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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.

MIGUEL MIRANDA,

Defendant and Appellant.

B234074

(Los Angeles County
Super. Ct. No. BA376362)

APPEAL from a judgment of the Superior Court of Los Angeles County, Monica Bachner, Judge. Affirmed.

Gideon Margolis, 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, Margaret E. Maxwell and Yun K. Lee, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Miguel Miranda of second degree robbery (Pen. Code, § 211). Appellant appeals from the trial court's denial of probation and imposition of a \$10 crime prevention fine. (Pen. Code, § 1202.5.) He contends the factors relied on by the court to deny probation are not supported by the record. He further argues the court failed to formally assess his ability to pay the fine and there was insufficient evidence to support such a finding. We find no abuse of discretion in the denial of probation, and rule the challenge to the fine forfeited for failure to raise the issue in the trial court.

FACTUAL AND PROCEDURAL SUMMARY

On September 24, 2010, at about 8:30 p.m., victim Carlos Cisneros was approached by three male assailants, one of whom had a gun. The other two men, appellant and his codefendant, were standing behind the victim and pushed him to the ground. The three men then began to strike the victim while he lay on the ground and took \$43 from his pockets. The victim was hurt but suffered no serious injuries. He called police and subsequently identified appellant and the codefendant as the two who attacked him from behind. A knife codefendant wielded during the robbery and a stick carried by appellant were found nearby.

Appellant and his codefendant were charged with second degree robbery, with an additional allegation that each personally used a deadly and dangerous weapon within the meaning of Penal Code section 12022, subdivision (b)(1). A jury found appellant guilty of robbery but found the allegation relating to use of a weapon untrue. The court denied probation and sentenced appellant to the low term of two years in state prison. The court then imposed a series of fines, including the \$10 crime prevention fine. This appeal followed.

DISCUSSION

I

Appellant contends the trial court based its decision to deny him probation on criteria unsupported by the record. He argues that had the court properly weighed the

factors affecting probation detailed in California Rules of Court, rule 4.414¹ there is a reasonable probability that it would have granted probation. We find no abuse of discretion.

A decision denying probation is reviewed for abuse of discretion. (*People v. Carbajal* (1995) 10 Cal.4th 1114, 1120.) The trial court has “broad discretion to determine whether an eligible defendant is suitable for probation.” (*Ibid.*) To establish abuse of discretion, it must be shown that the denial of probation was arbitrary or capricious. (*People v. Lai* (2006) 138 Cal.App.4th 1227, 1256-1257 (*Lai*); *People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.) Appellant concedes that he carries a heavy burden in challenging such a ruling.

Rule 4.414 lays out specific criteria to guide the court in determining whether to grant probation, including facts relating to the crime and facts relating to the defendant. Appellant submitted an application for probation and the prosecution responded, each arguing the merits of the various factors listed. Appellant now contends there was insufficient evidence to support either the probation report’s findings or the court’s ruling.

The trial court addressed nearly every factor listed in Rule 4.414 in reaching its decision to deny probation. First, it found the crime was serious as compared to similarly-situated crimes because there were multiple defendants perpetrating the crime against a single victim. (Rule 4.414(a)(1).) The court also found the victim was particularly vulnerable because he was much older than his attackers and was outnumbered by them. (Rule 4.414(a)(3).) The court determined that appellant was an active participant in the crime based on evidence he directly assaulted the victim. (Rule 4.414(a)(6).) The court did not find any unusual circumstance, such as provocation, that would make appellant’s actions unlikely to recur. Instead, it concluded that the record showed appellant’s actions to be predatory. (Rule 4.414(a)(7).) Finally, relying on recommendations and statements laid out in the probation report, the court concluded that

¹ All further rule references are to the California Rules of Court, unless otherwise stated.

appellant was unlikely to comply with reasonable terms of probation and would pose a danger to others. (Rule 4.414(b)(4), (8).)

After evaluating appellant's potential for functioning successfully on probation and the potential level of threat to the community if granted probation, the overall recommendation of the probation report was to deny probation. The report noted that the offense involved planning and calculation and a physical assault of the victim, leading the evaluators to believe that appellant would pose a "significant threat to the community and danger to those around him." The court directly cited a correctional counselor's assessment that appellant's crime indicated a complete lack of self-control, suggesting that he is a threat to the community. The court did recognize that several factors listed in Rule 4.414 did not apply, and that several others weighed in favor of granting probation, such as appellant's lack of a criminal record. Although the jury determined it was not proven beyond a reasonable doubt that appellant used a weapon, the prosecution urged the court to consider it at sentencing on the lower, preponderance of the evidence standard applicable to such determinations. The court declined to do so, and treated appellant as unarmed in determining the sentence.

Appellant presents rebuttals to each of the aggravating factors. He argues that the crime was not serious because of the lack of serious injury, the victim was not vulnerable as defined by case law, and the circumstances indicated that this was a "spontaneous" act that qualified as an unusual circumstance. He additionally challenges the level of threat he would pose if granted probation and, while conceding that the court could find he was an active participant, contends it was inappropriate to deny probation on that ground alone.

Appellant argues the record supports the opposite conclusion and probation should have been granted. However, a ruling will not be overturned even though reasonable people may disagree. (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319.) In addition to the deference afforded the trial court in its decision to deny probation generally, the trial court also has broad discretion in its evaluation of the individual factors in aggravation and mitigation to make that determination. (*Lai, supra*, 138 Cal.App.4th at pp. 1256-

1257.) As mentioned, the circumstances relied on by the court in denying probation need only be established by a preponderance of the evidence and our review is limited to determining whether there is sufficient evidence to support a finding that a particular factor is applicable. (*People v. Weaver, supra*, 149 Cal.App.4th at p. 1313.) The court clearly considered each of the factors laid out in Rule 4.414 and argued by the parties. It identified specific support in the record for each of its findings. The court also considered the probation report, which recommended denying probation. We find there was sufficient support for the trial court's denial of probation and that there was no abuse of discretion. We affirm the ruling.

II

Appellant contends for the first time on appeal there was insufficient evidence to support the imposition of a \$10 crime prevention fine pursuant to Penal Code section 1202.5, subdivision (a). He bases his challenge on the statutory requirement that a court determine the defendant's ability to pay the fine before imposing it.

Penal Code section 1202.5 explicitly requires the court to determine whether a defendant has the ability to pay before imposing the crime prevention fine. However, a statute requiring an ability-to-pay determination does not necessarily mandate the finding be made expressly. (*People v. Martinez* (1998) 65 Cal.App.4th 1511, 1516 [discussing a fine imposed under Health and Safety Code section 11372.7, which uses language identical to Penal Code section 1202.5 regarding an ability-to-pay determination].) When a court does impose a fine, we assume that implicit in that ruling is the court's determination that the defendant is able to pay it. (*Id.* at pp. 1517-1518; *People v. Castellanos* (2009) 175 Cal.App.4th 1524, 1531.) However, appellant's central argument is that there was not sufficient evidence in the record to support the finding and that his failure to raise this issue in the trial court does not forfeit his challenge on appeal.

Appellant relies heavily on our Supreme Court's decision in *People v. Butler* (2003) 31 Cal.4th 1119 (*Butler*), for his contention that a sufficiency of the evidence challenge to a sentencing determination may be brought for the first time on appeal. He also points to several, subsequent appellate court opinions for support of his application

of *Butler* as to ability-to-pay determinations. We conclude that *Butler* does not stand for so broad a proposition.

In *Butler*, *supra*, 31 Cal.4th at page 1123, the court considered whether a defendant forfeited his right to challenge the sufficiency of the evidence to support a finding of probable cause by failing to raise the issue in the trial court. At the sentencing phase, the defendant was ordered to submit to a blood test pursuant to Penal Code section 1202.1, which required a judicial finding of probable cause. (*Ibid.*) Based on the strict statutory limitations imposed on involuntary blood testing, the court ruled the forfeiture doctrine did not apply to the defendant's sufficiency of the evidence challenge. (*Ibid.*) In doing so, the Supreme Court specifically limited the scope of its decision, stating: "[N]othing in our analysis should be construed to undermine the forfeiture rule of *People v. Scott* [(1994)] 9 Cal.4th 331, that absent timely objection sentencing determinations are not reviewable on appeal, subject to the narrow exception articulated in *People v. Smith* (2001) 24 Cal.4th 849." (*Id.* at p. 1128, fn. 5.) In a separate concurring opinion, Justice Baxter, joined by Justice Chin, elaborated on this limitation: "[I]t remains the case that *other* sentencing determinations may not be challenged for the first time on appeal, even if the defendant claims that the resulting sentence is unsupported by the evidence. This includes claims that the record fails to demonstrate the *defendant's ability to pay a fine* (e.g., *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1072; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469 . . .)." (*Id.* at p. 1130, first italics in original, second italics added.)

Since *Butler*, the forfeiture rule has been specifically applied to crime prevention fines under Penal Code section 1202.5. In *People v. Crittle* (2007) 154 Cal.App.4th 368, 371-372, the defendant contended the trial court failed to make an ability-to-pay determination and the evidence was insufficient to support such a finding; the reviewing court found the defendant's failure to raise the issue at the sentencing hearing fatal to his challenge. (*Ibid.*) Nevertheless, appellant contends the holding in *Butler* supports his argument that the forfeiture doctrine should not apply to ability-to-pay determinations. (Cf. *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397 [finding a sufficiency of the

evidence challenge to an ability-to-pay determination need not be asserted in the trial court[.]) We are not persuaded; we believe it is clear that appellant's extension of that holding runs afoul of the limitations explicitly placed on it by the Supreme Court. The parties both note the Supreme Court has granted review to consider the applicability of the forfeiture doctrine to implied findings of a defendant's ability to pay a fee. (*People v. McCullough* (2011) 193 Cal.App.4th 864, review granted June 29, 2011, S192513.) Based on the case law as it currently stands, we find appellant's challenge forfeited for failure to raise the issue below.

Moreover, even if we assume that appellant's challenge were not forfeited, we would reach the same outcome and affirm the order. The amount of this fine, notwithstanding the existence of other fines to be paid (totaling \$523, \$200 of which is stayed), is extremely small. It would be reasonable to assume appellant could satisfy it from funds earned while serving his sentence. We affirm the order.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.