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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. DELANO NATHANIEL TEMPLE, Defendant and Appellant.	B263655 (Los Angeles County Super. Ct. Nos. MA046581, KA106823)

APPEAL from orders of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Affirmed.

Winston Kevin McKesson for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Delano Nathaniel Temple appeals from orders revoking his probation and sentencing him to state prison in two separate cases, following a single probation revocation hearing. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In case No. MA046581 (Case 1), defendant was charged by felony complaint on August 17, 2009 with two counts of assault by means likely to produce great bodily injury (Pen. Code, § 245, subd. (a)(1)).[1] Pursuant to a plea agreement, defendant pled no contest to one count of assault by means likely to produce great bodily injury on November 9, 2009. On November 30, 2009, the trial court suspended imposition of sentence and placed defendant on probation for three years, conditioned on service of 180 days in county jail.

On May 13, 2011, defendant's probation was revoked based upon his failure to report to probation and an arrest in Nevada. At a probation violation hearing on June 24, 2011, defendant admitted the probation violation and, pursuant to stipulation, his probation was reinstated and extended for a period of two years.

On December 14, 2011, defendant admitted another probation violation. His probation was revoked and reinstated with an additional 20 days of community labor ordered, for a total of 110 days of community labor. Defendant's probation was again revoked on February 15, 2012 for failure to appear with proof of

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1 All further statutory references are to the Penal Code.

progress toward completing the community labor. On February 16, defendant's probation was reinstated with an additional order as to completion of his community labor, including a specific order that he complete a minimum of eight days of Caltrans or community labor each month for the next two months.

On July 30, 2014, by felony complaint, defendant was charged in case No. KA106823 (Case 2) with possession of a firearm by a felon (§ 29800, subd. (a)(1)) and possession of ammunition (§ 30305, subd. (a)(1)). On July 31, pursuant to a plea agreement, defendant pled no contest to possession of a firearm by a felon. Imposition of sentence was suspended, and defendant was placed on formal probation for three years, conditioned on service of 365 days in county jail.

On November 12, 2014, probation was revoked in Case 1.

A hearing was held in Cases 1 and 2 on December 2, 2014, at which the court considered a recent probation report which indicated defendant had been arrested six times since the last report in 2012, resulting in three convictions, including his conviction for the firearm possession in Case 2. The report also noted that he had failed to complete the terms of his probation for Case 1 relating to community labor. At the conclusion of the hearing, the court continued the probation violation hearing relating to Case 1 to December 29 to allow defendant to have private counsel present. In Case 2, probation was revoked and the probation violation hearing was set for December 29.

The combined probation violation hearing was continued several times and ultimately held on March 18, 2015. At the hearing, defendant was questioned extensively about the circumstances surrounding his arrest and guilty plea in Case 2. He testified that he had been stopped in his car by the police.

When they asked if he was on probation, he stated that he was and gave them permission to search his car. The police found a handgun, and he was arrested for being a felon in possession of a handgun.

Defendant described how he had been represented in Case 2 by a public defender at the plea stage. Defendant testified that he had told his public defender that he wanted probation. Defendant explained his interaction with the attorney: "He gave me a pink paper, told me he talked to the [district attorney] and the judge, and they offered to give me 365 [days], a[t] county jail." He explained that while he read it, "I didn't really understand it. So I thought it was part of my violation. I figure since they knew I was on probation, that I was—I was getting violated so . . . ." He did not "necessarily" read the pink paper. His attorney did not read it to him, and he did not ask his attorney to explain it to him. His attorney did not discuss with him the possibility that he would be charged with a separate probation violation or even tell him that was a possibility. He only spoke with his attorney for about two minutes while he was in the holding cell.

Defendant acknowledged that when he signed the pink paper, he knew he was going to be on probation for Case 1 and Case 2. Additionally, when he was in court on Case 2, no one mentioned anything about Case 1, and he did not ask about it. His attorney never told him Case 1 would be taken care of at the same time as Case 2.

Defendant also testified he was stopped several times for driving on a suspended license, but to his knowledge his license had never been suspended. He later told the court that after he was stopped in September 2014, the police took his license and he learned it was suspended, but he claimed he was being truthful

when he testified he never knew it had been suspended because he did not know until "[a]fter they took it." He also admitted prior convictions for driving on a suspended license but claimed, "All these times I never knew my license was suspended."

Defendant further testified as to the community service he performed several years earlier. He explained that he had performed work as part of a youth program at Locke High School, cleaning and performing other jobs at the school. He also described how he had submitted a letter in 2012, which he claimed documented this work. His probation officer never told him that the work he performed was not in compliance with the court's order. It was not clear to him that he was to perform "community labor," as opposed to "community service." He did not know the difference between the two, as he thought both just involved "picking up trash." He found his own program and did not understand that he was to perform the labor through the probation department.

Defendant did recall a probation officer telling him that the court would be notified that he was not providing proof of Caltrans and community labor, but he told the probation officer he had previously filed the completion paperwork with the court. When he got a letter in the mail on November 12, 2014, defendant became aware for the first time that there was a problem with his completion of the community labor term and that he faced a potential probation violation. He admitted that he did not do eight days a month of community labor in February and March of 2012, and he never completed the 110 hours of work ordered, whether as community labor or community service.

The trial court found defendant's testimony not credible. Defendant testified he never knew his license was suspended,

"yet he suffered multiple arrests for driving on a suspended license." In addition, "defendant admitted that he never completed the community labor or Caltrans as ordered in the . . . broadest sense, even if the community service in his mind were permitted so it would not arguably been a willful violation, he still didn't complete it, no matter how you phrase it. So he failed to follow all the court orders." Defendant "may try to excuse it, and say I was confused and went too fast and I don't know, but he does admit that he did not complete it." Additionally, defendant "said in here that it's not a problem because he previously filed the completion with the court," but that was not "truthful based on what he told me which is that he didn't complete it."

Based on defendant's violations of the law and of court orders, the trial court revoked defendant's probation in both cases.

At the sentencing hearing on March 23, 2014, the trial court noted that the document stating that defendant performed community service at Locke High School to comply with the terms of probation in Case 1 appeared to be fraudulent. The court was unable to verify its authenticity, and the defense failed to subpoena a witness to verify it. The court concluded the letter was "a fraudulent submission."

The court also ruled on defendant's written motion in opposition to finding a probation violation, in which defendant argued that *Kellett v. Superior Court* (1966) 63 Cal.2d 822 (*Kellett*) barred the court from finding a probation violation in Case 1 based on his guilty plea and conviction in Case 2. The court denied the motion, finding *Kellett* inapplicable. Moreover, the court observed the defendant had signed a waiver indicating that he read and understood the consequences of his plea, one of

which was: "I understand that a conviction in this case may be grounds for violating any probation or parole that I [may] have been granted in any other case, and that I may be subject to additional punishment as a result of that violation."

After considering all of the testimony presented and the probation reports, the trial court revoked and denied probation in Case 1, sentencing defendant to the high term of four years in state prison. "The basis for [the high term]," the court explained, "is the defendant's multiple violations since he's been on probation, [and] the defendant submitting fraudulent documents to the court through probation."

In Case 2, the trial court revoked and denied probation and ordered defendant to serve one-third of the mid-term of 24 months in state prison. The sentence was to run consecutive to the term in Case 1 based on defendant's unsuccessful prior performance on probation and his dangerousness to the community.

DISCUSSION

A. *Ineffective Assistance of Counsel in Case 2*

Defendant claims ineffective assistance of counsel in Case 2 based on his counsel's failure to explain to him that he was only pleading no contest to the new charge, and he would still be subject to a finding of a probation violation and revocation of probation in Case 1 based on his conviction in Case 2. As the People point out, this issue is not properly before us.

A claim of pre-plea ineffective assistance of counsel may be raised on appeal from the judgment of conviction and requires that the defendant obtain a certificate of probable cause.

(§ 1237.5;[2] see *People v. Johnson* (2009) 47 Cal.4th 668, 683-685.) Compliance with section 1237.5 is required for review of issues for which a certificate of probable cause is required. (*People v. Mendez* (1999) 19 Cal.4th 1084, 1099.) Defendant neither obtained a certificate of probable cause nor appealed from the judgment of conviction in Case 2, and that judgment is now final. Absent a certificate of probable cause and an appeal from the judgment, we have no jurisdiction to review defendant's claim of pre-plea ineffective assistance of counsel. (See *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1749.) Our jurisdiction is limited to the orders from which this appeal was taken, revoking probation and sentencing defendant in the two cases. (*Ibid.*)

B. *The Handling of the Probation Violation Proceedings Did Not Violate Double Jeopardy*

Defendant contends that under *Kellett* and the constitutional prohibition against double jeopardy, the court was required to combine probation violation proceedings in Case 1 with Case 2 to the extent they were based on the same conduct

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[2] Section 1237.5 provides: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, or a revocation of probation following an admission of violation, except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

and could not punish him twice for the same conduct.[3] As the trial court found, *Kellett* has no application to the instant case.

Kellett examined the effect of section 654 on successive prosecutions arising out of the same course of conduct. Section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

Kellett involved a misdemeanor conviction followed by a felony conviction arising out of the same conduct. The court observed that "[i]f needless harassment and the waste of public funds are to be avoided, some acts that are divisible for the purpose of punishment must be regarded as being too interrelated to permit their being prosecuted successively. . . . When, as here, the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance permitted for

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[3] Defendant's contention that he was sentenced twice for the same probation violation is somewhat uncertain: it is not clear whether he contends it was improper for the court to revoke his probation in Case 1 based on the conviction in Case 2, or whether he contends the court could not revoke probation in both Case 1 and Case 2 based on the same probation violation. As we explain in the body of this opinion, under either theory there was no violation of the Penal Code or the prohibition against double jeopardy.

good cause. Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence." (*Kellett*, *supra*, 63 Cal.2d at p. 827, fn. omitted.)

The court "recognize[d] that in many places felonies and misdemeanors are usually prosecuted by different public law offices and that there is a risk that those in charge of misdemeanor prosecutions may proceed without adequately assessing the seriousness of a defendant's conduct or considering whether a felony prosecution should be undertaken. When the responsibility for the prosecution for the higher offense lies with a different public law office there is also the risk that a well advised defendant may plead guilty to a misdemeanor to foreclose a subsequent felony prosecution the misdemeanor prosecutor may be unaware of or may choose to ignore. Cases may also arise in which the district attorney is reasonably unaware of the felonies when the misdemeanors are prosecuted. In such situations the risk that there may be waste and harassment through both a misdemeanor and felony prosecution may be outweighed by the risk that a defendant guilty of a felony may escape proper punishment. Accordingly, in such cases section 654 does not bar a subsequent felony prosecution except to the extent that such prosecution is barred by that section's preclusion of multiple punishment." (*Kellett*, *supra*, 63 Cal.2d at pp. 827-828.)

A probation revocation hearing is not a criminal prosecution within the meaning of section 654. "A probation revocation hearing assesses whether conditions relating to punishment for a prior crime have been violated so that probation should be modified or revoked; a criminal prosecution

seeks conviction for wholly new offenses. [Citation.] If the People prevail at the hearing, the result is not a new felony conviction . . . . Rather, if they prevail, the court's discretion is limited to modifying a previously imposed sentence or imposing a new sentence for an earlier conviction. [Citations.] A revocation hearing arises as a continuing consequence of the probationer's original conviction; any sanction imposed at the hearing follows from that crime, not from the substance of new criminal allegations against the probationer." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 347-348.)

Because a probation revocation hearing is not a criminal prosecution and does not result in an acquittal or conviction and sentence, section 654 and *Kellett* have no application to a criminal prosecution and probation revocation arising out of the same course of conduct. (See, e.g., *In re Coughlin* (1976) 16 Cal.3d 52 [probation revocation hearing held after acquittal based on same conduct does not violate constitutional guarantee against double jeopardy].)

That a probation revocation hearing is not a criminal prosecution resolves defendant's contention that sentencing him twice for the same probation violation was a violation of double jeopardy. First, he was not "sentenced twice for the same violation." He was found to be in violation of probation in Cases 1 and 2, and the sentences previously suspended in those two cases were imposed.

Second, because a probation violation "hearing—despite its obvious importance to both probationer and People—neither threatens the probationer with the stigma of a new conviction nor with punishment other than that to which he was already exposed as a result of his earlier offense, it does not place the

probationer in jeopardy. [Citations.]" (*Lucido v. Superior Court*, *supra*, 51 Cal.3d at p. 348.) It thus does not invoke principles of double jeopardy. (*In re Coughlin*, *supra*, 16 Cal.3d at p. 61.)

DISPOSITION

The orders are affirmed.

KEENY, J.*

We concur:

ZELON, Acting P. J.

SEGAL, 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.