Filed 3/21/12 P. v. Mincey CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM EUGENE MINCEY II, Defendant and Appellant.	2d Crim. No. B229532 (Super. Ct. No. F434782) (San Luis Obispo County)

William Eugene Mincey appeals an order revoking probation and sentencing him to three years in state prison following his no contest plea to driving under the influence with prior driving under the influence convictions (Veh. Code,[1] § 23152, subd. (a)), and resisting, obstructing, or delaying a peace officer (Pen. Code, § 148, subd. (a)(1)).[2] He was awarded 294 days presentence custody credit and was ordered to pay a $500 restitution fine and a stayed $500 parole revocation fine. (Pen. Code, §§ 1202.4, subd. (b), 1202.45.) Appellant contends (1) the trial court erred in

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[1] All further undesignated statutory references are to the Vehicle Code.

[2] Appellant was also charged with violating his probation in case number M413485. The substantive offense underlying both alleged probation violations, violation of a protective order (Pen. Code, § 273.6, subd. (a)), was separately charged in case number M452370. After appellant was sentenced to state prison, the court terminated probation in case number M413485 and dismissed case number M452370 on the prosecution's motion.

sustaining his personal objection to counsel's time waiver; and (2) the $500 restitution and parole revocation fines are unauthorized.[3] We affirm.

FACTS AND PROCEDURAL HISTORY

Appellant's Arrest, Conviction, and Probation Violations

On June 20, 2009, appellant was arrested after exhibiting signs of intoxication during a traffic stop. During the arrest, appellant was resistive and tried to run away while being handcuffed. A blood test conducted later that night revealed that he had a blood alcohol level of .21.

In subsequently pleading no contest to a violation of section 23152, subdivision (a), appellant admitted he was driving with a blood alcohol level of 0.15 percent or higher (§ 23578). He also admitted a prior conviction for reckless driving in lieu of driving under the influence (§ 23103.5), and two prior convictions for driving with a blood alcohol level of .08 percent or higher (§ 23152, subd. (b)). He further admitted violating his probation in case numbers M378286 (a 2006 conviction for driving in violation of section 23152); M413485 (a 2008 conviction on three counts under Penal Code section 653m); and M424288 (a 2008 theft conviction). The court suspended imposition of sentence and granted appellant three years probation with terms and conditions including that he serve 210 days in county jail. Pursuant to appellant's plea, probation in case number M378286 was terminated after the restitution fine was transferred to the instant matter. Probation was also terminated in case number M424288. In case number M413485, probation was reinstated and modified to informal probation with the stay-away order as to the victim still in effect.

On June 29, 2010, probation was summarily revoked due to appellant's failure to keep probation informed of his whereabouts and reregister as a sex offender

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[3] In his briefs, appellant also argued that (1) his trial attorney provided constitutionally ineffective assistance by failing to object to the court's failure to state its reasons for imposing the upper term; and (2) the matter should be remanded for recalculation or explanation of the custody credit reward. At oral argument, appellate counsel informed us that these claims are now moot because appellant has been released on parole.

under Penal Code section 290.[4] Appellant admitted the violation, and probation was reinstated. On October 4, 2010, appellant was charged with violating his probation in both the instant matter and in case number M413485, based on his arrest for violating a protective order (Pen. Code, § 273.6, subd. (a)). Appellant was also separately charged with the substantive offense in case number M452370.

The Probation Violation Hearing

D.E. testified that appellant had raped and sexually assaulted her on September 20, 2010. D.E., who met appellant through an online dating site in July 2010, immediately told him that she wanted to terminate their relationship. After appellant refused to leave D.E.'s home, she sought an emergency protective order (EPO) from the Paso Robles Police Department. D.E. spoke to Detective David Opheim, who told her to continue having contact with appellant until the EPO was in place because he might otherwise become suspicious. D.E., however, immediately "defriended" appellant from her Facebook account and reported him on the site as a registered sex offender.

The EPO was granted on September 24, 2010, and Detective Opheim served it on appellant that same day. The EPO, which Detective Opheim read to appellant, states that appellant was not to contact D.E. by phone, email, or otherwise. Appellant was told to "log" and report any attempts by D.E. to contact him. Detective Opheim also gave a copy of the EPO to D.E., and told her to refrain from any further contact with appellant.

The following day, appellant called D.E. nine times by telephone and left voicemails. He also tried to contact her by Skype and sent her at least six emails. On September 29, 2010, D.E. showed her home telephone to Detective Opheim to verify that appellant had made several additional calls to her that day. Appellant had made four more calls to D.E. the previous day.

When Detective Opheim met with appellant later that day, appellant said he thought it was "all right" to contact D.E. because she had contacted him first. He

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[4] Appellant is required to register due to his 1997 conviction for committing a lewd act on a child in violation of Penal Code section 288, subdivision (c)(1).

admitted, however, that he recalled being told that he was prohibited from contacting D.E. regardless of the circumstances. He also admitted calling her nine times in the preceding hour.

D.E. testified that "to [her] knowledge" she had not made any attempt to contact appellant while the EPO was in effect. She acknowledged that she "was pretty messed up at that time" as a result of the situation and was taking prescription sleep medication. She denied calling appellant and telling him the EPO had expired, and also denied sending him messages via Facebook after the EPO went into effect. She denied sending messages to appellant through Keri S., a Facebook "friend" appellant had introduced to her. D.E. believed that she may have had a miscarriage while she was in the process of obtaining the EPO, but denied calling appellant while crying and upset about it. After the EPO expired, D.E. obtained a three-year protective order against appellant.

Detective Opheim testified that he was still investigating D.E.'s allegation regarding the sexual assault, and that the matter had yet to be submitted to the district attorney's office for review. The day before the EPO was issued, the detective listened in on a pretext call D.E. made to appellant at the police station. No additional calls were made to appellant after the EPO was issued.

Appellant testified in his defense. He admitted that Detective Opheim had given him the EPO on September 24 and instructed him not to call or contact D.E. He also acknowledged signing the EPO, but claimed he put it in his pocket without looking at it because Detective Opheim had asked to see his computer equipment. Appellant pulled his laptop computer out of his backpack and showed the detective the texts, calls, and emails that D.E. had sent him after the date of the alleged rape. He claimed that D.E. had also contacted him "via the wall" of Keri S.'s Facebook page and had "suggested to [him] that she was . . . losing [his] baby." Appellant responded by asking her if she was okay because he was worried about her well-being. D.E. told him that the EPO was not in force because it was dated September 1, 2010. She also said the police had misdated the order and that he could call her because the order was invalid. She also told him that

he should contact her because she needed someone to talk to. Although the face of the EPO clearly showed that September 1 had been changed to October 1, appellant claimed the change was made after he received the order. On rebuttal, Detective Opheim testified that he had corrected the date before serving it on appellant.

The Sentencing Hearing and Appellant's Objection to Counsel's Time Waiver

After the court found that appellant had violated his probation by contacting D.E. in violation of the EPO, it granted counsel's request for a four-day continuance of the sentencing hearing so that counsel could obtain evidence to support appellant's claim that D.E. had initiated the contact. At the continued hearing, appellant's attorney informed the court that he had been unable to obtain appellant's computer and stated "[appellant] wants me . . . to subpoena Facebook and other social network information in support of his factors in mitigation on his probation violation." The court agreed to an additional continuance and stated, "I'll put the matter over for further proceedings regarding sentencing in the probation matters. I'll put the pending misdemeanor [in case number M452370] over for a trial setting conference." The court asked whether there was a waiver of time on the misdemeanor charge, and counsel responded, "Yes."

The court told appellant: "You have a right to a speedy trial in the pending misdemeanor. But if we do that, then that's going to restrict how much time I can give you to present evidence with regards to sentencing in the felony." Appellant responded, "The only thing I think is happening is I'm being adversely effected [*sic*] by having to waive time." The court replied "[y]ou don't need to waive time" and asked counsel whether time was waived for sentencing on the probation violation. Counsel replied, "[y]es." After hearing argument from counsel, the court stated: "[Appellant], I've considered your situation. And, of course, I'm mindful of what I've heard in this probation violation hearing. I'm also mindful of the jury trial that was conducted in this department where you were convicted of the annoying or obscene phone calls to . . . one of your other victims. [¶] Based on what I've heard, probation is now denied you. And in [the felony probation violation matter], I'm sentencing you to the upper term of three

years." After the court granted the prosecutor's motion to dismiss the misdemeanor charge in the interests of justice, appellant stated, "I didn't want to waive time for the trial. I wanted to waive time for the probation hearing." The court responded, "That case is dismissed so you don't need to worry about that any longer."

DISCUSSION

Appellant's Objection to Counsel's Time Waiver

Appellant contends the court committed prejudicial error by "sustaining his personal objection to his attorney's time waivers for the hearing and trial, and in vacating its order continuing those matters at his attorney's request." He asserts that the court should have overruled his objection because the continuance counsel requested was essential to his effective representation of appellant. (See, e.g., *People v. Lomax* (2010) 49 Cal.4th 530, 553 [counsel generally has authority to waive speedy trial rights over client's objection where counsel is acting competently in the client's best interest].) According to appellant, "[n]othing said by counsel supports an inference that he sought to serve any other interest."

We conclude that just such an inference can be derived not only from counsel's proffered reason for seeking the continuance, but also from his response to appellant's objection to the time waiver. Counsel offered that he was requesting the continuance because "[appellant] wants me . . . to subpoena Facebook and other social network information in support of his factors in mitigation on his probation violation." When appellant subsequently expressed his objection to the waiver of time, counsel made no attempt to convince the court that a continuance was essential to his effective representation of appellant and did not hesitate in waiving time for sentencing. From this record, it is clear that counsel not only declined to challenge appellant's objection to the time waiver, but rather acquiesced in it and effectively abandoned his request for a continuance. Under the circumstances, it cannot be said the court erred in sustaining appellant's objection to counsel's time waiver, or in thereafter imposing sentence on the probation violation.

Even if appellant could establish that the court erred in this regard, the error would be harmless. The proffered purpose of the continuance was to allow counsel to subpoena records that would purportedly support appellant's testimony that D.E. had contacted him through his Facebook account. Counsel, however, made no documentary offer of proof that such evidence actually exists. As the People note, logic would suggest that any messages D.E. sent to appellant could be obtained simply by signing on to his Facebook account. Moreover, the prosecutor conceded that D.E. may have contacted appellant, and noted her inability to disavow doing so. Because appellant's testimony on this point was essentially undisputed, any error in failing to continue the matter for the asserted purpose was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Cunningham* (2001) 25 Cal.4th 926, 999 [error in failing to continue trial subject to *Watson* harmless error standard of review where error did not result in the complete exclusion of evidence necessary to establish an accused's defense].)[5]

Restitution and Parole Revocation Fines

Appellant claims the court erred in imposing a $500 restitution fine and a stayed $500 parole revocation fine. He argues that "[s]ince the original probationary restitution fine order was for $200, the order within the judgment increasing it to $500 is unauthorized."

We agree with the People that appellant has failed to meet his burden of demonstrating that the fines are unauthorized. Although the record reflects that $200 restitution and parole revocation fines were imposed for the felony in the instant matter, it also reflects the party's agreement that the fines previously ordered in case number M378286 "were going to be carried over to the felony." In exchange for this agreement, the court terminated appellant's probation in the prior case. Appellant offers no evidence that the restitution fine in that case was less than $300. No attempt was made to present

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[5] Appellant's claim that the court's ruling amounts to a violation of his federal due process rights was not raised below and is thus forfeited. (See *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126, fn. 30; *People v. Daniels* (2009) 176 Cal.App.4th 304, 320, fn. 10.) In any event, the alleged error, even if established, does not amount to a due process violation. (*People v. Cunningham, supra*, 25 Cal.4th at pp. 998-999.)

this court with the record of the proceedings in the prior case. While appellant notes that the fine is not included in the signed order of probation, the transfer was plainly contemplated and was part and parcel of appellant's negotiated plea. Under the circumstances, the court's failure to include the fine in the written order of probation is in the nature of a clerical error and the oral pronouncement controls. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185–186.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.*

* Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Michael L. Duffy, Judge

Superior Court County of San Luis Obispo

Dan Mrotek, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Mary Sanchez, Assistant Attorney General, Michael J. Wise, Deputy Attorney General, for Plaintiff and Respondent.