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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. KENT LESOPRAVSKY, Defendant and Appellant.	B281733 (Los Angeles County Super. Ct. No. PA077147)

APPEAL from an order by the Superior Court of Los Angeles County, Teri Schwartz, Judge. Affirmed.

Linda L. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

This is appellant Kent Lesopravsky's second appeal of his sentence. We affirm the resentencing order.

FACTUAL AND PROCEDURAL SUMMARY

1. THE PRESENT OFFENSES AND RELATED PROCEEDINGS.

We summarize only the facts and procedural background relevant to review. The record (the opinion in appellant's previous appeal)[1] reflects as follows. About 6:40 p.m. on May 14, 2013, appellant led police on a high-speed pursuit. During the pursuit, appellant committed numerous traffic violations in heavy traffic on surface streets. He then drove onto the 405 freeway where he swerved in and out of traffic during rush hour, reaching speeds in excess of 80 miles per hour, and threw a pipe out of the car's window. He eventually exited the freeway at Nordhoff, stopped, and police arrested him. There were 390 grams of marijuana on the car's floorboard and seat, and a methamphetamine pipe on appellant's person.

On June 23, 2014, appellant entered no contest pleas and admissions.[2] On July 1, 2014, the court sentenced appellant to prison for eight years on count 2 (the four-year upper term, doubled by the strike) with a concurrent term of four years on count 1 (the two-year middle term, doubled by the strike).

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[1] (*People v. Kent Lesopravsky* (Mar. 12, 2015, B257343) [nonpub. opn.].)

[2] Appellant entered no contest pleas to count 1 – evading an officer with willful disregard (Veh. Code, § 2800.2, subd. (a)) and count 2 – transporting marijuana (Health & Saf. Code, § 11360, subd. (a)) with admissions he suffered a strike (Pen. Code, § 667, subd. (d)), served a prior prison term (Pen. Code, § 667.5, subd. (b)), and was released on bail or on his own recognizance when he committed the offenses (Pen. Code, § 12022.1).

2. APPELLANT'S PETITION FOR RESENTENCING AND RELATED PROCEEDINGS.

On November 30, 2016, appellant filed a Health and Safety Code section 11361.8, subdivision (a) (Proposition 64)[3] petition for resentencing on count 2. On December 22, 2016, the court considered the petition and, pursuant to stipulation, reduced appellant's conviction on count 2 to a misdemeanor. On February 28, 2017, the court sentenced appellant to prison for six years on count 1 (the three-year upper term, doubled by the strike) with a six-month concurrent term on count 2 with credit for time served.

Appellant argues the trial court, by resentencing appellant to the upper term on count 1, abused its discretion. We reject the argument.

DISCUSSION

THE COURT PROPERLY RESENTENCED APPELLANT TO THE UPPER TERM ON COUNT 1.

1. No sentencing error occurred.

" 'A trial court's decision to impose a particular sentence is reviewed for abuse of discretion and will not be disturbed on appeal "unless its decision is so irrational or arbitrary that no reasonable person could agree with it." ' " (*People v. Nicolas*

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[3] "Proposition 64 [effective, November 9, 2016, also] added Health and Safety Code section 11361.8, which allows a 'person currently serving a sentence for a conviction' [for specified marijuana-related crimes] to petition the trial court to recall the person's sentence and resentence the person in accordance with the amended statute. [Citation.] If an inmate files such a petition and satisfies the statutory criteria for relief, 'the court shall grant the petition . . . unless the court determines that granting the petition would pose an unreasonable risk of danger to public safety.' " (*People v. Rascon* (2017) 10 Cal.App.5th 388, 392–393.)

(2017) 8 Cal.App.5th 1165, 1182 *(Nicolas)*.) It is the burden of the complaining party to demonstrate the sentencing choice was irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376.)

Lesopravsky maintains that the trial court abused its discretion in part because "[t]he court's reliance on circumstances that *the conduct posed a danger to people and property* constituted an improper basis to impose the high term because felony evading requires driving a vehicle in 'a willful or wanton disregard for the safety of persons or property', and the facts show nothing beyond violations of traffic laws."[4] (Italics added.) Lesopravsky principally relies on California Rules of Court, former rule 4.420(d), which states in relevant part: "A fact that is an element of the crime upon which punishment is being imposed may not be used to impose a greater term."

Case law, however, provides, "where the facts surrounding the charged offense exceed the minimum necessary to establish the elements of the crime, the trial court can use such evidence to aggravate the sentence." (*People v. Castorena* (1996) 51 Cal.App.4th 558, 562.)

The trial court expressly found that this was no ordinary evading arrest. At the sentencing hearing, Lesopravsky's counsel urged the court to impose the middle term on count 1, arguing that there was "not much aggravation." In response, the court replied, "[t]he only problem is, [defense counsel], that the present

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[4] Respondent maintains appellant forfeited this argument by failing to raise the issue below. There is no need to reach the forfeiture issue as we resolve appellant's claim on the merits to forestall a claim of ineffective assistance of counsel. (See *People v. Turner* (1990) 50 Cal.3d 668, 708.)

case involves a high-speed pursuit in an attempt to get rid of the evidence that was in the vehicle. And that put the lives of all the people on that freeway and on the streets in significant danger. And someone could have been and luckily wasn't killed or hurt." The court later stated, "the conduct in this case was egregious. Not the marijuana conduct, but the totality of the occurrence. The conduct; the police approaching; the defendant fleeing; and the high-speed pursuit that ensued while he tried to get rid of the evidence against him." Ultimately, the resentencing court concluded that appellant's "conduct overall . . . warranted the high term." Substantial evidence supported the court's finding that appellant's conduct constituted a valid aggravating factor. (Cal. Rules of Court, former rule 4.408(a).)

Appellant attempted to flee from police during a high-speed pursuit through city streets and on a freeway. During the pursuit, appellant made an unsafe right turn onto Devonshire in violation of Vehicle Code section 22107. On the freeway, he drove at unsafe speeds, over 80 miles per hour, in violation of Vehicle Code section 22350, and made at least two unsafe lane changes, swerving in and out of traffic, in violation of Vehicle Code section 21658. While driving unsafely in traffic on the freeway, he drove all the way to the shoulder. These were *four separate* violations assigned a traffic violation point count and implicating "safe operation of a motor vehicle upon the highway" within the meaning of Vehicle Code section 12810, subdivision (f) (see *People v. Leonard* (2017) 15 Cal.App.5th 275, 280–282), i.e., more than the *three* violations required by Vehicle Code sections 2800.2, subdivision (b) and 12810.

Diminishing further whatever control appellant had of his vehicle, he threw out of its passenger window what appeared to be a pipe. The manner in which appellant drove and the four qualifying traffic violations constituted facts exceeding the minimum necessary to establish appellant drove in a "willful or wanton disregard for the safety of persons or property" under Vehicle Code sections 2800.2, subdivision (b) and 12810.

The trial court was not obligated to ignore the subsequent driving in a "willful or wanton disregard for the safety of persons or property" within the meaning of Vehicle Code section 2800.2, subdivision (a); otherwise no aggravation could occur no matter how long such a pursuit continued or how many traffic offenses ensued. Thus, the trial court did not engage in impermissible dual use of facts to impose the sentence on count 1 and the upper term on that count, nor did the court improperly consider the dangerousness of appellant's conduct when imposing said upper term.

2. Any sentencing error was not prejudicial.

Even if the court erred by relying on the circumstances of the offense to impose the upper term on count 1, it does not follow the case must be remanded for resentencing. A single aggravating circumstance is sufficient for a trial court to select the upper term. (*Nicolas, supra,* 8 Cal.App.5th at p. 1182.) The court expressly stated multiple factors supported its reason for imposing the upper term.

The court stated, "the reason, again, for the high term . . . he has been to *state prison*. He has been *on probation*. At the time of the crime he was on *felony probation*." (Italics added.) The court continued, "The conduct in this case did pose a threat of harm to the community and the public by virtue of his reckless

conduct. I did mention at the time that *he was on bail*. I don't recall if he was. I thought he had the two cases and he was on bail.[5] But in any event, *I think there are enough factors* to justify and warrant the high term which was, in fact, the way the court viewed the case in July of 2014." (Italics added.) Appellant's criminal history and being out on bail when he committed this offense each, alone, would support the court's imposition of the upper term.

Appellant also argues that his "criminal history does not present *sufficiently* aggravating circumstances to support the imposition of the high term." (Italics added.) We reject the argument. There is no dispute appellant had been to prison (Cal. Rules of Court, rule 4.421(b)(3)) and was on felony probation at the time of the present offenses (*id.*, (b)(4)).[6]

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[5] Appellant, in fact, admitted the Penal Code section 12022.1 enhancement allegation in this case that he was released on bail or on his own recognizance when he committed the present offenses, but the court did not impose the enhancement. The fact he was on bail or on his own recognizance when he committed the present offenses was a valid aggravating factor. (*People v. Combs* (1986) 184 Cal.App.3d 508, 511.)

[6] The probation report reflects appellant was sentenced to prison in February and June 1994 for felony violations of Penal Code sections 475, subdivision (a) and 459, respectively, and, in 2005, for a felony violation of Health and Safety Code section 11377, subdivision (a). On July 13, 2010, appellant was placed on three years' probation for felony obstructing or resisting an executive officer (Pen. Code, § 69; case No. 10WF0923) and he was on probation in that case when he committed the present offenses.

Further, other aggravating factors were available. At resentencing, the court could have imposed consecutive instead of concurrent sentences on counts 1 and 2 (Cal. Rules of Court, rule 4.421(a)(7)). The probation report reflects appellant suffered four felony convictions and 10 misdemeanor convictions, i.e., he had numerous adult convictions (*id.*, (b)(2)). The report also reflects appellant committed new offenses while on probation granted in numerous cases (*id.*, (b)(5)).

In light of the above, even if the trial court erred by resentencing appellant to the upper term on count 1, any error was harmless. (See *People v. Avalos* (1984) 37 Cal.3d 216, 233; *People v. Watson* (1956) 46 Cal.2d 818, 836.) It is not reasonably probable that, following a remand, the court would do anything other than simply realign available aggravating factors to impose an upper term on count 1. (Cf. *People v. Edwards* (1993) 13 Cal.App.4th 75, 80; *People v. Porter* (1987) 194 Cal.App.3d 34, 39.) None of appellant's arguments compels a contrary conclusion.

DISPOSITION

The resentencing order is affirmed.

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KALRA, J.*

We concur:

EDMON, P. J.

EGERTON, J.

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