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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JAIME MUNDO JULIAN,

Defendant and Appellant.

B280043

(Los Angeles County
Super. Ct. No. BA302360)

APPEAL from a judgment of the Superior Court of Los Angeles County. C.H. Rehm, Jr., Judge. Affirmed in part, reversed in part, and remanded.

Juliana Drous, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jaime Mundo Julian contends that the trial court abused its discretion in revoking defendant's probation, and that the court erred in ordering the execution of the previously suspended sentence on the basis of violations which occurred after the expiration of the probationary period. Finding no abuse of discretion in revoking probation, we affirm that part of the judgment. However, we agree that the execution of sentence may have been based on unauthorized factors, and thus reverse the termination of probation, vacate the sentence, and remand with instructions.

BACKGROUND

In 2006, defendant pled guilty under a plea agreement to the following four felony counts: count 1, assault with intent to commit a felony in violation of Penal Code section 220¹; count 4, cutting a utility line in violation of section 591; and counts 5 and 6, corporal injury to a spouse in violation of section 273.5, subdivision (a). Among other consequences of his pleas, the prosecutor informed defendant that he would be deported, denied United States citizenship, and denied reentry into the United States.

In return for defendant's plea, the trial court dismissed three felony counts, imposed a sentence of eight years eight months in prison, suspended execution of the sentence, and placed defendant on formal probation for five years. Among other conditions of probation, the trial court ordered defendant to serve 365 days in County jail, with 210 days of combined custody and conduct credit; obey all laws, orders of the court, and instructions of the probation officer; report to the probation officer within 48 hours of release from custody; keep the probation officer apprised

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

of his address and telephone numbers at all times; complete a 52-week domestic violence course; have no contact with the victim or his son; provide a DNA sample; and pay specified fines totaling \$620.

In December 2006, the probation officer reported that defendant had been deported on November 2, 2006, had not reported to the probation department and had not paid any part of the \$620 in fines. Finding that defendant had failed to appear without sufficient excuse and had failed to contact the probation department, the trial court revoked defendant's probation and issued a bench warrant. In 2016, defendant was arrested under the warrant and appeared in court on November 7, 2016. The trial court noted that defendant had failed to appear in 2006 because he had been deported, and scheduled a formal probation violation hearing which went forward on December 19, 2016.

At the probation violation hearing, the parties stipulated that the report prepared by Deputy Probation Officer Ims [*sic*]² would be her testimony if she were called as a witness. As summarized by the trial court, the probation report alleged as follows: "It is alleged that [defendant] is in violation of his probation in that he failed to report to the probation department as ordered; he failed to pay any of his fines and fees, failed to attend or complete a court ordered domestic violence program and failed to keep the probation department advised of his work and home addresses and telephone numbers at all times." The report noted that defendant had been deported to Mexico on November 2, 2006, that on November 1, 2016, he may have violated section 148.9, by giving a false identification to peace officers, as well as Vehicle Code section 12500, subdivision (a), by

² The report was prepared by C. Mims, DPO. "Ims" was apparently a typographical error.

driving without a license, and that he illegally reentered the country after deportation. However the probation officer did not know when defendant returned to this country. The prosecution presented no other evidence and defendant did not testify.

Defendant filed a memorandum of points and authorities supporting his objection to the proceedings on the ground that the revocation of probation was unauthorized, as the prosecution had failed to demonstrate that a willful violation occurred within the probationary period. The court found that defendant had violated the terms of his probation in the following respects: failure to keep the probation officer advised of his work and home addresses and telephone numbers at all times; failure to enroll in or complete a domestic violence class; failure to pay any financial obligations or to make a showing that he was unable to do so; violation of section 148.9 and Vehicle Code section 12500, subdivision (a), on or about November 1, 2016; and illegally entering this country.

The trial court allowed defendant's wife and son to speak on his behalf. Defendant's son stated that defendant was a "good guy," had returned to help his family, and that he worked and paid rent. Defendant's wife stated that she had lived with defendant for the past 10 years, that he was a good person, and that she had never experienced aggression from him. His children from his ex-wife had lived with them for the last five or six years and they had a small child together. He was paying for his daughter's studies, but could no longer do so due to this situation.

The court revoked probation and ordered execution of the suspended sentence of eight years eight months in prison. Defendant filed a timely notice of appeal from the judgment.

DISCUSSION

I. Willful violation

Defendant contends that the trial court abused its discretion in revoking defendant's probation without evidence that he had willfully violated his probation by failing to report to the probation officer.

A court may summarily revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the person has violated any of the conditions of his or her supervision." (§ 1203.2, subd. (a).) "[A] summary revocation gives the court jurisdiction over and physical custody of the defendant and is proper if the defendant is accorded a subsequent formal hearing in conformance with due process. [Citation.] [¶] Therefore, after the summary revocation, the defendant is entitled to formal proceedings for probation revocation. The purpose of the formal proceedings is not to revoke probation, as the revocation has occurred as a matter of law; rather, the purpose is to give the defendant an opportunity to require the prosecution to prove the alleged violation occurred and justifies revocation. [Citation.]' [Citation.]" (*People v. Leiva* (2013) 56 Cal.4th 498, 505 (*Leiva*).)

Trial courts have "great discretion" in determining whether to revoke probation. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445.) Reviewing courts give "great deference" to the trial court's decision, and "bearing in mind that '[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court. [Citations.]' [Citation.]" (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.) "[O]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation. . . ." (*Rodriguez*, at p. 443.) "And the burden of demonstrating an abuse of the trial court's

discretion rests squarely on the defendant. [Citation.]” (*Urke*, at p. 773.) The trial court’s discretion is not abused where revocation is supported by substantial evidence. (*Id.* at pp. 772-773.)

“A court may not revoke probation unless the evidence supports ‘a conclusion [that] the probationer’s conduct constituted a willful violation of the terms and conditions of probation.’ [Citation.] Where a probationer is unable to comply with a probation condition because of circumstances beyond his or her control and [the] defendant’s conduct was not contumacious, revoking probation and imposing a prison term are reversible error. [Citation.]” (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295 (*Cervantes*); see also *People v. Zaring* (1992) 8 Cal.App.4th 362, 379 [unforeseen circumstances beyond defendant’s control].) A violation is not willful, for example, when the defendant is unable to appear in court due to deportation. (*Cervantes*, at p. 293; see also *People v. Galvan* (2007) 155 Cal.App.4th 978, 982 (*Galvan*) [physically unable to report to probation in person due to deportation].)

Here, defendant was ordered to report to the probation officer on the third floor of the courthouse within 48 hours of his release. It appears probable that defendant was deported from the jail or immediately upon release, as it occurred a few weeks after the court imposed 365 days in jail as a condition of probation, with 210 days custody credit. If so, defendant’s contention that revocation could not therefore be based upon this violation is well taken. (See *Galvan*, *supra*, 155 Cal.App.4th at p. 982.) And the probation revocation could not be justified by defendant’s failure to appear in court the day after his deportation. (See *Cervantes*, *supra*, 175 Cal.App.4th at p. 293.)

However, the trial court revoked probation not only because defendant failed to appear in court or report to the probation

department, but also because there had been no contact with the department at all. As respondent observes, other terms of probation required defendant to keep the probation officer advised of his addresses and telephone numbers, to enroll in or complete a domestic violence class, and to pay any of the financial obligations ordered. The court knew at the time of granting probation in 2006, that defendant would be deported, and defendant was so advised before he entered his plea and accepted the terms and conditions of probation. Defendant suggests that because he was not expressly told what to do upon deportation, he could not have been expected to comply with the terms. We disagree. Defendant's agreement to such terms, *knowing* that he would be deported, strongly suggests that he had some means to contact the probation department by mail, telephone, letter, or a third party such as his wife or his attorney, and that he implicitly agreed to provide his contact information, to begin meeting his financial obligations, and to at least inquire about domestic violence classes.

Quoting *Galvan, supra*, 155 Cal.App.4th at page 985, and *People v. Sanchez* (1987) 190 Cal.App.3d 224, 231 (*Sanchez*), defendant also contends that as a matter of law, “a convicted illegal alien felon, upon deportation, would be unable to comply with any terms and conditions of probation beyond the serving of any period of local incarceration imposed.” The quoted dictum was not urged in those cases as a ground to excuse a probationer from his promise to comply with the terms of probation. In *Sanchez*, the court was illustrating disadvantages to granting probation to such a defendant in the first instance. (*Sanchez, supra*, at p. 231.) In *Galvan*, the quote supported the court's determination that the defendant in that case *reasonably believed* he was excused from reporting. (*Galvan, supra*, at p. 985.) Here, no evidence of defendant's belief was presented, and if defendant

held such a belief, it cannot be said that it was reasonable, as he had been told he would be deported when he agreed to the terms.

Defendant contends that the trial court erred in finding a violation based on his failure to make required payments without a finding that his failure was willful or that he had the ability to pay. (See § 1203.2, subd. (a); *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1393-1394.) That requirement applies only to restitution,³ whereas the trial court imposed only fines and fees in this case. Under the due process clause of the Fourteenth Amendment, a trial court may not revoke an *indigent* defendant's probation for failure to pay either a fine or restitution "absent evidence and findings that the defendant was somehow responsible for the failure or that alternative forms of punishment were inadequate." (*Bearden v. Georgia* (1983) 461 U.S. 660, 665-666; see *People v. Cookson* (1991) 54 Cal.3d 1091, 1096.) However, there was no indication here that defendant was indigent, and as the trial court found, he did not claim an inability to pay the fines. Defendant was represented by private counsel, and according to the statements of his wife and son, he was working, paid the rent for his family, and paid for his daughter's education. Under such circumstances, we agree with respondent and the trial court that it was defendant's obligation to raise the issue of his inability to pay the fees. (Cf. *Whisenand*, at pp. 1395-1396.)

³ "Supervision shall not be revoked for failure of a person to make restitution imposed as a condition of supervision unless the court determines that the defendant has willfully failed to pay and has the ability to pay. Restitution shall be consistent with a person's ability to pay." (§ 1203.2, subd. (a).)

II. Termination of probation and execution of sentence

Defendant contends that the trial court had no authority to revoke probation and order execution of the previously suspended sentence on the basis of violations which did not occur *during* the probationary period.

“A probation violation does not automatically call for revocation of probation and imprisonment. [Citation.] A court may modify, revoke, or terminate the defendant’s probation upon finding the defendant has violated probation. (§ 1203.2, subds. (a), (b)(1).) . . . [U]pon finding a violation of probation and revoking probation, the court has several sentencing options. [Citation.] It may reinstate probation on the same terms, reinstate probation with modified terms, or terminate probation and sentence the defendant to state prison. [Citations.] [¶] If the court decides to reinstate probation, it may order additional jail time as a sanction. [Citation.] If, instead, the court decides to terminate probation and send the defendant to state prison, . . . [and] if the court originally imposed a sentence and suspended *execution* of it, . . . the court must order that imposed sentence into effect. [Citations.]” (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420-1421 (*Bolian*).)

The trial court may not, however, impose a new term of probation or terminate probation and order execution of the suspended sentence based on events that occurred after the expiration of the probationary period. (See *Leiva, supra*, 56 Cal.4th at pp. 502, 515-518.) Under section 1203.2, subdivision (a), summary revocation within the probationary period serves to toll the running of the period of probation, in order to preserve the trial court’s jurisdiction to hold a formal probation violation hearing after probation would otherwise have expired, but only “with regard to a violation that was alleged to have occurred *during* the probationary period.” (*Leiva, supra*, at pp. 514-515.)

Thus, the trial court was not authorized to terminate probation and sentence defendant based upon events occurring after defendant's five-year probationary term expired in 2011. It appears that the trial court did make it clear that all defendant's probation violations occurred in 2006, and the court expressly enumerated defendant's failure to keep the probation department advised of his contact information, to enroll in a domestic violence class, or to meet any financial obligations. However, the court then went on to say: "And it appears that you also violated Penal Code section 148.9 on or about November 1st, 2016 by providing false identification to a peace officer. You were also at that time allegedly in violation of Vehicle Code section 12500 [subdivision (a)], driving without a license. Apparently you are also in violation of federal law by illegally entering this country. So having found you in violation of your probation now the court has to consider an appropriate sentence. You were given and agreed to eight years and eight months in state prison."

Respondent agrees that there was no evidence of when defendant returned to this country and thus no violation of probation could be based upon that offense or the offenses for which defendant was arrested in 2016. He argues, however, that so long as the court properly exercised its discretion by revoking probation based upon permissible factors, the judgment should be affirmed. Respondent's argument begs the question whether, *after* revoking probation, the trial court improperly relied, in whole or in part, on unauthorized factors in deciding whether to terminate probation and order the suspended sentence to be executed.

Reinstating or refusing to reinstate probation is a discretionary sentencing choice. (See *Bolian, supra*, 231 Cal.App.4th at p. 1420.) A defendant is entitled to a sentence that reflects the trial court's exercise of discretion based on

legally permissible factors. (See *People v. Jones* (2007) 157 Cal.App.4th 1373, 1383.) Despite broad sentencing discretion, an abuse of discretion will be found if the trial court “relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. [Citations.]” (*People v. Sandoval* (2007) 41 Cal.4th 825, 847 [factors in mitigation or aggravation]; see also *People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 976-977 [reduction of “wobbler” offense to a misdemeanor].) “[W]hen the record indicates the court misunderstood or was unaware of the scope of its discretionary powers, we should remand to allow the court to properly exercise its discretion. [Citations.]” (*Bolian, supra*, at p. 1421; see also *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13.)

As it appears from the trial court’s comments that it relied in whole or in part on the improper factors of activity in 2016 in exercising its sentencing discretion, we will remand to give the court the opportunity to exercise its discretion either to reinstate probation or again terminate probation and order execution of sentence, based solely upon permissible factors. Like the court in *Bolian*, “[w]e do not intend to express an opinion on the choice between the two.” (*Bolian, supra*, 231 Cal.App.4th at p. 1422.)

DISPOSITION

That part of the judgment revoking defendant's probation is affirmed, but that part of the judgment terminating probation is reversed and vacated. The matter is remanded to the trial court with directions to exercise its discretion whether to reinstate probation (either on the same terms or on modified terms), or terminate probation and order execution of the suspended sentence.

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_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

* Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.