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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. MARQUICE WILLIAM BRUCE, Defendant and Appellant.	B276587 (Los Angeles County Super. Ct. No. TA137343)

APPEAL from judgment of the Superior Court of Los Angeles County. John J. Lonergan, Judge. Affirmed.

Marquice William Bruce, in pro. per.; and Alan E. Spears, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Marquice William Bruce appeals the judgment entered following the termination of his probation. After a jury had acquitted appellant of the charge of possession of a firearm by a prohibited person (Pen. Code,[1] § 29900, subd. (a)(1)) in Los Angeles County Superior Court case number TA138514, the trial court found him to be in violation of probation in Los Angeles County Superior Court case number TA137343. The trial court terminated probation and sentenced appellant to the upper term of five years in state prison in case number TA137343. Appellant received 512 days of precommitment custody credit, including 256 days of actual custody and 256 days of conduct credit.

Appellant timely appealed the judgment, and we appointed counsel to represent him on appeal. After examination of the record, counsel filed an opening brief raising no issues and asking this court to independently review the record. Appellant filed his own supplemental brief, in propria persona.

PROCEDURAL BACKGROUND

Appellant was charged in a felony complaint filed on June 4, 2015, with two counts of second degree robbery in violation of section 212.5, subdivision (c). On July 29, 2015, pursuant to a negotiated plea agreement, appellant withdrew his plea of not guilty and entered a plea of no contest as to count 1. The court suspended imposition of sentence and placed appellant on formal probation for three years on the conditions, inter alia, that he serve 116 days in custody and that he "not own, use or possess any dangerous or deadly weapons, including any firearms." The court awarded 116 days of custody credit,

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

consisting of 58 days of actual custody plus 58 days of conduct credit. The court further imposed fines, fees and assessments according to statute.

On October 27, 2015, probation was revoked. Thereafter, on February 8, 2016, appellant was charged by information in case number TA128514 with one count of possession of a firearm by a prohibited person. (§ 29900, subd. (a)(1).) A jury acquitted appellant of the charge after a three-day trial. Immediately after discharging the jury, the trial court found appellant to be in violation of probation in case number TA137343 based on the evidence presented at trial. The court denied probation, finding appellant unsuitable, and imposed sentence.

FACTUAL BACKGROUND

On October 23, 2015, about 8:35 p.m., Los Angeles Police Department Officer Hector Beas and his partner, Officer Gonzalez, were on patrol in the area of Vermont and 105th Street when they observed appellant and five other men standing on the sidewalk in front of a liquor store. The men were holding open alcohol containers, and the officers pulled over to address the violations of drinking in public and possession of open containers. Appellant appeared nervous and startled. As Officer Beas made eye contact with him, appellant clutched his waistband with his right hand and crouched behind a parked vehicle.

When the officers exited their patrol car, appellant took off running southbound on Vermont. Officers Beas and Gonzalez ran after appellant at full speed down Vermont and followed as he turned east on 105th Street. Appellant then ran south through a well-lit alley. From his position about 10 feet behind appellant, Officer Beas observed appellant holding his waistband with his right hand. The officer saw appellant remove from his waistband

what looked like a stainless steel firearm which he held down at his right thigh. Appellant tossed the gun over an ivy-covered chain link fence on the east side of the alley. Officer Beas saw the firearm was black with black plastic grips.

Appellant turned eastbound and continued running on 106th Street. He ran past seven homes, stopped, and laid facedown on the ground with his arms spread out to his side. While appellant was taken into custody, Officers Beas and Gonzalez returned to the alley to look for the gun. There they met other officers whom they directed to the area where appellant had thrown the weapon. Eventually, police recovered a loaded semiautomatic stainless steel firearm in the backyard of a house facing 105th Street.

The firearm had not been reported stolen and was unregistered. A forensic print specialist was unable to recover any fingerprints from the weapon, magazine, or ammunition.

The parties stipulated that appellant had previously suffered a felony conviction in case number TA137343.

DISCUSSION

In his supplemental brief appellant argues: (1) because he was acquitted of the firearm possession charge, the trial court abused its discretion in relying on the evidence adduced at trial to find appellant had violated probation; (2) *In re Coughlin* (1976) 16 Cal.3d 52 (*Coughlin*) is inapplicable to appellant's case; and (3) the trial court's probation violation determination violated double jeopardy and his constitutional rights to cross-examine and confront witnesses. Finally, appellant seeks to withdraw his plea agreement as to the underlying robbery conviction on the grounds that he is innocent of the charges and was not advised of his constitutional rights.

I. Substantial evidence supports the trial court's finding that appellant violated probation, and the trial court did not abuse its discretion in terminating probation.

Section 1203.2, subdivision (a) permits a court to revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe ... that the person has violated any of the conditions of his or her supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless of whether he or she has been prosecuted for those offenses." (See *Coughlin*, *supra*, 16 Cal.3d at p. 56; *People v. Galvan* (2007) 155 Cal.App.4th 978, 981.)

A court may revoke an order of probation at any time during the probationary period when the evidence shows the defendant has not complied with the terms of the probation. (*People v. Urke* (2011) 197 Cal.App.4th 766, 772 (*Urke*); *People v. Johnson* (1993) 20 Cal.App.4th 106, 110.) "[T]he facts supporting revocation of probation may be proven by a preponderance of the evidence." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 439, 447 (*Rodriguez*); *People v. Stanphill* (2009) 170 Cal.App.4th 61, 72.) We review the trial court's factual findings with regard to the probation revocation decision under the substantial evidence standard of review. (*People v. Superior Court (Jones)* (1998) 18 Cal.4th 667, 681.) We therefore review the record in the light most favorable to the judgment to determine whether there is substantial evidence from which the trial court could find a probation violation. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848–849.) We then review the trial court's decision to revoke probation for abuse of discretion. (*Rodriguez, supra,* 51 Cal.3d at p. 443.) A trial court does not abuse its discretion by revoking

probation if the record shows the defendant violated probation conditions. (*People v. Hawkins* (1975) 44 Cal.App.3d 958, 968.)

Because probation revocation proceedings are not a part of a criminal prosecution, "the trial court has broad discretion in determining whether the probationer has violated probation." (*Rodriguez*, *supra* 51 Cal.3d at p. 443 [section 1203.2(a) confers "great flexibility upon judges making the probation revocation determination"]; *Coughlin*, *supra*, 16 Cal.3d at p. 56.) And "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,' " we accord great deference to the trial court's decision. (*Urke*, *supra*, 197 Cal.App.4th at p. 773; *People v. Pinon* (1973) 35 Cal.App.3d 120, 123.) " 'The discretion of the court to revoke probation is analogous to its power to grant the probation, and the court's discretion will not be disturbed in the absence of a showing of abusive or arbitrary action. [Citations.]' [Citation.] 'Many times circumstances not warranting a conviction may fully justify a court in revoking probation granted on a prior offense.' " (*Urke*, *supra*, 197 Cal.App.4th at p. 773.) Indeed, even "the fact of an acquittal establishes only that the trier of fact entertained a reasonable doubt of defendant's guilt. On the other hand, such a doubt, of itself, would not preclude revocation of probation." (*Coughlin*, *supra*, 16 Cal.3d at p. 59; *Rodriguez*, *supra*, 51 Cal.3d at p. 442; see also *People v. Towne* (2008) 44 Cal.4th 63, 84.)

Accordingly, " ' "[o]nly in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation." ' [Citation.] And the burden of demonstrating an abuse of the trial court's discretion rests squarely on the defendant." (*Urke*, *supra*, 197 Cal.App.4th at p. 773.)

Here, the same judge who had just presided over appellant's gun possession trial found he had violated probation on the basis of the evidence adduced at trial. That evidence showed that Officer Beas observed appellant clutching his waistband with his right hand before and during the foot chase. As he continued his pursuit, the officer saw appellant remove a black stainless steel firearm with black plastic grips from his waistband and toss it over an ivy-covered chain link fence on the east side of the alley. Officer Beas was then able to direct another officer to the location on the other side of the fence where a loaded semiautomatic stainless steel firearm was recovered. The only uncertainty left by this evidence pertained to how quickly the officers actually recovered the weapon.

On the strength of this evidence, we conclude that substantial evidence supports the trial court's finding that appellant had violated his probation by illegally possessing a firearm. Further, given the ample grounds for the court's violation finding, we find no abuse of discretion in the trial court's termination of appellant's probation.

II. The trial court properly considered the evidence that appellant illegally possessed a firearm in revoking probation pursuant to *Coughlin*.

Appellant contends that the holding in *Coughlin*, *supra*, 16 Cal.3d 52, has no application to this case, and the trial court abused its discretion by relying on the evidence presented at trial. We disagree.

In *Rodriguez*, the California Supreme Court reaffirmed its holding in *Coughlin* that section 1203, subdivision (a) affords the trial court considerable "flexibility" in probation revocation determinations. As the high court explained, *Coughlin* held "that evidence that a probationer has committed another criminal

offense during the period of his probation is admissible at a revocation hearing despite the probationer's having been acquitted of the criminal charge at trial. (*In re Coughlin, supra*, 16 Cal.3d at p. 58.) In doing so, we stated that '[a]s the language of section 1203.2 would suggest, the determination whether to grant or revoke probation is largely discretionary.' (*Id*. at p. 56, citing *In re Larsen* (1955) 44 Cal.2d 642, 645, and *In re Davis* (1951) 37 Cal.2d 872, 875.)" (*Rodriguez*, *supra*, 51 Cal.3d at p. 443.)

Appellant offers no reason to conclude that the rule stated in *Coughlin* and reaffirmed in *Rodriguez* has changed. Nor does he cite any basis for finding *Coughlin* to be inapplicable to this case. Accordingly, we decline appellant's invitation to reject our Supreme Court's long-standing judgment on this issue.

III. The trial court's probation violation determination did not violate appellant's constitutional rights.

Appellant further challenges the trial court's probation violation determination on the grounds that it violated double jeopardy and his constitutional rights to cross-examine and confront witnesses. We disagree.

The trial court's reliance on the evidence from the firearm possession trial to revoke probation did not implicate the double jeopardy clause because "jeopardy does not attach in probation revocation hearings, which do not constitute 'trial' on a new criminal charge, result in 'conviction,' or integrally relate to 'enforcement' of the criminal laws. [Citations.] The limited purpose of the revocation hearing is to determine whether the probationer is abiding by the conditions of his probation." (*Lucido v. Superior Court* (1990) 51 Cal.3d 335, 343, fn. 5; *People v. Atwood* (2003) 110 Cal.App.4th 805, 813.)

As for appellant's claim that the revocation of probation somehow deprived him of his due process and confrontation rights, we note that the termination proceeding came on the heels of a full three-day jury trial during which his attorney cross-examined witnesses and vigorously argued the case on his behalf. We find no irregularities much less any violation of appellant's constitutional rights in either the trial or probation revocation proceedings.

Finally, appellant seeks to withdraw his June 29, 2015 plea agreement to the underlying robbery conviction, claiming he is innocent of the charges and was not advised of his constitutional rights. Appellant's request, made for the first time in this appeal, is untimely, falls outside of any exception to the requirements of section 1237.5,[2] and fails to state an adequate basis for withdrawing the plea.

Following a plea of no contest, the grounds for appealing the resulting conviction are limited, and under most circumstances, a defendant must obtain a certificate of probable cause pursuant to section 1237.5 in order to proceed with an

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[2] Section 1237.5, setting forth the prerequisites to appeal from a conviction on a plea of no contest, provides in relevant part: "No appeal shall be taken by the defendant from a judgment of conviction upon a plea of guilty or nolo contendere, . . . except where both of the following are met: [¶] (a) The defendant has filed with the trial court a written statement, executed under oath or penalty of perjury showing reasonable constitutional, jurisdictional, or other grounds going to the legality of the proceedings. [¶] (b) The trial court has executed and filed a certificate of probable cause for such appeal with the clerk of the court."

appeal. (*People v. Johnson* (2009) 47 Cal.4th 668, 677–678 (*Johnson*).) Section 1237.5 does not apply to asserted errors occurring in any hearing *after* the plea was entered in which the court determined the degree of the crime and penalty to be imposed. (*People v. Ward* (1967) 66 Cal.2d 571, 575 (*Ward*); *Johnson*, *supra*, at p. 678.)

However, as our Supreme Court has explained, "[e]ven when a defendant purports to challenge only the sentence imposed, a certificate of probable cause is required if the challenge goes to an aspect of the sentence to which the defendant agreed as an integral part of a plea agreement. [Citations.] The rationale for the exception to the certificate requirement recognized in *Ward* does not apply in such cases because, as a consequence of the plea agreement, the validity of an agreed-upon aspect of the sentence is not in contention at the sentencing hearing. Such an agreed-upon aspect of the sentence cannot be challenged without undermining the plea agreement itself. Consequently, an attack upon an integral part of plea agreement 'is, in substance, a challenge to the validity of the plea.' " (*Johnson*, *supra*, 47 Cal.4th at pp. 678–679.)

Even if the lack of a certificate of probable cause from the trial court were not fatal to appellant's request to withdraw his plea, his failure to state any adequate grounds for such relief would be. "On application of the defendant at any time before judgment . . . the [trial] court may, . . . for a good cause shown, permit the plea of guilty to be withdrawn and a plea of not guilty substituted." (§ 1018.) While mistake, ignorance or any other factor overcoming the exercise of free judgment may constitute good cause for withdrawal of a guilty plea, "good cause must be shown by clear and convincing evidence." (*People v. Cruz* (1974) 12 Cal.3d 562, 566–567; *Johnson*, *supra*, 47 Cal.4th at p. 679.)

Here, appellant's claim of innocence is unaccompanied by any showing that his exercise of free judgment was overcome in entering his plea, and his assertion that he was not advised of his constitutional rights is entirely belied by the record.

* * *

Based on our examination of the entire record, we reject appellant's claims, finding no abuse of discretion in the trial court's finding of a probation violation and imposition of sentence. Moreover, we are satisfied that appellant's attorney has fully complied with his responsibilities and that no arguable issues exist. (*People v. Kelly* (2006) 40 Cal.4th 106, 109–110; *People v. Wende* (1979) 25 Cal.3d 436, 441.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.