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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAMES ALVIN McDOWELL, Defendant and Appellant.	F049347 (Super. Ct. No. F05902860-6) **OPINION**

THE COURT*

APPEAL from a judgment of the Superior Court of Fresno County. Gary R. Orozco, Judge.

Harry Zimmerman, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, and Charles A. French, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P.J., Cornell, J., and Dawson, J.

Appellant, James Alvin McDowell, pled no contest to possession of cocaine (Health & Saf. Code, § 11350, subd. (a)) and admitted four prior prison term enhancements (Pen. Code, § 667.5, subd. (b)). On October 17, 2005, the court struck two enhancements and sentenced McDowell to a four-year term, the middle term of two years on the possession offense and 2 one-year prior prison term enhancements.

McDowell's appellate counsel has filed a brief which summarizes the facts, with citations to the record, raises no issues, and asks this court to independently review the record. (*People* v. *Wende* (1979) 25 Cal.3d 436.) However, through his appellate counsel McDowell asks us to address the following issues: 1) Did the court abuse its discretion by its failure to place appellant on Proposition 36 probation? 2) Did the court abuse its discretion by its failure to issue a certificate of probable cause? 3) Did the court abuse its discretion when it failed to impose the mitigated term?

People v. Dove (2004) 124 Cal.App.4th 1, is dispositive of the first issue. In *Dove*, the defendant was convicted of transportation of cocaine base and possession of cocaine base, a lesser included offense of the charged possession for sale of cocaine base. The trial court, however, denied appellant Proposition 36 probation finding that he possessed and transported the cocaine base for other than personal use. In upholding the denial, the *Dove* court stated, "[T]he acquittal on the charge of possession for sale did not bind the trial court. The acquittal simply meant the jury was not convinced beyond a reasonable doubt that the possession was for sale. . . . [T]he trial court was free to redetermine the personal use issue based on the preponderance of the evidence. [Citations.]" (*Id*. at p. 11.)

Further, the finding that possession was not for personal use need not be stated on the record. If the court imposes a prison sentence we will imply the necessary finding and we will sustain this finding if supported by substantial evidence. (*People v. Dove*, *supra*, 124 Cal.App.4th at p. 11.)

Here, the evidence at the preliminary hearing disclosed that McDowell was arrested outside a motel room with seven rocks of cocaine base in his possession and that he told the arresting officer that a man named Mason gave him the cocaine base to sell. Additionally, two officers testified as experts that McDowell possessed the drugs for sale. Although the court did not make an express finding that McDowell did not possess the cocaine base for personal use, in accord with *Dove* we imply this finding from the prison term the court imposed. Moreover, this finding is supported by the circumstances discussed above.

With respect to the certificate of probable cause issue we note the following. On November 30, 2005, McDowell filed a request for a certificate of probable cause alleging that although he understood he would receive a two-year term and the court subsequently imposed a two-year term, he later found out he was sentenced to a four-year term.

A certificate of probable cause may be refused if the proposed grounds for appeal are clearly frivolous or vexatious. (*People v. Manriquez* (1993) 18 Cal.App.4th 1167, 1170, fn. 3.)

The transcript of the change of plea proceedings clearly shows that prior to taking his plea the court advised McDowell that under his plea agreement he could receive a maximum four-year term. Further, the sentencing hearing transcript shows that the court sentenced McDowell to a four-year term. Thus, the court did not abuse its discretion when it denied McDowell's request for a certificate of probable cause because the grounds for McDowell's appeal were clearly frivolous.

Finally, we note that the record discloses several aggravating circumstances including that McDowell's prior convictions are numerous (Cal. Rules of Court, rule 4.421(b)(2)),[1] he served two prior prison terms which were not used to enhance his

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

sentence (rule 4.421(b)(3)), and McDowell was on parole when he committed the instant offense (rule 421((b)(4)). Since the court could have relied on any one of these circumstances to impose the upper term (*People v. Osband* (1996) 13 Cal.4th 622, 728), it did not abuse its discretion when it imposed only the middle term.

Further, following independent review of the record we find that no reasonably arguable factual or legal issues exist.

The judgment is affirmed.