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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE,
Plaintiff and Respondent,
v.
FORREST FULLER,
Defendant and Appellant.

A125630

(Sonoma County
Super. Ct. No. SCR-537701)

A felony complaint in case No. SCR-537701 (537701) filed on May 23, 2008, charged defendant with possession of methamphetamine (Health & Saf. Code, § 11377, subd. (a)), and further alleged that he had previously served four prison terms (Pen. Code, § 667.5, subd. (b)).¹ Defendant pleaded guilty and was placed on probation under Proposition 36, the Substance Abuse and Crime Prevention Act of 2000 (the Act), which is largely codified at sections 1210 and 1210.1. Subsequently, defendant admitted three violations of his probation on three separate occasions and, after the third violation, the trial court terminated his participation in drug court under the Act and sentenced him to four years in prison.

On appeal, defendant challenges his sentence and contends the court improperly terminated his probation under sections 1210 and 1210.1. He

¹ All further unspecified code sections refer to the Penal Code.

maintains that he received written notice of only two of his three violations of probation and section 1210.1 mandates written notice for all three probation violations prior to the court's revoking probation. The People do not dispute that the record does not contain a written notice of defendant's second probation violation, but they assert that he has forfeited his right to complain as he did not raise this issue in the trial court.

The record establishes that defendant had oral notice of his second probation violation, had four separate opportunities to object on the basis of no written notice, and received three distinct periods of probation. Defendant provided no evidence that the trial court and counsel operated under the mistaken understanding of the requirements under the Act. Consequently, on this record, we conclude defendant has forfeited any claim of error based on the absence of a probation-violation notice.

This court requested supplemental briefing on whether amendments to section 4019, effective January 25, 2010, apply retroactively to the calculation of defendant's presentence credit. For the reasons already discussed in our recent decision, *People v. Landon* (2010) 183 Cal.App.4th 1096, we conclude that the amendments do apply and defendant is entitled to an additional 40 days of presentence credit.

BACKGROUND

On May 22, 2008, a person approached a police officer and reported that a man driving an older white pick-up truck was waving a gun at him.² The officer located a vehicle matching the description and conducted a high-risk traffic stop. The driver of the vehicle was defendant. The officer did not find a gun but did find two baggies of methamphetamine. The officer arrested defendant.

A felony complaint filed in case No. 537701, on May 23, 2008, charged defendant with possession of methamphetamine (Health & Saf. Code, § 11377,

² The facts regarding the underlying crime are from the probation report.

subd. (a)), and further alleged that he had previously served four prison terms (§ 667.5, subd. (b)). On May 27, 2008, defendant pleaded guilty to possessing methamphetamine and admitted serving two prior prison terms. The court found defendant eligible for probation under the Act and placed defendant on three years formal probation with numerous conditions pursuant to section 1210.

On June 17, 2008, the probation office filed a “Probation Request for Violation of Probation 1210 Court” against defendant because defendant had a positive drug test. On June 25, 2008, defendant admitted violating probation.

On January 15, 2009, in case No. SCR-553213 (553213), defendant pleaded guilty to a charge of misdemeanor possession of a drug pipe in violation of Health and Safety Code section 11364. At this hearing, defendant admitted his second violation of probation in case No. 537701. The court told defendant: “As to case [No.] 537701, then, [defendant] is found in violation of probation based on the plea and conviction in the case ending [in] 213. This is the second violation of probation.”

At a review hearing on February 23, 2009, the court announced that defendant had missed court and asked him if he was prepared to admit his third probation violation in case No. 537701. Defendant offered an explanation and his drug program representative stated that defendant was “on track.” The court ruled that it was going to hold the violation in abeyance and reinstated formal probation.

On March 30, 2009, the probation office filed against defendant a “Probation Request for Violation of Probation 1210 Court” and alleged another positive test for methamphetamine. Defendant admitted his third violation of probation in case No. 537701 at the hearing on April 2, 2009. The court terminated defendant’s participation in drug court pursuant to section 1210 and remanded him into custody and referred the matter to the probation department for a sentencing report.

On June 4, 2009, at the sentencing hearing, defendant told the court that he did not think that he would be able to stop using drugs and that he did his best.

The court denied defendant probation and sentenced him to four years in state prison, the midterm of two years on the original possession of methamphetamine conviction and consecutive terms of one year each on the two admitted prior prison terms.

Defendant filed a timely notice of appeal.

DISCUSSION

I. Termination of Probation

Defendant contends the lower court erred in terminating his probation under section 1210 as he was provided only two, rather than three, noticed motions of violations of probation. The People agree that the record contains only two noticed motions, but claim defendant forfeited any right to make this challenge because he never objected on this basis in the lower court.

Proposition 36 is mandatory for those who qualify. (*People v. Esparza* (2003) 107 Cal.App.4th 691, 699.) It is not a discretionary sentencing choice subject to waiver. (*Ibid.*)

“Anticipating that drug abusers often initially falter in their recovery, Proposition 36 gives offenders several chances at probation before permitting a court to impose jail time. The first time an offender violates a *drug-related* condition of probation, he is entitled to be returned to probation unless he poses a danger to others. [Citation.] The second time he violates a drug-related condition of probation, he is entitled to be returned to probation unless he poses a danger to others or is unamenable to treatment. [Citation.] Only upon a third violation of a drug-related condition of probation does an offender lose the benefit of Proposition 36’s directive for treatment instead of incarceration. [Citation.] Upon such a violation, the court regains its discretion to impose jail or prison time.” (*In re Taylor* (2003) 105 Cal.App.4th 1394, 1397-1398, fns. omitted.) Thus, the possible consequences increase in severity as a defendant moves from the first, second, and third chances at probation. (*Ibid.*)

The 2001 version of section 1210.1, subdivision (e)(3) provides the

following:³ “(B) If a defendant receives probation under subdivision (a), and for the second time violates that probation . . . and the state moves for a second time to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. The trial court shall revoke probation if the alleged probation violation is proved and the state proves by a preponderance of the evidence either that the defendant poses a danger to the safety of others or is unamenable to drug treatment. . . . If the court does not revoke probation, it may intensify or alter the drug treatment plan.

“(C) If a defendant receives probation under subdivision (a), and for the third time violates that probation either by being arrested for a nonviolent drug possession offense, or by violating a drug-related condition of probation, and the state moves for a third time to revoke probation, the court shall conduct a hearing to determine whether probation shall be revoked. If the alleged probation violation is proved, the defendant is not eligible for continued probation under subdivision (a).” (Former § 1210.1, subdivisions (e)(3)(B) & (C).)

The statute requires noticed motions and the failure to provide noticed

³ Former section 1210.1 was amended effective July 12, 2006, (Stats. 2006, ch. 63, § 7); however, a preliminary injunction was issued on September 14, 2006, enjoining the People “from taking any action to implement, enforce or give effect to Senate Bill 1137 . . . until such time as a trial on the merits may be had or until further order of this Court.” (*Gardner v. Schwarzenegger* (Super. Ct. Alameda County, Jul. 12, 2006, RG06-278911).) The court granted the plaintiff’s motion for summary judgment and granted its writ of mandate. On July 14, 2008, the court issued its judgment, which granted writ of mandate and injunctive and declaratory relief. The writ directed the People to “refrain from taking any action to implement, enforce, or give effect to [any of the provisions of] Senate Bill 1137.” The permanent injunction restrained the People from “taking any action to implement, enforce, or give effective to Senate Bill 1137.” Senate Bill No. 1137 (2005-2006 Reg. Sess.) was declared invalid in its entirety and without force or effect. Accordingly, as in *People v. Hazle* (2007) 157 Cal.App.4th 567, 577 and *People v. Enriquez* (2008) 160 Cal.App.4th 230, 240, footnote 2, we will apply the former version of section 1210.1, that is, the version that was in effect before the Legislature enacted the 2006 amendment. The subdivisions at issue here, while renumbered, are substantively the same in both versions.

motions renders revocation of probation under the Act improper. (See, e.g., *People v. Tanner* (2005) 129 Cal.App.4th 223, 227 (*Tanner*); *People v. Hazle, supra*, 157 Cal.App.4th at p. 574; *People v. Enriquez, supra*, 160 Cal.App.4th at pp. 242-243.) In *People v. Hazle*, the court concluded that what appeared to be a third petition to revoke a defendant's probation under the Act for drug-related reasons may not be treated as a separate noticed motion to revoke probation if the defendant was not on notice of the second petition at the time of the conduct underlying the third petition. "The term 'motion' generally means an application made to a court or judge for the purpose of obtaining a rule or order directing some act to be done in favor of the applicant." [Citation.] Although the statute speaks in terms of the People *moving* to revoke probation, generally, a motion is ineffectual absent *notice*. "[N]otices must be given of any application where the rights of an adverse party are affected, even though no statute, as here, specifically requires it." [Citations.] Probation cannot be formally revoked absent notice. Indeed, one reason given to explain why trial courts retain the power to *summarily* revoke probation is because it ensures the probationer will be returned to court *and given notice* of the alleged grounds. [Citations.]" (*People v. Hazle, supra*, at pp. 574-575.)

In the present case, the record contains only two noticed motions to revoke probation. The record does not include any written noticed motion with regard to defendant's second violation. The People do not claim that there were three noticed motions as required by the statute, but assert that defendant cannot now challenge a lack of notice because he never raised such an objection in the lower court despite having multiple opportunities to do so.

As the People point out, defendant never complained at his hearing in case No. 553213 on January 15, 2009, of a lack of written notice of his second probation violation. At this hearing on the charge in case No. 553213, defendant's attorney stated that defendant was prepared to plead guilty to the new charge under Health and Safety Code section 11364 of unlawfully possessing a device

used for smoking a controlled substance. After the court entered defendant's plea into the record, the court advised defendant that as a result of his plea and conviction, he had a second violation of probation with regard to case No. 537701. Defendant raised no objection.

A little more than one month later, at a review hearing on February 23, 2009, the court announced that defendant had missed court and asked him if he was prepared to admit his third probation violation in case No. 537701. Defendant admitted that he "blew it and screwed up" The drug program representative explained that defendant was "on track," and the court ruled that it was going to hold the violation in abeyance and reinstated formal probation. Defendant did not object to the court's statement that this was his third violation; he never mentioned any lack of notice regarding his second violation.

On March 30, 2009, the probation office filed against defendant a "Probation Request for Violation of Probation 1210 Court" and alleged another positive test for methamphetamine. On April 2, 2009, the court asked defense counsel whether defendant was prepared to admit his third violation, which was "going to get him kicked out of the program" Defense counsel did not allege that defendant had never received the proper notice of his second violation and stated, "He'll admit the violation"

On June 4, 2009, at the sentencing hearing, defendant did not claim that he never received notice of his second probation violation. Instead, when provided with the opportunity to address the court after the district attorney and his attorney summarized his prior convictions for sales of methamphetamine and his drug use, defendant stated: "What she said is true. I have a problem. I know it. I did my best. You know, I blew it. That's all I can say."

The record shows that defendant had oral notice of his second probation violation and, despite having four opportunities to do so, never objected on the grounds that he did not receive a written notice. If defendant had objected on the grounds of no written notice, the issue could have been resolved. Defendant may

not raise this legal theory for the first time on appeal and therefore his contention is forfeited. (See, e.g., *North Coast Business Park v. Nielsen Construction Co.* (1993) 17 Cal.App.4th 22, 28-29, disagreed with on other grounds in *San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 315.)

Defendant argues that the motion for revocation is required by statute and therefore the court issued an unauthorized sentence. Thus, he is essentially arguing that the court acted in excess of its authority. However, “ ‘an act in excess of jurisdiction is valid until set aside, and parties may be precluded from setting it aside by such things as waiver, estoppel, or the passage of time. [Citations.]’ ” (*People v. Williams* (1999) 77 Cal.App.4th 436, 447.)

In the present case, there is no indication that defendant in fact lacked adequate notice and an opportunity to be heard on any issue material to the disposition of the matter. In the context of probation revocation, due process does not require a complete recitation of procedural rights and a personal waiver of those rights. (*People v. Dale* (1973) 36 Cal.App.3d 191, 194-195.) Rather, a defendant can waive the formal requirements of notice and a hearing and admit a probation violation through the conduct of the defendant’s attorney and the defendant’s own silent acquiescence therein. (*Ibid.*; *People v. Baker* (1974) 38 Cal.App.3d 625, 629; *People v. Martin* (1992) 3 Cal.App.4th 482, 486.)

Defendant relies on *Tanner, supra*, 129 Cal.App.4th 223 when arguing no forfeiture of his right to challenge the sentence. In *Tanner*, the defendant was placed on probation under the Act, but thereafter violated the conditions of his probation twice, by being discharged from his treatment program and by testing positive for drugs three days later. (*Tanner*, at p. 228.) At the review hearing, the defendant admitted the violations and the court placed him back on probation, telling him that this was his last chance. (*Ibid.*) Subsequently, defendant violated the drug-related conditions of his probation several more times and at another review hearing where two of those violations were alleged, he again appeared with counsel and admitted the violations. (*Id.* at p. 229.) The trial court found the

defendant ineligible for further treatment under the Act because he had committed more than three drug-related violations, revoked his probation, and ultimately sentenced him to five years in prison. (*Tanner*, at pp. 229-231.)

On appeal, the defendant in *Tanner* argued that the revocation of his probation was premature under the Act because the probation officer had only made two revocation motions, rather than three as required by the statutory scheme. (*Tanner, supra*, 129 Cal.App.4th 223.) The appellate court in *Tanner* concluded that defendant had violated his probation more than three times, but he had not been provided a third opportunity, as required under the Act, to have the court consider his eligibility for reinstatement of probation and placement in another drug treatment program. (*Tanner*, at pp. 236-238.) The court also rejected the People's argument of waiver because the record indicated that the trial court and all counsel had operated under a mistaken belief that revocation of probation under the Act was automatic once the defendant was found to have violated the drug-related conditions of probation three times, rather than only after the state had moved three times to revoke probation based on these violations. (*Tanner*, at p. 238.)

We conclude that the situation in *Tanner, supra*, 129 Cal.App.4th 223 differs significantly from the present case. Here, contrary to *Tanner*, neither the court nor counsel was operating under a misunderstanding as to what the law required. Further, unlike the defendant in *Tanner*, here, the court provided defendant with three opportunities to succeed in drug treatment programs pursuant to the Act. Defendant received three distinct periods of probation: May 27, 2008, until June 25, 2008; June 25, 2008, until January 15, 2009; and January 15, 2009, until April 2, 2009. Thus, defendant cannot now, belatedly, challenge his second probation violation on the basis of no written notice when he clearly had oral notice and four opportunities to raise this objection.

II. *Presentence Credit*

On April 28, 2010, this court ordered rehearing on its own motion and granted defendant's motion to file a supplemental opening brief on whether amendments to section 4019, effective January 25, 2010, apply retroactively and entitle him to additional presentence credits. As already discussed in our recent decision, *People v. Landon, supra*, 183 Cal.App.4th 1096, we conclude that the amendments do apply to all appeals pending as of January 25, 2010. Defendant is not among the prisoners excluded from the additional accrual of credit. (§ 4019, subs. (b), (c).) Defendant received 120 days of presentence custody credits and the People concede that, if the statute applies retroactively, defendant is entitled to an additional 40 days of presentence custody credit. Accordingly, we conclude that defendant is entitled to 160 days of presentence custody credits.

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment reflecting an additional 40 days of presentence custody credit for a total custody credit of 160 days, and to forward a certified copy of said amended abstract to the Department of Corrections and Rehabilitation. As amended, the judgment is affirmed.

Lambden, J.

We concur:

Haerle, Acting P.J.

Richman, J.