

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL WILLIAM MCLAIN,

Defendant and Appellant.

B293266

(Los Angeles County
Super. Ct. No. SA094750)

APPEAL from a judgment of the Superior Court of Los Angeles County. H. Jay Ford III, Judge. Affirmed.

Janet Gusdorff, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Michael McLain pleaded no contest to one count of battery with serious bodily injury. The court suspended imposition of sentence and placed him on three years formal probation. While on probation, McLain was charged with several felonies, including attempted murder, after he attacked two men using a machete. The trial court revoked probation and sentenced McLain to the high term of four years. Appointed counsel filed an opening brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). McLain filed a supplemental brief contending the sentence is excessive. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

We summarize the evidence in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.)

In December 2016, Richard W. was riding his bicycle when he heard McLain approach from behind on a skateboard. McLain struck Richard on the head and knocked him off the bicycle. While Richard was on the ground, McLain commanded, “leave you bicycle and get the fuck out of here.” Richard fled. He suffered a laceration on the back of his head that required stitches. When McLain was arrested, the police found brass knuckles in his pocket.

McLain was charged by information with second degree robbery (Pen. Code, § 211),¹ assault with a deadly weapon (§ 245, subd. (a)(1)), possession of metal knuckles (§ 21810), battery with serious bodily injury (§ 243, subd. (d)), and assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)). Great bodily injury and deadly or dangerous weapon enhancements were also alleged. Further, it was alleged that

¹ All future undesignated statutory references are to the Penal Code.

McLain suffered a prior conviction for assault with a deadly weapon.

Pursuant to a plea deal, McLain pleaded no contest to battery with serious bodily injury (§ 243, subd. (d)), and the court dismissed the remaining counts. The court suspended the imposition of sentence and placed McLain on formal probation for three years.

While on probation, McLain was charged with four felony counts, including attempted murder. The court held a probation revocation hearing concurrent with the preliminary hearing on the new charges.

The evidence presented at the hearing established that, in May 2018, McLain struck Ricky V. on the top of his head with a machete. When Kenneth L. intervened to try to protect Ricky, McLain struck him in the arm with the machete and had his dog attack Kenneth. Kenneth woke up a day and a half later in the hospital, with a large gash on his arm.

At the conclusion of the hearing, the court found McLain in violation of probation for failure to obey all laws. At sentencing, the court declined to reinstate probation given the facts of the violation and McLain's history. The court then imposed the high term of four years. In selecting that term, the court noted McLain's extensive criminal history predating the offense and the "particular callousness of the unprovoked attack" on Richard W., indicating McLain is a danger to society. The court additionally imposed various fines and fees.

McLain timely appealed.

DISCUSSION

We appointed counsel to represent McLain on appeal. Appointed counsel filed an opening brief pursuant to *Wende, supra*, 25 Cal.3d 436, requesting independent review of the record on appeal for arguable issues. We then notified McLain by letter that he could submit any claim, argument, or issue that he wished our court to review. In response, McLain filed a letter brief contending the trial court should have reinstated probation or imposed a lesser sentence. McLain has not shown error.

“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.” (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420.) In deciding whether to permanently revoke probation, the court may consider the nature of the violation and the defendant’s past performance on probation. (Cal. Rules of Court, rule 4.435.) “The decision whether to reinstate probation or terminate probation (and thus send the defendant to prison) rests within the broad discretion of the trial court.” (*People v. Bolian, supra*, at p. 1421.)

McLain suggests the trial court should have reinstated probation given the 2018 case was ultimately dismissed and he had served 13 months of probation without any other violations. We disagree. The 2018 case was dismissed because the People had difficulty subpoenaing necessary witnesses. The dismissal said little, if anything, about whether McLain committed the acts underlying the charges. Moreover, that McLain had otherwise abided by the terms of his probation is greatly overshadowed by the nature of the violation that led to its revocation: McLain

viciously attacked two men using a machete. The court did not abuse its discretion in permanently revoking probation.

There is similarly no merit to McLain's contention that dismissal of the 2018 case and his performance on probation dictated a lesser prison sentence. When imposing a prison sentence after revoking probation, the "length of the sentence must be based on circumstances existing at the time supervision was granted, and subsequent events may not be considered in selecting the base term or in deciding whether to strike the additional punishment for enhancements charged and found." (Cal. Rules of Court, rule 4.435(b)(1).) Therefore, in selecting the base term of McLain's sentence, the trial court could not consider the ultimate disposition of the 2018 case or his behavior while on probation. The court instead properly considered the nature of the underlying offense against Richard W. and McLain's extensive criminal history prior to that offense. (See Cal. Rules of Court, rule 4.421 [listing aggravating circumstances a court may consider when selecting a term of imprisonment].) McLain has not shown error on this point.

DISPOSITION

We have independently reviewed the record on appeal, and find that appointed counsel has fulfilled her duty and no arguable issues exist. (*Wende, supra*, 25 Cal.3d 436, *People v. Kelly* (2006) 40 Cal.4th 106.) The judgment is affirmed.

BIGELOW, P.J.

We Concur:

GRIMES, J.

WILEY, J.