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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME GODAY ZARAGOZA,

Defendant and Appellant.

E039301

(Super.Ct.No. SWF005784)

OPINION

APPEAL from the Superior Court of Riverside County. Martin Hairabedian, Jr., Judge. (Retired judge of the Orange Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Affirmed.

Linda Acaldo, under appointment by the Court of Appeal, for Defendant and Appellant

Bill Lockyer, Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Rhonda Cartwright-

Ladendorf, Supervising Deputy Attorney General, and Erika Hiramatsu, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Jaime Goday Zaragoza (defendant) alleges the trial court abused its discretion and violated his constitutional right to due process by denying him probation and sentencing him to the aggravated term for his felony conviction. Finding neither abuse of discretion nor constitutional error, we will affirm.

FACTUAL AND PROCEDURAL HISTORY

On October 1, 2003, defendant was arrested for driving under the influence of alcohol and methamphetamine. While out on bail and awaiting trial on charges stemming from that arrest, he was arrested again on September 26, 2004, under similar circumstances.¹ This time defendant was not only driving under the influence of alcohol; he also had an open can of beer, 21 grams of methamphetamine, marijuana, and drug paraphernalia including a pipe and an electronic scale in his car. In addition, he was driving without a valid license and had \$644 in cash in his wallet. At the time of the second arrest defendant told police that the drugs in his car were not his; later he told them that he sold methamphetamine to support his own addiction. On January 7, 2004, defendant failed to appear for a court hearing related to the first arrest; on November 10, 2004, he failed to appear at a hearing related to the second arrest.

¹ Defendant's opening brief erroneously gives November 26, 2004, as the date of the second arrest, but this appears to be a mistake.

In September 2005, at trial on all the charges from both offenses, defendant admitted under oath that he had lied to police when he said that the drugs in the car were not his. At the same time, defendant repeatedly testified that he did not sell drugs; all the methamphetamine in his possession was for his personal use. He carried the scale only to ensure that when he purchased his own drugs he would not be cheated.

On October 3, 2005, a jury convicted defendant of five felonies and four misdemeanors related to the two arrests. The convictions included two counts of possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a); felonies); transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a); a felony); possession of methamphetamine for sale (Health & Saf. Code, § 11378; a felony); two counts of failure to appear (Pen. Code, §§ 1320.5 & 853.7; one felony and one misdemeanor); driving while under the influence of alcohol and a drug (Veh. Code, § 23152, subd. (a); a misdemeanor); being under the influence of a controlled substance not prescribed by a licensed practitioner (Health & Saf. Code, § 11550, subd. (a); a misdemeanor); and possession of marijuana. (Health & Saf. Code, § 11357, subd. (b); a misdemeanor.) The jury also found true special allegations that defendant committed two of his most recent offenses while out on bail for two of the earlier ones. (Pen. Code, § 12022.1.) After trial, the court referred the matter to the probation department for a presentencing report.

The report identified factors relating to defendant's eligibility for probation under California Rules of Court,² rules 4.413 and 4.414 as well as sentencing factors to be considered under rules 4.421 and 4.423. There were no provisions under rule 4.413(a) (eligibility for probation) limiting or prohibiting probation for defendant. Factors under rule 4.414(b) (criteria related to the defendant) which the probation officer considered favorable to a grant of probation included that defendant was not presently on parole, that he was willing and able to comply with the terms of probation, and that he was remorseful. (Rule 4.414(b)(3), (4) & (7).) Unfavorable factors were that defendant's record revealed a pattern of increasingly serious criminal conduct and that his prior performance on probation or parole had not been satisfactory. (Rule 4.414(b)(1) & (2).)

Sentencing factors under rule 4.421 included that the crime involved a large quantity of contraband, that defendant's prior convictions as an adult were numerous and of increasing seriousness, and that his prior performance on probation or parole had been unsatisfactory. (Rule 4.421 (a)(10), (b)(2) & (5).) The report identified no mitigating circumstances under rule 4.423 and concluded that if defendant were to be sentenced to state prison, "the upper term of imprisonment appears justified." Because defendant had lied at trial the probation officer opined that "one could only hope that he is sincere about wanting help with his serious drug addiction." The seriousness of defendant's offense, the fact that he committed additional crimes while he was out on bail, the large quantity

² All further rule references will be to the California Rules of Court unless otherwise indicated.

[footnote continued on next page]

of drugs involved – coupled with his two prior violations of probation – warranted serious consideration of a state prison commitment. However, since defendant had ultimately completed his two prior grants of probation, it also appeared to the probation officer that defendant “should be granted one final opportunity on formal probation, since this is his first felony matter.”

As the sentencing hearing opened on November 4, 2005, the court remarked, “And, just for the record, I’ll tell you that the court has read and considered the Probation Report, so you may proceed.” Defense counsel then submitted on what he characterized as the probation officer’s recommendation for probation and discussed an off-the-record chambers conference in which the court had apparently indicated it was not inclined to grant probation. Counsel argued that given defendant’s young age (mid-30’s), his “insignificant” criminal record, the fact that he had never been to state prison or convicted of a felony before, and his drug addiction, probation was the appropriate disposition. In the alternative, counsel urged the court to refer defendant to the California Rehabilitation Center (CRC) for treatment pursuant to the provisions of Welfare and Institutions Code section 3051. If the court was not inclined either to grant probation or to refer defendant to CRC, counsel requested that he be sentenced to the low prison term. Notwithstanding the probation officer’s conclusion that there were no mitigating factors in the case, counsel asserted that there were in fact two: defendant was suffering from a

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physical addiction to drugs, and he had admitted his wrongdoing at an early stage of the proceedings. “It’s just the sales charge that [defendant] tried to skirt around, unfortunately, with his testimony.”

The prosecutor argued for an upper-term sentence. Under rule 4.423, defendant’s drug addiction should be considered an aggravating, not a mitigating, factor. In addition, defendant had wasted past opportunities to address his drug problem; while out on bail he had picked up a drug-selling charge; he had committed perjury at trial; his criminal actions were increasing in severity; and he had been arrested, most recently, with a large amount of methamphetamine and a scale in his possession. Defendant should not be “rewarded” by being sent to CRC. He had already had a year in county jail to get over his addiction and it was now time to punish him with a prison sentence.

After argument, the court commented, “Very well. Thank you. Well, you both gave good arguments. It’s difficult to disagree, but I feel that the defendant did the things the prosecutor mentioned and, of course, the defense, so the Court finds that the maximum five years would be imposed.” After sentencing defendant to the upper term of four years on the principal offense for the 2004 sales conviction (count 6), plus one consecutive year for the 2003 sales offense (count 2), and a variety of stayed or concurrent terms on six other charges, the court dismissed a two-year enhancement alleged with count 9, and made some additional comments. “I am taking into consideration the various things that have happened. [¶] You appear to be -- Mr. Zaragoza, you appear to be ignoring the law. You do a little thing first, and it gets a little

worse, then you're apprehended out on bail, and you did another thing a little worse.

And it continues to get worse, and I want that trend reversed. I want you to stay out of prison or jail or anywhere constantly. That's why I'm imposing the sentence."

After further discussion regarding defendant's custody credits and the status of his driver's license, the prosecutor again addressed the Court: "And, your Honor, if I may just state for the record, in order to justify giving [the] upper term, the Court would need to find circumstances in aggravation. I would request that the Court rely on Rule 4.421 Subdivision A Subsection 10; the crime involved a large quantity of contraband; 4.421 Subdivision 1 Subsection 2, the defendant's convictions are numerous and increasing in seriousness; and, Rule 4.421 Subdivision B Subsection 5, his prior performance on probation is unsatisfactory, and the fact that the Court was inclined to suspend the sentence for the out-on-bail allegation in order to give an enhanced punishment under Count 6, the principal term for the 11379." The court replied: "Very well, the Court so finds as stated by the district attorney." Lastly, the court told defendant, "you brought it on yourself, and you have to pay for it."

DISCUSSION

A. *Standard of Review and Probation Decisions*

We review a trial court's grant or denial of probation for abuse of discretion. "Probation is generally reserved for convicted criminals whose conditional release into society poses minimal risk to public safety and promotes rehabilitation. [Citations.] The sentencing court has broad discretion to determine whether an eligible defendant is

suitable for probation [Citations.]” (*People v. Carbajol* (1995) 10 Cal.4th 1114, 1120 (*Carbajol*)). The decision will not be disturbed on appeal “except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316.) Although courts are required to consider the recommendations in the probation report and often follow those recommendations, they are not bound to do so. (*People v. Welch* (1993) 5 Cal.4th 228, 234.) However, the imposition of a prison term is a sentencing choice requiring that the trial court understand the nature of its discretionary power and state the reasons for its choice pursuant to Penal Code section 1170, subdivision (c). (*People v. Leung* (1992) 5 Cal.App.4th 482, 506.) “The court shall state the reasons for its sentence choice on the record at the time of sentencing.” (Pen. Code, § 1170, subd. (c).)

A trial court’s discretion in granting or denying probation is limited by the criteria set forth in rule 4.414 (formerly rule 414). (*People v. Golliver* (1990) 219 Cal.App.3d 1612, 1617.) These criteria include, among others: the nature, seriousness, and circumstances of the crime (rule 4.414(a)(1)); the defendant’s prior record of criminal conduct, including the recency and frequency of prior crimes (rule 4.414(b)(1)); the defendant’s past performance on probation or parole (rule 4.414(b)(2)); the defendant’s willingness and ability to comply with the terms of probation (rule 4.414(b)(4)); and whether the defendant is remorseful (rule 4.414(b)(7).)

Although the trial court's statements explaining its choice of sentence were minimal in this case, there is adequate evidence in the record that it used the criteria outlined in rule 4.414 in reaching the decision not to grant probation.

Firstly, the court specifically drew attention to the fact that it had read and considered the probation officer's report, which contained facts against, as well as for, a grant of probation. On the one hand, defendant's record indicated a pattern of increasingly serious criminal conduct and his prior performance on probation or parole had not been satisfactory. (Rule 4.414 (b)(1) & (2).) On the other hand, defendant was not presently on parole, he was willing and able to comply with the terms of probation, and he was remorseful. (Rule 4.414 (b)(2), (3), (4) & (7).) However, defendant's appearance of remorse and willingness to work on his drug addiction – which the probation officer could “only hope” was sincere – were undermined by his demonstrated willingness to lie under oath, a fact that his own counsel had admitted and that the court indicated it believed.

Secondly, the court personally emphasized defendant's prior record and his poor performance on parole in its strong statement: “Mr. Zaragoza, you appear to be ignoring the law. You do a little thing first, and it gets a little worse, then you're apprehended out on bail, and you did another thing a little worse. And it continues to get worse, and I want that trend reversed That's why I'm imposing the sentence.”

Thirdly, the nature and seriousness of defendant's offenses, and the recency and frequency of his crimes, demonstrated his unsuitability for parole. (Rule 4.414 (a)(1) &

(b)(1.) The very fact that defendant was arrested twice within one year for driving under the influence of drugs and alcohol demonstrated his willingness to compromise public safety. He was someone who, as the court pointed out, had engaged in a continuing pattern of disregard for the law by committing consecutively worse offenses; he was not a convicted criminal who could be conditionally released into society with safety.

(*Carbajol, supra*, 10 Cal.4th at p. 1120.)

Finally, despite the probation report's conclusion that defendant was "remorseful," we see his chronic dishonesty as evidence to the contrary. Defendant had not been "totally cooperative and honest with both the police and the court" and he did not merely lie about his "intent" or try to "skirt around" the sales charge, as defense counsel argued. He openly lied to the police at the time of his arrest by first telling them the drugs in his car were not his, and he lied directly to the court under oath at trial – not just once but at least four separate times – when he repeatedly denied selling drugs. Telling lies about one's crimes and denying the truth of the charges are not the actions of a remorseful person. The court did not abuse its discretion in so concluding.

B. Standard of Review and Term Selection

As with the decision to grant or deny probation, a trial court's discretion to weigh aggravating and mitigating circumstances in selecting a prison sentence is broad, and an appellate court does not substitute its judgment on such matters. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1582; *People v. Calderon* (1993) 20 Cal.App.4th 82, 87.) In explaining its choice, the court is not required to discuss each factor independently.

(*People v. Evans* (1983) 141 Cal.App.3d 1019, 1022.) Moreover, “the finding of even one factor in aggravation is sufficient to justify the upper term.” (*People v. Steele* (2000) 83 Cal.App.4th 212, 226, citing *People v. Cruz* (1995) 38 Cal.App.4th 427, 233-234.) ““A trial court may minimize or even entirely disregard mitigating factors without stating its reasons.”” (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637 (*Zamora*), quoting *People v. Salazar* (1983) 144 Cal.App.3d 799, 813.) Unless the record affirmatively reflects otherwise, the court will be deemed to have considered the relevant criteria enumerated in the sentencing rules. (Rule 4.409; *Zamora, supra*, at p. 1637.) Objectives of sentencing include, among others: protecting society, punishing the defendant, and encouraging the defendant to lead a law abiding life in the future. (Rule 4.410(a)(1), (2) & 3.)

Defendant argues that the trial court should have based his sentence on the offense of which he was convicted and the sentencing factors mandated in the California Rules of Court. It is obvious to us that the court did exactly that. It considered the relevant criteria in the sentencing rules in selecting an appropriate term for his nine convictions, explicitly applying them so as to protect society, punish defendant, and encourage him to lead a law abiding life in the future.

As to protecting society, the prosecution here was correct when it reminded the court of the holding in the 1987 California case *People v. Reyes* (1987) 195 Cal.App.3d 957 (*Reyes*). *Reyes* held that chronic drug addiction combined with a failure to deal with the problem is an aggravating, not a mitigating, sentencing circumstance under rule

4.423, largely because the addiction endangers society. “For example, the felony drunk driver who is suffering from an uncontrolled alcoholism should be sentenced to a longer term, not a shorter one, in order to prevent him from driving under the influence again.” (*Reyes, supra*, at pp 962-963.) Similar reasoning applies to the drug addict “who shows little incentive or ability to deal with his drug abuse problem.” (*Ibid.*) Defendant was severely addicted to drugs and alcohol and had done little to address his problem. As evidenced by his second arrest, he continued to drive and endanger the public, becoming steadily involved in consecutively worse behavior. In the absence of affirmative evidence to the contrary, and even though it did not discuss this factor independently, we assume the court took it into account when it decided upon defendant’s sentence. (Rule 4.409; *People v. Evans, supra*, 141 Cal.App.3d at p. 1022.)

Nor did the court abuse its discretion by adopting the prosecutor’s comprehensive and well-organized statement of aggravating circumstances under rule 4.421. All of the adopted statements were true. Defendant’s crime did involve a large quantity of contraband: 22 grams of methamphetamine (rule 4.421(a)(10)); his convictions were numerous (nine) and had increased in seriousness: from simple possession to sales (rule 4.421(b)(2)); his prior performance on probation was unsatisfactory in that he committed more crimes while on release from custody and twice failed to appear in court at appointed times. (Rule 4.421(b)(4) & (5).)

That the court also felt defendant deserved punishment and needed encouragement to be law abiding in the future, proper goals of the sentencing statutes, rule 4.410(a)(1),

(2) & (3), were clear: “You appear . . . to be ignoring the law. . . . [A]nd it continues to get worse, and I want that trend reversed. I want you to stay out of prison or jail or anywhere That’s why I’m imposing the sentence.” “[Y]ou brought it on yourself, and you have to pay for it.”

C. The Blakely Issue

Defendant’s final argument is that his aggravated term is unconstitutional. We disagree.

Invoking the United States Supreme Court’s decision in *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*), defendant insists that his sentence violates due process because the factors the court used to select the upper term were not found by a jury nor proven beyond a reasonable doubt. Respondent replies that this court is bound to follow the California Supreme Court’s decision last year in *People v. Black* (2005) 35 Cal.4th 1238 (*Black*).

Respondent is correct about this court’s duty to follow *Black*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Even were we not so bound, however, we would not find defendant’s sentence a violation of *Blakely*. This is because at least one of the factors the court used to select the upper term – and it only needed one (*People v. Steele, supra*, 83 Cal.App.4th at p. 226) – was contained in the special allegation found true by the jury. Defendant committed his most recent crimes while out on bail for older ones. The court’s choice of the upper term did not violate his right to due process or trial by jury.

DISPOSITION

The judgment is affirmed.

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/s/ MILLER
J.

We concur:

/s/ HOLLENHORST
Acting P. J.

/s/ McKINSTER
J.