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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LEVI MURPHY,

Defendant and Appellant.

B264815

(Los Angeles County
Super. Ct. No. GA093250)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stan Blumenfeld, Judge. Affirmed.

Maggie Shrout, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Susan Sullivan Pithey and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Levi Murphy appeals from the trial court's post-judgment order terminating his probation under Penal Code¹ section 1203.2 and executing a previously imposed sentence of four years in state prison. On appeal, Murphy contends that the trial court erred by failing to exercise its discretion to consider whether a disposition other than imposition of a four-year prison term was warranted for his probation violation. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Charges

On May 8, 2014, Murphy was driving his vehicle in the city of Arcadia when he was involved in a traffic collision. Murphy hit Elisa Bounlom's vehicle on the right passenger side. Murphy then continued driving and rear-ended Ming Quan's vehicle. As a result of the collision, Bounlom suffered minor back pain, but did not seek medical treatment. Quan sustained injuries to his neck and upper back and received chiropractic treatment. Murphy was arrested for being under the influence of alcohol. At the police station, he submitted to a breathalyzer test, which showed a blood alcohol content of 0.13 percent.

Murphy was charged with one count of driving under the influence of alcohol and causing injury (Veh. Code, § 23153, subd. (a)), and one count of driving with a blood alcohol content of 0.08 percent or more and causing injury (Veh. Code, § 23153, subd. (b)). It was alleged that Murphy had two prior serious or violent felony convictions within the meaning of the "Three Strikes" law

¹ Unless otherwise stated, all further statutory references are to the Penal Code.

(§§ 667, subd. (d), 1170.12, subd. (b)), and had served one prior prison term within the meaning of section 667.5, subdivision (b).

II. Murphy Is Placed on Formal Probation

On February 11, 2015, the trial court held a pre-trial hearing. The court's indicated sentence would strike Murphy's two prior serious or violent felony convictions and place him on five years of formal probation. As a condition of his probation, Murphy would be placed in the Fresh Start Recovery Home, a residential treatment program. The court stated to Murphy: "[Y]ou do have a serious decision to make as to whether you want to accept the court's indicated sentence. Because the court's indicated sentence is going to be disastrous for you unless you are successful on the program, which means you have to have a level of commitment to doing what you need to do on the program. Because the indicated sentence is that I'm going to suspend the execution of four years in state prison, which means that if you don't take care of business and get all of this done, you violate the terms and conditions of your probation, you are going to be doing those four years. . . . Moreover, any time that you serve presentencing, if I have to sentence you in this case and revoke your probation, will be gone. You'll get no future credit, which means that if you hear the words from me 'I find a violation of Mr. Murphy's probation,' then your mind should read four years in state prison. . . ."

Murphy stated that he understood and wished to accept the trial court's indicated sentence. He pleaded no contest to each of the charged counts, and admitted the sentence enhancement allegations. The court ordered the prior serious or violent felony allegations stricken. (§ 1385.) The court sentenced Murphy to a total term of four years in state prison, suspended execution of

the sentence and placed Murphy on five years of formal probation.

The court ordered Murphy be released from custody and transported directly to the Fresh Start Recovery Home. The court further advised Murphy that he was “not to leave that recovery home for any reason whatsoever, unless this court approves of that release.” The court explained that if, for example, there was a medical emergency with a family member or Murphy felt threatened by someone in the facility, Murphy would need to “deal with it appropriately through proper channels within the program.” The court added: “You don’t take it upon yourself to simply leave. If you leave that program, I will impose that four years. If you otherwise violate the terms and conditions of your probation, I’ll impose that four years.” Murphy advised the court that he understood and accepted the terms and conditions of his probation.

III. Murphy Is Remanded Into Custody

On March 23, 2015, Murphy appeared in court, with a report that he had left the Fresh Start Recovery Home on March 19, had reported to his probation officer on March 20, and had checked himself into a new residential treatment program on March 22. The court noted that it was unclear whether Murphy had left Fresh Start on his own or had been asked to leave by the program, and continued the matter to allow defense counsel to present further information about Murphy’s departure from Fresh Start. The court ordered Murphy to remain in his new treatment program and submit to daily random drug testing until the next hearing date.

At a March 26, 2015 hearing, the trial court stated that it had received a letter from the Fresh Start program that “paints

a very different picture from that which was painted by Mr. Murphy when [the court] saw him last.” The letter indicated that Murphy had left Fresh Start without permission and had committed other violations of the terms and conditions of the program. The court read aloud portions of its prior sentencing order and stated that if the allegations made by Fresh Start were proven to be true, “it would be a very serious violation of [Murphy’s] probation.” The court also noted that Murphy appeared to be claiming that the allegations were fabricated and that he had been discharged from Fresh Start through no fault of his own because he made legitimate complaints about the conditions in the program. The court then stated: “So it seems to me the only thing that really is left for the court is to set this matter for a formal hearing to decide the issue. And if it turns out that I find a violation, I’m going to sentence him to that four years.” The court set the matter for a formal probation violation hearing, and remanded Murphy into custody.

IV. The Probation Violation Hearing

The court heard the probation violation on April 17, 2015. Gabriella Hernandez, the program director for Fresh Start, and Antea Whorton, the program’s house manager, testified that Murphy had been admitted into Fresh Start on March 4, 2015. On that day, he reviewed and signed a copy of the program rules and regulations, including the rule prohibiting residents from leaving the premises without authorization. Over the next two weeks, however, Murphy left the premises without authorization on four separate occasions.

On March 5, 2015, Murphy left the facility in the evening without authorization and returned a few hours later. On March 7, 2015, Murphy again left the facility without

authorization and returned in the evening smelling of alcohol. He admitted to Whorton on that occasion that he had used alcohol, marijuana, and methamphetamine. On March 9, 2015, Murphy left the facility a third time without authorization and broke a window in a neighbor's home. Following that incident, Murphy was warned that if he left the facility again without authorization, he would be discharged from the program. On March 19, 2015, Murphy had an appointment for a drug assessment at 10:00 a.m.; however, he left the facility at 6:00 a.m. without authorization and unaccompanied by an escort. Whorton called Murphy's mother as soon as he noticed Murphy was missing. Murphy's mother said that she did not know where he was, but Murphy called Whorton back two minutes later and Whorton could hear his mother in the background. Later that morning, Hernandez made the decision to discharge Murphy from Fresh Start for his repeated violations of the program rules. Both Hernandez and Whorton denied that Murphy ever complained to them about unsanitary conditions at the Fresh Start facility.

Murphy testified in his own behalf, denying that he ever left the premises of Fresh Start without authorization or an escort. According to Murphy, he left the facility on March 5 to attend an appointment with his probation officer, on March 7 to apply for an identification card with the Department of Motor Vehicles, and on March 9 to attend an Alcoholics Anonymous meeting. On each occasion, Murphy had permission to leave the facility, was accompanied by an escort, and did not consume any alcohol or drugs. On March 19, Murphy left the facility with an escort to attend a scheduled appointment for a substance abuse assessment. Murphy complained to the specialist conducting the

assessment that there were bed bugs and other sanitary issues at Fresh Start. On prior occasions, Murphy also had complained about the unsanitary conditions at Fresh Start to Hernandez and Whorton. When Murphy returned to Fresh Start on March 19 after his appointment, he was told that he was being discharged from the program for complaining about the conditions at the facility. The following day, Murphy met with his probation officer and enrolled in a new residential treatment program.

Defense counsel argued that Murphy was in substantial compliance with his probation, and that even if the court were to find a violation, it should reinstate probation and allow Murphy an opportunity to participate in the new treatment program. The prosecution argued that probation should not be reinstated because Murphy's conduct showed a pattern of repeated violations and misrepresentations to the court. The trial court noted that it had conducted an exhaustive review of the evidence and considered its prior admonitions to Murphy at the sentencing hearing about the consequences of a probation violation. In weighing the credibility of the witnesses, the court stated that it did not believe that Hernandez and Whorton had "completely fabricated all of these unauthorized leaves," as claimed by Murphy. The court also stated that its review of the evidence showed that Murphy had committed "a pattern of violations in the face of an incredibly stern admonition and opportunity." The court found that Murphy was in violation of the terms and conditions of his probation, and ordered execution of the previously imposed sentence of four years in state prison.

DISCUSSION

On appeal, Murphy argues that the trial court failed to properly exercise its discretion at the probation violation hearing as required under California law and the due process clause of the federal Constitution. Murphy specifically asserts that the trial court improperly decided before hearing any evidence or argument that any probation violation would result in the revocation of Murphy's probation and the imposition of a four-year state prison sentence.

I. Relevant Law

Under section 1203.2, a trial court may 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” (§ 1203.2, subd. (a).) “[U]pon 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. [Citations.]” (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420; see also *People v. Medina* (2001) 89 Cal.App.4th 318, 321 [noting that “[a]lthough section 1203.2 does not expressly state that a defendant may be ‘reinstated’ on probation, . . . the court’s authority to modify probation necessarily presumes the power to reinstate it”].)

“If . . . the court decides to terminate probation and send the defendant to state prison, the sentence the court may impose depends on how the court disposed of the case when it first placed the defendant on probation. If the court originally suspended imposition of sentence, the court may, upon revocation and termination of probation, ‘pronounce judgment for any time

within the longest period for which the person might have been sentenced.’ (§ 1203.2, subd. (c).)” (*People v. Bolian*, *supra*, 231 Cal.App.4th at p. 1420; *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1424 [“[w]hen a court suspends imposition of sentence before placing a defendant on probation, the court has full sentencing discretion upon revoking probation”].) In contrast, “if the court originally imposed a sentence and suspended execution of it, upon revocation and termination of probation, the court must order that imposed sentence into effect. [Citations.] The court ordinarily has no authority to impose a lesser sentence in such a case. [Citation.]” (*People v. Bolian*, *supra*, at pp. 1420-1421; *People v. Ramirez*, *supra*, at p. 1424 [“when a court imposes a sentence but suspends its execution pending a term of probation, on revocation and termination of probation the sentencing judge must order that exact sentence into effect”].)

The decision whether to reinstate or terminate probation rests within the broad discretion of the trial court. (*People v. Bolian*, *supra*, 231 Cal.App.4th at p. 1421.) “Generally, when the record shows that the trial court proceeded with sentencing on the erroneous assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing. [Citations.]” (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) “Remand for resentencing is not required, however, if the record demonstrates the trial court was aware of its sentencing discretion, . . . [or] if the record is silent concerning whether the trial court misunderstood its sentencing discretion. Error may not be presumed from a silent record. [Citation.] “[A] trial court is presumed to have been aware of and followed the applicable law.” [Citations.] [Citation.]” (*Id.* at pp. 1228-1229.)

II. The Trial Court Did Not Err in Imposing a Four-Year Prison Term for Murphy's Probation Violation

Murphy contends that the trial court abused its discretion in imposing a four-year prison term because the court failed to make an impartial assessment of whether a disposition other than revocation of probation and imposition of a prison sentence was warranted under the circumstances of the case. In support of this claim, Murphy points to the trial court's admonitions to him at the original sentencing hearing that if Murphy violated any of the terms and conditions of his probation, then he would be "doing those four years." Murphy also points to the trial court's statements in setting the matter for a formal probation violation hearing that if the allegations made by Fresh Start about Murphy's violations were proven to be true, then the court would impose "maximum [time] that [it] can give him" and would "sentence him to that four years." Murphy claims that these statements show that the trial court's only concern was whether he had violated his probation, and that once a violation was found, the court refused to consider any disposition other than imposing a four-year state prison term.

When the trial court's statements are considered in full and in context, however, the record reflects that the court properly exercised its discretion in determining whether Murphy had committed a violation of probation, and upon finding a violation, in deciding whether the revocation and termination of Murphy's probation was warranted under the circumstances of the case. In setting the matter for a formal probation violation hearing, the trial court noted that, if the allegations made by Fresh Start about Murphy's conduct in the program were found to be true, they would show a "very serious violation of his probation." The

court also explained that the “likely consequences” of finding a probation violation under such circumstances would be that the court would revoke Murphy’s probation and order the execution of the previously imposed four-year sentence. The court thus made clear that its disposition in the matter would depend upon the evidence presented by the parties at the hearing and the specific circumstances surrounding Murphy’s alleged probation violations.

The record further reflects that, at the probation violation hearing, the trial court carefully considered all of the evidence presented by the parties as well as the arguments of counsel before rendering its disposition. After hearing defense counsel’s argument that Murphy had substantially complied with the conditions of his probation and that his probation should be reinstated if a violation were found, the trial court stated to the prosecutor: “[T]he only issue I want you to address, please, is the request that if I find a violation, which I am inclined to do as should be clear and I haven’t been persuaded otherwise at this point, whether I should reinstate him.” In response, the prosecution argued that reinstatement was not warranted because Murphy had committed a pattern of repeated violations and misrepresentations to the court. The trial court agreed that Murphy’s conduct reflected a “pattern of violations in the face of an incredibly stern admonition and opportunity,” and on those grounds, decided to revoke and terminate his probation. Therefore, contrary to Murphy’s claim on appeal, the trial court did not solely determine at the hearing whether Murphy had violated the terms and conditions of his probation, but also considered whether Murphy’s probation should be reinstated or terminated.

In addition, once the trial court exercised its discretion to decide that termination of Murphy's probation was appropriate, the court was required to order the execution of the four-year prison term that it had previously imposed. As discussed, when the court first placed Murphy on formal probation, it imposed a total term of four years in state prison but suspended the execution of that sentence pending the period of probation. Accordingly, upon revocation and termination of probation, the court did not have the authority to impose a lesser sentence, but rather was required to order the exact sentence previously imposed into effect. (*People v. Bolian*, *supra*, 231 Cal.App.4th at pp. 1420-1421; *People v. Ramirez*, *supra*, 159 Cal.App.4th at p. 1424.) The trial court thus acted within the scope of its authority in sentencing Murphy to a four-year prison term.

Murphy nevertheless argues that the trial court violated his federal due process rights by predetermining his punishment for any probation violation without considering the particular circumstances of his case. The record reflects, however, that the trial court held a full evidentiary hearing for the purpose of determining whether Murphy had violated the conditions of his probation, and if so, whether his probation should be reinstated or terminated. Based on the evidence presented at the hearing, the trial court found that Murphy had engaged in a pattern of probation violations that included multiple unauthorized leaves from his residential treatment facility, and that Murphy had been repeatedly warned about the potential consequences of these violations prior to being placed on probation. Once the trial court decided in its discretion that termination of probation was warranted, it properly ordered the execution of the four-year prison term previously imposed. Because the totality of the

record demonstrates that the trial court properly understood and exercised its discretion at Murphy's probation violation hearing, remand for a new hearing is not required in this case.

DISPOSITION

The trial court's order revoking and terminating Murphy's probation and imposing a four-year term in state prison is affirmed.

ZELON, Acting P. J.

We concur:

SEGAL, J.

KEENY, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.