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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHANIE NICOLE MAU,

Defendant and Appellant.

2d Crim. No. B235301
(Super. Ct. No. F454100)
(San Luis Obispo County)

Stefanie Nicole Mau pleaded no contest to possession of methamphetamine, a controlled substance (Health & Saf. Code, § 11137, subd. (a)). She was placed in a Deferred Entry of Judgment ("DEJ") program (Pen. Code, § 1000, et seq.),¹ and ordered to report to Drug and Alcohol Services the following day. She did not enroll on that day, or at any time during the next six weeks. The trial court found appellant was not benefitting from treatment and therefore was not eligible for deferred judgment. It suspended imposition of sentence and placed appellant on three years' formal probation. Appellant contends the trial court erred in revoking her referral to the DEJ program and that it violated her Fifth Amendment privilege against self-incrimination when it required her to answer a question regarding recent drug use and then used that answer against her. We affirm.

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

Facts

After her arrest in November 2010, appellant was charged with possession of morphine (Health & Saf. Code, § 11351), receiving stolen property (Pen. Code, § 496, subd. (a)), possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and possession of a shopping cart. (Bus. & Prof. Code, § 22435.2, subd. (f).) She initially pleaded not guilty. The matter was continued at least eight times, until April 20, 2011. At that hearing, the charge relating to possession of the shopping cart was ordered dismissed after appellant provided proof that she paid restitution to the owner of the cart. Appellant also entered a plea of no contest to the possession of methamphetamine charge. The trial court placed her in the DEJ program and ordered her to report to Drug and Alcohol Services for enrollment the next day, April 21. Appellant was also ordered to appear on May 16 to provide proof of her enrollment in the program.

Enrollment in the DEJ program takes place only on Thursday mornings between 8:30 a.m. and 9:30 a.m. Appellant did not enroll on April 21, or at any time prior to the May 16 hearing. She did not appear at the May 16 hearing, but her counsel requested a second referral to DEJ, which the trial court granted. It ordered appellant to enroll in the program on May 26 at 8:45 a.m. and to provide proof of her enrollment at the next review hearing on June 3, 2011.

Appellant did not appear at the June 3 hearing and she still had not enrolled in the DEJ program. Counsel explained that he personally drove appellant to the enrollment office on June 2, but they arrived at about 10:00 a.m., after enrollment had closed for the day. Appellant was not allowed to enroll. The trial court found that appellant failed to enroll, even after she received two referrals to the program. It declined to "re-refer her" for a third time and set the matter for sentencing on July 8.

Appellant filed a motion for reconsideration that was heard by the trial court at a July 15 hearing. Appellant testified she was not able to enroll on April 21 because she had bronchitis. She remained ill, in bed and unable to speak for "about a

month." On the next available enrollment date, May 19, appellant was in Temecula for her Dad's birthday party. While she was there, appellant's car broke down. She was not able to return to San Luis Obispo County "for about a week-and-a-half." This caused her to miss the next enrollment date, May 26. On June 2, the next Thursday, appellant testified she did not have a ride to the enrollment office. She called her lawyer and he agreed to give her a ride. They arrived at the office after enrollment had closed for the day. She was not allowed to enroll. Appellant testified that she enrolled in the program on July 14, the day before the hearing.

On cross-examination, appellant admitted that she had last used illegal drugs "about two-and-a-half weeks ago." She testified that she did not have bronchitis at the April 20 hearing, when she was ordered to participate in the DEJ program, but that she developed it sometime between the April 20 hearing and her first enrollment date of April 21. Appellant had no documentation showing that she was stranded in Temecula due to a broken down car.

After appellant's testimony, the trial court declined to reconsider its prior order revoking appellant's referral to DEJ. It found that she failed to enroll on April 21 or on May 26. On June 15, she was charged with two drug-related misdemeanors. Appellant also admitted to having used illegal drugs recently. Based on all of that information, the trial court found, pursuant to section 1000.3, that appellant "is not benefitting from education, treatment or rehabilitation or that she's not performing satisfactorily. I do not find her eligible for deferred judgment at this time."

At the sentencing hearing on July 20, the trial court suspended imposition of sentence and granted probation for a period of three years. The terms of appellant's probation include that she complete Proposition 36 drug treatment program.

Appellant contends the trial court erred when it revoked her referral to the DEJ program because she had good cause for her failure to enroll in April and May 2011. She further contends the trial court violated her privilege against self-

incrimination when, at the July 15 hearing, it required her to answer whether she had recently used illegal drugs.

Discussion

Revocation of Referral to DEJ Program

Section 1000.3 provides, "If it appears to the prosecuting attorney, the court, or the probation department that the defendant is performing unsatisfactorily in the assigned program, or that the defendant is not benefiting from education, treatment, or rehabilitation . . . , the prosecuting attorney, the court on its own, or the probation department may make a motion for entry of judgment. [¶] After notice to the defendant, the court shall hold a hearing to determine whether judgment should be entered. [¶] If the court finds that the defendant is not performing satisfactorily in the assigned program, or that the defendant is not benefiting from education, treatment, or rehabilitation . . . , the court shall render a finding of guilt to the charge or charges pled, enter judgment, and schedule a sentencing hearing as otherwise provided in this code."

The trial court here made a factual finding that appellant had not enrolled in the DEJ program between the date of her guilty plea on April 20, 2011 and the June 3, 2011 hearing. It then found that she was not benefitting from treatment and therefore was not eligible for the DEJ program. Appellant contests that finding, pointing to her explanations for not having enrolled in the program in a timely manner. We conclude the trial court's factual findings are supported by substantial evidence. (*People v. Rios* (2011) 193 Cal.App.4th 584,589.)

When she entered her plea on April 20, 2011, appellant was instructed to enroll in the DEJ program the next day, at 8:45 a.m. She did not. On May 16, appellant was instructed to enroll in the program on May 26 at 8:45 a.m. She did not. On June 2, the next available enrollment date, appellant did not arrive at the enrollment site until after enrollment had closed for the day. Although she had explanations for her failure to enroll on each of these occasions, the trial court was not

required to accept those explanations as true, or as sufficient excuses for her failure to participate in treatment. (See, e.g., *People v. Friedeck* (2010) 183 Cal.App.4th 892, 897.)

One of the legislative purposes of the DEJ program is to address illegal drug use promptly by exposing the " ' "experimental or tentative user" ' " to " ' " educational and counseling programs in his [or her] own community, and to restore him [or her] to productive citizenship without the lasting stigma of a criminal conviction. " ' " (*People v. Trask* (2010) 191 Cal.App.4th 387, 394, quoting *People v. Orihuela* (2004) 122 Cal.App.4th 70, 72.) That purpose cannot be served where the person subject to diversion fails even to enroll in the designated treatment program. (See, e.g., *People v. Friedeck, supra*, 183 Cal.App.4th at pp. 896-897.) Because appellant failed to enroll in the DEJ program in a timely manner, the trial court's finding that she was not benefitting from the education, treatment and rehabilitation offered by the program was supported by substantial evidence.

Fifth Amendment Privilege

Appellant testified at the July 15, 2011 hearing, to explain her reasons for not having enrolled in the DEJ program. On cross-examination, the prosecutor asked, "When is the last time you used?" Defense counsel objected to the question "as being implicating. She's got charges pending against her. I don't consider that to be a proper question." The objection was overruled and appellant answered, "I would say about two-and-a-half weeks ago." The trial court cited this answer, along with appellant's failure to enroll and her June 15 misdemeanor charges, to support the "finding, pursuant to Penal Code 1000.3, that she is not benefitting from education, treatment or rehabilitation or that she's not performing satisfactorily. I do not find her eligible for deferred judgment at this time. [¶] I am going to refer the matter for sentencing."

Appellant contends the trial court erred when it required appellant to answer a question about illegal drug use and then used her self-incriminating answer

against her. Even if the privilege against self-incrimination applied at this hearing, the trial court's consideration of the incriminating response was harmless beyond a reasonable doubt. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782; *Chapman v. California* (1967) 386 U.S. 18; *People v. Coleman* (1975) 13 Cal.3d 867, 889.) Appellant's failure to timely enroll in the DEJ program and her two additional drug-related misdemeanor charges provided a sufficient basis for the order revoking her referral to DEJ. Substantial evidence supports the order, even without considering appellant's self-incriminating response.

Conclusion

The order is affirmed.

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YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Roger T. Picquet, Judge
Jacquelyn H. Duffy, Judge

Superior Court County of San Luis Obispo

Wiley Ramey, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, James William Bilderback II, Supervising Deputy Attorney General, Kathy S. Pomerantz, Deputy Attorney General, for Plaintiff and Respondent.