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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

TIVAL KARON WRIGHT,

Defendant and Appellant.

B275968

(Los Angeles County
Super. Ct. No. LA080122)

APPEAL from a judgment of the Superior Court of Los Angeles County, Martin Herscovitz, Judge. Affirmed.

Laurie Wilmore, 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, Paul M. Roadarmel, Jr., and Allison H. Chung, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

A trial court may consider criminal conduct in a probation revocation hearing even after an acquittal of the same criminal conduct. (*In re Coughlin* (1976) 16 Cal.3d 52, 59.) Here, the trial court held a probation revocation hearing prior to defendant's acquittal, and another judge supplemented the evidence after defendant's acquittal. Both judges concluded that defendant's probation should be revoked.

On appeal, defendant Tival Karon Wright requests a new probation revocation hearing, arguing that the procedures employed were improper and that the trial court lacked jurisdiction when it imposed judgment. We find no error and affirm.

BACKGROUND

In 2015, defendant pled no contest to first degree robbery, and the court suspended execution of a six-year prison sentence. Defendant was acquitted of a subsequent attempted robbery charge. As explained in detail, the trial court concluded that notwithstanding defendant's acquittal, defendant violated the condition of probation that he obey all laws. This appeal is from the judgment imposing defendant's suspended sentence for robbery.

1. Case No. LA080122 (Robbery)

On February 6, 2015, defendant was charged with one count of first degree robbery.

At the preliminary hearing before the Honorable Alan Schneider, the victim Micky Bagwell testified as follows. On January 9, 2015, Bagwell went to defendant's apartment to purchase marijuana concentrates. After he entered the apartment, defendant told him where to stand and brandished a

gun. Defendant held the gun to Bagwell's head and demanded money. Defendant took Bagwell's cash, phone, and wallet.

On July 14, 2015, defendant pled no contest to robbery and admitted that the felony was committed while he was released on bail (Pen. Code, § 12022.1). Defendant also admitted that the robbery was a serious or violent felony within the meaning of Penal Code section 1192.7, subdivision (c) and 667.5, subdivision (c).

The court (Honorable Susan Speer) imposed and suspended execution of a six-year sentence and ordered defendant serve five years' probation. As a condition of his probation, defendant was required to obey all laws.

Defendant's probation was revoked on February 9, 2016. On March 9, 2016, a probation revocation hearing was held concurrently with the preliminary hearing in case No. LA082902 (attempted robbery). The court indicated that there was an out-of-state witness and the charges were similar.

Defendant objected to conducting his probation revocation hearing concurrently with the preliminary hearing. His counsel argued that the probation revocation hearing should occur after the criminal trial. According to defense counsel: "The defense's position is that the trial judge hearing the actual trial in this case would be in the better position to evaluate whether that is a possible and believable defense, both to the open case and the probation violation hearing."

The court (Judge Schneider) rejected defense counsel's argument. It found defendant in violation of probation and specifically of the condition that he obey all laws. Defendant waived time for sentencing, and the court continued sentencing and transferred the case to a different department.

2. Case No. LA082902 (Attempted Robbery)

Although the information is not included in the record, it appears defendant was charged with attempted second degree robbery.

At the preliminary hearing, Christian Lee testified that on November 27, 2015, he went to the same apartment where Bagwell had been robbed. Lee planned to purchase marijuana from defendant. Defendant was waiting in a vehicle and told Lee to get into the vehicle. Defendant pulled out a gun and asked, “Where is the money?” Defendant pointed the gun at Lee. Eventually, Lee jumped out of the vehicle and ran.

At trial, Lee testified consistently with his preliminary hearing testimony and identified defendant as the person who tried to rob him. (Lee also identified defendant in a photographic lineup.)

On cross-examination, Lee testified that he described the suspect as follows: “male black with black hair, brown eyes, approximately six feet high, approximately 180 pounds, between the age of 20 to 30, and dreadlocks . . . that were shoulder . . . length.” Bagwell was found unavailable, and his preliminary hearing testimony was read to jurors. Records showed that defendant continued to live at the location Lee identified at the time someone attempted to rob Lee.

Defendant was the sole witness to testify in his defense. Defendant testified that, on the day someone attempted to rob Lee, defendant was with his girlfriend watching television and eating leftovers. Defendant testified that, at that time, he was living with his girlfriend, and not living in the apartment where Bagwell and Lee went to purchase marijuana. Defendant admitted that he intended to sell marijuana to Bagwell.

According to defendant, Bagwell tried to steal the marijuana, and they scuffled. Defendant reached for a pellet gun. Defendant testified that he never had contact with Lee. Defendant testified that in November 2015, he weighed 275 pounds.

On cross-examination defendant admitted pleading no contest to the robbery involving Bagwell and also pleading no contest to a grand theft allegation.

Jurors acquitted defendant.

3. Defendant's Probation Remains Revoked, and the Previously Suspended Sentence Is Imposed

On June 29, 2016, the court (Honorable Martin Herscovitz) indicated that defendant had been found in violation of his probation. The court stated that it was required to decide whether to reinstate probation or sentence defendant to the suspended term.

On July 5, 2016, the court (Honorable Martin Herscovitz) called defendant's case for a probation violation hearing. The court denied defendant's request to transfer the case to Judge Schneider.

The court stated that it would supplement the probation violation hearing. Defense counsel argued: "in light of the alibi defense presented by my client, in light of the jury's not guilty verdict, I think that there isn't sufficient evidence presented by the people based merely on the credibility of Mr. Lee of a possible misidentification. [¶] The defense theory presented was that he was identified in error and that my client, Mr. Wright, was not at the scene and, therefore, not in violation. [¶] So, based on the additional evidence presented, . . . the defense . . . would request that he be found not in violation of probation."

The court found defendant in violation of probation. It stated: “The court, based on the record that I heard, finds the defendant in violation. I think, in going with your jury argument that there is the huge difference between the various standards of proof that are available in the law, this being a probation violation, by a preponderance of the evidence, and proof beyond a reasonable doubt in the jury trial”

The court continued: “In this case, I was a bit dumbfounded by [the jury] verdict in this case based upon the huge amount of both direct and circumstantial evidence linking the defendant to this attempted robbery. So I’m convinced that the defendant is responsible for the second attempted robbery and is, therefore, in violation of his probation, and his probation will remain revoked.”

The court imposed the previously suspended six-year sentence.

DISCUSSION

On appeal, defendant argues that the court (Judge Schneider) abused its discretion in holding a probation revocation hearing concurrent with the preliminary hearing. He argues that the case should be remanded for “a new probation violation hearing at which he might meaningfully present his defense.” Defendant also argues that Judge Herscovitz lacked jurisdiction to sentence him and should have ordered a second probation report. As we shall explain, defendant’s arguments are not persuasive.

1. Defendant Does Not Demonstrate Reversible Error in Holding the Probation Revocation Hearing Concurrently with the Preliminary Hearing

Although it is a disfavored practice, our Supreme Court repeatedly has held that a trial court has discretion to conduct a probation revocation hearing *prior* to trial of criminal charges based on the same conduct. (*People v. Weaver* (1985) 39 Cal.3d 654, 656; *People v. Jasper* (1983) 33 Cal.3d 931, 935; *People v. Coleman* (1975) 13 Cal.3d 867, 889.)

Conducting the probation revocation hearing first is disfavored because due process requires the “meaningful opportunity to be heard and to explain one’s actions,” which may include presenting “mitigating circumstances and argu[ing] that the ends of justice do not warrant revocation.” (*Coleman, supra*, 13 Cal.3d at p. 873.) “When a pending or potential criminal charge forms the basis of an alleged violation of a condition of probation, a probationer who can explain his actions only by jeopardizing his chances of acquittal at a subsequent criminal trial may understandably feel that his opportunity to be heard is more illusory than real and that he is being deprived of his liberty without one of the essential elements of rudimentary fairness—a meaningful chance to speak on his own behalf.” (*Id.* at p. 874.) Notwithstanding the “danger of abuse by the state of its opportunity to coerce self-incriminatory testimony by scheduling the probation revocation hearing in advance of trial,” the trial court retains discretion. (*Id.* at pp. 888, 889, 897; see *People v. Preyer* (1985) 164 Cal.App.3d 568, 573 [“The Supreme Court has left the timing of probation revocation hearings to the discretion of the trial court.”].)

Discretion “ ‘implies [the] absence of arbitrary determination, capricious disposition or whimsical thinking. It imports the exercise of discriminating judgment within the bounds of reason.’ ” (*People v. Preyer, supra*, 164 Cal.App.3d at p. 573.) “In different cases, there may be different reasons to hold the probation revocation hearing before a related trial. . . . A violation of probation may . . . be found other than the crime charged in a related proceeding. A court may try to avoid unnecessary appearances of witnesses. [Citation.] It may be desirable to avoid recycling a probation revocation in one court waiting for completion of matters not even filed yet in another court.” (*Ibid.*) Even if a defendant demonstrates an abuse of discretion, to warrant reversal, the defendant must also show prejudice. (*Id.* at p. 575.)

Turning to this case, defendant fails to show either error or prejudice. First, the underlying concerns expressed in *Coleman* were not present in this case. Defendant had no mitigating evidence that would tend to incriminate him if he raised it at the probation revocation hearing. He had only exculpatory evidence, testifying to an alibi and arguing mistaken identity. Second, the appearance and scheduling of witnesses is an appropriate consideration in holding a probation revocation hearing prior to a trial on the same criminal conduct (*People v. Preyer, supra*, 164 Cal.App.3d at p. 573), and the trial court was concerned about the appearance of an out-of-state witness.¹

¹ Defendant states that rule 8.32 of the Superior Court of Los Angeles County, Local Rules, requires that a probation violation be heard after a new offense. However, as Attorney General states, local rules must be consistent with state law. (*Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1352.)

Even if the court had erred, defendant cannot demonstrate prejudice under any standard. The court (Judge Herscovitz) reevaluated whether probation should be reinstituted after jurors acquitted defendant. In considering whether probation should be reinstated, Judge Herscovitz explained that he was “dumbfounded” by the jurors verdict, and concluded that defendant’s defense lacked merit. Notwithstanding his defense, the court indicated, “. . . I’m convinced that the defendant is responsible for the second attempted robbery and is, therefore, in violation of his probation” Therefore defendant received the determination he seeks—a determination of whether he violated parole based on all of the evidence including his defense. As respondent points out, his request for another probation revocation hearing would constitute an idle act.

2. Because the Parole Revocation Proceeding Was Transferred, Defendant Fails to Show that Judge Herscovitz Lacked Jurisdiction

Defendant argues that Judge Schneider had exclusive jurisdiction over sentencing and Judge Herscovitz’s sentence was in excess of his jurisdiction. As we shall explain, his argument overlooks the fact that the case had been transferred without objection and therefore lacks merit.

“ [T]he jurisdiction of a multijudge, multidepartment superior court is vested in the court as a whole and if one department exercises authority in a matter which might properly be heard in another such action, although “irregula[r],” it does not amount to a defect of jurisdiction.’ [Citation.] However, ‘ . . . where a proceeding has been duly assigned for hearing and determination to one department of the superior court by the presiding judge of said court in conformity with the rules thereof,

and the proceeding so assigned has not been finally disposed of therein or legally removed therefrom, it is beyond the jurisdictional authority of another department of the same court to interfere with the exercise of the power of the department to which the proceeding has been so assigned. [Citation.] In other words, while one department is exercising the jurisdiction vested by the Constitution in the superior court of that county, the other departments thereof are as distinct therefrom as other superior courts. [Citation.] If such were not the law, conflicting adjudications of the same subject-matter by different departments of the one court would bring about an anomalous situation and doubtless lead to much confusion.’ [Citation.] The superior court department rule is equally applicable to different superior court districts.” (*People v. Madrigal* (1995) 37 Cal.App.4th 791, 795-796.)

“ “ “ “ “A superior court is but one tribunal, even if it be composed of numerous departments An order made in one department during the progress of a cause can neither be ignored nor overlooked in another department. . . .’ ” [Citations.] This is because the state Constitution, article IV, section 4 vests jurisdiction in the court, “. . . and not in any particular judge or department . . . ; and . . . whether sitting separately or together, the judges hold but one and the same court.” ’ ’ ’ [Citation.] “ “One department of the superior court cannot enjoin, restrain, or otherwise interfere with the judicial act of another department of the superior court.” ’ [Citation.] The first department “to assume and exercise jurisdiction over a matter acquires exclusive jurisdiction.” ’ [Citation.] “A judgment rendered in one department of the superior court is binding on that matter upon all other departments until such time as the judgment is

overturned.” ’ ’ (*People v. Madrigal*, *supra*, 37 Cal.App.4th at p. 796.)

The probation revocation initially was assigned to Judge Schneider and remained in that court until “finally disposed of therein or legally removed therefrom.” (*People v. Madrigal*, *supra*, 37 Cal.App.3d at p. 796.) Here, it was legally removed to another court room. Judge Schneider transferred the case to be heard with the open criminal matter. At the conclusion of the hearing, Judge Schneider indicated that “[d]epending on how everything works out, sentencing will be taken up at another time, and this case will go to department ‘S’ with the open matter.” The minute order similarly indicates that sentencing was continued and was to be heard with the open case.

“There is *no jurisdictional conflict* if the cause has actually been transferred to the second department, so that the first department is no longer exercising continuing jurisdiction.” (2 Witkin, Cal. Procedure (5th ed. 2008) Courts, § 233, p. 321.) Where a case is transferred from one department to another, there is no risk of conflicting decisions. (*Wozniak v. Lucutz* (2002) 102 Cal.App.4th 1031, 1041, overruled on another ground in *Even Zohar Construction & Remodleing, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 834-835.) Moreover, defendant did not object to the transfer, does not argue that the transfer was invalid, and therefore cannot show Judge Herscovitz lacked jurisdiction to impose sentence on the parole violation. (See *Wozniak*, at p. 1041.)

3. Probation Report

Although defendant correctly argues that no supplemental probation report was prepared in advance of his sentencing, he fails to demonstrate prejudice. The court revoked probation

because it found defendant responsible for the attempted robbery (notwithstanding the jurors' acquittal). Defendant's argument that if he was "not guilty of any law violations" the court may have reinstated probation is not persuasive because the court expressly concluded he *was* guilty of the attempted robbery of Lee. Given that finding, defendant fails to offer any evidence or explanation of how he could show he was "complying with probation [and] doing well."

DISPOSITION

The judgment is affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

RUBIN, J.