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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. EVAN WAYNE RUDY, Defendant and Appellant.	B255600 (Los Angeles County Super. Ct. Nos. KA104432, KA102582, KA102641)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas C. Falls, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and John Yang, Deputy Attorneys General, for Plaintiff and Respondent.

Pursuant to a plea agreement in two prior cases, appellant Evan Wayne Rudy was granted probation under Proposition 36 for which he otherwise was ineligible. While on probation he failed to appear at a mandatory court hearing, which resulted in the summary revocation of probation and issuance of a bench warrant. When he was arrested pursuant to the warrant, he was found to have drugs in his possession. This led to probation violation charges and a new felony complaint for possession of methamphetamine.

Appellant moved for dismissal, drug court, or probation under Proposition 36 in the new case, with continued probation in the prior cases. In opposition, the prosecution argued he was not eligible for probation under Proposition 36. The trial court denied the motion after indicating that it would defer to the prosecution's determination of appellant's ineligibility for probation, and would issue a certificate of probable cause to authorize appellate review of its ruling. (Pen. Code, § 1237.5.)

Faced with a possible maximum sentence of 10 years in the prior cases, appellant entered into a new plea agreement that covered all three cases. Pursuant to that agreement, he pleaded no contest to the probation violation and new drug possession charges. In return, he received concurrent prison terms of 32 months that resolved all three cases. The trial court issued a certificate of probable cause on its ruling to deny appellant's "Motion to Grant Proposition 36 Drug Treatment or In the Alternative Drug Court or To Dismiss."

Appellant has now appealed from the judgment. He challenges the denial of probation, contending the trial court erred in refusing to make its independent determination of his eligibility for probation under Proposition 36, and that the use of his prior conviction to support the denial of probation constituted a violation of the first plea agreement. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Proposition 36, the "Substance Abuse and Crime Prevention Act of 2000," which took effect July 1, 2001, provides for probation and community-based treatment of those

convicted of a "nonviolent drug possession offense." (Pen. Code, §§ 1210, 1210.1, subd. (a); *People v. Parodi* (2011) 198 Cal.App.4th 1179, 1183; *In re Taylor* (2003) 105 Cal.App.4th 1394, 1397.) The term "nonviolent drug possession offense" is defined as "the unlawful personal use, possession for personal use, or transportation for personal use of" certain controlled substances, or "the offense of being under the influence of a controlled substance in violation of Section 11550 of the Health and Safety Code." (Pen. Code, § 1210, subd. (a).) Upon an appellant's successful completion of probation and treatment under Proposition 36, the conviction is set aside, and the indictment, complaint, or information is dismissed. (*Id.* at § 1210.1, subd. (e).)

The trial court initially granted appellant probation under Proposition 36 in case Nos. KA102641 and KA102582 pursuant to a joint settlement agreement that covered both cases.[1] Both involved identical nonviolent drug possession offenses—possession of a controlled substance (Health & Saf. Code, § 11377, subd. (a)), and being under the influence of a narcotic (*id.* at § 11550, subd. (a))—that were charged as a second strike based on a prior conviction of aggravated assault. (Pen. Code, §§ 245, subd. (a)(1), 1170.12, 667.) Imposition of sentence was suspended in both cases.

Case No. KA102582 also included a felony charge of smuggling a controlled substance into a jail or state prison in violation of Penal Code section 4573.[2] It is

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[1] Before the court approved the plea agreement, appellant signed a document titled "Advisement of Rights, Waiver, and Plea Form for Felonies and/or Misdemeanors—Proposition 36 (Penal Code § 1210 et seq.)." The document included the following information: Appellant's maximum possible sentence in the two cases was 10 years, 4 months. If he received probation under Proposition 36, he would be required to participate in a drug treatment program for up to one year, with aftercare services for up to six months. His probation could be revoked for a nondrug-related offense, or a drug-related offense if, upon a first violation, he is found to be dangerous to others, and if, upon a second violation, he is found to be dangerous or unamenable to treatment.

[2] Penal Code section 4573 provides in relevant part: "Except when otherwise authorized by law . . . any person, who knowingly brings or sends into, or knowingly assists in bringing into, or sending into, any state prison . . . or into any county, city and county, or city jail . . . any controlled substance, the possession of which is prohibited by . . . the Health and Safety Code . . . is guilty of a felony punishable by imprisonment

undisputed on appeal that without the plea agreement in case Nos. KA102582 and KA102641 (the validity of which is not before us), the Penal Code section 4573 allegation (which was not stricken) rendered appellant ineligible for probation under Proposition 36. (See *People v. Parodi*, *supra*, 198 Cal.App.4th at p. 1183 [violation of Pen. Code, § 4573 is not a nonviolent drug possession offense]; Pen. Code, § 1210.1, subd. (b)(1) [defendant is not eligible for probation under Proposition 36 if he or she, "in addition to one or more nonviolent drug possession offenses, has been convicted in the same proceeding of a misdemeanor not related to the use of drugs or any felony"].)

At the first progress report hearing, appellant presented proof of his enrollment in a drug treatment program. The court ordered him to bring evidence of completion to the next hearing. When he did not appear, the court summarily revoked his probation and issued a bench warrant. Appellant was arrested later that day, and found to have methamphetamine on his person. This led to a new felony complaint, case No. KA104432, for violation of Health and Safety Code section 11377, subdivision (a), which was alleged as a second strike based on the same prior conviction of aggravated assault. (Pen. Code, §§ 245, subd. (a)(1), 1170.12, 667.)

Appellant filed a "Motion to Grant Proposition 36 Drug Treatment or In the Alternative Drug Court or To Dismiss." He argued that for a first drug-related violation, probation may not be revoked unless it is proven that the defendant poses a danger to others. (Pen. Code, § 1210.1, subd. (f)(3)(A).) In opposition, the prosecution argued that appellant was ineligible for probation under Proposition 36.

In denying appellant's motion, the trial court made the following statement: "It's my belief based on the code that it's the district attorney's office—yes, district attorney['s] office determines eligib[ility], not the court. They've determined he's not eligible. The court is not going to second guess their decision on that matter, and I have indicated to the defense that if they wish to appeal or take a writ on that issue, they're free to do so. And in this case, because your client has been made what appears to be a

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pursuant to subdivision (h) of Section 1170 for two, three, or four years." (Pen. Code, § 4573, subd.(a).)

really good offer, assuming I'm correct, he's going to plead. I will indicate that if it comes to it, we will sign a certificate of probable cause for an appeal on that sole issue."

After his motion was denied, appellant agreed to a global settlement of the three cases, which was approved by the court. In return for his plea of no contest to the new felony drug possession charge in case No. KA104432, he received a 16-month prison term, doubled as a second strike to 32 months. That conviction resulted in the automatic violation of probation in case Nos. KA102582 and KA102641, for which he received a negotiated sentence in each case of 16 months, doubled as a second strike to 32 months, to run concurrently with the other sentences.

Upon issuance of the certificate of probable cause, appellant filed the present appeal.

DISCUSSION

Proposition 36 anticipated that individuals who are undergoing drug treatment may relapse and violate probation more than once. Where the first probation violation consists of a new nonviolent drug-related offense, Proposition 36 provides an avenue for the trial court to grant continued probation and community-based treatment. If the prosecution moves to revoke probation for a first nonviolent drug-related violation, the trial court "shall conduct a hearing to determine whether probation shall be revoked." (Pen. Code, § 1210.1, subd. (f)(3)(A).) The defendant may be remanded to custody for a period not exceeding 30 days while information is gathered for the hearing. After the hearing, the court shall revoke probation if the prosecution proves the violation occurred, and proves by a preponderance of evidence that the defendant poses a danger to the safety of others. (*Ibid.*) If the court does not revoke probation, it "may intensify or alter the drug treatment plan" upon consideration of factors such as "the seriousness of the violation, previous treatment compliance, employment, education, vocational training, medical conditions, medical treatment, including narcotics replacement treatment, and including the opinion of the defendant's licensed and treating physicians if immediately

available and presented at the hearing, child support obligations, and family responsibilities." (*Ibid.*)

Appellant argues the trial court erroneously deferred to the district attorney's eligibility determination, and "abdicated its responsibility in allowing the prosecutor to determine eligibility when she has no role whatsoever in the determination." He contends that because the trial court "simply refused to determine eligibility, electing to delegate that determination to the prosecutor," the judgment must be reversed with directions to grant probation.

Respondent concedes that "the trial court appears to have been operating under the impression that the District Attorney determines Proposition 36 eligibility[.]" However, respondent argues that because the court's ruling was correct, it should be affirmed notwithstanding any error in reasoning. (Citing *People v. Lujan* (1959) 167 Cal.App.2d 104, 107–108 [lawful sentence must be upheld notwithstanding trial court's incorrect reasoning]; *People v. Brown* (2004) 33 Cal.4th 892, 901 [correct decision will not be disturbed on appeal merely because given for the wrong reason]; *People v. Dove* (2004) 124 Cal.App.4th 1, 10 [when defendant is ineligible for probation, a prison sentence is required].)

We agree that the trial court erred in deferring to the prosecution's determination of defendant's eligibility for probation under Proposition 36. We therefore must determine whether the error was prejudicial.

It is undisputed that defendant was convicted in the prior cases of a violation of Penal Code section 4573. It is also undisputed that this conviction, standing alone, would ordinarily disqualify him from probation under Proposition 36. (See *People v. Parodi*, *supra*, 198 Cal.App.4th at p. 1183; Pen. Code, § 1210.1, subd. (b)(1).) The issue is whether he was granted immunity from such disqualification in his prior plea agreement.

Appellant contends the use of his Penal Code section 4573 conviction to deny probation constituted a violation of his prior plea agreement, but does not explain where that particular provision of the agreement can be found in the record. We find nothing in the record to suggest the parties discussed the use of defendant's Penal Code section 4573

conviction in future cases. There is no indication of any pre-plea negotiation on that issue. If the prosecution had agreed to provide such a substantial benefit, it surely would have been mentioned at some point in the proceedings. Under the circumstances, we infer there was no agreement to confer this additional benefit. We therefore reject the contention that the use of the Penal Code section 4573 conviction to deny probation constituted a violation of the prior agreement.

Because defendant was not shielded from future use of the prior conviction, he was correctly deemed ineligible for probation under Proposition 36. Accordingly, the trial court's erroneous deference to the prosecution's eligibility determination was harmless under any standard of review.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.