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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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.

NATHAN COLBERT,

Defendant and Appellant.

2d Crim. No. B254508
(Super. Ct. Nos. BA417592-01
BA409045-02)
(Los Angeles County)

Nathan Colbert appeals from the judgments entered in two cases. In case number BA409045-02 (case 1), appellant contends that the trial court abused its discretion by sentencing him to prison for 11 years after finding him in violation of probation. The charges in the other case, number BA417592-01 (case 2), were the basis for revoking probation in case 1. In case 2 appellant was sentenced to prison for two years, to be served concurrently with the sentence in case 1. We affirm.

Procedural Background

In case 1 appellant waived his right to a preliminary examination and pleaded guilty to the sale of cocaine. (Health & Saf. Code, § 11352, subd. (a).) He admitted seven prior separate prison terms. (Pen. Code, § 667.5, subd. (b).)[1] The prosecutor told him that his maximum prison sentence would be 11 years. In July 2013 the court

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

suspended the imposition of sentence and placed appellant on formal probation for five years on condition that he serve 240 days in county jail.

In case 2 appellant was charged with three counts of petty theft with prior theft convictions. (§ 666, subd. (a).) The petty thefts allegedly occurred in August and September 2013. Based on these thefts, the People requested that appellant's probation be revoked in case 1.

The parties engaged in negotiations on both cases. The record does not include a transcript of the negotiations, but the trial court summarized them in an order denying appellant's request to recall the sentence in case 1. The court stated: "The People offered [appellant] a 'package' plea agreement that would resolve all of his cases." Pursuant to the agreement, appellant would receive a four-year prison sentence. "[T]he court specifically informed [appellant], *on the record*, that his maximum exposure on the probation violation [case 1] alone was twelve years, less time served, and that his other pending cases and probation violations could add significantly more time. The court also informed [appellant], *on the record*, that the court felt that he deserved more than the four years offered by the People but that the court would accept that plea agreement if the parties agreed to it because they had more knowledge of the strengths and weaknesses of the case. [¶] [Appellant] rejected the People's plea offer, feeling that it was 'too much time' and seeking yet another grant of probation. The People rejected this suggestion, as did the court. The People withdrew the four-year plea bargain offer."

The trial court conducted a hearing on the violation of probation in case 1. The People called only one witness, who testified that appellant had taken five shampoo bottles and exited a CVS store without paying for them. The court found appellant in violation of probation for committing petty theft.

Before sentencing appellant in case 1, the trial court noted that he had 10 prior felony convictions for which he had served seven prison terms. He also had five misdemeanor convictions. He was on probation when he stole the shampoo bottles. The court observed: "[I]t does become pretty apparent . . . that the community needs a break from [appellant]. I kind of hoped that [he] would have seen the light a little bit but

apparently not." The court imposed the middle term of four years for the sale of cocaine plus seven years for the seven prior prison terms. Appellant was outraged and told the judge to "fuck himself."

After appellant was sentenced in case 1, he waived his right to a preliminary examination in case 2 and pleaded guilty to the three petty thefts with prior theft convictions. The court sentenced him to prison for two years and ordered that the sentence be served concurrently with the 11-year prison term in case 1.

Discussion

Appellant contends that the 11-year sentence in case 1 was an abuse of discretion because (1) the prosecution's original offer, which the trial court approved, would have resulted in a prison sentence of only four years, and (2) the probation violation "was a minor transgression of the law." Appellant argues that the court could not lawfully have "sentence[d] [him] to almost three times the amount that *the court indicated would be a fair sentence* . . . without having learned something new at [the probation violation] hearing that caused it to believe a higher sentence was appropriate." (Italics added.)

A trial court "is precluded from imposing a more severe sentence because the accused elects to proceed to trial" instead of accepting the prosecution's proposed case settlement. (*In re Lewallen* (1979) 23 Cal.3d 274, 281.) To state a claim for relief under *Lewallen*, "[t]here must be some showing, properly before the appellate court, that the higher sentence was imposed as punishment for exercise of the right" to a jury trial or a hearing on an alleged violation of probation. (*People v. Angus* (1980) 114 Cal.App.3d 973, 989-990; see also *People v. Szeto* (1981) 29 Cal.3d 20, 35 [defendant did not "state[] a claim for relief under *Lewallen* for he admits the sentencing judge did not say anything reasonably giving rise to the inference that he was penalizing defendant for exercising his right to jury trial"].) "The mere fact . . . that following trial defendant received a more severe sentence than he was offered during plea negotiations does not in itself support the inference that he was penalized for exercising his constitutional rights." (***Ibid***.)

There is no evidence that the trial court imposed the 11-year prison term to penalize appellant for refusing to accept the prosecution's proposed case settlement.

Contrary to appellant's assertion, the court did not indicate that four years "would be a fair sentence." In its order denying appellant's request to recall the sentence in case 1, the court stated that it had informed appellant that it "felt that he deserved more than the four years offered by the People but that the court would accept that plea agreement if the parties agreed to it because they had more knowledge of the strengths and weaknesses of the case." Appellant was therefore put on notice that the court considered the proposed four-year sentence to be unduly lenient.

It is of no consequence that the probation violation was what appellant characterizes as "a minor transgression of the law." Appellant is wrong in maintaining that "[t]his Court, in reviewing the lower court's decision, must consider . . . what appellant did to violate the terms of his probation . . . ." In sentencing appellant, "[t]he [trial] court could not . . . consider 'the acts which constituted the probation violation' . . . ." (*People v. Angus*, *supra*, 114 Cal.App.3d at p. 989.) "The length of the sentence must be based on circumstances existing at the time probation 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).)

Appellant argues that the 11-year sentence in case 1 was an abuse of discretion because it was based in part on the court's mistaken belief that he had "a recent conviction and imprisonment for a crime of domestic violence." In support of his argument, appellant cites criminal history documents in case 1 that do not show this conviction. But when the court sentenced appellant in case 1, it never mentioned the domestic violence conviction. It mentioned appellant's "four sales convictions in addition to all of his theft and burglary convictions." The court mentioned the domestic violence conviction for the first time in its post-judgment order denying appellant's request to recall the sentence in case 1. There is no evidence that the court relied upon the domestic violence conviction when it sentenced appellant approximately two months earlier.

In any event, the probation report in case 2 shows that on May 5, 2011, appellant was sentenced to prison for five years for inflicting corporal punishment on a spouse or cohabitant in violation of section 273.5, subdivision (a). In the trial court, appellant did not argue that this information was inaccurate.

Disposition

The judgments are affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Shelley Torrealba, Judge
Henry Hall, Judge

Superior Court County of Los Angeles

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