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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.

ERIC J. RODRIGUEZ,

Defendant and Appellant.

2d Crim. No. B269630
(Super. Ct. No. MA064543)
(Los Angeles County)

Eric J. Rodriguez appeals a postjudgment order revoking probation and sentencing him to two years state prison for attempted second degree robbery. (Pen. Code, §§ 654, 211.) Appellant contends that the trial court erred in not imposing a 16-month low term sentence. We affirm.

In 2014, appellant tried to rob a 52-year-old man. Appellant demanded that the victim hand over his cell phone and repeatedly punched him in the face and head, causing the victim to suffer a blowout fracture of the left eye orbit, a bilateral nasal bone fracture, and a possible fracture of the nasal septum. The victim called the police on his cell phone and tried to ward off the

attack with a knife, stabbing appellant in the back and arms before losing consciousness.

Appellant pled no contest to attempted second degree robbery. The trial court suspended imposition of sentence and granted five years probation subject to the condition that appellant serve 120 days county jail and attend anti-theft counseling. On July 24, 2015, the trial court revoked probation and reinstated probation subject to the condition that appellant serve 365 days county jail and enroll in a 52-week domestic violence counseling program.

On September 22, 2015, appellant broke into a Palmdale residence and took a shower. Appellant told the officer that he was homeless and planned to spend the night in the house.

Appellant was arrested for burglary, denied violating probation, and rejected an indicated sentence of 18 months state prison on the underlying conviction for attempted robbery. At the probation violation hearing, evidence was received that appellant broke into the Palmdale house by shattering a door jam and breaking the doorknob off. The evidence further showed that appellant violated his probation terms by not giving his probation officer a correct address, not attending anti-theft counseling as ordered, and not enrolling in a 52-week domestic violence program. The trial court revoked probation and sentenced appellant to two years state prison on the 2014 conviction for attempted robbery.

Discussion

Appellant asserts that the trial court abused its discretion by not imposing a 16-month low term sentence, the sentence offer previously rejected by appellant. The trial court

reviewed the 2014 probation report and 2015 supplemental probation report and said it “did not see any mitigating factor that would justify anything other than [a] midterm [sentence].”¹

Appellant argues that the trial court failed to consider, as a mitigating factor, that “[t]he defendant was motivated by a desire to provide necessities for his or her family or self” (Cal. Rules of Ct., rule 4.423(a)(8).) Appellant waived the error by not objecting at the sentencing hearing. (*People v. Scott* (1994) 9 Cal.4th 331, 356.) Appellant’s trial attorney argued that the court should reinstate probation because the probation violations “have to do with [appellant’s] status of poverty.”

Assuming that counsel’s comments preserved the sentencing issue for appeal, we reject the argument that the trial court failed to consider appellant’s homelessness or desire to provide necessities for himself as a mitigating factor for sentencing. “Absent an explicit statement by the trial court to the contrary, it is presumed the court properly exercised its legal duty to consider all possible mitigating and aggravating factors in determining the appropriate sentence. [Citation.]” (*People v. Oberreuter* (1988) 204 Cal.App.3d 884, 888.)

¹ The 2014 probation report reflects the appellant had prior convictions and/or arrests for burglary, battery with great bodily injury, resisting arrest, possession of a controlled substance, driving with a suspended license, making criminal threats, and petty theft. It stated that appellant was homeless the past year and there was no information that appellant was married or had children. The 2015 supplemental probation report states that appellant was estranged from his mother, had not talked to her in awhile, and was not sure that she lived at her last known address.

The trial court found that the attempted robbery was serious, that it involved an unprovoked attack in which appellant inflicted great injury on the victim, that appellant was an active participant in the attack, that appellant was on probation at the time of the offense, and that appellant lacked the willingness to comply with the terms and conditions of probation. The trial court identified five aggravating factors, any one of which would have supported a midterm sentence. Appellant makes no showing that the sentence is arbitrary or irrational. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977-978), or that it is reasonably probable that he would receive a more favorable sentence if the matter was remanded for resentencing. (See *People v. Coelho* (2001) 89 Cal.App.4th 861, 889 [remand for resentencing would be an idle act].)

Ineffective Assistance of Counsel

Appellant, in the alternative, claims that trial counsel was ineffective in not objecting to the sentence on the ground that appellant was motivated by a desire to provide necessities for his family or self. (Cal. Rules of Ct., rule 4.423(a)(8).) Defense counsel cannot be considered ineffective for failing to make groundless objections. (*People v. Boyette* (2002) 29 Cal.4th 381, 437.) Appellant fails to explain how the theft of a cell phone “to provide necessities” for himself or his family (Cal. Rules of Ct., rule 4.423(a)(8)) was a mitigating factor, or had it been raised by trial counsel, would have resulted in a more favorable sentence. To prevail on an ineffective assistance of counsel claim, appellant must show deficient performance and resulting prejudice, which is lacking here. (*Strickland v. Washington* (1984) 466 U.S. 668, 687; *People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

Disposition

The judgment is affirmed.

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YEGAN, J.

We concur:

GILBERT, P. J.

PERREN, J.

Christopher G. Estes, Judge

Superior Court County of Los Angeles

Jared G. Coleman, 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, Margaret E. Maxwell, Supervising Deputy Attorney General, Tasha G. Timbadia, Deputy Attorney General, for Plaintiff and Respondent.