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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

**THE PEOPLE,**

**Plaintiff and Respondent,**

**v.**

**RICHARD LYLE SANDERSON.**

**Defendant and Appellant.**

**A125500**

**(Humboldt County  
Super. Ct. No. CR055789)**

Defendant Richard Lyle Sanderson (appellant) appeals the sentence imposed by the trial court pursuant to a negotiated disposition. His sole contention on appeal is that his defense counsel rendered ineffective assistance in failing to object to the court's failure to give proper reasons for imposing the aggravated term on a firearm use enhancement. We reject the claim and affirm.<sup>1</sup>

**BACKGROUND**

Since this appeal raises an issue related only to sentencing, a detailed recitation of facts is unnecessary. The probation officer's report reveals that on November 7, 2005, appellant robbed Jeremy Freeman<sup>2</sup> at gunpoint. The victim Shawn Garfield then retaliated by threatening appellant if he did not return the stolen property. The next day,

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<sup>1</sup> By separate order of this same date appellant's petition for habeas corpus is denied.

<sup>2</sup> Elsewhere the record refers to the robbery victim as Jeremy Friedman.

when Garfield sought appellant out at a Eureka apartment, appellant fatally shot him in the chest.

On July 19, 2006, appellant pled guilty to voluntary manslaughter with use of a firearm (Pen. Code, § 192, subd. (a))<sup>3</sup> (count 1), and first degree robbery (§§ 211, 212.5, subd. (a)) (count 2). He admitted he personally used a firearm in committing the voluntary manslaughter. (§§ 1203.06, subd. (a)(1), 12022.5, subd. (a).) The court imposed a state prison sentence of 22 years four months as follows: an upper 11-year term for the voluntary manslaughter conviction, an upper 10-year term for the firearm enhancement, and a consecutive 16-month term for the robbery conviction.

Appellant appealed his sentence, arguing, in part, that the court erred in relying on the same aggravating factors to impose upper terms for both the manslaughter conviction and the enhancement; the People conceded the error. On January 22, 2008, this court found that defense counsel was deficient in failing to object to the court's reliance on the same four aggravating factors to impose the upper term for the manslaughter conviction and the firearm enhancement,<sup>4</sup> and vacated the judgment and remanded the matter for resentencing. (See *People v. Sanderson* (Jan. 22, 2008) A115806 [nonpub. opn.]) (*Sanderson I*.)

On November 5, 2008, appellant's newly appointed counsel, Edward Schrock, filed a motion to withdraw appellant's guilty pleas and admission. On January 27, 2009, appellant substituted Russell Clanton as his counsel. On April 20, the court denied appellant's motion to withdraw his guilty pleas. On May 15, Clanton filed a motion for reconsideration of the denial of the motion to withdraw appellant's guilty pleas.

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<sup>3</sup> All undesignated section references are to the Penal Code.

<sup>4</sup> The four aggravating factors relied upon by the trial court were: appellant "engaged in violent conduct posing a serious danger to society; his prior convictions and juvenile adjudications were numerous and of increasing seriousness; he was on probation when the present crimes were committed; and his prior performance on probation was unsatisfactory, particularly while he was a juvenile." (*Sanderson I, supra*, A115806.) *Sanderson I* stated that all four aggravating factors "have a common origin-[appellant's] adult and juvenile criminal history."

On June 12, 2009, Clanton filed a sentencing statement in mitigation on appellant's behalf. It asserted that although the robbery occurred prior to the manslaughter and involved another party, appellant's course of conduct leading to Garfield's death was "inextricably linked" to the robbery. Thus, the acts were a single period of aberrant behavior favoring concurrent sentencing. It also asserted that appellant's violence against Garfield was committed out of concern for appellant's own safety and was not callous, vicious or cruel. Finally, it stated that mitigating factors existed: appellant was hiding from Garfield just prior to the shooting, and, at the time of the event, was suffering from a serious methamphetamine addiction.

On June 15, 2009, the trial court denied the motion for reconsideration. It again sentenced appellant to the aggravated 11-year term on the voluntary manslaughter conviction, a consecutive 10-year term on the firearm enhancement, and a consecutive 16-months term on the robbery conviction. On July 15, appellant filed a notice of appeal that challenged the validity of his plea and asserted "[i]neffective assistance of counsel by original attorney[,] which induced [appellant's] plea[;] and[,] more recently[,] the denial of [appellant's] motion to withdraw plea resulting in resentencing . . . and the court's inappropriate use of [California Rules of Court, r]ule[s] 4.421 [and] 4.423."<sup>5</sup> On August 11, appellant's appellate counsel, Richard Such, filed an amended notice of appeal and request for a certificate of probable cause. The request for a certificate of probable cause was granted.

## DISCUSSION

Appellant contends defense counsel rendered ineffective assistance in failing to object to the court's failure to state proper reasons for imposing the upper 10-year term on the firearm enhancement.

A defendant claiming ineffective assistance of counsel has the burden to show: (1) counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms; and (2) the deficient performance

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<sup>5</sup> All further rule references are to the California Rules of Court.

resulted in prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Prejudice is shown when “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*Strickland, supra*, 466 U.S. at p. 694.) Where an ineffective assistance of counsel claim is based on trial counsel’s failure to make a motion or render an objection, a defendant must prove not only the absence of a reasonable tactical explanation for the omission but also that the motion or objection would have been meritorious. (*People v. Mattson* (1990) 50 Cal.3d 826, 876; *People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1272.)

Moreover, “[r]eviewing courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel’s omissions. [Citation.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) “When a claim of ineffective assistance [of counsel] is made on direct appeal, and the record does not show the reason for counsel’s challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]” (*People v. Anderson* (2001) 25 Cal.4th 543, 569.)

At the resentencing hearing the court made the following statements after finding appellant ineligible for probation and concluding he should be sentenced consecutively on the voluntary manslaughter and robbery convictions:

“Regarding the principal offense, the . . . voluntary manslaughter, [and] the second count being . . . the robbery, we have the enhancement—the use of the firearm. . . . [¶] . . . [¶] And regarding the voluntar[y] manslaughter, it does appear that rule 4.421([b])(2) does apply to [appellant]. Circumstances in aggravation, [appellant’s] prior convictions as an adult, sustained petitions as a juvenile, are numerous. [¶] We have, again, as stated within the probation report the matters beginning in [1999] where [appellant] as a juvenile entered a locked residence and took a firearm and other items. We have the matter, again in [1999], other matters in between, but March [2, 1999], that’s a residence, March [12, 1999], that’s a residence, burglary, March 24[, 1999,] lit several fires, burned

approximately one-half acre. We have [1999,] broke into a residence, took keys to a vehicle, other items as stated over [\$1,000]. February 2000, possession of throwing darts strapped to his right leg. We have then 2001[,] a fight, apparently juvenile hall, and the record does go on. [¶] We have then the adult record beginning in [2003], a fight with another, juvenile facility. Actually, that might be the adult. It was the jail, held on a juvenile matter, and then November [2003] the assault on the mother. [¶] . . . [¶] And so it does appear that under rule 4.421 that the prior convictions are numerous. I don't see how that's overcome in any stretch by any other circumstances. So I will select the upper term, the [11] years, for [the voluntary manslaughter].

“Regarding the enhancement, [section 12022.5, subdivision (a)], the probation officer points out . . . that [appellant] was on several grants of probation, [rule] 4.421([b])(4), when this matter was committed, and under [rule 4.421(b)](5), the prior performance on probation was unsatisfactory given his arrest and conviction in the earlier matters. [¶] And it would appear that the prior performance on probation has been unsatisfactory. . . .”

The court rejected the probation department's assertion of the mitigating circumstance that Garfield was the aggressor or “provoker” of the incident under rule 4.423(a)(2). It concluded the aggravating circumstances outweighed those in mitigation and therefore imposed the upper 10-year term on the gun enhancement. It also imposed a consecutive 16-month (one-third the midterm) sentence on the robbery.

#### I. *Court's Consideration of Appellant's Juvenile Adjudications*

Appellant first argues that defense counsel failed to object to the court's “primary” reliance on appellant's juvenile “matters,” some of which were adjudications, in finding that his prior convictions were numerous. He notes that at the time of sentencing the issue of whether prior adjudications could be used to enhance an adult offender's sentence was pending in our Supreme Court (see *People v. Nguyen* (2009) 46 Cal.4th 1007 (*Nguyen*)), after the Court of Appeal reversed on that issue in favor of the defendant. Appellant asserts that a reasonably competent counsel would have objected to the court's reliance on appellant's juvenile adjudications and argued that his two adult

convictions of disturbing the peace were not numerous or significant enough to justify the upper term on the enhancement. Appellant's claim lacks merit.

A few weeks after appellant's sentencing, our Supreme Court held in *Nguyen, supra*, 46 Cal.4th at page 1019: "we agree with the majority view that the Fifth, Sixth, and Fourteenth Amendments, as construed in *Apprendi* [*v. New Jersey* (2000) 530 U.S. 466], do not preclude the sentence-enhancing use, against an adult felon, of a prior valid, fair, and reliable adjudication that the defendant, while a minor, previously engaged in felony misconduct, where the juvenile proceeding included all the constitutional protections applicable to such matters, even though these protections do not include the right to jury trial." The Supreme Court noted that with the exception of the Court of Appeal case being reviewed, "all California Court of Appeal panels to address the issue [in a published opinion]<sup>6</sup>, both before and after *Apprendi*, have squarely held that the Fifth, Sixth, and Fourteenth Amendments permit the use of prior juvenile adjudications to enhance the sentences for subsequent adult offenses, even though there is no right to a jury trial in juvenile proceedings." (*Nguyen, supra*, 46 Cal.4th at p. 1020.)

Given this legal landscape at the time of appellant's sentencing, we cannot conclude that defense counsel was ineffective in failing to object to the court's consideration of appellant's juvenile adjudications in imposing the upper term on the firearm enhancement. Defense counsel could have reasonably concluded that an objection would have been futile.

## II. *Court's Consideration of Appellant's Prior Performance on Probation*

Next, appellant contends defense counsel failed to object to the court's finding that appellant's prior performance on probation was unsatisfactory in imposing the upper term on the firearm enhancement. He argues his poor performance on probation was based on the fact of his numerous prior convictions, a factor the court used to impose the upper term on the manslaughter conviction. Thus, defense counsel should have objected to the

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<sup>6</sup> The bracketed language was added to *Nguyen, supra*, 46 Cal.4th 1007 in an August 19, 2009 modification.

court's improper dual use of the same fact to aggravate and enhance his sentence. Again, appellant's claim lacks merit.

Probation status and performance on probation are distinct aggravating factors, and each is distinct from the factor of having numerous prior convictions. (See *People v. Yim* (2007) 152 Cal.App.4th 366, 369 (*Yim*) [parole status and parole performance are distinct aggravating factors].) Moreover, a single aggravating factor is sufficient to support a sentencing choice. (*Ibid.*) Consequently, even absent the factor of appellant's prior performance on probation, the court could have imposed the upper term on the firearm enhancement solely on his status as a probationer at the time of the instant offenses. (Rule 4.421(b)(4).)

### III. Court's Consideration of Appellant's Probation Status

Finally, in a related contention, appellant argues that defense counsel was ineffective in failing to object to the court's consideration of the fact that at the time of the instant offenses appellant was on several grants of probation. In reliance on *People v. Rodriguez* (1993) 21 Cal.App.4th 232, 241 (*Rodriguez*), he argues that the fact that he was on probation at the time of the instant offense for crimes unrelated to firearm use was not reasonably related to imposition of the upper term on the firearm enhancement.<sup>7</sup>

Again, we disagree.

Rule 4.421(b)(4) expressly permits the sentencing court to consider as an aggravating factor that "The defendant was on probation or parole when the crime was committed." In addition, *Rodriguez* is distinguishable. In that case, the defendant was convicted of second degree murder and the court gave the following reason for imposing the aggravated term on the gun use enhancement, " '[T]he gun misfired and you had to re-rack.' " (*Rodriguez, supra*, 21 Cal.App.4th at p. 241.) The Court of Appeal stated, " 'The essence of "aggravation" relates to the effect of a particular fact in making the offense distinctively worse than the ordinary.' [Citation.] We fail to see how

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<sup>7</sup> In support of his claim he also erroneously relies, in part, on rule 4.428(b), which was deleted in May 2007. (See Historical Notes, 23 Pt.1B West's Ann. Court Rules (2010 supp.) foll. rule 4.428.)

Rodriguez’s act of ‘[re-racking]’ his pistol to correct a misfire makes his use of a firearm worse than the ordinary. . . . But the act was nothing more than preparatory to carrying out the intent to shoot, not an aggravating factor.” (*Id.* at pp. 241-242.) Here, the fact that appellant was on probation at the time he committed the instant offenses was a recidivism factor properly considered by the court. (See *Yim, supra*, 152 Cal.App.4th at pp. 368, 371.)

Appellant’s appeal has failed to establish any ineffective assistance of counsel.

DISPOSITION

The judgment is affirmed.

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SIMONS, Acting P. J.

We concur:

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NEEDHAM, J.

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BRUINIERS, J.