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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN OLIVERO,

Defendant and Appellant.

B231218

(Los Angeles County  
Super. Ct. No. BA375026)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Alex Ricciardulli, Judge. Affirmed.

Meredith J. Watts, 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, Scott A. Taryle  
and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

## **INTRODUCTION**

Defendant Juan Olivero, who was convicted of second degree burglary of a motor vehicle (Pen. Code, § 459), contends on appeal that the trial court abused its discretion in refusing to order California Rehabilitation Center (CRC) commitment (Welf. & Inst. Code, § 3051) for him despite his record of petty crime and drug offenses that demonstrate he is a drug addict. We affirm the judgment because we find that Olivero forfeited his claim by failing to request below the initiation of CRC proceedings, and even if he had made the request, the trial court would have been within its discretion to refuse it in light of Olivero's lengthy criminal history and repeated violations of parole and probation.

## **FACTUAL AND PROCEDURAL BACKGROUND**

On September 21, 2010, Olivero was charged with one count of second degree burglary of a vehicle in violation of Penal Code section 459. Olivero initially pled no contest to the charge with the understanding that he would be transferred to sentenced offenders' drug court (SODC). However, he was deemed medically ineligible for SODC because he has sleep apnea and must sleep with a medical apparatus. When his case was returned to the trial court for resentencing, Olivero was permitted to withdraw his plea. After he rejected a plea deal of five years' imprisonment, the charge against him was tried to a jury.

Because the contentions on appeal do not require a detailed review of the evidence presented at trial, we only briefly outline the evidence in accord with the proper standard on appeal. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) At trial, the victim testified that at around 2:00 a.m., the alarm on his remote car key sounded and woke him up. From his window he observed a man standing next to his car. He went downstairs and followed the man while calling the police on his

cell phone. The victim flagged down the police car responding to the call, and described the suspect to Officer Eric Martin. Officer Martin observed Olivero, who matched the victim's description, walking on the sidewalk. Olivero was detained and the victim identified him as the man who had been standing next to his car. Olivero was found in possession of a plastic bag that contained a porcelain chip tied on a string, which Officer Martin testified is a favorite tool for car burglars because the chip can noiselessly shatter a car window when swung at it. Officer Martin testified that the victim's car window was shattered and the damage was consistent with being hit with a porcelain chip. He also testified that Olivero's hand was bloody at the time of his arrest, and that a smear of blood was found on the seat of the victim's car. The jury found Olivero guilty of the charge.

Olivero waived a jury trial on the allegations of nine prior convictions alleged under Penal Code section 667.5, subdivision (b); a court trial held on the prior alleged convictions resulted in the court finding beyond a reasonable doubt that they were all true.

The probation report submitted to the court stated that Olivero appeared to have a significant substance abuse problem, and elaborated as follows: "The defendant has incurred seven felony convictions for possessing controlled substances and selling or furnishing marijuana. He has been placed on Prop 36 substance abuse placement program, he was ordered to test for narcotics while on formal probation and has a testing order for substance abuse while on parole. The defendant is not cooperating with parole at this time. His history of arrest indicates a serious abuse problem that defendant has not addressed."

The probation report noted that Olivero had continually been on probation for the previous eight years, and concluded that Olivero was unsuitable for a new grant of probation, given that he had committed the current crime while on

probation, had not complied with the terms of his probation, had never had a job while on probation, and had demonstrated only that he would continue to commit criminal acts at the expense of others. The report also stated, “The court may wish to order the defendant to attend California Rehabilitation Center (or similar facility for substance abuse) while incarcerated.”

Olivero’s counsel submitted a sentencing memorandum requesting that the court reduce the conviction to a misdemeanor pursuant to Penal Code section 17, subdivision (b), or in the alternative impose a probationary sentence involving intensive drug treatment. At the sentencing hearing, Olivero’s counsel argued in favor of a drug treatment program, suggesting that, “for example, the court can order a suspended sentence, S.O.D.C., and order him to do an in-patient or outpatient drug treatment program, and if he fails to do so he would be sentenced to prison. I think it’s apparent that if he were able to be on his medication he would not be sentenced to prison, he would be automatically in that drug treatment court.” Counsel did not request CRC commitment for his client.

The prosecutor argued in response that “in various drug-related cases the defendant has been given the opportunity to complete various drug programs and those opportunities have all resulted, ultimately, in prison terms. . . . And there are, of course, drug treatment programs within certain prisons that Mr. Olivero could take advantage of, if he were so inclined. But, given the failure of previous drug programs and without any further information on what specifically counsel would be looking for, we just don’t believe that probation is appropriate in this case.”

The court declined to reduce the offense to a misdemeanor and found that Olivero was not suitable for probation due to his lengthy criminal record. After dismissing five of Olivero’s one-year prison priors under Penal Code section 1385

because they were remote drug offenses, the court sentenced Olivero to a total term of six year in prison, based on the mid-term of two years for the burglary plus four years for the prison priors. The court's stated rationale for the sentence was that the probation report demonstrated a virtually uninterrupted record of criminality from ages 19 to 39, Olivero's age as of the current offense, including at least 10 felonies and two misdemeanors.

Olivero timely appealed.

## **DISCUSSION**

Olivero contends that the trial court erred in refusing to refer him for evaluation under Welfare and Institutions Code section 3051 (section 3051) for commitment to the CRC.<sup>1</sup> Section 3051 states in relevant part: "Upon conviction of a defendant for a felony . . . and upon imposition of sentence, if it appears to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics the judge shall suspend the execution of the sentence and order the district attorney to file a petition for commitment of the defendant to the Director of Corrections for confinement in the narcotic detention, treatment, and rehabilitation facility unless, in the opinion of the judge, the defendant's record and probation report indicate

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<sup>1</sup> In his reply brief Olivero suggests (in passing) that his opening brief also challenged the trial court's refusal to reduce his offense to a misdemeanor under Penal Code section 17, subdivision (b). Although Olivero's opening brief states the standard of review for a refusal to reduce a "wobbler" offense charged as a felony to a misdemeanor, neither the opening nor the reply brief contains any argument or citation to authority with respect to the propriety of the trial court's decision in this regard. Therefore, we decline to consider the issue. (*Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862 [issue not supported by reasoned argument and citations to authority may be treated as waived].)

such a pattern of criminality that he or she does not constitute a fit subject for commitment under this section.”

Section 3051 vests discretion in the trial court to determine whether evaluation for commitment to CRC is appropriate. (*People v. Masters* (2002) 96 Cal.App.4th 700, 703; *People v. McGinnis* (2001) 87 Cal.App.4th 592, 595.) “If the trial court finds that a defendant is addicted or in danger of becoming addicted, it must suspend execution of sentence and order commitment proceedings unless it finds that the defendant is unsuitable for commitment. [Citation.] In the determination of a ‘pattern of criminality,’ the trial court may consider a defendant’s prior convictions, his performance on probation or parole, and the circumstances of the present offense. [Citation.] ‘[E]xcessive criminality is the *only* consideration a sentencing court should look to for refusing to initiate CRC proceedings.’ [Citation.]” (*People v. Jeffery* (2006) 142 Cal.App.4th 192, 196.)

Olivero concedes that his trial counsel did not request CRC commitment and further acknowledges authority holding that a defendant must raise the possibility of referral to the CRC in the trial court in order to raise the issue on appeal. (*People v. Lizarraga* (2003) 110 Cal.App.4th 689, 692 (*Lizarraga*) [defendant forfeited his right to raise the issue of a CRC commitment on appeal by failing to raise the issue in the trial court]; *People v. Planavsky* (1995) 40 Cal.App.4th 1300, 1305, 1311-1312 (*Planavsky*) [forfeiture rule applied where defendant never made request for CRC placement].) He correctly notes that the purpose of the forfeiture doctrine is to encourage defendants to bring errors to the attention of the trial court, so that they may be corrected. (*People v. Saunders* (1993) 5 Cal.4th 580, 590.) However, he contends that the forfeiture rule should not apply in this case because the question of CRC placement was sufficiently before the trial court, given that

the court was plainly aware that Olivero was a drug addict and because the prosecutor alluded to the possibility of Olivero seeking drug treatment in prison.

We disagree with Olivero. In cases finding a forfeiture of the right to request CRC commitment, the record inevitably includes evidence of the defendants' substance abuse, or else the defendants could not argue that "it appear[ed] to the judge that the defendant may be addicted or by reason of repeated use of narcotics may be in imminent danger of becoming addicted to narcotics" such that CRC commitment was even a possibility. (§ 3051.) Nor do generic requests for placement in a drug treatment program suffice to put the court on notice that a defendant wants to be considered for CRC commitment. Even where it is obvious that a defendant is addicted to narcotics, his or her counsel may purposefully not request CRC commitment because of the particular CRC programs and the particular conditions of confinement associated with the CRC, or based on the judgment that the "defendant's record and probation report indicate such a pattern of criminality that [defendant does] not constitute a fit subject for commitment . . . ." (Welf. & Inst. Code, § 3051; see *Lizarraga, supra*, 110 Cal.App.4th at p. 693.)

*Planavsky*, the seminal decision applying the forfeiture doctrine to the failure to request CTC commitment in the trial court, is particularly instructive. In that case, the defendant's substance abuse was plainly evident to the trial court, as the probation report was "rife with references to [defendant's] problem with illegal drugs," and during the sentencing hearing the trial court demonstrated it was familiar with that report. (*Planavsky, supra*, 40 Cal.App.4th at p. 1304.) The defendant's counsel requested that the defendant be ordered to serve a year in a narcotics rehabilitation program known as the Rap Institute, but no one requested placement in the CRC. (*Id.* at pp. 1303, 1305.) On appeal the defendant argued

that the trial court should have conducted a CRC evaluation anyway because he obviously was addicted to drugs and had requested drug treatment. The appellate court rejected this argument, finding that “requiring the defendant to make a section 3051 request accords with the basic rules of appellate procedure” designed to prevent parties from “tak[ing] advantage of an error on appeal when it could easily have been corrected at the trial.” (*Id.* at p. 1312.)

We likewise hold that the trial court’s awareness of a defendant’s drug addiction and the fact that other drug treatment options were raised at the sentencing hearing does not obviate the requirement that the defendant’s counsel specifically request a CRC evaluation. Thus, Olivero forfeited any issues relating to a possible CRC commitment by failing to request such a placement in the trial court.

In any event, we conclude that the record did not support a CRC referral. As the trial court noted at the sentencing hearing, in the previous 20 years he scarcely went a year without committing a crime, including more than 10 felonies.<sup>2</sup> This record alone demonstrates a “pattern of criminality” that the trial court reasonably could have found disqualified Olivero from the CRC program. (§ 3051.) Further, the probation report states that Olivero had not cooperated with the terms of his current parole, and had committed numerous of his offenses while on probation. His poor performance while on parole and probation only reinforces the determination that he was not a “fit subject” for CRC commitment. (§ 3051; see *People v. Jeffery*, *supra*, 142 Cal.App.4th at p. 196.)

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<sup>2</sup> The probation report reveals more than 10 uncharged offenses over the years as well.



**DISPOSITION**

The judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.