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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DEREK ALLAN BOWMAN, Defendant and Appellant.	B275343 (Los Angeles County Super. Ct. No. NA904453)

APPEAL from an order of the Superior Court of Los Angeles County. James D. Otto, Judge. Affirmed.

Ann Haberfelde, 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, Assistant Attorney General, Victoria B. Wilson and Lindsay Boyd, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Derek Allan Bowman contends the trial court failed to exercise its discretion by not giving him a split sentence when it revoked and terminated his probation. We disagree and affirm.

Background

Appellant was pulled over for speeding and arrested on two outstanding warrants. A search of his wallet yielded multiple fraudulent driver's licenses, blank checks not in his name, and blank credit cards. Appellant was charged with nine felony counts: Identity theft (Pen. Code, § 530.5, subd. (a))[1] (counts 1-3), and counterfeit seals (§ 472) (counts 4-9). The information further alleged that appellant had suffered numerous prior convictions over 20 years (§§ 1203, subd. (e)(4), 667.5, subd. (b)).

On June 20, 2013, after rejecting a plea offer of seven years, appellant pled no contest to all charges and admitted the prior conviction allegations. The trial court sentenced him to a total of 14 years 4 months in county jail, suspended execution of sentence, and placed appellant on formal probation for five years, subject to various terms and conditions. The court repeatedly informed appellant that if he violated probation, his case would come back to the same court, he would serve the time imposed, and this was appellant's "'one last chance.'"

On November 16, 2015, the trial court revoked appellant's probation. At a hearing on March 17, 2016, appellant stipulated to a probation violation. Defense counsel asked for a split sentence. The court did not believe it had authority to impose such a sentence, but stated that it was "unlikely" the court would do so even if it had authority. The court also stated: "Given his

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

new case, nine counts of activity—I gave him a tremendous break back in 2013, and when I did that, I told him if he messed up again, he would get the time. This was his last chance. [¶] I kept him on probation to me . . . I told him that suspended time would be imposed. I don't see any reason for me to change that." The court terminated probation and imposed the suspended sentence. This appeal followed.

DISCUSSION

In 2011, the Legislature enacted and amended the Criminal Justice Realignment Act of 2011 (the Act). (*People v. Scott* (2014) 58 Cal.4th 1415, 1418 (*Scott*).) The Act changed the punishment for nonserious and nonviolent felonies by allowing "low-level felony offenders" to serve their sentences in county jail rather than state prison. (*Ibid.*, see also former § 1170, subd. (h).) The Act also allowed for offenders to serve their sentences either entirely in county jail or partly in county jail and partly under the mandatory supervision of the county probation officer. (*Scott*, at pp. 1418–1419, citing former, § 1170, subd. (h)(2), (3) & (5).) At the time of appellant's sentencing in 2013, section 1170, subdivision (h)(5) left the decision whether and how to split a sentence up to the discretion of the trial court. (Former § 1170, subds. (h)(5)(B) & (i).)

Effective January 1, 2015, the Act was amended to make the grant of a split sentence presumptive, "[u]nless the court finds that, in the interests of justice, it is not appropriate in a particular case." (§ 1170, subd. (h)(5)(A); see also § 1170, subd. (h)(7) [new version "shall be applied prospectively to any person sentenced on or after January 1, 2015"].) In response to the amendment, the Judicial Council adopted California Rules of Court, rule 4.415, also effective January 1, 2015. The rule

acknowledges that a split sentence is presumptive under section 1170, subdivision (h), and sets forth nonexclusive criteria in determining whether to deny mandatory supervision. (Cal. Rules of Court, rule 4.415.)

Appellant acknowledges that he "accepted a plea bargain in June 2013, and sentence was imposed at that time" and therefore he "is not entitled to application of the new version of section 1170, subdivision (h)(5) that creates [a] presumption that a split sentence applies." He nevertheless argues that the trial court failed to exercise its discretion in determining whether to impose a split sentence and that the matter must be remanded to the trial court for an exercise of such discretion. We disagree.

It is undisputed that at the time of appellant's sentencing in 2013, the trial court could have imposed a split sentence under the Act, but did not do so. Instead, the court imposed a straight county jail custody term, suspended execution of sentence, and granted probation. The court made explicitly clear that if appellant violated probation, appellant would serve the imposed sentence of 14 years 4 months. There is no need for the court to reconsider its discretion.

We agree with the People that where, as here, the trial court imposed a full term in custody and suspended *the execution* of sentence, the trial court was required to impose that sentence once probation was revoked and terminated. (*People v. Howard* (1997) 16 Cal.4th 1081, 1095 (*Howard*).) *Howard* held that "in situations in which the court chose to impose sentence but suspended its execution pending a term of probation," if probation is later revoked "the sentencing judge must order that exact sentence into effect." (*Id*. at p. 1088.) Recently, in *Scott, supra,* 58 Cal.4th at p. 1424, our Supreme Court reiterated that

"*Howard* establishes that when a court elects to impose a sentence, a judgment has been entered and the terms of the sentence have been set even though its execution is suspended pending a term of probation." We agree with the People that the question is not whether the trial court had discretion to impose a split sentence, but whether it had discretion to resentence appellant after already imposing a term. The trial court properly determined that it did not.

For the first time in his reply brief, appellant relies on *People v. Camp* (2015) 233 Cal.App.4th 461, which was issued before he filed his opening brief. We normally disregard points and authorities raised for the first time in a reply brief and do so here. In any event, *Camp* is distinguishable because the defendant in that case was initially sentenced to a split sentence. He was concluding his county jail term when it was discovered he was subject to deportation and therefore ineligible for mandatory supervision. The trial court then modified his sentence by omitting the mandatory supervision term, and the Court of Appeal affirmed. (*Id*. at pp. 465–466.)

DISPOSITION

The order terminating probation and executing the sentence imposed is affirmed.

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_____, Acting P. J.
ASHMANN-GERST

We concur:

_____, J.
CHAVEZ

_____, J.
HOFFSTADT