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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRETT MICHAEL RUPP,

Defendant and Appellant.

B280988

(Los Angeles County  
Super. Ct. No. MA065141)

APPEAL from a judgment of the Superior Court of  
Los Angeles County, Daviann L. Mitchell, Judge. Affirmed.

Cindy Brines, under appointment by the Court of Appeal,  
for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Brett Michael Rupp appeals from a judgment entered on January 23, 2017, imposed after he was found to have violated probation.

Following our independent examination of the entire record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*), we conclude no arguable issues exist. Accordingly, we affirm.

### **PROCEDURAL AND FACTUAL HISTORY**

A January 20, 2015 complaint alleged that appellant committed one count of first degree residential robbery (Pen. Code, § 211),<sup>1</sup> one count of elder or dependent adult abuse (§ 368, subd. (b)(1)), and one count of driving or taking a vehicle without consent (Veh. Code, § 10851, subd. (a)). Appellant had taken his elderly grandfather's car and punched him numerous times and pushed him as well.

On February 20, 2015, appellant entered a plea of nolo contendere to one count of elder or dependent adult abuse (§ 368, subd. (b)(1)). The court dismissed the remaining two counts pursuant to the agreed-upon terms of the plea bargain. The trial court suspended appellant's sentence and placed him on formal probation for five years. The court ordered appellant to pay a \$300 restitution fine, a \$40 court security fine, and a \$30 criminal facility assessment fine.<sup>2</sup>

Among other conditions of probation, the court ordered appellant to serve 365 days in jail, to obey all laws and orders of

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<sup>1</sup> Further statutory references are to the Penal Code, unless otherwise noted.

<sup>2</sup> The court imposed and stayed a \$300 probation revocation fine.

the court, to enroll in and complete a three-month anger management program, and not to use or possess any narcotics. The court also ordered appellant to submit to periodic controlled substance testing when requested by the probation officer or any other peace officer.

On July 6, 2016, at a hearing at which appellant was represented by counsel, the court modified appellant's conditions of probation, ordering him to attend Alcoholics Anonymous (A.A.) meetings twice per week for at least six months and to provide proof of attendance to his probation officer.

On November 7, 2016, appellant was arrested for being under the influence of a controlled substance in violation of Health and Safety Code section 11550. Los Angeles County Deputy Sheriff Charles Dana responded to a "suspicious person" call from the Palmdale Embassy Suites. When the deputy arrived at about 4:35 a.m., he saw that appellant was pacing. Appellant was "fidgety" and his speech was incoherent. Appellant's pulse was abnormally high. His pupils were exceptionally dilated and had little reaction to a medical pen light. Appellant refused to comply with the deputy's directions for a Romberg test. The deputy, who had experience with methamphetamine users, concluded that appellant was under the influence of methamphetamine and arrested him. Deputy Dana transported appellant to the Palmdale Sheriff's station, where the deputy asked appellant to provide a urine sample for substance testing. Appellant refused. Deputy Dana noted the time of the refusal on the form as "0507," indicating 5:07 a.m.

On January 20, 2017, the court conducted a probation revocation hearing. Deputy Dana testified as to the above facts.

He further testified that appellant declined to sign the form indicating his refusal to give a urine sample.

Appellant testified on his own behalf, denying that he had been under the influence of methamphetamine. He suggested that his consumption of an energy drink earlier at 8:00 p.m. or 9:00 p.m., made him appear at 4:30 a.m., the next day, as though he had consumed methamphetamine. He also explained that he was pacing in front of the hotel because his car had broken down after an accident and, although he wanted to treat himself to a nice hotel room that night, the hotel was booked.

Appellant denied that he refused to take a urine test. He recounted this scenario: Deputies at the station asked him to remove his boots. He refused. He argued with them, so they kept him until 10:00 a.m. At that time, deputies asked him to sign “paperwork.” He refused, asking why he had been arrested. He was told that he was under arrest for being under the influence of methamphetamine. He noted that he had not been tested and refused to sign any paperwork.

Appellant’s probation officer, Daniel Leist, testified that appellant provided him paperwork to show appellant attended A.A. meetings three or four times per month. However, the paperwork simply had initials and dates and did not show that the paperwork was actually from, or authorized by, A.A.

The court determined that appellant was “completely incredible. I don’t believe [or] accept anything that he says as true. I think he’s lying. I think he’s giving self-serving statements.” The court found that appellant “[was] willfully

insufficient” in complying with the condition of probation that he attend A.A. twice per week.<sup>3</sup>

The court further found that the evidence established that appellant was under the influence of methamphetamine on November 7, 2016, and that his explanation of why he did not submit to testing is “incredible.”

Then the court went on to find that appellant’s failure to pay his fines was willful. The court determined that appellant had the ability to pay, as he earned \$2,000 per month, and the fine payment had been reduced to \$25 per month.

The court revoked probation and imposed a high term prison sentence of four years. (§§ 368, 1170, subd. (h)(3).) In selecting the upper term, the court set forth the following aggravating factors: The victim, appellant’s 83-year-old grandfather was particularly vulnerable; appellant engaged in violent conduct, as he punched his grandfather numerous times; appellant was on parole or probation when he committed the offenses; and his prior convictions as an adult are numerous and increasing in seriousness, including four domestic violence convictions and one burglary.

### **DISCUSSION**

Appellant timely appealed. After review of the record, appellant’s court-appointed appellate counsel filed an opening brief, asking this court to review the record independently pursuant to *Wende, supra*, 25 Cal.3d 436. Via an August 9, 2017

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<sup>3</sup> The court determined that appellant’s record of attendance at A.A. was fraudulent or manufactured, because it had a July 5 date, a day before the court had ordered appellant to attend A.A. twice per week. However, the court went on to accept the document into evidence.

letter, we advised appellant that he had 30 days within which to submit any contentions or issues that he wished us to consider. Appellant has not filed a supplemental brief.

A court may revoke probation “if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer . . . or otherwise that the person has violated any of the conditions of his or her [probation] . . . .” (§ 1203.2, subd. (a).) “[G]reat deference is accorded the trial court’s decision, bearing in mind that ‘[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court. [Citations.]’ [Citation.]” (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.) Proof of a probation violation by a preponderance of the evidence is sufficient to revoke probation. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 446.) Trial courts have broad discretion to determine whether a defendant has violated probation and whether, as a result, the court should revoke probation. (*Id.* at pp. 443, 445.)

The court acted well within its discretion in revoking appellant’s probation where it determined, based on a preponderance of the evidence, that appellant violated several conditions of probation: On November 7, 2016, appellant was under the influence of methamphetamine in violation of Health and Safety Code section 11550;<sup>4</sup> he refused a controlled substance testing when requested by a peace officer; he willfully failed to

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<sup>4</sup> “A person shall not use, or be under the influence of any controlled substance . . . .” (Health & Saf. Code, § 11550, subd. (a).)

attend A.A. twice per week; and, although employed and earning \$2,000 per month, he willfully failed to pay the \$25 monthly fine.

We have examined the entire record and are satisfied that no arguable issues exist, and that appellant has, by virtue of counsel's compliance with the *Wende* procedure and our review of the record, received adequate and effective appellate review of the judgment entered against him in this case. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 112-113.)

DISPOSITION

The judgment is affirmed.

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DHANIDINA, J.\*

We concur:

EDMON, P.J.

LAVIN, J

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.