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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.

DORIAN MARKAYE
MAYFIELD,

Defendant and Appellant.

B284335

(Los Angeles County
Super. Ct. No. SA091051)

APPEAL from a judgment of the Superior Court of
Los Angeles County. Susan M. Speer, Judge. Affirmed.

Michelle T. Livecchi-Raufi, 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, William H. Shin and Nikhil D. Cooper, Deputy
Attorneys General, for Plaintiff and Respondent.

After revoking probation, the trial court sentenced appellant Dorian Markaye Mayfield to the applicable three-year mid-term sentence for his underlying offense. Mayfield claims the trial court erred as a matter of law when, at sentencing on the underlying offense, the court considered as aggravating factors Mayfield's conduct while on probation. Although the Attorney General concedes this error, the Attorney General contends it was harmless error. Because in addition to the factors challenged on appeal the trial court relied on appropriate factors, we agree with the Attorney General and conclude the trial court's error was harmless and not a ground for reversal.

BACKGROUND

1. The Instant Case

According to the probation report in this case, on August 12, 2015, Mayfield asked a man drinking on the street if he had taken some of Mayfield's belongings. The man denied taking Mayfield's property. Then, using a rock he had put inside a sock, Mayfield hit the man several times on his head and shoulder. Mayfield also grabbed the man's sleeping bag, which had approximately \$26 inside. Mayfield was arrested and charged with felony second degree robbery (Pen. Code, § 212.5, subd. (c)),¹ and assault by force likely to produce great bodily injury (§ 245, subd. (a)(4)).

The probation report recounted Mayfield's criminal history dating back to 1997 in Louisiana, where he had been convicted on two separate occasions on felony charges of burglary and theft. His criminal record also included more recent convictions in the

¹ Subsequent undesignated statutory references are to the Penal Code.

Southern California area beginning in 2012, when he was convicted of misdemeanor petty theft. He also had separate felony and misdemeanor convictions in 2014 for possession of a controlled substance and property damage. At the time of his arrest in the instant case, Mayfield was on probation stemming from his 2014 felony conviction for possession of a controlled substance.

In the instant case, Mayfield entered into a plea agreement with the prosecution. In compliance with the agreement, Mayfield entered a plea of nolo contendere to the assault charge. The trial court found Mayfield guilty on the assault count, dismissed the robbery count, and placed Mayfield on three years of formal probation with conditions, including that Mayfield serve 365 days in a county jail, obey all laws, and not use force or violence against anyone.

2. The 2016 Case (LA083923)

In 2016, while on probation in the instant case, Mayfield was arrested and charged with felony attempted robbery (§§ 211, 664) and resisting arrest (§ 69). Briefly, the events leading to Mayfield's 2016 arrest and charges are as follows: On July 22, 2016, Alfonso Arroniz was working at a restaurant in Van Nuys when he noticed Mayfield yelling and acting aggressively with people inside the restaurant. When Arroniz walked outside, Mayfield followed and demanded money from him. Mayfield grabbed Arroniz by his neck, but Arroniz was able to pin Mayfield to the ground and calm him down. However, when Arroniz let go of Mayfield, Mayfield raised his hands as if to fight and chased Arroniz, who twisted his knee. Police Officer Thomas Gracey responded to the scene. When he arrived, Mayfield was handcuffed and acting belligerent and aggressive. As Officer

Gracey was leading Mayfield to a police car, Mayfield pulled away from the officer's grasp and head-butted him in the chin. Although Officer Gracey was uninjured and able to regain control of Mayfield, Mayfield continued to resist the officer. Another officer at the scene took out his taser and warned Mayfield he would use it if Mayfield did not calm down. At that point, the officers were able to place Mayfield into the police car.

Mayfield pleaded not guilty to the 2016 charges and the case went to trial. Mayfield represented himself at trial. The jury deadlocked, and the trial court declared a mistrial. In June 2017, Mayfield was retried on the 2016 charges. Mayfield again represented himself at trial. On retrial, the jury found Mayfield not guilty of the attempted robbery charge but again deadlocked on the resisting arrest charge. Thus, the trial court declared a mistrial on that charge. On July 11, 2017, the prosecution announced it was unable to retry Mayfield on the resisting arrest charge, and the trial court dismissed that count with prejudice.

3. Probation Revocation and Sentencing in the Instant Case

In January 2017, as a result of Mayfield's 2016 arrest, the trial court revoked his probation in the instant case. The court continued the probation violation hearing until after the conclusion of the 2016 case.

The probation violation hearing was held on July 11, 2017. Mayfield again represented himself. At the hearing, the trial court determined Mayfield had violated the terms of his probation by failing to obey all laws and by using force and violence against another person. In particular, based on the evidence presented at the trial of the 2016 case, the court found by a preponderance of the evidence that Mayfield both had

assaulted Arroniz by means likely to produce great bodily injury and had resisted arrest by Officer Gracey. The court noted the standard of proof for a probation violation was a preponderance of the evidence, which differed from the beyond a reasonable doubt standard required for a finding of guilt at trial.

The trial court declined to reinstate probation and instead sentenced Mayfield on the assault count to the mid term of three years in state prison. The court found the following five factors in aggravation: (a) “[t]he crimes involve threat of great bodily harm against both victims,” (b) “[v]ictim Ar[r]oniz was particularly vulnerable and the attack was unprovoked without warning and the victim was unarmed,” (c) “[Mayfield] has engaged in violent conduct that indicates a serious danger to society in this case,” (d) “[Mayfield’s] prior convictions as an adult dating back to 1997 are numerous and increasing [in] seriousness,” and (e) “[Mayfield’s] performance on probation on this case and on the 5CA case has been unsatisfactory.”² The trial court found no mitigating factors.

Mayfield appealed.

DISCUSSION

Mayfield argues his sentence should be reversed because, in choosing the mid term, the trial court incorrectly considered Mayfield’s conduct after he had been granted, and was on, probation. In particular, Mayfield contends the trial court erred when it considered the events leading to his 2016 arrest (postprobation conduct) as aggravating factors affecting his

² Although the trial court did not specify what it meant by the “5CA case,” it appears that was a reference to the 2014 case for which Mayfield was on probation when he was arrested in the instant case. The parties do not state otherwise.

sentence in the instant case. Although the Attorney General concedes the trial court erred when, at sentencing, it relied on Mayfield's postprobation conduct, the Attorney General argues the error was harmless. As discussed below, we agree with the Attorney General and affirm the judgment.

1. Applicable Law and Standard of Review

The choice of the appropriate sentence term rests within the trial court's discretion. (§ 1170, subd. (b).) The trial court may rely on a single valid aggravating circumstance to impose an aggravated term. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) The court's articulated reasons must be supported by a preponderance of the evidence in the record and they must reasonably relate to the particular sentencing determination. (*People v. Scott* (1994) 9 Cal.4th 331, 349 (*Scott*).) "The length of the sentence must be based on circumstances existing at the time supervision was granted, and subsequent events may not be considered in selecting the base term." (Cal. Rules of Court, rule 4.435(b)(1).)³

In general, we review the trial court's sentencing decision for an abuse of discretion. (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) "The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.'" (*Ibid.*) A trial court abuses its discretion "if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision." (*Ibid.*)

³ Subsequent undesignated rule references are to the California Rules of Court.

Mayfield contends we should employ a de novo standard of review. He claims the sole issue on appeal is whether, as a matter of law, the trial court relied on improper sentencing factors. This is only partially accurate. Although we consider whether the trial court considered improper sentencing factors as a matter of law, that is not the end of our inquiry. We must consider also whether, even if a legal error was made, the error was prejudicial. “When [the trial] court errs in identifying or articulating its sentencing choices, the reviewing court has no choice but to remand the matter for resentencing unless it finds the error nonprejudicial, i.e., it is ‘not reasonably probable that a more favorable sentence would have been imposed in the absence of the error.’” (*Scott, supra*, 9 Cal.4th at p. 355.) In other words, “ “[w]hen a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper.” ’” (*People v. Black* (2009) 176 Cal.App.4th 145, 152.)

2. Forfeiture

As an initial matter, we address the Attorney General’s forfeiture argument. The Attorney General correctly notes that, at the time of sentencing, Mayfield failed to object to the trial court’s reliance on his postprobation conduct. By failing to raise this issue below, Mayfield has forfeited it on appeal. “[C]omplaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal.” (*Scott, supra*, 9 Cal.4th at p. 356.) “[C]laims involving the trial court’s failure to properly make or articulate its discretionary sentencing choices’

are subject to forfeiture, including ‘cases in which the stated reasons allegedly do not apply to the particular case, and cases in which the court purportedly erred because it double-counted a particular sentencing factor, misweighed the various factors, or failed to state any reasons or to give a sufficient number of valid reasons.’ ([*Scott*,] at p. 353.) We recently affirmed this rule, and do so again.” (*People v. Boyce* (2014) 59 Cal.4th 672, 730–731.)

Nonetheless, we may still consider the issue on appeal and we exercise our discretion to do so here. (*People v. Williams* (1998) 17 Cal.4th 148, 161–162, fn. 6.)

3. The trial court’s error was harmless.

It is undisputed that, when sentencing Mayfield in the instant case (i.e., on the 2015 assault count), the trial court relied in part on Mayfield’s postprobation conduct. In particular, the trial court included as aggravating factors its findings both that Mayfield’s conduct leading to his 2016 arrest involved the threat of great bodily injury and that the victim Arroniz was particularly vulnerable, was unarmed, and did not provoke the attack. Because those aggravating factors concern Mayfield’s postprobation conduct, it was error for the trial court to consider them when sentencing Mayfield in the instant case. (Rule 4.435(b)(1).) The Attorney General correctly concedes this error.

However, although the trial court erred, we conclude it was harmless error and, therefore, not a ground for reversal. In addition to including the improper factors noted above, the trial court also considered three appropriate aggravating factors. First, the trial court found Mayfield had “engaged in violent conduct that indicates a serious danger to society in *this case*.” (*Italics added*.) Although Mayfield argues to the contrary, we conclude the trial court’s reference to “this case” clearly

references Mayfield's violent and dangerous conduct that lead to his 2015 arrest and the instant case; namely, his unprovoked and repeated use of a makeshift weapon (a rock wrapped in a sock) to hit a man on the street. It was proper for the trial court to consider that factor when sentencing Mayfield. (Rule 4.421(b)(1).)

Second, as an additional aggravating factor, the trial court found Mayfield's prior convictions as an adult were numerous and increasing in seriousness. Despite Mayfield's argument to the contrary, this finding is supported by the record. Although there was a long hiatus following his 1997 arrests, Mayfield was convicted four times between 2012 and 2015, with two of the four convictions being felony convictions. Thus, the record supports a finding that, despite a long break, Mayfield's criminal history resumed in 2012 and included two felonies. This was a proper factor for the trial court to consider. (Rule 4.421(b)(2).)

And third, as a final aggravating factor, the trial court found Mayfield's "performance on probation on this case and on the 5CA case has been unsatisfactory." Although for purposes of sentencing it was improper for the trial court to consider Mayfield's conduct while on probation in the instant case, it was not improper for the court to consider his conduct while on probation in the earlier 2014 case. It is undisputed that while on probation stemming from his 2014 arrest, Mayfield was arrested in the instant case for serious and violent crimes. It was proper for the trial court to consider that aggravating factor at sentencing. (Rule 4.421(b)(4), (5).)

Although at the sentencing hearing the trial court stated it found no factors in mitigation, Mayfield asserts the trial court failed to consider mitigating factors. Mayfield identifies both his

alleged lack of a substantial criminal record as a mitigating factor as well as unidentified mitigating factors that he contends necessarily supported the trial court's initial grant of probation in the instant case. However, because Mayfield raised this issue for the first time in his reply brief on appeal, we decline to address it. (*Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, 92, fn. 2 [issue raised for first time in reply brief on appeal was "doubly waived"].)

In sum, we conclude it is not reasonably probable that, had the trial court not relied on Mayfield's postprobation conduct, the trial court would have chosen a lesser sentence. (*People v. Black, supra*, 176 Cal.App.4th at p. 152.) Accordingly, we find the trial court committed harmless error and we affirm the sentence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

HOFFSTADT, J.