

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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 SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

LUIS ANGEL HERNANDEZ,

Defendant and Appellant.

B272133

(Los Angeles County
Super. Ct. No. BA439972)

APPEAL from a judgment of the Superior Court of
Los Angeles County, Norman Shapiro, Judge. Affirmed.

Rachel Varnell, 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, Senior Assistant
Attorney General, Zee Rodriguez and Corey J. Robins, Deputy
Attorneys General, for Plaintiff and Respondent.

Luis Angel Hernandez appeals from the judgment entered after a jury convicted him of second degree robbery and misdemeanor assault. Based on these convictions, the trial court found Hernandez had violated probation imposed in an earlier case for aggravated assault, in which he had received a suspended four-year state prison sentence. The court sentenced Hernandez to the upper term of five years in state prison for the robbery conviction and ordered the revived four-year prison term to run concurrently. Hernandez contends that, in imposing the upper term of five years, the court improperly considered his rejection of a proposed plea agreement with a three-year sentence offered by the People before trial. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On September 19, 2015 Hernandez was seen at a market in Hollywood walking toward the store's exit with a large bulge on the side of his pants. The store manager and a security guard approached Hernandez and asked to speak with him, but Hernandez continued walking out of the store. The store manager saw that Hernandez had a large liquor bottle in his pants and asked him to return it. Hernandez refused and cursed at the two employees. When Hernandez appeared ready to flee, the security guard restrained Hernandez in a bear hug. Resisting, Hernandez bit the guard on each arm, drawing blood. Two other security personnel joined the group. One helped the guard pull Hernandez to the ground; the second called the police. Hernandez punched each of the two security guards attempting to hold him several times in the head. In the confusion that followed, he escaped and ran into a nearby alley. One of the guards followed him and directed the police to the alley where Hernandez was huddled with a homeless man. The police

arrested Hernandez, but the bottle was never found. A store security video played for the jury showed Hernandez hiding behind a display and stuffing a half-gallon bottle of vodka into his pants.

The jury convicted Hernandez of second degree robbery (Pen. Code, § 211) (count 1),¹ an offense with a potential sentence of two, three or five years, and misdemeanor assault (§ 240) (count 2).²

At the sentencing hearing the trial court found Hernandez to be in violation of probation imposed with a suspended four-year state prison sentence for an earlier case of aggravated assault. (*People v. Hernandez* (Super. Ct., L.A. County, 2014, No. MA063506).) Hernandez’s counsel asked the court to impose the lower term of two years for the robbery conviction and to terminate probation with no time served for the aggravated assault. She argued Hernandez’s criminal history consistently involved alcohol abuse, which “may be the root of what is driving his behaviors.” The People requested the upper term of five years

¹ Statutory references are to this code.

² Hernandez was originally charged with assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(4)), and the People specially alleged one of the robbery victims was over the age of 65 (§ 667.9, subd. (a)). As to both counts the information alleged Hernandez had served three prior prison terms for felonies (§667.5, subd. (b)). The jury convicted Hernandez on the robbery count but found the special allegation regarding the victim’s age not true and convicted him of the lesser included offense of misdemeanor assault on count 2. The court granted the People’s motion to strike the prior prison term allegations following trial when it became clear Hernandez had never been committed to prison for those prior convictions.

on the robbery conviction, plus one year four months (one-third of the suspended four-year sentence) for the aggravated assault. The prosecutor stated Hernandez had been on probation because he had assaulted and bitten his stepfather, who had restrained him in the same manner as the market security guard; he had a lengthy criminal record and had flouted opportunities for rehabilitation; and he was “seemingly unable to comport himself in a manner that makes it safe for society.”³

In response to these arguments, the court agreed with defense counsel alcohol was probably the root of Hernandez’s problems. The court then noted the People had offered “to settle the case for three years, [but] the defendant chose to go to trial” and asked whether the proffered three years had included disposition of the earlier aggravated assault. When no one present could answer the court’s question, it proceeded with sentencing. Addressing Hernandez, the court stated, “I think the District Attorney’s position accurately sums up your conduct . . . [and] your attorney is correct too that part of the issue here deals with alcohol. I think the proper term would be a five-year state-prison term, and the way I am going to implement that term . . . [is] to impose the four-year high term [for the aggravated assault].” Turning to the robbery conviction, the court added it would select the middle term of three years to run consecutively to the aggravated assault (the principal term), thereby reducing the effective term to one-third the middle term, for an additional term of one year. When the prosecutor suggested the sentence on the robbery conviction should serve as the principal term because

³ The record does not include the sentencing memoranda submitted by the parties.

of the higher maximum sentence, the court vacated its original pronouncement of sentence.⁴ Instead, the court imposed the upper term of five years for the robbery conviction and ordered the four-year term on the aggravated assault conviction to run concurrently.

DISCUSSION

1. *Governing Law*

Whether to impose the lower, middle or upper term is governed by section 1170, subdivision (b), which provides, “When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer’s report, . . . and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, . . . and any further evidence introduced at the sentencing hearing. The court shall select the term which, in the court’s discretion, best serves the interests of justice. . . .” “The trial court’s sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an ‘individualized consideration of the offense, the

⁴ Section 1170.1, subdivision (a), provides “[t]he principal term shall consist of the greatest term of imprisonment imposed by the court for any of the crimes, including any term imposed for applicable specific enhancements.” Notwithstanding the prosecutor’s suggestion, the upper term of four years imposed for aggravated assault in Hernandez’s earlier case could have served as the principal term so long as the trial court elected not to impose the upper term of five years for the robbery conviction.

offender, and the public interest.” (*People v. Sandoval* (2007) 41 Cal.4th 825, 847.) A trial court abuses its discretion “if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision.” (*Ibid.*; see *People v. Willover* (2016) 248 Cal.App.4th 302, 323.) Subject to certain exceptions, “a trial court is free to base an upper term sentence upon any aggravating circumstance that (1) the court deems significant and (2) is reasonably related to the decision being made.” (*People v. Moberly* (2009) 176 Cal.App.4th 1191, 1196; see *Sandoval*, at p. 848; Cal. Rules of Court, rules 4.408(a), 4.421.)

However, “[a] defendant may not be penalized for exercising his or her jury trial right, which is a violation of Fourteenth Amendment due process rights.” (*People v. Ghebretensae* (2013) 222 Cal.App.4th 741, 761, citing *In re Lewallen* (1979) 23 Cal.3d 274, 278 (*Lewallen*); accord, *People v. Collins* (2001) 26 Cal.4th 297, 306-307; see *People v. Clancey* (2013) 56 Cal.4th 562, 575 [“[a] court . . . may not treat a defendant more leniently because he [forgoes] his right to trial or more harshly because he exercises that right”].) The defendant bears the burden of demonstrating the sentence was imposed as punishment for exercising his or her right to a jury trial. (*People v. Szeto* (1981) 29 Cal.3d 20, 34-35; *Ghebretensae*, at p. 762; see *Lewallen*, p. 274.)⁵ Reversal is required only when the sentencing

⁵ In *Lewallen* the defendant rejected a proffered plea agreement and was thereafter convicted by a jury. At sentencing, in response to defense counsel’s request for informal probation, the trial court stated, “[T]here’s no reason [to have] the District Attorney attempt to negotiate matters if after the defendant refuses a negotiation he gets the same sentence as if he had

judge's statements reasonably give rise to the inference that the more severe sentence was meant to penalize the defendant for exercising his or her constitutional right to go to trial. (*Szeto*, at p. 35; *Lewallen*, at pp. 279-281.)

2. *The Trial Court's Selection of the Upper Term Was Justified and Was Not Tainted by Consideration of Hernandez's Rejection of the Proffered Plea Agreement*

Hernandez contends the trial court violated his right to due process by selecting a harsher sentence (the five-year upper term) for his robbery conviction because he had exercised his right to a jury trial.⁶ The transcript of the sentencing hearing, however,

accepted the negotiation. It is just a waste of everybody's time, and what's he got to lose. . . . [I]f a defendant wants a jury trial and he's convicted, he's not going to be penalized with that, but on the other hand he's not going to have the consideration he would have had if there was a plea." (*Lewallen, supra*, 23 Cal.3d at p. 277.) The Supreme Court remanded the matter for resentencing, finding the defendant had shown "the trial court's exercise of its sentencing function was improperly influenced by his refusal of the proffered plea bargain and insistence on his right to trial." (*Ibid.*)

⁶ The People contend Hernandez forfeited this issue by failing to object on this ground at the sentencing hearing. (See, e.g., *People v. Scott* (1994) 9 Cal.4th 331, 356 ["complaints about the manner in which the trial court exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal"]; see *People v. Tillman* (2000) 22 Cal.4th 300, 303 [People's failure to object to trial court's failure to state on the record its reasons for not imposing a restitution fine forfeited claim on appeal].) While failure to raise an argument in the trial court might normally result in its forfeiture, this court has discretion to consider issues of

dispels any suggestion the court's sentencing decision was influenced by Hernandez's election to stand trial. Both defense counsel and the prosecutor submitted sentencing memoranda and stated on the record the grounds for their separate positions. The court acknowledged the merit of defense counsel's assessment of alcoholism as the root of Hernandez's problems, but agreed with the prosecutor's position Hernandez had failed to rehabilitate himself through probation and had committed multiple offenses of increasing violence.⁷ After questioning whether the proffered plea agreement had encompassed both the current and prior offenses, the court stated its intention to sentence Hernandez to an aggregate term of five years in state prison. The court initially selected the three-year middle term for the robbery conviction (the same term offered in the rejected plea agreement), intending the four-year sentence for the prior aggravated assault conviction to serve as the principal term, thus reducing the

constitutional significance presented for the first time on appeal. (See *People v. Freeman* (2010) 47 Cal.4th 993, 1000 [although any potential statutory claims had been forfeited, review on appeal was still available for the constitutionally based challenge asserting judicial bias]; *People v. Chatman* (2006) 38 Cal.4th 344, 362 [same].)

⁷ Under California Rules of Court, rule 4.421, circumstances in aggravation applicable here included "[t]he defendant has engaged in violent conduct that indicates a serious danger to society" (*id.*, subd. (b)(1)); "[t]he defendant's prior convictions . . . are numerous or of increasing seriousness" (*id.*, subd. (b)(2)); "[t]he defendant was on probation . . . when the crime was committed" (*id.*, subd. (b)(4)); and "[t]he defendant's prior performance on probation . . . was unsatisfactory" (*id.*, subd. (b)(5)).

effective length of the three-year subordinate term to one additional year. (See § 1170.1, subd. (a).) When the prosecutor suggested the sentence for the robbery conviction should serve as the principal term, the court recalculated the five-year aggregate term by selecting the upper term of five years for the robbery conviction and ordering the four-year aggravated assault term to run concurrently. The court's clear intention to impose an aggregate term of five years for both offenses, however calculated, vitiates the contention the court was improperly motivated to select the upper term for robbery merely to punish Hernandez for exercising his right to a jury trial.

DISPOSITION

The judgment is affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

MENETREZ, J.*

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