Filed 11/28/18 P. v. Vasquez CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ALEX ALFREDO VASQUEZ, Defendant and Appellant.	B282644 (Los Angeles County Super. Ct. No. MA066020)

APPEAL from an order of the Superior Court of Los Angeles County, Andrew E. Cooper, Judge. Affirmed.

Benjamin P. Lechman, 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, Scott A. Taryle and Colleen M. Tiedemann, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Alfredo Vasquez pleaded no contest to willfully inflicting corporal injury on a child's parent—his son's mother. He received formal probation. As a condition to his probation, Vasquez was subject to a protective order requiring him to stay away from the victim and not contact her. The trial court found Vasquez had violated the protective order by assaulting her and sending her threatening text messages. The trial court revoked Vasquez's probation and executed the previously suspended seven-year state prison sentence.

On appeal, Vasquez contends the evidence was insufficient to support a finding he had violated the protective order, particularly where the protective order conflicted with a family court order. He further contends the trial court abused its discretion when it executed his prison sentence for what he contends was just contact with his son's mother. In addition, Vasquez faults the trial court for misunderstanding or being unaware of its discretion to reinstate probation or to sentence Vasquez to a lesser prison term.

We conclude there was substantial evidence supporting the trial court's revocation of probation and Vasquez's argument impermissibly asks us to reweigh evidence. Because the family court order is not in the record, Vasquez has forfeited his argument based on any asserted inconsistency between that order and the protective order. Finally, taking all inferences in favor of the trial court's order, we conclude the record demonstrates the trial court was aware of its discretion to reinstate probation, but determined Vasquez was no longer an appropriate candidate for probation. That being true, the trial court then had no discretion to execute a lesser prison term than

the term that was suspended when the original trial court put Vasquez on formal probation.

FACTUAL AND PROCEDURAL BACKGROUND

1. Vasquez's No Contest Plea

In May 2015, Vasquez was charged in a felony complaint with one count each of willfully inflicting corporal injury on a child's parent, R.P., the mother of his son, (Pen. Code,[1] § 273.5, subd. (a), count 1), assault by means of force likely to produce great bodily injury on R.P. (§ 245, subd. (a)(4), count 2) and cruelty to a child, his son A.V., by inflicting injury (§ 273a, subd. (b), count 3). As to counts 1 and 2, the complaint specially alleged a great bodily injury enhancement (§ 12022.7, subd. (e)).

On August 25, 2015, with the assistance of a Spanish language interpreter, Vasquez pleaded no contest to willfully inflicting corporal injury on R.P., the mother of his son, and admitted the great bodily injury enhancement. Prior to entering his plea, Vasquez completed an advisement of rights, waiver, and plea form also with the help of a Spanish language interpreter. Vasquez acknowledged he had read, initialed, and signed the form; he understood the nature of the charge and the consequences of his plea and admission as translated by the interpreter; and he waived his constitutional rights. Vasquez's counsel stipulated to a factual basis for the plea. The trial court found Vasquez had knowingly, voluntarily, and intelligently waived his constitutional rights and entered his no contest plea.

Pursuant to the negotiated agreement, Vasquez was to be sentenced to an aggregate seven-year state-prison term,

---

[1] Undesignated statutory citations are to the Penal Code.

execution of the sentence was to be suspended, and Vasquez was to be placed on five years of formal probation. The seven-year term would consist of the upper term of four years for willfully inflicting corporal injury on R.P., plus the lower term of three years for the great bodily injury enhancement.

The trial court advised Vasquez on the record, "If you are at any point found to be in violation of your probation and the court revokes your probation and imposes sentence you would be sentenced to seven years in state prison. Do you understand that, sir?" Vasquez answered, "Yes, I do." The trial court ordered the probation department to prepare a probation report and continued the matter for sentencing. The court admonished Vasquez that "the protective order previously issued in this case is still in effect," and that the protected individuals were R.P. and A.V. Vasquez stated that he understood.

2. Vasquez's Receipt of Probation

On September 16, 2015, Vasquez appeared before a different bench officer for sentencing. He was assisted by a Spanish language interpreter. In accordance with the plea agreement, the court sentenced Vasquez to an aggregate state prison term of seven years, suspended execution of sentence and placed him on five years of formal probation. The remaining counts were dismissed as part of the plea agreement.

Among the terms of probation was that Vasquez was to engage in domestic violence counseling and obey the terms of a 10-year criminal protective order as to R.P. and A.V. (See § 273.5, subd. (j).) In pertinent part, the court ordered Vasquez as follows: "Good cause appearing, you must not harass, strike, threaten, assault, sexually or otherwise, follow, stalk, molest, destroy or damage personal or real property, disturb the peace,

keep under surveillance, or block the movements of the protected persons named above [R.P. and A.V.]." [¶] [¶] [¶] [¶] "You must have no personal, electronic, telephonic, or written contact with them. You must have no contact with them through a third party except your attorney of record. [¶] You must not come within 100 yards of them. You may, however, have peaceful contact with them as an exception to the no contact or stay away only for the safe exchange of the children, the court ordered visitation, as stated in any family, juvenile, or probate court order issued after the date this order is signed, which means that you can see your child if the family court approves it after today's date. [¶] Do you understand that?" Vasquez answered, "Yes."

Turning to the prosecutor, the court inquired, "People, can you state the reasons for the offer of probation? I have approved it. We have discussed it informally. I want the record to reflect why this is an exceptional situation of the defendant because it's presumptive state prison." The prosecutor responded that Vasquez would benefit from domestic violence counseling while on probation, he did not have a criminal record, had not harassed the victim since he had been out of custody on this case, and the victim could not be located. The court stated, "All right. Very well. Okay."

Some discussion ensued concerning the need to order Vasquez back to court to show proof of his enrollment in domestic violence counseling. The court then admonished Vasquez, "Let me explain to you so you fully understand, Mr. Vasquez, if you violate any terms and conditions of probation, or you contact [R.P.], in violation of this protective order, or the minor, in violation of the protective order, even if you're having a cup of coffee, if you violate this in any way, you will go to state prison

for seven years. [¶] Do you understand that?" Vasquez answered, "Yes."

3. Summary Revocation of Probation

On October 12, 2016, the trial court summarily revoked Vasquez's probation after the People filed a motion requesting revocation for repeated violations of the criminal protective order. Vasquez was remanded into custody.

4. Probation Revocation Hearing

A probation revocation hearing commenced on February 2, 2017 before a third bench officer. R.P. testified that Vasquez was the father of her son, A.V. She and Vasquez were in a romantic relationship for a period of time until 2015, when she ended it because "he would hit me a lot."

After the protective order was issued on September 16, 2015, Vasquez texted R.P. that "he wanted to come back." Thereafter, Vasquez went to R.P.'s house uninvited. Angry because R.P. had failed to respond, Vasquez entered R.P.'s bedroom and began hitting her. Vasquez head-butted R.P.'s face and punched "all over" her body and her face. R.P. was bleeding and telling him to stop; Vasquez replied that he did not care. The prosecutor introduced into evidence photographs of R.P.'s injuries that she had taken with her cell phone. R.P. did not report her injuries to the police because she feared for herself and for her son.

On several occasions in October 2015, Vasquez appeared unannounced at R.P.'s home. He would punch, scratch, kick, and bite R.P. He also kneed her in the chest.

On January 1, 2016, Vasquez showed up at R.P.'s home and hit her "really hard" in "the ribs" and "left flank area." She was

unable to walk for two to three weeks. Cell phone photographs that R.P. took of her injuries on this occasion were introduced into evidence.

On February 21, 2016, Vasquez again appeared at R.P.'s home and punched her left shoulder. Photographs of these injuries R.P. took using her cell phone were introduced into evidence. R.P. did not report the January and February 2016 incidents to the police because she was afraid for her son's safety as well as her own.

In June, July, and August 2016, R.P. received a series of text messages from Vasquez saying he wanted to come back and be a family. Copies of the text messages were introduced into evidence. In early August 2016, Vasquez telephoned R.P. and said he "felt like killing" her. Vasquez decided to report what had happened to the police, because "there was no way to stop it," and she was in a relationship with someone else. The police directed her to the probation department on or about August 20, 2016.

After several defense continuances, the probation revocation hearing resumed briefly on March 30, 2017 and again on April 4, 2017. Vasquez testified he had a relationship with R.P. with whom he had a son. Vasquez recently married his girlfriend Y.V., with whom he had a daughter. According to Vasquez, he only saw R.P. on January 1, 2016, when she insisted on dropping off their son, which he was reluctant to have her do for fear of violating the criminal protective order. R.P. told him that she did not care. Vasquez denied arguing or have a physical altercation with R.P. on that date.

On January 10, 2016, R.P. told Vasquez that if he loved their son, he should come to their son's birthday party. Vasquez

went with his daughter and had no arguments or physical altercations with R.P.

On February 21, 2016, R.P. brought their son to Vasquez's house. She was angry about Vasquez's then girlfriend Y.V. (now wife) and hit him with her purse.[2]

On October 31, 2016, R.P. came to Vasquez's house with their son, who wanted to spend Halloween with his father. Later, R.P. returned from work to Vasquez's house. When he told R.P. to leave, she became angry about his plan to spend Halloween with Y.V. Vasquez was aware of R.P.'s new relationship and told her to respect her boyfriend. But R.P. said she loved Vasquez. Vasquez explained that he texted R.P. because if he showed her affection, she would "give [him] information" about their son.

Vasquez testified he understood there was a family law order that allowed him to visit and communicate with his son and a criminal protective order. He also understood the criminal protective order had "priority" over the family law order. Vasquez testified he violated the protective order "so many times" and "sen[t] all th[o]se texts" because, after the order was issued, the first person to contact him was R.P., who came to his house. Thereafter, their son became ill. "And [R.P.] used that so that I would not know what was going on with my son. So I would then have to go to the house." Vasquez denied that he had "ever physically touched" R.P. since being on probation. The only reason Vasquez had contact with R.P. was so he could see their son.

Gregory S., Vasquez's neighbor, testified he noticed scabs or marks on Vasquez's face on or around February 22, 2016.

---

[2] R.P. denied this incident occurred on cross-examination.

The weekend before, Gregory S. saw R.P. at Vasquez's house. After talking to Vasquez about the marks, Gregory S. decided against calling the police for fear Vasquez would get into trouble.

Y.V., Vasquez's wife, testified that beginning in November 2104, R.P. came to Vasquez's house uninvited on several occasions when Y.V. was there. R.P. showed Y.V. some sexual photographs of R.P. and Vasquez to show they were still in a relationship, apprised Y.V. of Vasquez's current criminal case and probation, and told Y.V. that she and Vasquez were still involved.

The trial court heard counsels' arguments following the presentation of evidence. During argument, the prosecutor requested that Vasquez's probation be revoked and the trial court execute the previously suspended state prison sentence. Vasquez's counsel urged the court, if it found him in violation of probation, to reinstate probation with the modified condition that he serve time in county jail.

The trial court determined Vasquez had willfully violated his probation. In explaining its ruling, the court stated it found R.P.'s testimony to be credible and corroborated by photographs of her injuries; and on direct examination, Vasquez admitted violating the criminal protective order by texting R.P. on multiple occasions. Although R.P. may have encouraged some of those violations, the criminal protective order was against Vasquez, not R.P.

At the sentencing hearing immediately thereafter, the trial court stated, "The court has to consider the original terms of the sentencing agreement, and I have reviewed the court file as well as the related probation reports in considering sentencing. I believe both sides have already addressed sentencing, but if

either side would like to be heard further, I'll give that opportunity." In response, the prosecutor submitted. Prior to submitting, Vasquez's counsel stated, "I'm sure your Honor is aware of what defense would always like in cases like these, so I'll submit as well." The court stated, "I have discretion; however, these are sentences that are agreed upon and that defendants enter into often and unfortunately find themselves in these situations." The trial court revoked Vasquez's probation and executed the previously suspended seven-year state prison sentence.

DISCUSSION

1. Substantial Evidence Supports The Decision To Revoke Probation

a. Governing legal principles and standard of review

"Section 1203.2, subdivision (a), authorizes a court to revoke probation if the interests of justice so require and the court, in its judgment, has reason to believe that the person has violated any of the conditions of his or her probation. [Citation.] ' "When the evidence shows that a defendant has not complied with the terms of probation, the order of probation may be revoked at any time during the probationary period. [Citations.]" [Citation.].' [Citation.] The standard of proof in a probation revocation proceeding is proof by a preponderance of the evidence. [Citations.] 'Probation revocation proceedings are not a part of a criminal prosecution, and the trial court has broad discretion in determining whether the probationer has violated

probation.' " (*People v. Urke* (2011) 197 Cal.App.4th 766, 772, fn. omitted; see *People v. Rodriguez* (1990) 51 Cal.3d 437, 443.)

"We review a probation revocation decision pursuant to the substantial evidence standard of review [citation], and great deference is accorded the trial court's decision, bearing in mind that '[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court.' " (*People v. Urke*, *supra*, 197 Cal.App.4th at p. 773.) Under this standard, discretion is abused when there is no substantial evidence to support the trial court's findings. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 997; see also *People v. Powell* (2011) 194 Cal.App.4th 1268, 1284, fn. 6.)

b. There was substantial evidence that Vasquez violated probation

Vasquez argues there was insufficient evidence that he violated his probation because the record showed that R.P. was the aggressor and that she lied about Vasquez's physical abuse. The record is to the contrary. First, Vasquez admitted he had texted R.P. on multiple occasions in violation of the criminal protective order. Second, the trial court expressly found R.P.'s testimony credible over Vasquez's testimony. Determining witness credibility is the "exclusive province" of the trier of fact. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) As the trial court stated, R.P.'s testimony relating Vasquez's physical abuse was corroborated by photographs she took of her injuries. These photographs depict a large bruise on R.P.'s left shoulder and a bruise to her left triceps area, as well as a large bruise to her neck area and under her chin. They show scratches to her hand and other body parts. Although not entirely clear, there appears

to be bruising to her left cheek as well. We reject Vasquez's invitation to reweigh the evidence and to substitute our judgment for that of the trial court as the finder of fact. That is not the function of an appellate court. (*People v. Culver* (1973) 10 Cal.3d 542, 548.) The issue of witness credibility, as resolved by the trial court, was supported by substantial evidence.

Vasquez also maintains that, because the contents of the family law order and the criminal protective order conflicted and the trial court never resolved the conflict, he did not willfully violate the protective order. Vasquez never made this argument before the trial court and has thus failed to preserve the issue on appeal. (See, e.g., *People v. Saunders* (1993) 5 Cal.4th 580, 590 [" ' "[I]t is unfair to the trial judge and to the adverse party to take advantage of an error on appeal when it could easily have been corrected at the trial," ' " italics omitted].) Indeed, the precise contents of the family law order were never discussed at the hearing; the order was never introduced into evidence. Only the criminal protective order was introduced by the prosecutor. The family court order is not in the appellate record.

Because Vasquez's contention requires us to compare the contents of the two orders and the family law order is not part of the record, he cannot prevail on this issue. As the appellant, Vasquez has the burden to provide an adequate record to support his claim of prejudicial error. Absent an adequate record to enable us to review the relevant order, we must reject Vasquez's claim. (See generally *People v. Neilson* (2007) 154 Cal.App.4th 1529, 1534 [appellant's burden to provide adequate record on appeal; failure to do so requires resolution of issues against appellant]; *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 366.)

2. Vasquez Has Not Shown The Trial Court Was Unaware Of Its Discretion When It Ordered Executed The Suspended State Prison Sentence

"A probation violation does not automatically call for revocation of probation and imprisonment. [Citation.] A court may modify, revoke, or terminate the defendant's probation upon finding the defendant has violated probation. (§ 1203.2, subds. (a), (b)(1).) The power to modify probation necessarily includes the power to reinstate probation. [Citations.] Thus, upon finding a violation of probation and revoking probation, the court has several sentencing options. [Citation.] It may reinstate probation on the same terms, reinstate probation with modified terms, or terminate probation and sentence the defendant to state prison. ([Citation]; see Couzens et al., Sentencing California Crimes (The Rutter Group 2014) ¶ 23:1, p. 23-2 (rel. 5/2014) ['After a defendant violates felony probation, the court may either reinstate the defendant on probation with additional sanctions and/or modification of the conditions of probation, or send the defendant to state prison.'].)" (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420 (*Bolian*).)

Vasquez contends that, upon finding him in violation of probation, the trial court had the discretion to select among three sentencing options and: (1) reinstate probation on the same terms; (2) reinstate probation on modified terms; or (3) terminate probation and impose "*some lesser term than the full seven years.*" (Italics added.)

Relying on *Bolian*, Vasquez argues in sentencing him to state prison, the court either did not understand the full range of sentencing options available or mistakenly believed it had no discretion and was required to send him to prison because the

original grant of probation included a prison sentence with execution of sentence.

The defendant in *Bolian* pleaded guilty to one count of possessing a deadly weapon (a billy club) (former § 12020, subd. (a)(1)) and admitted enhancement allegations that he had suffered two prior prison terms (§ 667.5, subd. (b)). (*Bolian*, *supra*, 231 Cal.App.4th at p. 1418.) The trial court sentenced the defendant to five years in prison, suspended execution of the sentence, and placed him on formal probation for five years. (*Ibid.*) The defendant was reported to have violated probation by repeatedly testing positive for marijuana use. (*Ibid.*) The probation officer recommended that the defendant be found in violation of probation and that the trial court modify probation by ordering the defendant to complete a drug rehabilitation program. (*Ibid.*) At the probation revocation hearing, the defendant was found in violation for also failing to complete court-ordered community service as a condition of probation. The probation officer revised his recommendation and suggested the court modify probation by ordering the drug rehabilitation and some jail time. (*Id.* at pp. 1418-1419.)

At the sentencing hearing in *Bolian*, defense counsel urged the trial court to follow the probation officer's latest recommendation. The court responded by questioning whether the probation officer knew that the case involved a sentence in which execution of sentence had been suspended rather than imposition of sentence had been suspended and whether the probation officer understood the difference between the two dispositions. The court explained, " 'The difficulty is that it will be illegal for me to do, and the probation officer may not be aware of that. I would have to make a de minimis finding to do that.

This isn't de minimis. And I can't. It would be illegal and improper. That's what an execution of sentence suspended is so a judge doesn't come in and undercut another judge.' " (*Bolian*, *supra*, 231 Cal.App.4th at p. 1419.) The defense attorney stated it would not be illegal to reinstate probation when execution of sentence has been suspended. The court disagreed stating, " 'It is. That's why they do an ESS.' " (*Id.* at p. 1420.)

On appeal, our colleagues in Division Eight concluded, "Taken as a whole, the court's comments implied (1) it was illegal to reinstate and modify probation for violations that were more than de minimis, and/or (2) it was illegal to reinstate and modify probation when a sentence had been imposed but execution suspended. Neither was the case. Upon finding a probation violation, the court had the broad discretion to choose between reinstatement and termination. Moreover, whether the court had previously suspended imposition of a sentence or suspended execution of a sentence, the court still had the authority to choose between reinstatement and termination." (*Bolian*, *supra*, 231 Cal.App.4th at p. 1422.) "Only once the court rejects reinstatement and chooses termination will [that] difference . . . come into play." (*Ibid.*) The Court of Appeal concluded that "a fair reading of the [trial] court's comments demonstrates it was not aware of its discretionary power to reinstate and modify probation" and remanded "to give the court the opportunity to exercise its discretion." (*Ibid.*)

Vasquez's contentions require us to analyze the trial court's brief statement at sentencing in the context in which it was made. Certain presumptions also apply. "On appeal, we presume that the trial court followed established law and thus properly exercised its discretion in sentencing a criminal

defendant. (See, e.g., *People v. Coddington* (2000) 23 Cal.4th 529, 644 [reviewing court presumes trial court knew and applied correct statutory and case law], overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; [citation].) Thus, we may not assume the court was unaware of its discretion simply because it failed to explicitly refer to its alternative sentencing choices." (*People v. Weddington* (2016) 246 Cal.App.4th 468, 492.) Furthermore, the defendant has the burden of affirmatively demonstrating error. (*People v. Henson* (1991) 231 Cal.App.3d 172, 182.)

Although Vasquez appears to argue the trial court could have imposed a state prison sentence that was less than seven years, that is contrary to law. (*People v. Howard* (1997) 16 Cal.4th 1081, 1084-1085, 1087-1088 [trial court retains discretion when it originally suspends the imposition of the sentence before placing the defendant on probation, but when a sentence has actually been imposed and only its execution has been suspended, the revocation of probation generally brings the former judgment into full force and effect].) Here, in electing to revoke and terminate Vasquez's probation, the court had no discretion but to execute the seven-year sentence.

Contrary to Vasquez's argument, the court's "oblique reference to the word discretion" (italics omitted) and use of the term " 'agreed-upon' " were not "similar in character to those made by the trial court" in *Bolian*. Rather, in stating that it had discretion, "however, these are sentences that are agreed upon and that defendants enter into often and unfortunately find themselves in these situations," the court was reflecting upon the fact it would have had discretion concerning the length of the state prison sentence if the negotiated plea had involved a

suspended imposition of sentence and probation, instead of, as in this case, a suspended execution of "an agreed-upon" sentence and probation.

In addition, Vasquez's counsel specifically requested that the trial court reinstate probation with a modified condition of county jail time rather than execute the suspended state prison sentence. (See *People v. Jones* (1990) 224 Cal.App.3d 1309, 1316 [defendant's request for reinstatement of probation can support a finding that the trial court was aware that it had discretion to reinstate probation].) Although the trial court declined to select that disposition, unlike the court in *Bolian*, the court here did not reject it as "improper and illegal." Therefore, the court considered the options of reinstating and modifying probation or executing the suspended state prison sentence and elected the latter.

3. The Trial Court Did Not Abuse Its Discretion In Declining To Reinstate Probation And Executing The Suspended State Prison Sentence

Vasquez claims the trial court abused its discretion by revoking his probation and executing the suspended state prison sentence based on his merely "having some contact" with R.P. He relies on *People v. Zaring* (1992) 8 Cal.App.4th 362. There the trial court ordered the defendant to be in court for a hearing at 8:30 a.m. and advised that failure would result in probation revocation. The defendant appeared 22 minutes late due to an unexpected delay on the way to court. The caregiver for the defendant's children became ill the morning of the hearing and, as a consequence, they had to be dropped off at school on the defendant's way to court. The trial court revoked the defendant's

probation for being late on the ground the defendant willfully violated her probation. (*Id.* at pp. 366-367.)

The Court of Appeal reversed, concluding the trial court abused its discretion. The court explained: "[T]he appellant was confronted with a last minute unforeseen circumstance as well as a parental responsibility common to virtually every family. Nothing in the record supports the conclusion that her conduct was the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court. . . . Collectively, we cannot in good conscience find the evidence supports the conclusion that the conduct of appellant, even assuming the order was a probationary condition, constituted a willful violation of that condition." (*People v. Zaring*, *supra*, 8 Cal.App.4th at p. 379, fn. omitted.)

However, Vasquez's misconduct in this case was not the product of unforeseen circumstances like in *Zaring*. The probation violation itself consisted of repeated violent acts toward R.P., which were consistent with the offense for which Vasquez was on probation. In addition, Vasquez violated a criminal protective order by more than simply having unauthorized contact with R.P. That Vasquez was to comply with the protective order was a fundamental term of his probation premised on the need to protect R.P. and their son. While Vasquez attempts to minimize his conduct, it resulted in a significant and intentional violation.

DISPOSITION

The order is affirmed.
NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P.J.

JOHNSON, J.