People v. Short

2010 | Cited 0 times | California Court of Appeal | August 23, 2010

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Emmanuel Linwood Short appeals from the judgment entered following revocation of probation previously granted upon his conviction by no contest plea of corporal injury to a child (Pen. Code, § 273d, subd. (a)).[1] The trial court imposed the four-year state prison sentence previously imposed and suspended. Appellant contends that the trial court abused its discretion in terminating his probation.

We affirm.

PROCEDURAL AND FACTUAL BACKGROUND

On December 8, 2006, appellant pled no contest to inflicting corporal injury on a child (§ 273d, subd. (a)) for allegedly striking his girlfriend's three-year-old son with a belt on his lower back and buttocks approximately a dozen times. The trial court sentenced appellant to four years in state prison, suspended execution of sentence and placed appellant on five years' formal probation, subject to conditions, including that he spend 270 days in county jail, not consume alcohol and obey all laws and orders of the court.

On June 8, 2009, probation was modified to require appellant to make monthly payments towards his financial obligations and/or to meet with the financial evaluator to reduce the payments.

On or about June 10, 2009, appellant hit his sister approximately 15 times in the face causing her nose to bleed, grabbed her neck and threatened to kill her. Witnesses believed appellant was intoxicated at the time.

On August 3, 2009, the probation office filed a "Notice to Court of Technical Violation," after learning that appellant had entered into a misdemeanor plea in a new case. Probation recommended that appellant's 2006 probation be extended a year and he be required to attended Alcoholics Anonymous meetings. The trial court summarily revoked appellant's probation and set the matter for hearing as a contested violation.

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On September 18, 2009, the trial court conducted the contested probation violation hearing at which appellant's probation officer, Marie Brown, testified. She noted that appellant was "a little slow" in completing his child abuse classes. Though it had been nearly three years since he was placed on probation, he still had to take eight classes of the 52 the court had ordered. He was also slow in making payments that were ordered as a condition of probation.

Brown nonetheless testified that appellant was doing "okay" on probation. His arrest for battery on his sister, while he was intoxicated, was the only arrest while he was on probation. Appellant had obtained part-time employment as a karate instructor and had a positive and courteous attitude on probation. She did note that appellant had been granted felony probation for a 2005 conviction, as well as this one. Familiar with the circumstances of the battery case, Brown still believed that appellant should be given another chance on probation.

Justin Palacio testified as a defense witness. He accompanied appellant to the location where the incident with appellant's sister occurred. Palacio was in another room and heard arguing but did not hear any screaming or scuffling. Appellant's sister was not crying, nor did she complain to Palacio about appellant.

The trial court found that appellant was in violation of his probation, "regardless of the underlying circumstances of that [battery] conviction," as he was "in violation of other conditions as well," including a failure to complete his court-ordered counseling. The trial court stated, "Despite the fact that you had this ton of bricks hanging over your head in the event you did violate, you being a karate instructor, obviously you have the ability to not only physically defend yourself but certainly the ability to harm others in a physical altercation, and you do that to your sister evidently . . . . You were convicted of that offense. And, when a person is on suspended time, that means that they understand that that will be the sentence in the event they violate probation, no matter how de minimis the violation may be."

The trial court imposed the suspended sentence, stating: "I'm taking into consideration everything that was filed within this record, the court file, . . . [¶] It appears [appellant] has a lot of people offering their support for him. They think highly of him in terms of his character and honesty and so forth and his willingness to mend his ways. [¶] The probation report submitted included that Upland police report which in detail outlines the alleged complaints made by witnesses including the victim. This is more than just slapping an item out of the hand of his sister, as [appellant] reported. He attacked his sister on this particular occasion, not just once but twice, the first time striking her in the face multiple times in the presence of witnesses. He was an invited guest into this household at the time. She evidently gets away from him for a brief period of time. He attacks her again, striking her again in the face multiple times. A total of 15 was reported according to this report, obviously requiring a call for 911; that's when [appellant] was taken away by his companions to obviously avoid police contact. This is more than just a slap out of a hand. We have a karate expert with the effects of alcohol determining his behavior and attacking his sibling, a female, obviously beating her fairly

sufficient with his fists. That's pretty aggravated . . . . [¶] . . . [¶] I find [appellant] in violation of probation. And the sentence that was previously--the execution of which was previously suspended will now be imposed, . . ."

DISCUSSION

Appellant's sole contention on appeal is that the trial court abused its discretion in terminating his probation and imposing the previously suspended, four-year prison sentence. He argues that the trial court could only revoke probation if "the interests of justice so require." He claims that there was no justification for revoking probation here because the original offense was not committed with any evil intent, for two and one-half years he complied with the terms of probation, the battery which was the subject of the violation was only a misdemeanor and not proven, and the probation officer recommended reinstatement. This contention is meritless.

In reviewing the record of a probation violation hearing, great 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." (People v. Pinon (1973) 35 Cal.App.3d 120, 123.) Granting or revoking probation is within the broad discretion of the trial court. (People v. Rodriguez (1990) 51 Cal.3d 437, 443.) '"[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."' (Ibid.) Denial of probation is an abuse of discretion where arbitrary and capricious. (People v. Edwards (1976) 18 Cal.3d 796, 807.)

"[A] grant of probation is not a matter of right but an act of clemency . . . ." (People v. Covington (2000) 82 Cal.App.4th 1263, 1267.) Section 1203.2 provides in part: "[T]he court may revoke and terminate . . . 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), italics added; People v. Taylor (1968) 260 Cal.App.2d 393, 395.) "Once the court has decided that a violation of probation has occurred, the court must go on to decide whether under all of the circumstances the violation of probation warrants revocation." (People v. Avery (1986) 179 Cal.App.3d 1198, 1204.) While the court must consider a probation officer's report, it is not bound by that report and recommendation, or, indeed, the record of the case. "Rather, '[i]t must be guided by considerations pertaining to psychology, sociology and penology, or, in the words of the code, to "the ends of justice"; by general rules of policy which have not been and in the nature of the case should not be crystallized into positive or definite rules of law.'" (Whitcombe v. County of Yolo (1977) 73 Cal.App.3d 698, 708.)

Here, appellant does not contest the sufficiency of the evidence to support the finding that he violated probation, but claims that, under all of the circumstances, it was an abuse of discretion to revoke probation. The inquiry upon revocation of probation is not directed to the probationer's guilt or innocence but to performance on probation, that is whether the probationer violated the

conditions of probation and if so what it portends for future conduct. The focus is on whether a probationer has shown he can conform his conduct to the law. (People v. Beaudrie (1983) 147 Cal.App.3d 686, 691.) This distinguishes the considerations appropriate for determining whether a defendant should initially receive probation and whether a defendant should have probation revoked. In the latter case, the defendant has a track record of performance on probation which may be indicative of how he will continue to perform on probation if his probation is not revoked, and which should therefore be given substantial weight.

While we might have decided this case differently than the trial court, we will not substitute our judgment for its judgment where it properly exercised its discretion. We cannot say that the trial court abused its discretion here. As previously stated, the focus of a probation violation is whether the probationer has shown an ability to comply with the law. (People v. Beaudrie, supra, 147 Cal.App.3d at p. 691.) There was evidence from which the trial court could have properly concluded that appellant had not. At the time appellant committed the underlying corporal injury to a child, he was already on probation for a prior felony conviction, which failed to deter his commission of the underlying offense in this matter. While on probation in this matter, appellant had multiple violations of probation conditions. He was drinking alcohol and reputedly drunk at the time of the incident with his sister, violating the condition that he not consume alcohol. He also failed to obey the law, as he was convicted of battery on his sister. The offense against his sister was particularly violent as he hit her 15 times, causing her nose to bleed and threatening to get a gun and kill her. Finally, while no specific finding was made on the point, appellant was dilatory in completing the 52 court-ordered child abuse classes, still having eight to go after nearly three years on probation. These facts suggest that appellant was not going to succeed on probation and justified the trial court's revoking probation.

DISPOSITION

The judgment is affirmed.

We concur: ASHMANN-GERST, J., CHAVEZ, J.

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