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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

In re ALEXANDER L., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, **Plaintiff and Respondent,** **v.** **ALEXANDER L.,** **Defendant and Appellant.**	**A132129** **(Contra Costa County Super. Ct. No. J06-02298)**

Alexander L. (appellant), born in 1993, appeals a juvenile court dispositional order continuing him as a ward of the court and committing him to the Department of Juvenile Justice (DJJ)[1] after he was found to have violated his probation. He contends (1) the court erroneously admitted hearsay evidence at the probation violation hearing; (2) there

[1] As of July 1, 2005, the correctional agency formerly known as the Department of the Youth Authority (or California Youth Authority) became known as the Department of Corrections and Rehabilitation, Division of Juvenile Facilities (DJF). The DJF is part of the DJJ. (Welf. & Inst. Code, § 1710, subd. (a); Pen. Code, § 6001; Gov. Code, §§ 12838, subd. (a), 12838.2, 12838.5, 12838.13.) Statutes that formerly referred to the Department of the Youth Authority, such as Welfare and Institutions Code sections 731 and 733, now refer to the DJF. However, the parties to this appeal, the trial court, form JV-735, other cases, and certain of the California Rules of Court, refer to the DJF as the DJJ. (See, e.g., *In re D.J.* (2010) 185 Cal.App.4th 278; Cal. Rules of Court, rule 5.805.) In this opinion, we likewise refer to the DJF as the DJJ.

was insufficient evidence that he violated the terms of his probation; and (3) any probation condition requiring him to progress in treatment is unconstitutionally vague or overly broad. In addition, he contends, and the People concede, his commitment to DJJ was statutorily unauthorized and the matter must be remanded for a new dispositional hearing. We conclude that the court's finding that appellant violated his probation was based solely on inadmissible hearsay evidence and therefore reverse.[2]

BACKGROUND

In December 2006, the six-year-old victim told his mother that, during the preceding month, appellant had sodomized and orally copulated him and forced him to orally copulate appellant. In February 2007, pursuant to a negotiated disposition, appellant pled no contest to committing a lewd act on a child under age 14 (Pen. Code, § 288, subd. (a)) and sodomy of a person under age 18 (Pen. Code, § 286, subd. (b)(1).) Two additional sex offense counts were dismissed.

On February 27, 2007, the court declared appellant a ward of the court (Welf. & Inst. Code, § 602)[3] and ordered him detained in juvenile hall pending placement in a court-approved home or institution. The court imposed standard probation conditions, including that he "attend/participate" in individual counseling.[4] The court's oral statement of probation conditions included "[c]ounseling as directed."

Appellant was placed at the Mathiot Group Home Program in Sacramento on May 2, 2007, and was terminated therefrom on July 12 based on repeated disruptive behavior. As a result, he was found to have violated his probation.

On August 10, 2007, appellant was placed at Children's Therapeutic Communities in Riverside. He was removed from that program on September 25, 2008. A notice of

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[2] In light of our reversal, we deny appellant's May 21, 2012 request that we take judicial notice of various records recently filed in the instant case in the superior court in support of his claim regarding his DJJ commitment.

[3] All undesignated section references are to the Welfare and Institutions Code.

[4] The court did not check the box on the form minute order ordering appellant to attend "sexual offender counseling."

probation violation was filed alleging that appellant was "displaying inappropriate sex acts with group home peers." That notice of probation violation was later dismissed.

On November 21, 2008, appellant was placed at Breaking the Cycle Residential Treatment Center (BTC) in Sacramento. The probation department's January 13, 2009 placement review report's "assessment" section stated, "Minor needs to complete a juvenile sex offender treatment program prior to returning home."

On April 19, 2010, the probation department filed a notice of probation violation (§ 777) which alleged the following: "On April 12, 2010, [appellant] was terminated from [BTC], a court-ordered placement for failure to progress in treatment."[5]

Probation Violation Hearing

A contested probation violation hearing was held on September 20, 2010. The prosecutor requested the court take judicial notice that appellant was "made a ward [of the court] and ordered into placement for sexual offender treatment on February 27, 2010"[6] and "on November 21, 2008, [appellant] was placed at [BTC]." Defense counsel objected that the request for judicial notice was untimely pursuant to Evidence Code section 453, subdivision (a). The court noted that the facts to be judicially noticed were in the court's file and within defense counsel's knowledge, but offered defense counsel an opportunity to establish prejudice due to insufficient notice. When defense counsel said she could not make such a showing, the court granted the prosecutor's request.

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[5] At the subsequent probation revocation hearing, due to hearsay concerns and at the prosecutor's request, the court struck from the section 777 notice the additional allegation that appellant was terminated from BTC for "failure to follow program rules by sexually acting out with other residents."

[6] The reference to February 27, *2010* appears to be a misstatement. At the hearing defense counsel acknowledged the dispositional hearing on the section 602 petition occurred on February 27, 2007. We therefore construe the judicial notice request as regarding the court's February 27, 2007 order.

Kira Brown, appellant's probation officer and the sole witness at the probation revocation hearing, testified she took over appellant's supervision on April 17, 2009.[7] She knew he was placed at BTC on November 21, 2008. On April 12, 2010, Brown went to BTC to arrest appellant for violating probation for "failing to progress." Brown had received a "seven-day notice" from BTC notifying her of appellant's termination from their program and providing the probation department seven days to arrest or otherwise remove appellant from the program. Brown stated she had obtained appellant's discharge summary from appellant's BTC therapist and licensed clinical social worker, Kathleen Masina, but had no direct conversations with Masina. Brown said, "[M]ost of the information I received from [Masina was] through reports and also through the two directors of the program. [Masina] is sort of a contracted therapist for [BTC]. She doesn't sit on the probation visits, but I am sort of informed through the director and [appellant] and the other children that are there what's been going on in their therapy sessions with [Masina]." Brown also stated, "part of my job as a placement deputy is to compose every six months, placement reports, ... I have written three since taking over [appellant's] caseload, and that provides information that I have received from the program itself as to his progress in treatment." Over defense counsel's hearsay and lack of foundation objections, Brown further stated that appellant's "treatment providers explained to [Brown] that he is failing to progress in treatment" and "Theresa Bolton" had told Brown that appellant was "not using the interventions or the therapy to his advantage."

Brown testified she was familiar with the steps that a ward has to take when placed at BTC. Again, over defense counsel's hearsay and lack of foundation objections, Brown said, "There are three phases, and in those phases there are various groups, individual, and family therapy that needs to be completed as well as work assignments, written assignments, and journaling. He . . . did make it to phase two, but it did not last

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[7] Appellant is correct that, other than the matters judicially noticed by the court, Brown's testimony was the only evidence presented at the probation violation hearing. No documents were admitted into evidence.

longer than I think four weeks." Brown said that after appellant failed at phase two, he was returned to phase one. Over hearsay and lack of foundation objections, Brown testified appellant was at phase one on April 12, 2010, when he was terminated from BTC. Brown explained that, on average, if a person takes advantage of the BTC program and participates sincerely, he or she can complete it in 18 to 24 months. She said the minimum time to complete each phase is six months. Thus, on average, a person progressing appropriately could complete the BTC program in as little as 18 months or as long as 24 months.

Defense counsel chose not to cross-examine Brown and rested without introducing any evidence.

Thereafter, defense counsel argued that although there was "some evidence" appellant was terminated from BTC, no "competent" evidence was presented that he violated his probation by failing to progress in treatment. Defense counsel argued Brown's testimony that appellant had failed to progress in treatment was inadmissible hearsay, unsupported by competent evidence or Brown's personal knowledge.

In finding appellant in violation of his probation the court stated, "[I]t does seem to me if the program requires completion of three phases in 18 to 24 months and if at the end of . . . approximately 17 months, one month from the end of the earliest time that a person could complete the program, is only in phase one and it takes a minimum of six months to complete each phase, that that's a sufficient basis for the court to find a violation of probation." The court ordered that appellant continue to be detained pending the dispositional hearing. The court's minute order from the September 20, 2010 probation violation hearing notes that the court sustained the probation violation alleged in the probation department's April 19 section 777 notice.

At the April 4, 2011 dispositional hearing, the court found by clear and convincing evidence that appellant failed to reform while placed in residential treatment programs and imposed a DJJ commitment.

Appellant filed a timely notice of appeal from the April 4, 2011 commitment order.

DISCUSSION

I. *Hearsay Testimony Was Erroneously Admitted*

Appellant contends he was denied his due process rights at the probation violation hearing because the court improperly admitted Brown's testimonial hearsay that he failed to progress in treatment without a good cause showing of the unavailability of percipient witnesses. He argues there is no indication that Brown's testimony was based on her personal knowledge. Instead, he argues it was based on unspecified, unreliable information Brown said she had received from various treatment providers and program administrators, including Masina and Bolton.[8] We review the admission of hearsay evidence at the section 777 hearing for abuse of discretion. (*People v. Abrams* (2007) 158 Cal.App.4th 396, 400 (*Abrams*).)

"Although probation violation hearings involve the criminal justice system, they are not governed by all the procedural safeguards of a criminal trial. [Citations.] Specifically the Sixth Amendment's right of confrontation does not apply to probation violation hearings. [Citation.] A defendant's right to cross-examine and confront witnesses at a violation hearing stems, rather, from the due process clause of the Fourteenth Amendment. [Citation.]" (*Abrams, supra,* 158 Cal.App.4th at p. 400.)

Subdivision (c) of section 777 provides the court "may admit and consider reliable hearsay evidence at the [probation violation] hearing to the same extent that such evidence would be admissible in an adult probation revocation hearing, pursuant to the decision in [*People v. Brown*] and any other relevant provision of law." In *People v. Brown* (1989) 215 Cal.App.3d 452, Division Two of this court held that a probationer's confrontation rights were not violated by allowing a police officer to testify regarding the results of a drug test although the officer was not involved in the laboratory testing. (*Id.*

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[8] The People summarily argue that the admissible evidence establishing appellant's dates of wardship, placement, and termination from BTC "alone proved appellant's failure to progress in treatment, as the prosecutor argued." The trial court appeared to reject that argument in stating, "[D]on't I have an obligation at least to find out what the reason [for the termination] is?" and stated that the alleged violation of appellant's probation was that he was terminated from BTC for failing to progress in treatment.

at pp. 454-455.) "As long as hearsay testimony bears a substantial degree of trustworthiness it may legitimately be used at a probation revocation proceeding. [Citations.] In general, the court will find hearsay evidence trustworthy when there are sufficient 'indicia of reliability.' [Citation.]" (*Id.* at p. 454.)

In determining whether hearsay bears a substantial degree of trustworthiness such that it maybe admissible at a section 777 probation violation hearing, courts have distinguished between testimonial and nontestimonial hearsay. (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1199-1201 (*Shepherd*).) The "need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor. [Citation.]" (*People v. Arreola* (1994) 7 Cal.4th 1144, 1157 (*Arreola*).) If the proffered hearsay evidence is testimonial in nature, such as a declarant's prior testimony or a witness's live testimony regarding a declarant's out-of-court statements, "good cause" must be established. (*Id.* at pp. 1157, 1159; *Shepherd*, at pp. 1201-1202.)

"Thus, the minimum due process requirements for a probation revocation hearing include the general right ' "to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation) . . . ." [Citation.]' [Citation.]" (*People v. Stanphill* (2009) 170 Cal.App.4th 61, 78.) "The broad standard of 'good cause' is met (1) when the declarant is 'unavailable' under the traditional hearsay standard (see Evid. Code, § 240), (2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm (including, in appropriate circumstances, mental or emotional harm) to the declarant." (*Arreola, supra*, 7 Cal.4th at pp. 1159-1160.) "[I]n determining the admissibility of the evidence on a case-by-case basis, the showing of good cause that has been made must be considered together with other circumstances relevant to the issue, including the purpose for which the evidence is offered (e.g., as substantive evidence of an alleged probation violation, rather than, for example, simply a reference to the defendant's character); the significance of the particular evidence to a factual determination relevant to a finding of violation of

probation; and whether other admissible evidence, including, for example, any admissions made by the probationer, corroborates the former testimony, or whether, instead, the former testimony constitutes the sole evidence establishing a violation of probation." (*Id.* at p. 1160.)

Abrams, relied on by the People, involved nontestimonial hearsay admitted in a probation violation hearing without a showing of good cause. In *Abrams*, the defendant's probation officer, Dangerfield, testified at the probation revocation hearing regarding a report prepared by probation officer Smith that the defendant had not made any appointments or contacted Smith. Dangerfield also testified that probation department records showed the defendant failed to contact the probation office. (*Abrams, supra*, 158 Cal.App.4th at p. 401.) The defendant testified at the revocation hearing and admitted he had not reported to the probation department in person. (*Id.* at p. 399.) The *Abrams* court concluded Dangerfield's testimony regarding the contents of Smith's report was properly admitted. (*Id.* at p. 401.) The court stated that Smith's presence would not likely have added anything to the truth-furthering process, because he would be testifying that the defendant did *not* make any appointments and that Smith had *not* spoken to the defendant. (*Id.* at p. 404.) The court also concluded that having a computer custodian of records recount the process of logging in calls would have been of little assistance. (*Ibid.*) The *Abrams* court stated, "The credibility of those two witnesses was not critical to the court's determination whether defendant had violated his probation. As the court in *Arreola* stated it: 'the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts . . . .' [Citation.] . . . [T]he Dangerfield and Smith reports were 'prepared contemporaneously to, and specifically for, the hearing where [the defendant's] lack of compliance' was at issue. [Citation.]" (*Abrams*, at p. 404.) The *Abrams* court concluded the evidence from the probation reports had sufficient " 'indicia of reliability' " (*Ibid.*) The court then distilled the following principles: "Evidence that is properly viewed as a substitute for live testimony, such as statements to a probation

officer by victims or witnesses, likely falls on the *Winson-Arreola*[9] side of the line. (See, e.g., *In re Miller* (2006) 145 Cal.App.4th 1228, 1238-1240 [probation report of witnesses' statements to police officer not admissible]; *In re Kentron D.* (2002) 101 Cal.App.4th 1381, 1384-1385 [probation officer's percipient testimony about physical and verbal altercation at probation camp not admissible through probation report].) We hold the rule is otherwise where the evidence involves more routine matters such as the making and keeping of probation appointments, restitution and other payments, and similar records of events of which the probation officer is not likely to have personal recollection and as to which the officer 'would rely instead on the record of his or her own action.' [Citation.]" (*Abrams*, at p. 405, fn. omitted.)

In this case, Brown testified she was familiar with the steps that a ward has to take when placed at BTC. This provided a proper foundation for her testimony that the BTC program consisted of three phases; that in those phases the minor needs to complete various groups, individual and family therapy, journaling, and work and written assignments; and that the average minor progresses through the entire program in approximately 18 to 24 months, or on average, six months per phase. The judicially noticed evidence established that appellant entered BTC November 21, 2008, and Brown had personal knowledge that appellant was terminated from BTC on April 12, 2010. Brown further testified: (1) at one point appellant "made it to phase two, but it did not last longer than I think four weeks"; and (2) appellant then "went back down to phase one," where he remained until he was terminated from the program.

If admissible, these two pieces of evidence, in conjunction with Brown's other testimony related in the preceding paragraph, would be sufficient evidence that appellant had not made satisfactory progress at BTC. But admitting this hearsay evidence would violate due process.

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9 *Arreola* affirmed *People v. Winson* (1981) 29 Cal.3d 711, which refused to approve use of a transcript of a witness's prior preliminary hearing testimony at the probation revocation hearing where the witness was not legally unavailable and there was no good cause showing. (*Arreola, supra,* 7 Cal.4th at pp. 1159.)

We assume, without deciding, that this evidence is not testimonial as defined in *Arreola* and *Shepherd*. It is not similar to a declarant's prior testimony, where observing the witness's demeanor is important. (*Arreola, supra*, 7 Cal.4th at pp. 1156-1157.) Instead, evidence of the phase appellant was placed in on a given date seems to be a routine matter, "such as the making and keeping of probation appointments, restitution and other payments, and similar records of events of which the probation officer is not likely to have personal recollection and as to which the officer 'would rely instead upon the record of his or her own action.' (*Arreola, supra*, 7 Cal.4th at p. 1157.)" (*Abrams, supra*, 158 Cal.App.4th at p. 405, fn. omitted.)

Brown, however, never provided an adequate foundation for this evidence under *Abrams*. She never stated that she had personal knowledge of appellant's placement or participation in BTC. From the record, it appears that Bolton was the source of Brown's testimony regarding appellant's placement in the different phases of the program, although this is by no means certain. Bolton is simply the last person mentioned by Brown as a source of information two transcript pages before Brown testified about how long appellant was placed in phase two before returning to phase one.[10] In any event, Bolton's position at the program is never identified, nor is the source of Bolton's information. We note that trial counsel objected to the testimony regarding appellant's participation in phase two and demotion to phase one on the grounds it was hearsay and lacked foundation. The trial court incorrectly overruled each objection. Since Brown's hearsay testimony was the sole evidence on which the court based its finding that appellant violated his probation, the error in its admission is not harmless beyond a

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[10] Another possible candidate for the source of the information is Masina, who Brown identified as "sort of a contracted therapist for [BTC]." Brown had received a discharge summary from Masina, but had never spoken with her directly. "[Masina] doesn't sit on the probation visits, but I am sort of informed through the director and [appellant] and the other children that are there what's been going on in their therapy sessions with [Masina]." Even if we could fairly conclude that Masina was the source of the challenged testimony, Brown failed to tie the information to the discharge summary provided by Masina, or to clarify whether Masina prepared that summary.

reasonable doubt. (See *In re Kentron D., supra*, 101 Cal.App.4th at p. 1394.) The probation violation finding must be reversed.

II. *Rehearing*

Appellant raises two arguments that we address in the event the People elect to pursue the probation violation following remand. First, appellant argues that because the prosecution presented no evidence at the probation violation hearing of the "nature of [his] probation conditions" or specified which condition had allegedly been violated, the court could not determine whether he violated probation. At the February 27, 2007 hearing at which appellant was declared a ward of the court, the court ordered him placed in a residential program and imposed standard probation conditions, including that he "attend/participate" in individual counseling as directed. The section 777 notice alleged that appellant violated his probation due to his termination from BTC, a court-ordered placement, for failure to progress in treatment. Thus, his probation conditions and their violations were sufficiently identified at the probation violation hearing.

Appellant also argues that "to the extent it was a condition of [his] probation that he progress in treatment beyond participating in individual counseling, and that he progress at a certain rate, the conditions failed to provide notice of these requirements" and are unenforceable as vague and overbroad. In particular, he argues a condition that a probationer progress in treatment is impermissibly vague because it lacks reasonable specificity as to the required rate of progress, and progressing in treatment may not be entirely under the probationer's control. He argues such a condition would be overly broad because it does not give sufficient direction to the probation officer in determining its scope. The People argue a vagueness/overbreadth challenge to appellant's probation conditions is untimely because it was not raised at the time the conditions were imposed.

In *In re Sheena K.* (2007) 40 Cal.4th 875, a juvenile adjudicated a ward of the court appealed a dispositional order placing her on probation. For the first time on appeal, she contended that one of her probation conditions was unconstitutionally vague and overbroad. (*Id.* at p. 878.) In declining to apply the doctrine of forfeiture to her constitutional claim on appeal, our Supreme Court held an alleged "facial constitutional

defect in the relevant probation condition" that is "capable of correction without reference to the particular sentencing record developed in the trial court *can* be said to present a pure question of law" and, therefore, may be raised for the first time on appeal. (*Id.* at p. 887.) The court cautioned that, where such a challenge does not present a pure question of law capable of resolution without reference to the sentencing record developed by the trial court, traditional principles of objection and waiver apply. (*Id.* at p. 889.)

Here, in contrast to *In re Sheena K.*, appellant did not appeal from the February 2007 order of probation. Moreover, because appellant's claim does not address the specific language of the challenged probation conditions, it does not present a facial challenge capable of correction without reference to the juvenile court's sentencing record. Thus, his overbreadth/vagueness challenge is forfeited. (*See People v. Anderson* (2010) 50 Cal.4th 19, 26; *People v. Gardineer* (2000) 79 Cal.App.4th 148, 151.)

DISPOSITION

The order finding appellant violated probation is reversed and the matter remanded for a new section 777 hearing.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.