Filed 9/10/12 P. v. Molina CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER MOLINA, Defendant and Appellant.	B234293 (Los Angeles County Super. Ct. No. NA074038)

APPEAL from a judgment of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. Reversed and remanded.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey, and Shawn McGahey Webb, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * *

After a contested probation violation hearing, the trial court found appellant Christopher Molina in violation of probation. The court revoked and terminated probation, and executed the 10-year eight-month prison term previously suspended at the time of appellant's plea. Appellant appeals from the trial court's termination of probation and from its imposition of the previously suspended prison term. We reverse and remand with instructions.

BACKGROUND

A. Facts Underlying the Violation

The facts which follow were either testified to at appellant's probation violation hearing or were contained within the court file and subject to judicial notice.

In April 2007, appellant was charged with four counts of attempted robbery, in violation of Penal Code sections 664/211, and one count of assault with a deadly weapon, in violation of section 245, subdivision (a)(1).[1] In connection with the attempted robbery counts, the felony complaint alleged that appellant personally used a dangerous or deadly weapon (a knife) in violation of section 12022, subdivision (b)(1).

On May 1, 2007, prior to preliminary hearing, the People extended an offer of two years in the state prison in exchange for appellant's guilty or no contest plea. The record is unclear what count or counts the offer involved. As an alternative, the court below offered appellant the option of pleading to all charges and admitting all allegations for the maximum sentence (which the court calculated as 10 years eight months) suspended, five years of probation, and one year in the county jail. Appellant rejected the People's offer, accepted the court's offer, and entered his no contest pleas and admissions.

The probation and sentencing hearing occurred two weeks later, on May 16, 2007, after preparation of the probation report. The court imposed but suspended execution of the 10-year eight-month sentence and placed appellant on five years of felony probation. At appellant's request, the court did not order him to serve a year in the county jail as a condition of probation, but instead sentenced him to time served, which was 31 actual

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

days, plus 14 good time/work time credit days. The court did so, notwithstanding its concern that a time-served sentence meant that appellant would not do an in-custody alcohol/drug treatment program and instead would be expected to complete such a program through probation while out of custody. The court also imposed standard terms and conditions of probation, including those that appellant must keep probation advised of his residence at all times; must obey all laws, orders of the court, and rules and regulations of probation; and must cooperate with probation in a plan for alcohol and drug counseling.

On October 21, 2008, appellant's case was assigned to a new probation officer, Kasey Brown. On January 2, 2009, Brown sent a certified letter to appellant's address in San Pedro as reflected in the probation file. The letter asked appellant to meet with Brown in his office on January 15, 2009. It also advised him that if he failed to appear, the court would be notified. The letter was not returned as undelivered. Appellant did not make the January 15 appointment.

In addition, appellant was supposed to provide probation with proof of enrollment in a drug and alcohol program. Brown's review of the file disclosed no such proof of enrollment. Brown's review of the file also showed that prior to the January 2, 2009 letter, the last time appellant had reported to probation was February 26, 2008. Finally, Brown's review of the file showed that as of the date of his testimony on June 30, 2011, the only address appellant had provided probation was the residence in San Pedro.

After appellant failed to make the January 15 appointment, Brown submitted a violation report to the court. The court set May 4, 2009, for a hearing on the violation report. Brown sent notice of the date to appellant. Appellant failed to appear in court on May 4. As a result, the court revoked probation and issued a no-bail warrant for his arrest.

Brown's review of the probation file also showed that appellant appeared at the probation office on April 19, 2010, and spoke with another probation officer. That officer informed appellant of the outstanding bench warrant and told him to report to the court.

On May 14, 2010, the court received a letter dated May 3, 2010, from Hector Monarrez, the director of Victory Outreach in Compton. The letter advised the court that appellant entered "our Victory Outreach Recovery Home June 22, 2010 [*sic*]" and "is scheduled to complete our program [this] coming June 2010 [*sic*]." The letter acknowledged the outstanding bench warrant and asked the court to recall it and set a future date for appellant's appearance. The court took no action on the warrant in response to the letter. A subsequent letter from Monarrez, dated June 30, 2011, and submitted to the court at the violation hearing, indicated that appellant entered the Victory Outreach Recovery Home on June 2, 2009, and graduated from the program on July 29, 2010.

On May 31, 2011, appellant appeared in court after being arrested on the warrant. The court remanded into custody, set bail at no bail, and set a date for his violation hearing. The court continued the hearing a number of times and eventually conducted it on June 30, 2011.

B. The Court's Ruling

Based upon the facts above, the court below found appellant in violation of his probation for a number of reasons: (1) failing to keep probation advised of his residence address; (2) failing to appear for the January 15, 2009 appointment with his probation officer; (3) failing to appear in court on May 4, 2009, for the initial hearing on the violation report; and (4) failing to enter the court-ordered alcohol/drug counseling program.

After finding appellant in violation of probation, the court indicated its intent to revoke and terminate probation and execute the previously suspended 10-year eight-month prison term. At defense counsel's request, the court continued the sentencing to the late afternoon so that counsel could provide any mitigating evidence by way of documentation. The court denied counsel's request to present such evidence by way of live testimony.

That afternoon, the court received and reviewed the June 30, 2011 letter from Victory Outreach. It also considered the arguments of both counsel and a direct plea from the defendant himself. Despite a request from the prosecutor that it reinstate

probation, the court revoked and terminated probation and lifted the suspension of the previously imposed 10-year eight-month prison term. In its decision, the court noticed the discrepancy between the dates referenced in the two Victory Outreach letters and concluded that Victory Outreach was trying to "perpetrat[e] [a] fraud on the court" by "writ[ing] letters to help [appellant] have a mitigating factor."

DISCUSSION

Appellant makes a number of arguments challenging the trial court's revocation and termination of probation and imposition of the previously suspended prison term.

A. Prejudgment of Potential Violations

Appellant first contends that comments by the court, when it took his plea and placed him on probation in 2007, establish that the court had prejudged any potential future violation. Appellant argues that these comments demonstrate that the court intended to revoke and terminate probation, and impose the previously suspended prison term, regardless of the nature of the violation. We disagree.

After appellant advised the court he would take the court's suspended maximum prison term rather than the People's immediate, though significantly lesser prison term, the court took great pains to advise appellant of the potential downside of his decision. After describing the two offers, the trial court asked, "Is there any of the offers that you like?" Appellant responded, "I'll take the one year county jail, five years probation." The court then advised appellant, "You do know, of course, that if you violate your probation you will get the ten years, eight months. Do you understand that?" Appellant answered, "Yes sir, I do."

When the court subsequently took the plea, it advised appellant as follows:

> "THE COURT: The maximum term in your case is ten years, eight months. The agreed-upon sentence is one year in the county jail, five years formal probation with a sustained [*sic*] sentence of the maximum term. Do you understand that?
>
> "THE DEFENDANT: Yes.
>
> "THE COURT: If you violate your probation you will get the ten years, eight months that has been suspended. Do you understand that?
>
> "THE DEFENDANT: Yes.

"THE COURT: You have to comply, therefore, with all the terms and conditions of probation. Do you understand that?

"THE DEFENDANT: Yes."

And finally, at the initial probation and sentencing hearing, after defense counsel indicated appellant was requesting time served rather than a year in county jail as originally agreed upon, the following occurred:

"THE COURT: All right. In that case then I can't send him to [the in-custody drug/alcohol program], if I [were] to do that on his last 120 days. Do you understand that?

"[DEFENSE COUNSEL]: I understand that, but obviously he would like to get off [*sic*].

"THE COURT: Is that what he wants to do[?] I just want to make sure he does not fall off.

"[DEFENSE COUNSEL]: He indicates he would like to get time served.

"THE COURT: Let me find out. Mr. Molina, you are asking the court for something better which is time served, but you know the problem, of course, is that you won't be able to [do the in-custody program] for drug rehab. You have to do [that] on your own. Is that what you want to do?

"THE DEFENDANT: How would affect my --

"THE COURT: If I sentence you to one year county jail, which is what we agreed upon[,] the last 120 days that you serve will be spending it in [the in-custody program] and get drug rehab. By you asking me for time served you are not going to be able to [do] that[.] [Y]ou have to do alcohol and drug treatment on your own.

"THE DEFENDANT: But I would be released.

"THE COURT: You know being released is not the big problem. The big problem is if you are going to bust probation, if you are going to bust, if you do you will get ten years eight months. So you want to be released?

"THE DEFENDANT: Yes."

We agree, in part, with appellant. At any violation hearing, a probationer has the right to an unbiased judicial officer who must make two decisions based upon the evidence presented to it: (1) whether the probationer has violated the terms and

conditions of his probation and, if so, (2) whether it still remains appropriate for him to retain his conditional liberty by being placed back on probation. (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 348; see also *Black v. Romano* (1985) 471 U.S. 606, 611.)

We also, however, disagree with appellant. A common-sense review of the record described above, in context, demonstrates neither judicial bias nor prejudgment of any potential future probation violation. Prior to accepting a plea, a trial court is required to advise a defendant of the direct consequences of his plea, including the permissible range of punishment. (*Bunnell v. Superior Court* (1975) 13 Cal.3d 592, 605.) In the immediate case, appellant elected to take an offer from the court -- which though perhaps immediately preferable to the People's offer because it allowed early release without a state prison sentence -- bore the downside risk of a lengthy, nondiscretionary, state prison term should he violate probation in a manner that justified revocation and termination. The trial court, in its experience, was assuredly aware of that potential downside. Its comments, considered in context, were nothing more than a short-hand warning to appellant -- which apparently went unheeded -- that if he violated the terms and conditions of probation in a manner that justified termination of probation rather than reinstatement, the only prison term available was the previously suspended maximum term. We find no error in the court's comments or any suggestion of bias or prejudgment of issues.[2]

B. Revocation and Termination of Probation

Next, appellant contends that the trial court erred when it revoked and terminated probation, rather than revoking and reinstating probation with modified terms and

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[2] Appellant's reliance on *Gonzales v. Johnson* (N.D.Tex. 1997) 994 F.Supp. 759, is not persuasive. The material facts of *Gonzales* are distinguishable from this case. *Gonzales* involved a bench officer who had been criticized on three prior occasions by state appellate and federal trial courts for prejudging cases without listening to evidence. (*Id.* at p. 764, fn. 3.) Additionally, the *Gonzales* judge had a history of "promising" specific sentences to probationers in the event of a violation, asking probation what that "promise" had been after he found a violation, and then routinely imposing the sentence previously "promised." (*Id*. at pp. 762-763.) Thus, the judge in *Gonzales* had a history that affirmatively suggested prejudgment rather than a common-sense and shorthand warning about the perils of violating probation in a manner than warranted revocation and termination rather than revocation and reinstatement. That is not the case here.

conditions. Appellant's argument is two-fold: first, he essentially contends that the trial court applied the wrong legal standard because it refused to consider the facts and circumstances of his underlying offenses as potentially mitigating and, second, he contends that even if the trial court understood the correct legal standard, its decision was an abuse of discretion. For the reasons that follow, we find that the record below suggests the trial court did not apply the correct legal standard. Accordingly, we reverse and remand the case so that the trial court may explicitly consider and apply the correct legal standard in its decision whether to terminate probation and execute the previously suspended prison term or reinstate probation with modified terms and conditions.

"The discretion of the court to revoke probation is analogous to its power to grant probation, and the court's discretion will not be disturbed in the absence of a showing of abusive or arbitrary action." (*People v. Silva* (1966) 241 Cal.App.2d 80, 84; accord, *People v. Urke* (2011) 197 Cal.App.4th 766, 773.) An appellate court will not interfere with the trial court's exercise of discretion in a decision to revoke and terminate probation so long as the court below "'considered all facts bearing on the offense and the defendant to be sentenced.' [Citation.]" (*People v. Downey* (2000) 82 Cal.App.4th 899 910.)

Rule 4.414 of the California Rules of Court, is entitled "Criteria affecting probation." It describes a number of factors, related both to the underlying crime and to the defendant. These factors "must be considered by the sentencing judge[.]" (Rule 4.409.) The factors described in rule 4.414 are, we believe, as applicable to the decision whether to reinstate or terminate probation after a revocation hearing as they are to the decision whether or not to grant probation initially. Among the factors related to the crime that the court is required to consider are "[t]he nature, seriousness, and circumstances of the crime as compared to other instances of the same crime" and "[w]hether the manner in which the crime was carried out demonstrated criminal sophistication or professionalism on the part of the defendant[.]" (Rule 4.414(a)(1), (a)(8).)

After finding appellant in violation of probation, the trial court heard argument. Both defense counsel and the prosecutor urged the court to reinstate probation. Both

attempted to discuss the mitigating circumstances related to the underlying crimes which justified reinstatement of probation rather than termination of probation and execution of the suspended state prison term. The trial court rebuffed both efforts. With respect to defense counsel, the following exchange occurred:

> "THE COURT: I'll hear from you.
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> "[DEFENSE COUNSEL]: Thank you. Several years ago my client made a bad decision.
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> "THE COURT: You mean to commit the crime?
>
> "[DEFENSE COUNSEL]: That's correct. He was highly intoxicated --
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> "THE COURT: Counsel, those are not mitigating factors. I want mitigating factors. He accepted responsibility at this by waiving appeal and pleading to the case, so I'm not going to relitigate the issue of why he committed the crime or not. Tell me what the mitigating factors are under 4.423 under California Rules of Court."

And, with respect to the prosecutor, the following subsequently occurred:

> "[THE PROSECUTOR]: . . . In this case the defendant was 20 years at the time of the crime. I know Your Honor and myself put a lot of weight on whether a person has a prior record. This is a person who was 20 years old. He did not have any prior criminal record. [¶] When the facts of the case were evaluated, the defendant was highly intoxicated at the time of the crime. He was determined to be intoxicated both by all of the victims as well as the officers that arrived on scene at the time of the crime. So, therefore, we have a factual situation where we have a 20-year old young man with no prior criminal record, who did a stupid thing and got drunk on the day of the crime. He did stupid actions, but there is no indication that the victims were actually in dire fear because the defendant, in fact, gave him, one of the victims the knife.
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> "THE COURT: I don't want to talk -- sir, I don't want to talk about the underlying facts of the case.
>
> "[THE PROSECUTOR]: Well, those are relevant in a probation violation hearing, Your Honor, by case law that's supposed to be really the only thing that is evaluated in determining whether somebody -- the sentence on the probation violation. The question always is, is justice. What is justice?
>
> "THE COURT: Let me stop you.
>
> "[THE PROSECUTOR]: This is a young man --

"THE COURT: Counsel, I disagree with you.

"[THE PROSECUTOR]: Well, you can disagree. Can I finish?

"THE COURT: The sentence is either a revocation and reinstatement of probation or the imposition of a [*sic*] suspended time.

"[THE PROSECUTOR]: Correct.

"THE COURT: So you are arguing for revocation and reinstatement?

"[THE PROSECUTOR]: Yes, Your Honor, that's what I am arguing for."

The record of the trial court's exchanges with both defense counsel and the prosecutor suggests that it either would not, or believed it could not, consider the facts and circumstances of the underlying offense as potentially mitigating in terms of whether probation should be terminated or reinstated. As the authorities cited above show, while not the only factor the court is to consider, the nature of the underlying offense is one factor the court must weigh in terms of its decision to terminate or reinstate probation. (Cal. Rules of Court, rule 4.409.)[3]

Since the record below affirmatively indicates that the trial court may not have considered all relevant factors, we reverse and remand for a new hearing on the appropriate disposition after appellant's revocation of probation. (See Cal. Rules of Court, rule 4.409 ["[r]elevant criteria . . . will be deemed to have been considered unless the record affirmatively reflects otherwise"].) At the hearing, the trial court should consider all of the criteria listed in rule 4.414, as well as appellant's performance on probation and the nature and seriousness of the proven violations.

Since we conclude that the trial court failed to consider all relevant factors, we do not address appellant's additional contention that, under the facts and circumstances of this case, termination rather than reinstatement of probation was an abuse of discretion.

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[3] We note that while the court was reluctant to listen to a discussion of the underlying crimes in terms of mitigation, it expressed no such reluctance in implicitly characterizing them as aggravating when it executed the previously suspended state prison term.

That argument may be raised in a subsequent appeal if the court again imposes the previously suspended state prison term.

C. Illegal Sentence

During appellant's change of plea, the trial court advised him that his maximum sentence for the offenses charged was 10 years eight months. At appellant's initial sentencing hearing, the court "suspended the execution of a ten-year, eight-month prison term" and placed appellant on five years of felony probation. Later, after the revocation hearing, the court purported to execute the previously suspended 10-year eight-month prison term.[4] The record is not express, but it appears that at the change of plea the court calculated the maximum prison term as follows: the high term of four years as a base term for the assault with a deadly weapon charged in count 2, plus four consecutive subordinate terms of eight months for each of the attempted robbery counts (one-third the midterm of two years on each count), plus four 1-year enhancements for the use of a knife alleged in connection with the four attempted robbery charges.

Although not raised by the parties, we invited additional briefing on the legality of this sentence: specifically, whether the full consecutive sentencing on the four 1-year knife enhancements was legal. The parties agree that this was error and that if sentenced consecutively, appellant can receive only one-third of one year (or four months) for each of the four knife enhancements. (§ 1170.1, subd. (a).) The parties also agree that if the previously suspended state prison term is executed, it must be reduced by two years eight months in order to make the sentence lawful. To the extent this becomes relevant on remand, the trial court is ordered to correct the sentence.

Since the parties have not raised the issue, we express no opinion whether, under the circumstances of this case, misadvising the appellant about his maximum term affected the knowing, intelligent, and voluntary nature of his change of plea.

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[4] We say "purported" because, in actuality, the court imposed an additional one-year enhancement for the use of a knife in connection with the assault with a deadly weapon charge, a count to which (1) the People did not attach a knife use and (2) legally could not do so. (§ 12022, subd. (b)(1).) Thus, a review of the reporter's transcript shows the court actually sentenced appellant to 11 years eight months.

DISPOSITION

The judgment is reversed. The case is remanded for a new sentencing hearing consistent with this opinion.

SORTINO, J.*

We concur:

FLIER, Acting P. J.

GRIMES, J.

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