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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE CONTRERAS-IBARRA,

Defendant and Appellant.

A132880

(Solano County
Super. Ct. No. FCR273798)

I.

INTRODUCTION

Jose Contreras-Ibarra (appellant) appeals from the revocation of his probation and imposition of a three-year prison sentence, the execution of which was stayed for five years. He contends that his federal due process rights were violated when the trial court revoked his probation for a reason for which he received no notice. We disagree and affirm.

II.

PROCEDURAL BACKGROUND

A felony criminal complaint was originally filed by the Solano County District Attorney charging appellant with one count each of corporal injury to a spouse or cohabitant (Pen. Code,¹ § 273.5, subd. (a)), child endangerment (§ 273a, subd. (a)), making a criminal threat (§ 422), and resisting arrest (§ 148, subd. (a)(1)).

¹ All subsequent undesignated statutory references are to the Penal Code.

On February 16, 2010, appellant entered a plea of no contest to the first two charges, in return for an agreement that the last two counts would be dismissed, he would not be sentenced to more than 180 days in county jail, and he would be granted probation. At the subsequent sentencing hearing, sentencing was suspended, and appellant was placed on three years of formal probation with conditions, including that he serve 180 days in county jail, less custody credits. Additional conditions of probation were that appellant would “obey all laws,” report to and comply with all orders of the probation department, advise probation of his residence location, employer, and a telephone number where he could be reached, and personally appear at the probation department with a “picture [identification]” within two days of his release from custody.

Thereafter, in July 2010, probation was revoked and a bench warrant for appellant’s arrest was issued. This action resulted from a “Request for Warrant and Order Thereon” filed by the probation department alleging that appellant had violated the terms of his probation by failing to advise the department of his current residence. The request also noted that appellant had been deported from California to Mexico on June 18, 2010.

Appellant was arrested and remanded into custody pending a hearing on the probation violations on June 15, 2011. A hearing on the probation violations was held on June 28, 2011. During that hearing, appellant explained that his absence and failure to report resulted from his deportation by authorities. He admitted that he attempted to cross the border between Mexico and California and was caught by authorities. As a result, the trial court concluded that appellant had violated the conditions of his probation in that he had failed to “obey all laws,” when he attempted to cross into the United States illegally. Appellant’s probation was ordered revoked.

A sentencing hearing was held on July 25, 2011, at which time the trial court sentenced appellant to three years in state prison on the charges to which he had pled no contest, but suspended execution of that sentence. Appellant was then reinstated on probation for an extended period of five years, subject to conditions, including that he serve 120 days in county jail. The order of probation included the following: “If deft

[sic] is deported again he will be in violation again if he returns to the United States illegally. If he comes back lawfully he will not be in violation for being deported.”

III.

DISCUSSION

Appellant contends that his right to due process under the federal Constitution was violated because the court found that he had violated a condition of probation for which he received no notice.

In *People v. Vickers* (1972) 8 Cal.3d 451, our Supreme Court held that under the federal and state constitutions, the minimum requirements of due process for revocation of probation include written notice of the claimed violations of probation; disclosure of the evidence of the alleged violations; an opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses; a “neutral and detached” hearing body; and a written statement of the reasons for revoking probation. (*Id.* at pp. 457-459.)

A probation revocation hearing does not require all the procedural safeguards of a criminal trial. Instead, the procedures should be flexible depending on the factual scenario. (*People v. Abrams* (2007) 158 Cal.App.4th 396, 400; *People v. Buford* (1974) 42 Cal.App.3d 975, 981.) In addition, a defendant can waive his right to a hearing and other procedural safeguards through his own conduct, or that of his defense counsel. (*People v. Martin* (1992) 3 Cal.App.4th 482, 486-487.) This includes the right to written notice of the alleged violations, which can be waived either expressly, or by failure to seasonably assert it. (*In re La Croix* (1974) 12 Cal.3d 146, 153; *People v. Baker* (1974) 38 Cal.App.3d 625, 629 [the failure to provide the defendant with prior written notice of probation violations charged against him did not violate his due process rights where it was not clear how the defendant received notice of the charged violations and defense counsel was given the opportunity to read the charged violations during a recess in the sentencing hearing and discuss them with the defendant, without any objection being raised as to lack of notice].)

In addition, the failure to object to the lack of written notice of the probation violations forfeits the issue for purposes of appeal. (*People v. Hawkins* (1975) 44 Cal.App.3d 958, 967; *People v. Saunders* (1993) 5 Cal.4th 580, 590 [constitutional right may be forfeited in criminal as well as civil cases by failure to make timely assertion of the right]; *People v. Dale* (1973) 36 Cal.App.3d 191, 195 [waiver in revocation proceeding may occur when counsel submits alleged violation on probation report and defendant acquiesces by remaining silent].)

Tammy DeWitt, appellant's probation officer, testified at the June 28, 2011 hearing that appellant had been deported the previous year, on June 18, 2010, and he did not report to probation prior to that time. In response, appellant was called to testify by his attorney through an interpreter. He confirmed that he had been deported to Mexico in June 2010. He was unsuccessful in coming back into the United States "out of custody," because he had been detained by immigration officials at the border, who then drove him to Solano County because he had this case pending. Since the time he was placed in custody, he had never been out of custody in the United States. Prior to his most recent attempt to enter the United States, appellant admitted that he had made two unsuccessful prior attempts to do so.

During argument of the matter, appellant's counsel referred to *People v. Tapia* (2001) 91 Cal.App.4th 738, disapproved on another ground in *People v. Wagner* (2009) 45 Cal.4th 1039, 1061, fn. 10, arguing that appellant could not be held to have violated his probation for failure to maintain contact with probation because he had been deported and had been arrested upon his return to California after failing to show that he was in the country legally.

The trial court agreed with defense counsel that appellant had not violated the conditions of his probation that he "remain in touch with probation" because he had been deported. However, the court noted that another condition of appellant's probation was that he "obey all laws." The court concluded that appellant's illegal reentry in the country, "without documentation, apparently what happened with this gentleman, and he was picked up at the border, that's a straight up violation of his probation."

In response, appellant's counsel agreed that appellant "was in violation because of his supposed intent to enter the United States, or attempts," but he had not been given written notice of this violation. Thus, counsel argued that due process required that appellant be given written notice of the new, alleged violation that he had violated his duty to "obey all laws." In light of counsel's remarks, the following exchange occurred:

"THE COURT: . . . Do you want some time to look into this? Are you saying that you need more time?"

"[DEFENSE COUNSEL]: No, your Honor, I'd submit it to the Court. I just wanted a chance to respond to the Court.

"THE COURT: I will give you more time if you would like, [defense counsel], if there is something else you want to look into or research.

"[DEFENSE COUNSEL]: I prefer that there is a ruling on this issue now, and then I will handle the ruling appropriately."

The trial court then went on to find that appellant had violated the conditions of his probation to obey all laws in trying to return to the United States.

No violation of appellant's due process rights occurred under these circumstances. While counsel may be correct that written notice of the violation to "obey all laws" had not been given, counsel's refusal of an offered continuance of the hearing fully satisfied appellant's due process right. Furthermore, counsel's stated "prefer[ence]" that the trial court rule on the issue immediately, constitutes a waiver of any claim for lack of written notice.

Appellant's reliance on *People v. Mosley* (1988) 198 Cal.App.3d 1167 (*Mosley*), not only is misplaced, but it supports our conclusion in this case on the facts presented. In *Mosley*, the defendant was simultaneously being tried by a jury for rape, while the trial court was considering that charge as a violation of the defendant's probation granted in another case. During the course of testimony, it was revealed that the defendant was drinking alcohol on the night of the alleged rape. During jury deliberations, when it became uncertain whether defendant would be convicted, the prosecutor asked the court to consider appellant's drinking as a violation of his probation. No one knew if

abstinence was a condition of probation, and the court and counsel searched their respective files. After the jury returned its verdict of not guilty, the court found the defendant to have violated his probation because he had consumed alcohol. (*Id.* at pp. 1172-1173.)

The appellate court found that the defendant's due process right to notice of the alleged violations of probation had been violated and reversed the revocation. (*Mosley, supra*, 198 Cal.App.3d at p. 1175.) In reaching this result, the court concluded: "*Here, the record does not disclose that Mosley was offered additional time to answer the unnoticed allegation on which his revocation was based.* The evidentiary phase of the hearing was completed before either he or the court was aware of the charge which ultimately constituted the basis for revocation. *Mosley had no opportunity to prepare and defend against that allegation.* Defense counsel might well have cross-examined the complaining witness and the officer with a different purpose had he known that he was defending his client against an allegation of alcohol consumption. Likewise, counsel may have called defendant as a witness. Because the trial court failed to provide 'a constitutionally sufficient safeguard of appellant's due process rights and [preserve] the fundamental fairness of the proceedings,' Mosley was denied due process." (*Id.* at p. 1174, italics added.)

Several obvious differences between *Mosley* and the instant case are readily apparent. First, there is no evidence here that defense counsel was unaware of appellant's duty to "obey all laws," a condition found in virtually all grants of probation. More importantly, here appellant was offered additional time to answer the new allegation, and an opportunity to "prepare and defend against that allegation." (*Mosley, supra*, 198 Cal.App.3d at p. 1174.) In fact, appellant's counsel refused the offer of a continuance, and stated a "prefer[ence]" to have the court rule immediately on the alternative ground.

Based on the facts of this case, there was no violation of appellant's due process rights in connection with the challenged probation revocation hearing, and we affirm that ruling.²

IV.
DISPOSITION

The order revoking appellant's probation is affirmed.

RUVOLO, P. J.

We concur:

REARDON, J.

RIVERA, J.

² On appeal, appellant points to the unfairness of his having been "blindsided" by the new violation allegation after he had admitted the facts establishing the new violation during his defense against the noticed violations. We disagree. Had appellant not testified about the reason for his failure to make contact with the probation department, the record would have conclusively proved a violation of the original alleged condition of probation. Accordingly, we see no unfairness was visited on him, particularly where he declined the continuance and asked the court to rule without delay.

We similarly find unpersuasive appellant's contention that the new violation was not actually proved. Not only were there reasonable inferences which supported the conclusion that appellant had violated the law by attempting to enter the United States illegally, but appellant's counsel essentially conceded the violation.