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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. JOSEPH R. DUGISH, JR., Defendant and Appellant.	A128607 (Del Norte County Super. Ct. No. CRF09-9362)

Joseph R. Dugish, Jr. (appellant) was convicted, following a jury trial, of second degree robbery. On appeal, he contends the trial court abused its discretion in imposing the upper term of five years for his robbery conviction. We shall affirm.

PROCEDURAL BACKGROUND

Appellant was charged by information with one count of second degree robbery. (Pen. Code, § 211.)

A jury found him guilty as charged and, on March 25, 2010, the trial court sentenced appellant to the upper term of five years in state prison.

On May 7, 2010, appellant filed a notice of appeal.

FACTUAL BACKGROUND

Prosecution Case

Melissa Metz, a teller at U.S. Bank in Crescent City in July 2009, testified that, on July 3, 2009, a man in line came up to her teller window and, speaking softly, said, "Give me your money or you're dead." Metz responded, "Are you joking?" He then said, louder this time, "No, give me your money or you're dead." He had his right hand in his

pocket and his left hand was on the counter, in the shape of a gun and pointed at her. Metz was really scared and she started shaking. When she looked around at her coworkers to let them know something was wrong, the man said, "No buttons." Since the man told her she was going to die, Metz opened her drawer and took out twenty-, ten-, and five-dollar bills. Some of the bills were "bait money," with recorded serial numbers; when she pulled out the bait money, a silent alarm was triggered. After she had pulled out some money, appellant told her to stop. He then grabbed the money and left the bank.

The whole incident took a couple of minutes, at most. The man who robbed the bank was wearing a long-sleeved maroon shirt with light stripes on the sleeves, shorts, a dark beanie, and sunglasses. He had another shirt on underneath the outer shirt. He also had a mustache. After the man left, Metz's manager told her to lock the door "really quick," which she did, although she was the most scared she had ever been and could not stop crying. Another customer then left the bank to chase the robber.

After the police arrived at the bank, an officer took Metz to a location, in front of Everett's bar, and asked if she saw the robber. He said, "Make sure that it is him, and if it's not him, let me know . . . ." She pointed at a man, whom she recognized as the man who had robbed the bank. She was positive it was the same man, although he now was wearing a different shirt than the one he had been wearing in the bank. Metz identified appellant at trial as the robber.

Kassandra Mattz, the branch manager at the bank, testified that, on July 3, 2009, a man wearing a red sweatshirt, a beanie, shorts, and sunglasses entered the bank. He was "swinging his arms, staggering a little." The fact that he had on sunglasses and was looking around gave her a "really weird feeling" that he was going to rob the bank. She watched him and then, when she started to get up from her desk, he turned to her and said, "No buttons." She therefore did not move. Mattz then saw the man point his finger at teller Metz, "lunge[] at her a little bit," and tell her to give him her money. Metz gave him the money and he left. The incident lasted about a minute and a half. After the

robber left the bank, Mattz locked the doors, but then let a customer out to run after the robber. Mattz identified appellant at trial as the robber.

Police officers arrived shortly thereafter and searched the area near the bank. Officer Dominic Mello first saw a man who appeared to be searching for something. He then saw another man, later identified as appellant, on the sidewalk near Everett's bar who had a "paranoid demeanor," looking behind him and trying to blend in with the surroundings. He was wearing a maroon t-shirt and black shorts. Mello saw appellant bend down and "mess with" a wooden barrel. Mello later located U.S. currency in the barrel.

Police Officer Jerrin Gill, also dispatched to an area near U.S. Bank following the robbery, saw numerous people going about their business. He also saw a man who was "actively looking for something." He then saw a man matching the description of the robber. He first saw the man reach down into a barrel and then saw him pace back and forth nervously. He was wearing a burgundy short-sleeved shirt with a collar. A fellow officer commanded the man who was pacing to show his hands, but he did not cooperate. The other officer then "had him at gunpoint" and told him to get on the ground, but he did not obey those commands. The man resisted the officers' attempt to handcuff him, but Gill ultimately got him to the ground. As he was being handcuffed, the man began to make spontaneous statements, including, "It was me. It was me at the bank." He also said, "I wasn't trying to hurt anybody. I told them I just needed some help." Gill identified appellant at trial as the man the officers had handcuffed.

Correctional Officer Micah Jimenez testified that, as he escorted appellant from the prebooking area in the Del Norte County jail on July 3, 2009, appellant said that he robbed the bank because "he wanted to hurt himself." Jimenez responded, "Oh, is that right?" Appellant then said, "Yeah, I can do what I want."

Police recovered the money, a total of $530, from the barrel. It included the bait money Metz had given appellant. Police also found a sock cap, a pair of sunglasses, and a red shirt with stripes on each sleeve that had been thrown against some ivy and were

partially concealed, on the likely route appellant took from the bank. They also found a pair of pants nearby.

Defense Case

Appellant testified that he did not rob the bank, never said he had robbed it, and did not even know where the bank was located. On July 3, 2009, he had gone to visit a friend nearby. On the way to the bus stop to go home, he had stopped in front of Everett's, where he scrounged for cigarette butts in a canister. That was when he was arrested. Appellant admitted that he had been convicted of felony vandalism in 2005 and had served time in jail.

DISCUSSION

Appellant contends the trial court abused its discretion in imposing the upper term of five years for his robbery conviction.

Trial Court Background

The probation department recommended that appellant be sentenced to the upper term, listing eight factors in aggravation and none in mitigation. At the sentencing hearing, during a discussion of which aggravating factors applied, the trial court found, pursuant to California Rules of Court, rule 4.421(a)(8),[1] that "it was definitely planned. [¶] He had two sets of clothes. Slips probably one over the other, would be my belief." The court disagreed with the probation department's assertion that the victim was particularly vulnerable. (Rule 4.421(a)(3).) Both the court and defense counsel noted that appellant had been convicted of felony vandalism and misdemeanor making a criminal threat in 2006, for which he spent eight months in jail. (See rule 4.421(b)(2).)

After defense counsel argued for probation or, at the most, the middle term, the court responded as follows: "I've been wrestling with this case in my own mind. [¶] I don't think that [the] mitigated [term] is appropriate, but when I go through factors in aggravation and factors in mitigation, I personally, at this point, unless I'm convinced otherwise, do not agree that all of the [probation department's] recommended findings

[1] All further rule references are to the California Rules of Court.

with regard to circumstances in aggravation would apply, but it does appear to me that probably four apply.

"And it would appear to me that [rule 4.421(a)(8)] does apply, because it shows planning. Not sophistication, but planning.

"It would appear to me that [rule 4.421(b)(2)] would apply. That the defendant's prior convictions are possibly numerous, but certainly increasing in seriousness, going from, I think he had three domestic violence convictions, it appears, going into bank robbery. And the stuff that he's been doing now in his later life appears to be more serious than what he did earlier in life. [¶] So most people tend to get in trouble in their twenties and thirties, and kind of mellow out when they get older. I'm not seeing that from [appellant's] history."

The court continued: "It also appears to me he has not been successful on probation because . . . he's on probation now, and so that would appear to be [a factor in] aggravation also.

"B5 is that—well, first of all he was on probation when this occurred. And also [rule 4.421(b)(5)], that his prior performance on probation has not been satisfactory, so it would appear to me there's at least four factors in aggravation.

"I think the people and the probation department would argue that there's more, but to me those seem to be pretty straightforward.

"Frankly, I didn't see any factors in . . . mitigation. [¶] . . . [¶] I think it could be argued that [rule 4.423(a)(6)] might apply; that he exercised caution to avoid harm, because he didn't have a weapon as far as we know. [¶] But the other part of [rule 4.423(a)(6)] is that no harm was done or threatened against the victim, and I think that balances out, because he definitely threatened to kill somebody. Even though now he's apparently saying he didn't, I don't find that to be credible."

The court concluded: "So that's where I'm looking at it, but I'm seeing more aggravated factors and I'm not seeing mitigated factors." At that point, defense counsel responded: "I can't disagree with that, although I don't believe that they were—they rise to the level of imposition of the aggravated term." Counsel did not question that

appellant's convictions were numerous, but did question whether they were of increasing seriousness. The court explained that it was talking about appellant going from misdemeanor conduct to robbing a bank. The prosecutor argued for the aggravated term.

Following the discussion about the appropriate term, the court summarized its conclusions: "Looking at factors in aggravation, mitigation, I've basically already told you what I find, and I find [(a)(8)] is, and under Rule 4.421, circumstances in aggravation, applies, that the crime showed planning but not sophistication.

"I find that [rule 4.421(b)(2)] applies in that his crimes are [of] increased seriousness, and—and that he had a relatively recent felony, as well as a [Penal Code section] 422 [(misdemeanor criminal threat)], as well as the DUI, and now that bank robbery.

"I find [4.421(b)(4)] applies in that he was on probation when this occurred, and that [rule 4.421(b)(5)] applies in that his prior performance on probation has been unsatisfactory.

"I do not find any factors in mitigation. [¶] I considered [rule 4.423(a)(6)]. I think that he did exercise caution to avoid harm. He did not take a weapon into the bank, but I think it's offset by the fact that he did threaten the victim, so I just can't find that [rule 4.423(a)(6)] applies to mitigate it.

"And in exercising—after considering all the factors in aggravation and mitigation and exercising my discretion, I do find that the aggravated term of five years would be appropriate."

Legal Analysis

Section 1170, subdivision (b), as amended in 2007, provides in relevant part: "When a judgment of imprisonment is to be imposed and the statute specifies three possible terms, the choice of the appropriate term shall rest within the sound discretion of the court. . . . In determining the appropriate term, the court may consider the record in the case, the probation officer's report, other reports, including reports received pursuant to Section 1203.03, and statements in aggravation or mitigation submitted by the prosecution, the defendant, or the victim, . . . and any further evidence introduced at the

sentencing hearing. The court shall select the term which, in the court's discretion, best serves the interests of justice."

In *People v. Sandoval* (2007) 41 Cal.4th 825, 847 (*Sandoval*), the California Supreme Court described a trial court's discretion under the amended law as follows: "Even with the broad discretion afforded a trial court under the amended sentencing scheme, its sentencing decision will be subject to review for abuse of discretion. [Citations.] The trial court's sentencing discretion must be exercised in a manner that is not arbitrary and capricious, that is consistent with the letter and spirit of the law, and that is based upon an 'individualized consideration of the offense, the offender, and the public interest.' [Citation.] As under the former scheme, a trial court will abuse its discretion under the amended scheme if it relies upon circumstances that are not relevant to the decision or that otherwise constitute an improper basis for decision. [Citations.]" Under the amended law, "a trial court is free to base an upper term sentence upon any aggravating circumstance that the court deems significant, subject to specific prohibitions. [Citations.] The court's discretion to identify aggravating circumstances is otherwise limited only by the requirement that they be 'reasonably related to the decision being made.' [Citation.]" (*Id*. at p. 848.)

In the present case, appellant argues that (1) the trial court misunderstood the actual amount of time appellant would remain in prison; (2) there were no aggravating factors that justified imposition of the upper term; and (3) the trial court should have considered his mental illness as a factor in mitigation.

1. *Trial Court's Understanding of the Amount of Prison Time Appellant Faced*

When the court set forth appellant's sentence at the sentencing hearing, it first said that it found the aggravated term of five years appropriate. It then said: "I'm aware that [appellant] would be out in something over two years. Now, I think when I look at, overall, how much time he's going to spend, I think it probably is appropriate.

"Now, it's my understanding that he will do 85 percent. [¶] You agree with that, Mr. Alexander [defense counsel]?"

Defense counsel replied, "I do."

The court continued: "So he is sentenced to the Department of Corrections and Rehabilitation for the aggravated term of four years."

The court then calculated appellant's custody credits as 305 days and imposed the requisite fines and fees. When the court asked if there was "anything else," defense counsel said: "No, your Honor. Thank you."

The court clerk then asked: "Your Honor, what did you say the total time in prison [is]?" The court responded: "I misspoke. I said four. I meant five. It is five years in prison for the aggravated."

Appellant argues that the trial court's imposition of the upper term "rested on an incorrect understanding of the actual time appellant would serve in state prison, rendering the decision to sentence appellant to five years irrational."

Respondent asserts that appellant has forfeited this argument for failing to raise it in the trial court. (See *People v. Scott* (1994) 9 Cal.4th 331, 353 ["waiver doctrine should apply to claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices"].) We agree. Defense counsel had two opportunities to raise this point: first, when the court asked if he agreed with the court's pronouncement, at which time counsel said, "I do"; and again, when the court asked if there was "anything else," and counsel replied in the negative. We therefore agree with respondent that appellant has forfeited this portion of his argument on appeal for failing to raise it in the trial court when explicitly given two opportunities to do so.[2]

2. *The Circumstances In Aggravation Found by the Court*

Appellant argues that there were no aggravating factors that justified imposition of the upper term.

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[2] We also observe that this claim would fail on the merits. The trial court acknowledged that it had misspoke when it said that it was sentencing appellant to a four-year aggravated term, which would have resulted in an approximately two-and-one-half-year term, had he served 85 percent of the four years. The court's correction of its misstatement demonstrates its understanding that appellant would serve 85 percent of a five-year term.

The trial court found that the offense—second degree robbery—showed planning (rule 4.421(a)(8)), in that appellant targeted a bank and also wore dark glasses, a beanie, and a second shirt, all of which he discarded after leaving the bank. As the court said, this was not sophisticated planning, but its finding that the crime demonstrated planning was " 'reasonably related to the decision being made' " as applied to appellant. (*Sandoval*, *supra*, 41 Cal.4th at p. 848.)

The court also found that appellant's prior convictions were "possibly numerous, but certainly increasing in seriousness" (rule 4.421(b)(2)), in that he had suffered three misdemeanor domestic violence convictions many years earlier, as well as more recent felony vandalism conviction and misdemeanor criminal threats, driving without a license, and driving under the influence convictions, all leading up to the present bank robbery. The court's finding that rule 4.421(b)(2) applied was reasonable, given both the number of convictions appellant has suffered as well as the trajectory from less to more serious as he got older. (See *People v. Black* (2007) 41 Cal.4th 799, 818.)

Finally, the court found that appellant's prior performance on probation had not been satisfactory (rule 4.421(b)(5)), and that he was on probation when he committed the present offense (rule 4.421(b)(4)). Appellant does not challenge the trial court's probation-related findings, but merely asserts that these two factors "regarding probationary status and performance, well may not have been sufficient in themselves for the court to have imposed the aggravated term in this case . . . ." Given our conclusion that the court's findings on the other two circumstances in aggravation were in fact reasonable, the court clearly had sufficient grounds for imposing the upper term. (Cf. *People v. Osband* (1996) 13 Cal.4th 622, 728-729 ["Only a single aggravating factor is required to impose the upper term"].)

3. *Appellant's Mental Illness as a Circumstance in Mitigation*

Appellant argues that the trial court should have considered his mental illness as a factor in mitigation.

Respondent asserts that appellant has also forfeited this argument due to his failure to raise it in the trial court. (See *People v. Scott*, *supra*, 9 Cal.4th at p. 353.) Again, we

agree. Counsel's response when the court said that it had found factors in aggravation, but none in mitigation was, "I can't disagree with that . . . ." Consequently, appellant has forfeited this portion of his claim on appeal.[3]

In conclusion, appellant has forfeited two of his three claims regarding the trial court's imposition of the upper-term sentence. Furthermore, with respect to its findings in aggravation, the court's decision was properly based on an "individualized consideration of the offense, the offender, and the public interest." (*Sandoval*, *supra*, 41 Cal.4th at p. 847.) There was no abuse of discretion.

DISPOSITION

The judgment is affirmed.

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Kline, P.J.

We concur:

_____
Haerle, J.

_____
Richman, J.

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[3] Even were we to address this claim on the merits, it would not change the result, given that the court was well aware of appellant's mental health issues and that it reasonably found several circumstances in aggravation to support its imposition of the upper term. (See *People v. Salazar* (1983) 144 Cal.App.3d 799, 813 ["A trial court may minimize or even entirely disregard mitigating factors without stating its reasons"]; cf. *People v. Price* (1991) 1 Cal.4th 324, 492 ["When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it reasonably probable that the trial court would have chosen a lesser sentence had it known some of its reasons were improper"].)