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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

AARION PLEASANT,

Defendant and Appellant.

B234360

(Los Angeles County
Super. Ct. No. BA380968)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Judith L. Champagne, Judge. Affirmed.

Ann Krausz, 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, Senior Assistant Attorney General, Lawrence M. Daniels and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Aarion Pleasant was convicted, following a jury trial, of one count of assault with a firearm in violation of Penal Code section 235, subdivision (a)(2). The jury also found true the allegation that appellant personally used a firearm within the meaning of Penal Code section 12022.5, subdivision (a). The trial court sentenced appellant to a term of 12 years in state prison, consisting of the low term of 2 years for the assault conviction plus a 10-year term for the Penal Code section 12022.5 firearm enhancement.

Appellant appeals from the judgment of conviction, contending that the trial court abused its discretion in sentencing him to 12 years in state prison, and also contending that he received ineffective assistance of counsel at sentencing. We affirm the judgment of conviction.

Facts

On July 24, 2010, about 11:00 a.m., 16-year-old appellant approached Miguel Chavez and asked him, "Do you live here?" Chavez replied, "Yes." Appellant fired three gunshots at Chavez, but did not hit him. There were six or seven people standing just a few feet from appellant at the time of the shooting. None of them were hit.

Appellant ran away after the shooting, went to a park, and entered the restroom. When he entered the restroom he was wearing a black shirt, blue jeans and a black baseball cap. When appellant re-emerged from the restroom, he was wearing a white t-shirt and shorts.

Police found appellant in the driveway of a residence on 52nd Street, bent down between a car parked in the driveway and another car. As police watched, appellant stood up and walked around one of the vehicles. Police detained him. They found a black purse on the ground where appellant had been bent over. Inside the purse was a revolver loaded with three live rounds and three expended shells. Police recovered a black shirt from the porch of the house.

Discussion

1. Welfare and Institutions Code section 707.2

Appellant contends that the trial court abused its discretion by failing to consider all the dispositional factors set forth in Welfare and Institutions Code section 707.2, and for not adequately considering a Youth Authority commitment. Appellant is mistaken.

Welfare and Institutions Code section 707.2, subdivision (a), permits the trial court to remand a minor to the Youth Authority for an assessment of the minor's amenability to the training and treatment offered by the Youth Authority. That subdivision also lists a number of factors to be considered by the court in determining the appropriate disposition of the minor. Subdivision (b) of that section provides the section does not apply where commitment to the Youth Authority is prohibited by Welfare and Institutions Code section 1732.6. That was appellant's situation.

Welfare and Institutions Code section 1732.6, subdivision (b), provides that a minor may not be committed to the Youth Authority if the minor is convicted of, inter alia, "[a]n offense described in paragraphs (1), (2), or (3) of subdivision (d) of Section 707, if the circumstances enumerated in those paragraphs are found to be true by the trier of fact" or "[a]n offense described in subdivision (b) of Section 707, if the minor had attained the age of 16 years of age or older at the time of commission of the offense." (Welf. & Inst. Code, § 1732.6, subds. (b)(2) & (b)(3).)

The two referenced subdivisions of Welfare and Institutions Code section 707 overlap to a degree. Subdivision (d)(1) refers to a minor who is 16 years of age or older who is accused of committing an offense enumerated in subdivision (b). Appellant was 16 years old at the time of the offense. His offense of assault with a firearm is listed as an offense in subdivision (b) of Welfare and Institutions Code section 707, specifically in subdivision (b)(13). Further, the allegation that he personally used a firearm within the meaning of Penal Code section 12022.5 is also listed in subdivision (b) of Welfare and Institutions Code section 707, specifically in subdivision (b)(17). Thus, Welfare and Institutions Code section 1732.6, subdivision (b), rendered appellant ineligible for commitment to the Youth Authority.

In addition, Welfare and Institutions Code section 1732.6, subdivision (a), provides that a minor shall not be committed to the Youth Authority when the minor is convicted of a crime listed in Penal Code section 667.5, subdivision (c), or Penal Code section 1192.7, subdivision (c), and the minor is sentenced to a determinate term in prison "such that the maximum number of years of potential confinement when added to the minor's age would exceed 25 years." Appellant was 16 years old and was sentenced to a determinate term of 12 years in prison, for a total of 28 years. Appellant's offense of assault with a deadly weapon with a true finding of personal use of a firearm is listed in Penal Code section 667.5 subdivision (c)(8) and Penal Code section 1192.7, subdivisions (c)(8) and (c)(23). Thus, Welfare and Institutions Code section 1732.6, subdivision (a), also rendered appellant ineligible for commitment to the Youth Authority.

2. High term for enhancement

Appellant contends that the trial court abused its discretion in imposing the upper term for the Penal Code section 12022.5 enhancement on the basis of appellant's two prior sustained juvenile petitions for battery. He further contends that the imposition of the upper term resulted in a miscarriage of justice because it did not promote the ends of substantial justice.

Generally, determination of the appropriate term of imprisonment is within the trial court's broad discretion, and must be upheld absent a clear showing that the sentencing decision was arbitrary or irrational. (*People v. Lamb* (1988) 206 Cal.App.3d 397, 401.) "'Sentencing courts have wide discretion in weighing aggravating and mitigating factors [citations], and may balance them against each other in qualitative as well as quantitative terms.' [Citation.] One factor alone may warrant imposition of the upper term [citation] and the trial court need not state reasons for minimizing or disregarding circumstances in mitigation [citation]." (*Ibid.*)

Section 12022.5 is an enhancement, and when "an enhancement is punishable by one of three terms, the court shall, in its discretion, impose the term that best serves the

interest of justice, and state the reasons for its sentence choice on the record at the time of sentencing." (Pen. Code, § 1170.1, subd. (d).)

Here, the trial court based the upper term of the firearm enhancement on the fact that appellant had two prior sustained petitions for battery and was on probation at the time of the current offense.

Appellant contends that the trial court abused its discretion because the batteries were misdemeanors from 2009 and 2010 and involved his mother, and did not make him a hardened criminal. He also points out that the probation officer was concerned about appellant's maturity level and his ability to navigate through the adult prison system, and recommended probation or the mid-term, and contends that it was an abuse of discretion for the trial court to depart from this recommendation solely on the basis of the two prior sustained petitions.

To the extent that appellant suggests that the batteries were somehow less serious because the victim was his mother, we do not agree. If anything, the contrary is true. The offenses themselves involved escalating violence. In the first incident, appellant grabbed his mother by the arms and pushed her. In the second, he threw her against the wall. Appellant received probation in both cases, and was on probation at the time of the current offense. Thus, there are two factors in aggravation which would support the upper term. Further, appellant's current offense involved a degree of criminal sophistication. Appellant, a minor, somehow acquired a handgun and ammunition. Following the shooting, he attempted to disguise himself. These facts support the trial court's rejection of the probation officer's belief that appellant was not mature or able to navigate the adult prison system. The trial court's decision was not arbitrary or capricious. There was no miscarriage of justice.

3. Ineffective assistance of counsel

Appellant contends that his trial counsel did not possess knowledge of elementary principles of sentencing law and so provided ineffective assistance of counsel. We do not agree.

Appellant has the burden of proving ineffective assistance of counsel. (*People v. Pope* (1979) 23 Cal.3d 412, 425.) In order to establish such a claim, appellant must show that his counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's error, a different result would have been reasonably probable. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688, 694; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*Strickland v. Washington, supra*, 466 U.S. at p. 694.)

At the sentencing hearing, appellant's counsel asked the court to impose the minimum amount of time, which counsel stated was 10 years on the firearm enhancement and the low term of three years on the assault conviction. This was incorrect. Penal Code section 12022.5 provides for a low term of three years, a mid-term of four years and the upper term of 10 years. The low term for assault with a firearm is two years. Thus, the minimum term for appellant would have been five years, not 13 as counsel stated.

Appellant also points out that his counsel did not mention the probation report at the sentencing hearing, and did not discuss "the wide range of sentencing and housing choices available to the court." He contends that counsel failed to promote the most advantageous position for him.

Appellant is correct that his counsel misstated the possible terms for his conviction and enhancement. He is also correct that counsel did not refer to any statements in the probation report, and did not suggest any alternatives to a prison sentence. Even assuming for the sake of argument that counsel's performance fell below an objective standard of reasonableness, we see no reasonable probability that appellant would have received a more favorable outcome if his counsel had "promoted the most advantageous outcome" for him.

With respect to the various terms for appellant's offense and enhancement, counsel clearly requested the minimum amount of time for appellant. The court was clearly aware that there was a range of terms for the enhancement, and that 10 years was the high term. The court in fact imposed the low term of two years for the assault conviction.

With respect to mitigating circumstances, counsel did argue a number of mitigating factors, including appellant's lack of an adult criminal record and the fact that no one was actually injured by appellant's assault. Counsel clearly pointed out that appellant was "still a minor and will be a minor for several more years." He also argued that the court should "temper justice with mercy given my client's young age." The court was aware that the probation officer believed that appellant was too immature for state prison, but based on the totality of the circumstances the court did not agree with that assessment. The court also indicated that it was aware that it had "various sentencing options," but did not find them appropriate.

Since the court was aware of the correct terms for appellant's offense and enhancement, the contents of the probation report and the availability of other sentencing options, there is no reasonable probability that appellant would have received a more favorable outcome if his trial counsel's argument had included that information.

Appellant also contends that his counsel was ineffective in failing to object to the absence of an amenability finding on the record as specified under Welfare and Institutions Code section 707.2, subdivision (a) and to the court's failure to discuss all the primary considerations in subdivision (a) of section 707.2. As we discuss, *ante*, section 707.2 did not apply to appellant. Thus, his counsel did not commit any errors by failing to refer to the requirements of that section.

Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P. J.

We concur:

MOSK, J.

KRIEGLER, J.