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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

PAXTON DERRICK TAIT,

Defendant and Appellant.

B296636

(Los Angeles County
Super. Ct. No. NA110254)

APPEAL from an order of the Superior Court of
Los Angeles County, Tomson T. Ong, Judge. Affirmed.

James M. Crawford for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief
Assistant Attorney General, Lance E. Winters, Assistant
Attorney General, Steven E. Mercer and Eric J. Kohm, Deputy
Attorneys General, for Plaintiff and Respondent.

Paxton Derrick Tait appeals from an order revoking his probation on the ground his due process rights were violated. He contends that the trial court abused its discretion by revoking probation and imposing an upper term sentence and that we must remand for an ability to pay hearing under recent authority, *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*). We reject all contentions.

BACKGROUND

An information charged Tait and five others with manufacturing concentrated cannabis (Health & Saf. Code, § 11379.6, subd. (a); count 1), manufacturing concentrated cannabis with a volatile solvent (*id.*, § 11362.3, subd. (a)(6); count 2), and cultivating more than six cannabis plants (*id.*, § 11358, subd. (c); count 3). The information also alleged firearm enhancements as to count 1 (Pen. Code,¹ § 12022, subd. (d)) and as to count 2 (§ 12022, subd. (a)(2)). Tait pleaded no contest to count 1, and the trial court dismissed the remaining counts. The trial court suspended imposition of sentence and placed Tait on five years' probation on the condition he serve 180 days in county jail. Tait was ordered to obey all laws and to stay out of places where alcohol is the main item of sale.

Just two months later, the People filed a written notice to have Tait's probation revoked based on a new violation of section 273.5, subdivision (a), corporal injury to a spouse. An arrest report and a follow-up investigation were attached to the notice. According to those documents, Tait and the victim had a child together. They met to discuss custody and ended up at a

¹ All further statutory references are to the Penal Code unless otherwise indicated.

nightclub. The victim got drunk, and they went to Tait's apartment. There, he and the victim argued. When she refused to leave, he physically picked her up and removed her from his apartment by force, resulting in visible injuries. Although the victim initially told law enforcement that Tait caused her injuries, she later recanted.

Based upon the allegations in the notice, the trial court preliminarily revoked probation and issued a bench warrant. At the subsequent revocation hearing, a police sergeant testified in keeping with the reports. That is, when he arrived at Tait's apartment on the night of the assault, the victim was distraught and had been crying. She had red marks on her wrists, a scratch on her shoulder, and her back was completely red. She said that Tait had dragged her out of the bathroom and carried her out of the apartment. Tait admitted that when the victim refused to leave the apartment, he lifted her and took her outside. However, the victim testified in court that Tait did not cause her injuries; instead, a man at the nightclub grabbed her wrists and picked her up, which made her fall onto a table. She admitted that Tait was with her at a nightclub which sold alcohol.

Based on this evidence, the trial court found that Tait had violated the conditions of his probation by failing to stay out of places where alcohol is the main item of sale and by physically lifting the victim, which constituted a battery in violation of section 242. The trial court sentenced Tait to the upper term of seven years in county jail on count 1. And, as detailed *post*, the trial court imposed a restitution fine and assessments.

DISCUSSION

I. Tait's due process rights were not violated

Tait contends that his due process rights were violated because, first, he did not receive notice of the claimed bases for revoking his probation, which deprived him of the opportunity to respond to the evidence against him, and, second, he did not have a neutral fact finder. The due process clause of the Fourteenth Amendment requires written notice of the claimed violations of probation before probation may be finally revoked. (*People v. Mosley* (1988) 198 Cal.App.3d 1167, 1173; *Morrissey v. Brewer* (1972) 408 U.S. 471.) Due process also requires disclosure of the evidence against the probationer; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation. (*Mosley*, at p. 1173.) Notice thus must be sufficient to give the probationer a fair opportunity to prepare and defend against the allegations.

First, Tait had adequate notice of the charges against him. The notice specifically cited section 273.5, corporal injury to a spouse, as a basis for the revocation. Ultimately, the trial court found that Tait violated probation by violating section 242, which is simple battery. However, the documents attached to the revocation notice detailed the circumstances of the incident and provided notice that battery was a potential ground for revoking probation. Those documents contained Tait's admission to the responding officer that he picked up the unwilling victim and forcibly removed her from his apartment. This constituted a battery, i.e., an unwanted touching, which is a lesser included offense of infliction of corporal injury on a spouse. (*People v.*

Hamlin (2009) 170 Cal.App.4th 1412, 1457.) We fail to see how being given notice that revocation is based on a greater offense can be insufficient notice that it might be based on a lesser included offense when the probation condition at issue is to obey *all* laws. Tait's defense to the battery was the same as to corporal injury to a spouse, that his actions were justified. In an analogous context, an accusatory pleading provides notice of the specific offense charged *and* of necessarily included offenses. (*People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1237–1238.) Similarly, an accusatory pleading and preliminary hearing transcript provide adequate notice of criminal charges. (*People v. Thomas* (1987) 43 Cal.3d 818, 830.) Hence, Tait had adequate notice that battery was a basis for revoking probation.

Tait also had adequate notice of the other ground for revocation, that he went to a nightclub where alcohol was the main item sold. Adequate notice can be derived from multiple sources, for example, a supplemental probation report read just before the revocation hearing (*People v. Baker* (1974) 38 Cal.App.3d 625, 629), or a new report filed during the preceding week (*People v. Buford* (1974) 42 Cal.App.3d 975, 982). Here, a follow-up report dated two days after the incident and an arrest report were attached to the notice. Those documents detailed the information on which the revocation was ultimately based, including that Tait was at a nightclub where alcohol was served.

This case therefore is not like *People v. Mosley*, *supra*, 198 Cal.App.3d at page 1172 and *People v. Self* (1991) 233 Cal.App.3d 414. The notice in *Mosley* alleged revocation of probation was based solely on a new charge of rape, but probation was ultimately revoked because the probationer drank alcoholic beverages. However, the probationer's alcohol consumption was

raised only *after* the revocation hearing. Similarly, in *Self*, at page 416, footnote one, the trial court allowed the prosecution to amend the petition at the hearing, which failed to afford the probationer his procedural safeguards.

Second, we also cannot find that Tait was deprived of his due process right to a neutral fact finder. He questions the trial court's partiality based on a comment at the plea hearing. When counsel asked if the trial court would consider an open plea in light of the probation recommendations, the trial court said, "it's not a probation case as far as I'm concerned." In no way does the court's expressed unwillingness to offer probation as part of an open plea suggest the trial court had prejudged Tait's case. (See *People v. Kozel* (1982) 133 Cal.App.3d 507, 521 [no indication trial court prejudged guilt].)

II. Abuse of discretion

Tait next contends that the trial court abused its discretion by revoking probation and by imposing the upper term. We disagree.

A 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 supervision. (§ 1203.2, subd. (a); *People v. Leiva* (2013) 56 Cal.4th 498, 504.) The facts supporting revocation of probation may be proved by a preponderance of the evidence (*People v. Rodriguez* (1990) 51 Cal.3d 437, 439), and we review the trial court's factual findings for substantial evidence (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681). We will not disturb a trial court's decision to revoke probation absent an abuse of discretion. (*People v. Galvan* (2007) 155 Cal.App.4th 978, 981–982.) We interfere with

the trial court's exercise of discretion " 'only in a very extreme case.' " (*Rodriguez*, at p. 443.)

As a preliminary matter, Tait did not object at the time of sentencing, and therefore has forfeited his sentencing claims. (*People v. Sperling* (2017) 12 Cal.App.5th 1094, 1100.) However, we consider Tait's arguments, as he has raised ineffective assistance of counsel as an alternative.

Tait argues that the trial court failed to consider the relevant factors in deciding whether to reinstate probation. (See generally Cal. Rules of Court, rule 4.414 [criteria affecting probation].) But, unless the record affirmatively reflects otherwise, a trial court is deemed to have considered relevant criteria, including mitigating circumstances in making sentencing choices. (*People v. Zamora* (1991) 230 Cal.App.3d 1627, 1637.) Nothing affirmatively shows that the trial court considered improper factors. Rather, the trial court said it was revoking probation based on the credibility of the witnesses and the exhibits. The trial court also had the probation report which included an evaluation of Tait.

Next, Tait contends the trial court abused its discretion by rejecting the probation department's recommendation to revoke and reinstate probation, instead imposing the upper term of seven years on count 1.² However, a trial court is not obligated to follow the probation department's recommendation but instead

² Tait also argues that his Sixth Amendment rights were violated because the trial court imposed the upper term based on facts not found true by a jury. This argument appears to be based on this State's prior sentencing scheme. That scheme now gives a trial judge discretion to impose the upper, middle or low term. (*People v. Wilson* (2008) 164 Cal.App.4th 988, 992.)

must consider all facts bearing upon the offenses and the defendant. (*People v. Downey* (2000) 82 Cal.App.4th 899, 910.) The trial court here did not state why it imposed the upper term. (See § 1170, subd. (c) [trial court should state reasons for sentencing choices]; Cal. Rules of Court, rule 4.420(e).) Even if a sentencing court fails to state such reasons, we reverse the sentence only if it is reasonably probable a more favorable result would have been reached in the absence of the error. (*People v. Sanchez* (1994) 23 Cal.App.4th 1680, 1684.) It is not reasonably probable the trial court would have imposed anything other than the upper term. Tait violated the terms of his probation just two months after entering into the plea. And, he violated it in more than one way, by entering an establishment that mainly sold alcohol and by battering the mother of his child. (See Cal. Rules of Court, rule 4.421(b)(1).) Also, the facts underlying his plea include that he committed his crime with five others and a firearm was involved. (See Cal. Rules of Court, rules 4.421(a)(8) [manner of crime indicates planning, sophistication, professionalism], 4.421(a)(1).)

Therefore, Tait's related claim that his counsel provided ineffective assistance by failing to object at the sentencing hearing fails, because Tait cannot establish prejudice. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 [ineffective assistance of counsel claim requires error and prejudice].)

III. Ability to pay hearing

Without objection from Tait, the trial court imposed, among others, a \$2,800 restitution fine (1202.4, subd. (b)), a \$30 court facilities assessment (Gov. Code, § 70373), and a \$40 court operations assessment (Pen. Code, § 1465.8). Under recent

authority holding that such a fine and assessments may not constitutionally be imposed absent evidence of the defendant's ability to pay them, Tait contends that the matter must be remanded so that the trial court can conduct an ability to pay hearing. (See *Dueñas, supra*, 30 Cal.App.5th 1157.) We disagree because the issue was forfeited.

Dueñas, supra, 30 Cal.App.5th at page 1169 concerned imposition of the minimum fine under section 1202.4, subdivision (b). The scenario involving a minimum fine, however, is not before us. Here, the trial court imposed a \$2,800 restitution fine. Under that circumstance, the statute provides that a court may consider a defendant's inability to pay. (§ 1202.4, subd. (d); *People v. Avila* (2009) 46 Cal.4th 680, 729.) Tait did not object to the \$2,800 fine. Having failed to object on the ground of inability to pay, the issue is forfeited as to the fine and assessments. (See *People v. Frandsen* (2019) 33 Cal.App.5th 1126, 1154; *People v. Scott* (1994) 9 Cal.4th 331, 353.) Moreover, the record suggests a reason why Tait did not object: he has an ability to pay because he was actually paying his obligations. During his short-lived stay on probation, he made two payments of \$25 each toward his restitution fine and assessments.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.