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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

VICTORIANO RODRIGUEZ-
GONZALEZ,

Defendant and Appellant.

2d Crim. No. B296423
(Super. Ct. No. NA105459)
(Los Angeles County)

Victoriano Rodriguez-Gonzalez pled no contest to one count of second degree robbery. (Pen. Code,¹ §§ 211, 212.5, subd. (c).) The trial court sentenced him to five years in state prison, suspended execution of the sentence, and placed him on three years of formal probation. The court later terminated probation and ordered Rodriguez-Gonzalez to serve his five-year prison sentence. It also ordered him to pay a \$300 restitution fine

¹ All further unlabeled statutory references are to the Penal Code.

(§ 1202.4), \$40 court operations assessment (§ 1465.8), and \$30 court facilities assessment (Gov. Code, § 70373).

Rodriguez-Gonzalez contends the trial court erred when it terminated probation. He also contends the court erroneously imposed the restitution fine and court assessments without determining that he had the ability to pay. We remand the case with directions to stay execution of the fine and to strike the assessments, and otherwise affirm.

FACTUAL AND PROCEDURAL HISTORY

In December 2016, Rodriguez-Gonzalez entered a grocery store, picked up a package of shoe insoles and bottle of liquor, hid them under his clothes, and attempted to leave without paying. A security guard confronted him as he left the store and told him to return the items. Rodriguez-Gonzalez refused. He slapped the security guard across the face, punched him in the mouth, and ran.

The following month, Rodriguez-Gonzalez pled no contest to second degree robbery. The trial court sentenced him to five years in prison; ordered him to pay a \$300 restitution fine, \$40 court operations assessment, and \$30 court facilities assessment; suspended execution of the sentence; and placed him on three years of formal probation. As terms and conditions of probation, the court ordered Rodriguez-Gonzalez to serve four months in jail, obey all laws, and refrain from drinking alcohol.

Rodriguez-Gonzalez failed to report to his probation officer several times over the next two months. He was caught drinking alcohol and arrested for resisting a police officer. His probation officer recommended that the trial court revoke and terminate probation, and lift the suspension on Rodriguez-Gonzalez's five-year prison sentence.

At a July 2017 hearing, Rodriguez-Gonzalez admitted that he had violated probation. The trial court revoked probation, but then reinstated it and ordered Rodriguez-Gonzalez to complete an inpatient drug treatment program. It warned him that “[a]ny violation, I don’t care what, any violation of the program, of the rules, probation, anything, the law, five years, and you waive your back time.” Rodriguez-Gonzalez said that he understood, and waived 118 days of custody credits in exchange for reinstatement of his probation.

Six weeks later, Rodriguez-Gonzalez was dismissed from his drug treatment program after he returned from a field trip under the influence of alcohol and methamphetamine. After his dismissal, he failed to report to his probation officer. He was later arrested for having an open container of alcohol in public.

The trial court revoked Rodriguez-Gonzalez’s probation in October. The probation officer again recommended that the court lift the suspension on his prison sentence, but the court reinstated probation and ordered Rodriguez-Gonzalez to complete a six-month residential treatment program with Salvation Army. In exchange, he waived 162 days of custody credits.

At the conclusion of the hearing, Rodriguez-Gonzalez was transported from court to the Salvation Army treatment program. The program did not accept him, however, because he was taking prescription medications for schizophrenia. He returned to Long Beach, where he was living on the street. His probation officer told him to contact her every day until he got into another treatment program.

Rodriguez-Gonzalez did not contact his probation officer for several weeks. When he did call her, he said he had

not yet enrolled in treatment. The officer told him to report to court the next day, explain that he had not enrolled in a program, and then contact her again after he had done so. Rodriguez-Gonzalez failed to contact the officer. She had no contact with him until police picked him up on a warrant in July 2018.

At the conclusion of a January 31, 2019 hearing, the trial court terminated probation. The court acknowledged that Rodriguez-Gonzalez had a mental illness, but it had given him multiple opportunities to comply with the terms and conditions of probation yet he failed to do so. It did not “see any other choice[]” but incarceration. It lifted the suspension on Rodriguez-Gonzalez’s five-year prison sentence, and ordered him to pay the restitution fine and court assessments previously imposed.

DISCUSSION

Probation termination

Rodriguez-Gonzalez contends the trial court erred when it terminated probation and lifted the suspension on his five-year prison sentence. We disagree.

“Probation 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.” (*People v. Pinon* (1973) 35 Cal.App.3d 120, 123.) A court may revoke probation “if the interests of justice so require and the court, in its judgment, has reason to believe . . . that the [defendant] has violated any of the conditions of [their] supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses.” (§ 1203.2, subd. (a).) But “[t]he decision to revoke probation does not trigger automatic consequences.” (*People v. Jones* (1990) 224 Cal.App.3d 1309, 1315.) Rather, it gives the revoking court “the option to reinstate

probation on the same or modified terms, or to terminate probation and commit the [defendant] to prison.” (*Ibid.*)

When deciding whether to terminate probation, the trial court should “consider the nature of the violation and the defendant’s past performance on supervision.” (Cal. Rules of Court, rule 4.435(a).) It should also consider what the defendant’s performance “portend[s] for future conduct” and whether they “can conform [their] behavior to the parameters of the law.” (*People v. Beaudrie* (1983) 147 Cal.App.3d 686, 691.) We review a decision to terminate probation for abuse of discretion. (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1421.)

There was no abuse of discretion here. Rodriguez-Gonzalez accrued multiple probation violations in the two years between his sentencing and the trial court’s decision to terminate probation. The court reinstated probation twice during those two years, giving Rodriguez-Gonzalez chances to comply with its terms and conditions. His multiple failures to do so showed that he could not conform his behavior to the parameters of the law. The court thus determined that it had no choice other than to terminate probation. That was well within the court’s discretion. (See, e.g., *People v. Bauer* (2011) 193 Cal.App.4th 396, 400-401 [no abuse of discretion to terminate probation for defendant with “abysmal” probation record].)

Rodriguez-Gonzalez counters that his rejection by the Salvation Army treatment program was out of his control, and thus did not provide a basis for the trial court to terminate probation. But the court did not base its termination decision on the Salvation Army’s rejection alone. After Rodriguez-Gonzalez’s rejection, the probation officer told him to contact her every day until he got into a program. He did not do so for several weeks.

When he finally did, he had not enrolled in a drug treatment program. He then ignored the officer's instructions to inform the trial court about his situation, and continued to accumulate probation violations and arrests. All of this history factored into the court's decision to terminate probation.

Rodriguez-Gonzalez also argues the trial court's warning that "any violation of the program, of the rules, probation, anything, the law, five years, and you waive your back time" shows that it did not consider the circumstances of his violations before terminating probation, as required. But the court gave this warning the *first* time it revoked probation, in July 2017. It then reinstated probation, revoked it again, and reinstated it again before it finally terminated it. And at each revocation hearing the court discussed the circumstances of Rodriguez-Gonzalez's violations, as was required. (See *People v. Zaring* (1992) 8 Cal.App.4th 362, 378 [court's decision to revoke and terminate probation "must be based upon the facts before it"].) That was not an abuse of discretion.

Restitution fine and court assessments

Rodriguez-Gonzalez contends the trial court's imposition of the restitution fine and court assessments without determining that he had the ability to pay them violated his due process rights. We agree. (*People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1168, 1171-1172 (*Dueñas*).)

Like the defendant in *Dueñas*, Rodriguez-Gonzalez is homeless. And there is no other information in the record regarding his financial status. Given the unique circumstances of this case, it is reasonable to infer that Rodriguez-Gonzalez lacks the ability to pay the restitution fine and court assessments. To avoid an unnecessary hearing on remand, we will direct the trial

court to stay enforcement of the fine and strike the assessments.
(*Dueñas, supra*, 30 Cal.App.5th at pp. 1172-1173.)

DISPOSITION

The case is remanded to the trial court with directions to: (1) enter an order staying enforcement of the \$300 restitution fine, and (2) strike the \$40 court operations assessment and the \$30 court facilities assessment. The clerk of the court shall prepare an amended abstract of judgment and forward a copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

TANGEMAN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Jesus I. Rodriguez, Judge

Superior Court County of Los Angeles

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