Filed 12/20/16 P. v. Burch CA2/6

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ERIK M. BURCH, Defendant and Appellant.	2d Crim. B267718 (Super. Ct. No. 2009040707) (Ventura County)

Erik M. Burch appeals the judgment following his conviction by jury of street terrorism (Pen. Code, § 186.22, subd. (a)),[1] dissuading a witness by force or threat (§ 136.1, subd. (c)(1)), second degree robbery (§ 211), and second degree commercial burglary (§ 459). The jury found "not true" the allegations that appellant committed his offenses for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1).) Appellant admitted a prior conviction allegation. (§ 667.5, subd. (b).)

[1] All statutory references are to the Penal Code.

The trial court sentenced appellant to three years in state prison, comprised of the low term of two years for second degree robbery plus a consecutive one-year term pursuant to section 667.5, subdivision (b). The court also ordered appellant to serve the low term of 16 months for street terrorism, two years for dissuading a witness by force or threat, and 16 months for second degree commercial burglary, but stayed the sentence on those counts pursuant to section 654.[2]

Appellant contends the trial court abused its discretion by finding his was not an "unusual case" where the interests of justice would best be served by a grant of probation. (§ 1203, subd. (e)(4).) We conclude the trial court appropriately exercised its discretion to sentence appellant to state prison. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On July 26, 2009, appellant and fellow members of the Varrio Simi Valley gang entered a McDonald's restaurant in Moorpark. The restaurant is in the territory of the Moorpark Locos, a rival gang. Employees in the restaurant watched appellant and his companions because the restaurant had been previously targeted for tagging by gang members.

While appellant remained in the restaurant area, some of his fellow gang members entered the restaurant's bathroom and tagged it with gang messages. Appellant and his companions subsequently returned to appellant's vehicle. A restaurant employee wrote down appellant's license plate number

---

[2] In addition, appellant was concurrently sentenced to a 16-month prison term in Ventura County Superior Court case No. 2009045474. (See *People v. Burch* (May 24, 2016, B267962) [nonpub. opn.].)

on a piece of paper and handed it to a fellow employee so that the police could be notified of the vandalism. As that employee was preparing to call the police, appellant returned to the restaurant and snatched the paper from the employee's hand. Appellant gestured toward the employee in a threatening manner and said, "What? What?" as if challenging the employee to a fight. He then left. The employee called the police.

Appellant was arrested in this case and in Ventura County Superior Court case No. 2009045474 on December 14, 2009. He was released on bail three days later. Both cases were continued for several years, and appellant remained free on bail until June 10, 2015, when he was convicted in this case and remanded into custody. Appellant was not arrested or charged with any new offenses during the nearly six years that he was free on bail, although while in custody at the Ventura County jail pending sentencing, he "received two major write-ups for failing to obey and [an] accumulation of minor write-ups."

The sentencing hearing was held on September 9, 2015. The probation report noted that appellant was presumptively ineligible for probation pursuant to section 1203, subdivision (e)(4) based on two prior felony convictions. The prior convictions included a 2002 conviction for possession of a firearm by a felon (former § 12021, subd. (a)(1)), for which appellant served a two-year prison term. Appellant also was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)) in 2004 and sentenced to two years in prison. Appellant was released on parole in February 2005 and discharged from parole in June 2008. The probation report stated that there did not "appear to be any factors which may indicate this is an unusual case where

probation may be granted" under rule 4.413(c) of the California Rules of Court.

The prosecution asked the trial court to deny probation and sentence appellant to six years in state prison. In denying probation, the court found that there were no factors that would support a grant of probation. The court also noted that appellant had several disciplinary write-ups since he was remanded into custody, which demonstrated that appellant was not willing to respect authority or rules. The court concluded that "this is not a probation case, this is a state prison case." It did, however, consider appellant's performance while he was free on bail as a mitigating factor in selecting the low term of two years on the second degree robbery count plus a consecutive one-year term for the prior conviction, for a total prison term of three years.

DISCUSSION

It is undisputed that appellant's prior felony convictions rendered him presumptively ineligible for probation unless the trial court found this to be an "unusual" case where the interests of justice would be best served by granting probation. (§ 1203, subd. (e)(4).) In determining whether the case is unusual, the court must consider the criteria set forth in rule 4.413(c) of the California Rules of Court. (*People v. Stuart* (2007) 156 Cal.App.4th 165, 178 (*Stuart*).) The probation report advised that that there were no factors indicating that this case is unusual under rule 4.413(c). After reading the report "at least a half a dozen times," the court concurred, stating "I have to make a finding that it would be in the interests of justice . . . in order to release the defendant on probation. Probation doesn't

see any factors that would allow me to do that. And as hard as I have searched, frankly I don't see them either."

We review the trial court's determination whether a case is "unusual" for abuse of discretion. (*Stuart*, *supra*, 156 Cal.App.4th at p. 179.) The court is presumed to have acted to achieve legitimate sentencing objectives and we reverse only if the determination is so irrational or arbitrary that no reasonable person could agree with it. (*Ibid.*)

Under the portion of rule 4.413(c) that is relevant here, a case may be unusual if "[t]he fact or circumstance giving rise to the limitation on probation is, in this case, substantially less serious than the circumstances typically present in other cases involving the same probation limitation, and the defendant has no recent record of committing similar crimes or crimes of violence;" *and* "[t]he current offense is less serious than a prior felony conviction that is the cause of the limitation on probation, and the defendant has been free from incarceration and serious violation of the law for a substantial time before the current offense." (Cal. Rules of Ct., rule 4.413(c)(1)(A), (B).)

Appellant argues the presumption against probation was overcome because his current offense is less serious than his prior felonies and because he was free from incarceration and serious violation of the law for a substantial period before the current offense. We agree that the current offense is less serious than his felony offenses for possession of a firearm by a felon and assault, but cannot agree that he was free from incarceration and serious violation of the law for a substantial period before the current offense. His current offense occurred in July 2009. The record reflects that he suffered his felony convictions in 2002 and 2004 and was paroled in 2005, just four years before his current

offense. A reasonable trial judge could conclude that there was no substantial period of time between appellant's incarceration and his current offense, particularly when he was on parole until June 2008. Indeed, appellant committed the current offense a year after his release from parole.

Furthermore, as appellant concedes, the offense in Ventura County Superior Court case No. 2009045474 occurred in May 2009, two months *before* the current offense. Appellant was charged with street terrorism (§ 186.22, subd. (a)) and accessory after the fact (§ 32), with criminal street gang and prior conviction allegations (§§ 186.22, subd. (b), 667.5, subd. (b)). (*People v. Burch, supra*, B267962.) The fact that appellant pled guilty to being an accessory after the fact in that case undermines his assertion that he had no serious violation of the law for a substantial period before the current offense.

Finally, even if a fact listed in rule 4.413(c) exists, this does not necessarily mean that the case is unusual. The trial court may find it so, but it need not. (*Stuart*, *supra*, 156 Cal.App.4th at p. 178.) Having considered all the facts and circumstances of this case, we conclude the court did not abuse its discretion when it determined that appellant failed to overcome the presumption against probation by demonstrating that this was an unusual case where the interests of justice would best be served by granting probation.[3]

---

[3] Appellant also makes a number of arguments for probation based on rule 4.414, which sets forth the criteria the trial court should consider once it determines the defendant has overcome the presumption of probation ineligibility. (*Stuart, supra*, 156 Cal.App.4th at p. 178.) Because the court appropriately found that appellant's case was not unusual and

The judgment is affirmed.
NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P. J.

TANGEMAN, J.

---

did not merit consideration for probation, we need not address these arguments.

Ryan J. Wright, Judge
Superior Court County of Ventura

Mark R. Feeser, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and David F. Glassman, Deputy Attorney General, for Plaintiff and Respondent.