luis Obispo." Defense counsel believed appellant had paid the fines and the holds were being lifted. The court explained appellant was going to have to go through the Proposition 36 program in Kern County unless she managed to transfer the case to San Luis Obispo. Defense counsel replied that appellant intended to live in Sacramento. The court replied it was going to be up to Sacramento County as to whether it would accept her case.

The First Probation Violation

On February 19, 2004, appellant was placed on three years' probation in San Luis Obispo County, for a felony violation of Health and Safety Code section 11377, subdivision (a), possession of narcotics.

On March 10, 2004, the court revoked appellant's probation in the instant case and issued a bench warrant for appellant's arrest, based on her alleged probation violation of failing to report to her probation officer as directed. On March 25, 2004, appellant denied violating the conditions of probation in this case and was released on her own recognizance (OR).

On April 6, 2004, appellant failed to appear and the court revoked her OR release. On April 26, 2004, appellant was returned to custody and the court denied another OR release.

On June 8, 2004, appellant admitted she violated probation by failing to appear for a status conference. The court reinstated appellant on probation pursuant to Proposition 36, and advised her probation violation was "kind of like a strike against you" for purposes of Proposition 36 eligibility.

The Second Probation Violation

On August 17, 2004, the court revoked appellant's probation and issued a bench warrant based on her alleged probation violation of failing to report as directed.

On October 7, 2004, appellant was convicted in San Luis Obispo County of possession of an opium pipe (Health & Saf. Code, § 11364), and possession of a dirk or dagger (Pen. Code, § 12020, subd. (a)(4)).

On September 30, 2004, appellant was returned to custody in the instant case. On November 18, 2004, appellant admitted the probation violation in this case. The probation report prepared for this violation found one mitigating circumstance, that appellant pleaded to the underlying offense at an early stage of the criminal process; and three aggravating circumstances, that her prior convictions as an adult were numerous, her prior performance on probation was unsatisfactory because she continued to reoffend; and she was on misdemeanor probation when the offense was committed. The probation report stated appellant was statutorily eligible for a grant of probation but she was not a suitable candidate because "she has been afforded numerous opportunities at the local level through both Kern County and San Luis Obispo County and has failed to reform." She had received two opportunities to complete probation pursuant to Proposition 36 in Kern County, and one such opportunity in San Luis Obispo County, but had failed to do so. Based on the aggravating circumstances, the probation report recommended imposition of the upper term of three years.

On December 20, 2004, appellant filed a sentencing statement, conceded she had a substance abuse problem, and admitted she had been using "this time" since she was 40 years old. She requested reinstatement and modification of probation, with a residential treatment facility as a condition of probation. Appellant submitted letters from her family and friends, stating that she was a good and responsible person until her husband abandoned her and their young children, and she started using drugs.

On December 29, 2004, the court conducted the hearing on appellant's second probation violation. The court was inclined to give appellant an opportunity at felony probation, including one year in county jail and attendance in a program. The prosecutor did not object. The court excluded appellant from Proposition 36 probation but reinstated

her on felony probation pursuant to specific terms and conditions, including service of one year in county jail and being released to a custodial treatment program.

On August 11, 2005, the court conducted a status conference. Appellant stipulated to the court's modification of the terms and conditions of her probation to permit her to attend and complete mental health counseling.

The Third Probation Violation

On August 29, 2005, the court revoked appellant's probation after an alleged violation for failing an inpatient drug and alcohol treatment program and using a controlled substance.

On September 20, 2005, the court conducted a hearing as to appellant's alleged probation violation. Regina Walker testified she had been appellant's probation officer since February 17, 2005, and was familiar with the history of her case. Ms. Walker testified appellant was placed on probation on December 15, 2003, but excluded from Proposition 36 treatment on December 29, 2004. Thereafter, she was placed on felony probation and required to complete an inpatient drug/alcohol treatment program as one of the terms and conditions of her probation.

Ms. Walker testified appellant enrolled in the Friese Recovery Home program on February 23, 2005, but was dismissed from that program on March 15, 2005. After appellant was dismissed from the program, she went directly to Ms. Walker's office and informed her about the situation. Appellant said she had been dismissed because she had asked to call her probation officer. Ms. Walker testified she decided to give appellant another opportunity at an inpatient program, and directed her to enroll in the Samaria program. A couple of days later, appellant enrolled in the Samaria program.

Ms. Walker testified that on April 26, 2005, she went to Samaria on a routine visit and talked to appellant. Appellant admitted she used methamphetamine on the weekend of March 26, 2005. Appellant was not under the influence when she spoke to Ms. Walker. Appellant had been subject to drug tests at the Samaria program, but had not

failed any tests at that time. Ms. Walker admonished appellant about the drug use and placed her on restriction in the program, but decided not to find a probation violation and permitted appellant to continue in the Samaria program.

Ms. Walker testified she spoke with appellant on May 24, 2005. Appellant was interested in participating in the mental health court program and receiving treatment because she had been diagnosed as bipolar and might be eligible for the program. Appellant also believed the program would help pay for her medication. Ms. Walker arranged for appellant to receive an evaluation for the mental health court program. Ms. Walker did not receive any information to confirm appellant was bipolar or suffered from any type of disorder, but the mental health court's probation officer advised her that appellant was accepted to enroll in the program.

On August 11, 2005, appellant appeared in court and the probation order was modified to permit her to enter the mental health program. Ms. Walker did not advise the court about appellant's admitted use of methamphetamine. Immediately after that hearing, Ms. Walker instructed appellant to report to an officer at the mental health court program, but she was not aware if appellant did so.

Ms. Walker testified that after the modification order, appellant remained in the Samaria program because it was an approved program within the mental health court. On August 18, 2005, Carline Logan, the manager of the Samaria program, advised Ms. Walker that appellant failed to return after a weekend pass, and that appellant had been terminated from the program and would not be accepted back. Appellant subsequently called Ms. Walker, and she instructed appellant to report to the probation department. On August 25, 2005, appellant appeared at the probation department as ordered, and Ms. Walker placed her under arrest.

Ms. Walker testified she was not aware of appellant failing any drug tests, she never received any evaluation from the mental health program as to appellant's issues,

and she never received any information as to what kind of mental health treatment she received.

Appellant testified at the hearing and explained she was in the Friese program for about two weeks but felt it was "much too religious for me. I'm not used to that." Appellant complained there was no communication between the clients and the staff, and the staff required written complaints if the clients had any issues. Appellant did not have access to her medication, she was not able to get out to see a doctor, and she wanted to call her probation officer. She filed written requests for three days to call her probation officer, and each request was denied. The staff demanded to know the reason she wanted to call her probation officer and she refused to disclose it. The staff advised her that she could leave whenever she wanted, and "if I wasn't happy there, there was the door." Appellant left her things there and immediately contacted Ms. Walker.

Appellant testified that she discussed her concerns with Ms. Walker, and they agreed that she could enter an alternative program. She entered the Samaria program in March 2005, and appellant paid the fee of $600 per month. Appellant testified that when Ms. Walker visited her on April 26, 2005, she admitted that she had relapsed and used drugs three weeks earlier, but she was allowed to stay in the program.

Appellant testified she was clean and sober from March 26 through the weekend of August 18, 2005. At that time, she went for a weekend pass and had permission to leave. She tried to obtain her medication in Fresno but had to wait seven hours in the emergency room. "And I left because I was having—I don't know if you call it a breakdown, but a severe manic problem. And, bipolar, you are either manic or depressive, and I was in a manic state. I couldn't focus; I couldn't concentrate; I couldn't sit still. And I left the hospital because they told me the wait would be five more hours. I had been without my medication two weeks prior to this, before I went." Appellant testified her refills ran out, and she was on a waiting list for one month to get into her doctor. She had requested placement in the mental health program because of these

problems to get her medication. She had attended her intake interview with the mental health program, and was waiting to be contacted for her next appointment.

Appellant testified that she had regularly called Ms. Logan, the manager of the Samaria program, during her weekend pass, and told her about her relapse and what she was going through. Appellant could not drive and did not have enough money for the bus, and had someone telegraph the bus fare to her. When she returned to the Samaria program after her weekend pass, she immediately spoke to Ms. Logan about the situation. Ms. Logan said there was no problem with her returning to the program, and all she had to do was check in with the probation office. Ms. Logan said she would call appellant's probation officer and tell her that appellant was going to the office. Appellant testified she went directly to Ms. Walker's office and was arrested.

At the revocation hearing, appellant testified that she had been clean and sober since August 18, 2005. She had talked to Ms. Logan a few days earlier, and Ms. Logan said there was no problem for appellant to return, and there was a bed waiting for her if probation was reinstated. Appellant testified she had been diagnosed as bipolar for "quite some years" but was just learning about the importance of staying on her medication. It had been "trial and error" to find the right doctors and medication. In the past three weeks, she had found a psychiatrist through the mental health department, and she was on the right medication, and "I've been doing really well since then." Appellant was taking Seroquel, Trazodone, Prozac, and Cavinton. Appellant had been working for the American Red Cross for three weeks. She would be able to keep her job if she went back to the Samaria program.

The court found appellant had violated probation because she "did, in fact, fail the residential treatment program, and she did use a restricted dangerous drug, namely, methamphetamine. Both of those events were a clear violation of the specific terms of her probation." The court set the matter for the sentencing hearing, noted the conflicting evidence as to whether appellant would be allowed to return to the Samaria program, and

asked: "[I]f somebody can do a little checking on that, I would be awfully curious." The court revoked appellant's probation but allowed her to remain on bail.

Appellant's Failure to Appear

On October 4, 2005, appellant filed a sentencing statement, requesting placement in a residential treatment facility willing to accept her. Appellant conceded she had not been an ideal probationer, but admitted her previous mistakes and wanted to receive further treatment.

On October 6, 2005, appellant failed to appear in court.

On February 16, 2006, appellant was arrested for violating Penal Code section 647, subdivision (b).

On February 21, 2006, appellant was returned to custody.

The Sentencing Hearing

The supplemental probation report recommended imposition of the upper term of three years in prison, based on the recommendation in the previous probation report and appellant's third violation of probation. "She has been afforded several opportunities on [Proposition 36] treatment and felony probation, yet she continues to disregard the orders of the Court."

On March 7, 2006, the court conducted the sentencing hearing. The court stated it had read and considered the probation officer's original report and the supplemental attachments, "which reminds me of how [appellant] came to be before us this morning." Defense counsel asked the court to impose the midterm and consider the mitigating circumstances that she entered a plea at an early stage, and she only possessed a minor amount, about .25 grams of a controlled substance. Counsel also argued appellant's mental condition did not excuse her behavior but was a mitigating factor, and appellant was like other people with mental illnesses who seek to self-medicate. While appellant had an extensive criminal history, the offenses were minor and she had never been sent to prison. The prosecutor stated there was no evidence to support the mitigating

circumstances, appellant violated probation three times, and the upper term should be imposed.

The court denied reinstatement of probation, imposed the upper term of three years, and made extensive findings about the case.

> "Let me first start by saying that I appreciate the fact that defense counsel has not argued this morning for another chance at probation.
>
> "During the three months that I had the probation revocation calendar, along with all the other things during that three-month period, there were a number of times when I was more than willing to put someone back on probation if he or she was ready, willing, and able to get into a program or get back into a program.
>
> "And in this particular case, I might have been inclined to do that, although it wasn't very likely given the fact that [appellant] has been in and out of a number of programs throughout the years.
>
> "When she failed to show up for sentencing back in October of last year, that made it abundantly clear to me that she was no longer a viable candidate for probation.
>
> "Likewise, when I indicated that I've read all the materials, including the original probation officer's report, I can read all of those letters, and I've read the most recent letters and the ones that have come in between, and in reading those, I still sense a certain amount of denial. And as I've often heard many people say, you really can't help yourself until you hit rock bottom and until you are really and truly ready to help yourself.
>
> "She is no longer a viable candidate for probation given the number of opportunities that she has been afforded and the number of times that she has violated the terms of her probation, sometimes understandably and sometimes, quite frankly, inexplicably so.
>
> "She does have a long record, and many of these involve substance abuse. They go back a long ways. But I note that she had the [Health and Safety Code section] 11377 back in San Luis Obispo. She did finally finish that, as I recall. She's got another one in 2004. She was placed on felony probation in that particular one. She had a good work history for a long time, and something occurred in her life that finally led her to get away from her chosen vocation and into a lifestyle that has been not good.

"At this time, her probationary status is revoked.

"I do find as circumstances in mitigation that she did enter a plea at an early stage of these proceedings. I also find that there was a relatively small amount involved. However, I also find that she was still on probation at the time that she committed the original crime. Her probationary status was revoked a number of times on a number of cases over the years before she picked up this particular case. And, again, quite frankly, she did not ever perform well on probation. Her convictions as an adult have been numerous, to say the least, and there have been a lot of times where I have exercised my discretion where I felt it was appropriate. Quite frankly, this is not one of them."

At the conclusion of the hearing, the court offered additional comments:

"I will share with [appellant] what I've shared with a number of other people over the years. A few of them have taken me up on it, and those who have been successful.

"When you get out, if you are still interested in a program and you can't get in because parole won't get you in one, you've got other stuff, give me a call. I'll get you in a program."

On or about April 20, 2006, appellant filed a timely notice of appeal.

DISCUSSION

On appeal, appellant contends the court abused its discretion when it imposed the upper term in this case, it erroneously placed emphasis on her prior criminal record and probation violations, it should have considered her drug and mental health issues as mitigating circumstances, and it failed to properly balance aggravating and mitigating circumstances.

The midterm is statutorily presumed to be the appropriate term unless there are circumstances in aggravation or mitigation of the crime. (Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a); *People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582-1583.) "[T]he court may impose the upper or lower term of imprisonment only where the balance of aggravating or mitigating factors cited in support of that choice 'weighs' against imposition of the middle term. [Citation.]" (*People v. Scott* (1994) 9 Cal.4th

331, 350.) A single valid aggravating factor is sufficient to support imposition of the upper term. (*People v. Carron* (1995) 37 Cal.App.4th 1230, 1241; *People v. Cruz* (1995) 38 Cal.App.4th 427, 433; *People v. Holguin* (1989) 213 Cal.App.3d 1308, 1319; *People v. Osband* (1996) 13 Cal.4th 622, 730, distinguished on other grounds by *People v. Lucero* (2000) 23 Cal.4th 692, 714.) "'Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in "qualitative as well as quantitative terms" [citation] .... We must affirm unless there is a clear showing the sentence choice was arbitrary or irrational.' [Citations.]" (*People v. Avalos, supra*, 47 Cal.App.4th at p. 1582.)

"… In determining whether there are circumstances that justify imposition of the upper or lower term, the court may consider the record in the case, the probation officer's report, other reports including reports received pursuant to [Penal Code] Section 1203.03 and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim . . ., and any further evidence introduced at the sentencing hearing." (Pen. Code, § 1170, subd. (b).) We review the court's sentencing determination for an abuse of discretion. (*People v. Trausch* (1995) 36 Cal.App.4th 1239, 1247.) A trial court abuses its discretion only when its choice is arbitrary or capricious, or exceeds the bounds of reason after consideration of all of the circumstances. (*Ibid.*)

The entirety of the record refutes appellant's assertions that the court failed to properly balance the aggravating and mitigating circumstances. As set forth *ante*, the court made a lengthy sentencing statement, properly reviewed appellant's criminal record and her multiple probation violations, and her conduct while on probation in this case, which included additional probation violations, reoffending, and failing to appear. The court properly relied on the aggravating circumstances that her prior convictions were numerous, her prior performance on probation was unsatisfactory in that she continued to reoffend, and she was on misdemeanor probation when she committed the instant offense. (Cal. Rules of Court, rule 4.421(b)(2), (b)(4), (b)(5).)

Appellant complains the court failed to consider her history of drug addiction and mental health problems. The trial court may, but is not required to, consider a defendant's alcoholism as a mitigating factor. (*People v. Reyes* (1987) 195 Cal.App.3d 957, 960-964 & fn. 2; *In re Handa* (1985) 166 Cal.App.3d 966, 973-974.) The defendant may argue at sentencing that an addiction to drugs should be considered as a mitigating factor, but the trial court may reject this conclusion and is not required to indicate its reasons for doing so. (*People v. Davis* (1980) 103 Cal.App.3d 270, 280-281, disapproved on other grounds in *People v. Sumstine* (1984) 36 Cal.3d 909, 921, fn. 8 and *People v. Wolcott* (1983) 34 Cal.3d 92, 106, fn. 6; *In re Handa, supra*, 166 Cal.App.3d at p. 973.) As noted in *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1511 "drug addiction is not necessarily regarded as a mitigating factor when a criminal defendant has a long-term problem and seems unwilling to pursue treatment. [Citations.]" A similar situation existed in this case. The court was well aware of appellant's numerous attempts to obtain treatment for her various issues, regretfully noted that she had failed in multiple treatment opportunities, and still sensed "a certain amount of denial. And as I've often heard many people say, you really can't help yourself until you hit rock bottom and until you are really and truly ready to help yourself." The court did not abuse its discretion in imposing the upper term.

Appellant separately contends that the imposition of the upper term contravened *Blakely v. Washington* (2004) 542 U.S. 296, but concedes the California Supreme Court rejected her contentions in *People v. Black* (2005) 35 Cal.4th 1238. We recognize *Black* will not be the final word on this issue. (See *People v. Cunningham* (Apr. 18, 2005, A103501) [nonpub. opn.] cert. granted Feb. 21, 2006, No. 05-6551, sub nom. *Cunningham v. California* (2006) ___ U.S. ___ [126 S.Ct. 1329, 164 L.Ed.2d 47].) But for the time being, *Black* is the controlling authority. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Accordingly, appellant's contention must be rejected.

DISPOSITION

The judgment is affirmed.