

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

WILLIAM MICHAEL NITSCHKE,

Defendant and Appellant.

A133937

(Solano County Super. Ct.  
Nos. VCR204147 & VCR205045)

Based on the testimony of defendant’s probation officer at a contested probation revocation hearing, the court found defendant in violation of his probation for failing to complete and his termination from a treatment program; failing to report any change in address to probation within 48 hours; and failing to notify probation that he had not completed the program. On appeal, defendant argues the order revoking his probation must be reversed because the probation officer’s testimony was based on documents that were faxed to her by someone at the program, without documentary substantiation and without good cause to excuse the live testimony of a program employee. He asserts his due process right to confront and cross-examine that person was violated. We will affirm, because the probation officer’s testimony “was in the nature of documentary material that is admissible in a probation revocation hearing.” (*People v. Gomez* (2010) 181 Cal.App.4th 1028, 1033.)

## **PROCEDURAL HISTORY AND STATEMENT OF FACTS<sup>1</sup>**

### *Action No. VCR204147*

On September 28, 2009, defendant pleaded no contest to a single count of possession of a controlled substance. (Health & Saf. Code, § 11377, subd. (a).) The court suspended imposition of sentence and placed defendant on formal probation for three years on the condition, among others, that he obey all laws and orders of the court, report to and comply with all orders of probation, advise probation of his location and phone, and let them know within 48 hours of any change. In October of 2009, new charges were filed against defendant in action No. VCR205045. His probation was summarily revoked.

### *Action No. VCR205045*

On March 8, 2010, defendant pleaded no contest to one count of receiving stolen property and admitted serving four prior prison terms in action No. VCR205045. On April 6, 2010, the court suspended execution of a seven-year state-prison sentence and placed defendant on probation, on the condition, among others, that he enter and complete a Category II rehabilitation program. The court reinstated probation in VCR204147 on the same terms and conditions as before, except that the court deleted the “Proposition 36” (Pen. Code, § 1210.1) terms, and added a condition that defendant enter and complete the same type of program.

### *The Probation Revocation at Issue Here<sup>2</sup>*

On July 21, 2011, the court summarily revoked defendant’s probation in both cases. The clerk’s minutes indicate that the bases for the violation were failure to comply with the program and failure to report an address change to probation. A formal revocation hearing was held September 12, 2011. The court found defendant violated his

---

<sup>1</sup> Because the facts underlying defendant’s convictions are not germane to the issue raised on appeal we do not summarize them.

<sup>2</sup> There was a prior probation violation, similarly based upon failure to complete the Salvation Army residential treatment program, which defendant admitted on August 13, 2010. Probation was reinstated.

probation. Defendant was sentenced to prison in action No. VCR205045 for seven years. He received a concurrent two-year prison sentence in No. VCR204147.

### *The Contested Probation Revocation Hearing*

The court took judicial notice of the procedural history of defendant's two cases and his probationary conditions (outlined above) from the court file. The bases for revocation on which the prosecution proceeded were the "failure to complete a Category II residential program, and to provide a change of address, and contact Probation within 48 hours."

Defendant's probation officer, Andrea Rodgers, was the sole witness called by the prosecution. She had been employed as a deputy probation officer by the Solano County Probation Department (Probation) for six years. At the time of the hearing, she was assigned to supervise all defendants who were court ordered to attend residential treatment programs. She tracked her probationers with "a database system through our case notes, which anytime we have an entry or anything that is sufficient regarding the case, we enter it into our computer system, or if we receive information from programs via fax or via mail, we also put that in our file, as well." Defendant was first assigned to her caseload in April of 2010 and then again in August of 2010. She met with him at that time to review with him the order "saying he was to attend and complete a Category II residential treatment program." She told him that if he did not attend and successfully complete the program she would return him to court for a violation and he indicated he understood that.

Ms. Rodgers familiarized herself with all the various programs in which her probationers are placed "[n]ormally via phone contact. Sometimes through e-mail, but its normally through phone or by fax. [W]e have discussions regarding if someone is in the program, if someone is having difficulties in the program, things like that pertaining to their probation case. If they're already placed in a program, usually I'll call and familiarize myself, send them my business card, give them my contact information, so if they have any questions they can contact me." Defendant had been released from custody on August 26, 2010 and placed directly into the San Francisco Salvation Army

program. He was supposed to stay there a minimum of six months. She was familiar with the Salvation Army's letterhead and their process. "Normally, when [probationers are] released from custody, the program will either follow up with me and let . . . me know that they've made it to the program, or they'll send me a fax indicating that they've entered the program successfully." She relied on the programs' processes to keep track of her probationers as part of her job duties.

Over defendant's hearsay objection, Ms. Rodgers testified that on September 1, 2010 she received a fax, on Salvation Army letterhead, notifying her that defendant was in the Salvation Army program. The letter was received at Probation in the normal course of business. She recognized the signature as that of the intake coordinator, with whom she had spoken in the past. The letter indicated that defendant had been admitted into the program on August 26, 2010.

Over defendant's further objections of hearsay and "foundation," Ms. Rodgers testified that on January 26, 2011, she received a fax advising her that defendant had been terminated from the program on January 25, 2011. This notification, too, was on "letterhead via fax to Probation." She recognized the name of the person who signed it; she had spoken with that person before. Ms. Rodgers's testimony about defendant's termination from the program was based solely on the fax transmission that she received from the Salvation Army. Defendant was terminated for a "nondrug-related reason." The court overruled both objections, finding the testimony about both faxed documents admissible as "reliable hearsay/documentary evidence."

The court asked Ms. Rodgers about the reason given in the letter from the Salvation Army for defendant's termination. The letter said "it was pilfering, theft of property from the program; and on the second page, it said, '[h]e was storing our merchandise in places found in the nooks and crannies of the warehouse.'" The court responded, "I'm not sure I'm willing to consider the reason for the truth of the matter. That may be beyond the reliable hearsay/documentary evidence rules, but it did indicate that he was terminated from the program, which I think does properly qualify as documentary evidence that can be reliable hearsay."

When defendant was released from custody, he signed placement instructions advising him that if he were terminated from the program for any reason he was to contact Ms. Rodgers “immediately.” Nevertheless, at the intake interview she would amend that to mean the probationer needed to contact her within 48 hours, “per his probation orders.” Defendant never contacted her about his discharge from the program in January 2011.

The defense called no witnesses.

At the conclusion of the testimony, defense counsel argued that Ms. Rodgers’s testimony was “based on a fax transmission. I don’t believe we can say one way or another—I mean, there’s no confirmation. There’s no direct contact with anyone at the Salvation Army program to know one way or another whether Mr. Nitschke was, in fact, terminated from this program.” The court ruled, “I find him in violation, that he was, in fact, terminated from the program because he did not successfully complete the Cat II program. [¶] Further, I find him in violation of failing to report any change in address to Probation, as directed, within 48 hours, and to notify them that he had not completed the program.”

## **DISCUSSION**

Defendant argues that the trial court erred by admitting the hearsay testimony of probation officer Andrea Rodgers at the probation revocation hearing, about the fax transmissions of letters from the Salvation Army program to her, informing her that defendant had been admitted to the program, and later expelled from the program. “By doing so, the trial court abused its discretion and deprived [defendant] of his Fourteenth Amendment due process rights.” Defendant also argues that the failure to introduce the faxed documents into evidence rendered Ms. Rodgers’s testimony about his admission to, performance in, and termination from the treatment program verbal testimonial hearsay that should not have been admitted without a showing of good cause to excuse the live testimony of a Salvation Army treatment program employee/percipient witness. He claims that Ms. Rodgers’s testimony was (1) unreliable and (2) deprived him of an

opportunity to confront and cross-examine the out-of-court declarant who was used by the prosecution to prove a willful violation of probation.

We review the revocation of probation for abuse of discretion. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 443, 445.) “We review rulings on whether hearsay was improperly admitted at a violation hearing for abuse of discretion.” (*People v. Abrams* (2007) 158 Cal.App.4th 396, 400 (*Abrams*). See also *People v. O’Connell* (2003) 107 Cal.App.4th 1062, 1066 ( *O’Connell*) and *People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1197–1198 (*Shepherd*).)<sup>3</sup>

We begin by noting that a probation revocation proceeding is not a criminal prosecution (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411) and that a probationer facing revocation is not entitled to the “full panoply of rights” due a defendant in a criminal trial. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 480 (*Morrissey*)). “Specifically the Sixth Amendment’s right of confrontation does not apply to probation violation hearings.” (*Abrams, supra*, 158 Cal.App.4th at p. 400.) Nevertheless, “[b]ecause ‘the [probationer] faces lengthy incarceration if his [probation] is revoked’ [citation], and termination of his or her liberty ‘inflicts a “grievous loss” on the [probationer] and often on others’ . . . , the probationer has ‘a continued post-conviction interest in accurate fact-finding and the informed use of discretion by the trial court . . . “to insure that his liberty is not unjustifiably taken away . . . .” ’ [Citations.]” (*People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1294.) This interest gives rise to a due process right to confront and cross-examine adverse witnesses. (*Ibid.*) However, “due process is flexible and calls for such procedural protections as the particular situation demands.” (*Morrissey, supra*, 408 U.S. at p. 481.)

---

<sup>3</sup> Defendant argues for a de novo standard of review based on the following statement in *People v. Stanphill* (2009) 170 Cal.App.4th 61: “The parties fail to address the standard of review. We apply de novo review [citation], but we would reach the same result even under a lesser standard.” (*Id.* at p. 78.) We have found no other published case that applied de novo review to questions about the admissibility of hearsay evidence in a probation revocation hearing, and we decline to apply de novo review here.

Flexibility means that the defendant's confrontation right at a formal revocation hearing is not absolute. "Confrontation . . . with exclusion of hearsay, strict adherence to rules of evidence, and cross-examination, is not compelled in a probation extension proceeding." (*People v. Minor* (2010) 189 Cal.App.4th 1, 20.) Testimonial hearsay evidence which would presumptively contravene the Sixth Amendment as interpreted in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), is sometimes admissible in the revocation hearing, but only upon a showing of good cause to excuse the live testimony. (*People v. Winson* (1981) 29 Cal.3d 711 (*Winson*); *People v. Arreola* (1994) 7 Cal.4th 1144 (*Arreola*)). On the other hand, it is sometimes said that "non-testimonial" hearsay, such as that contained in certain types of documentary evidence, is admissible in a revocation hearing, without a specific showing of good cause, if it is shown to be sufficiently reliable. (*People v. Maki* (1985) 39 Cal.3d 707 (*Maki*); *Abrams, supra*, 158 Cal.App.4th at p. 398.) "Due process does not prohibit the 'use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence' " accompanied by "reasonable indicia of reliability." (*Gomez, supra*, 181 Cal.App.4th at p. 1034.)

While these rules are easy to state, they are not as easy to apply, for the distinction between testimonial hearsay and nontestimonial hearsay is not always clear. For example, sometimes the content of a probation report is admissible, and sometimes it is not. In *Gomez, supra*, 181 Cal.App.4th 1028, the trial court admitted into evidence "a probation report which showed that defendant failed to report to his probation officer, pay restitution, or submit verification of his employment and attendance at counseling sessions." (*Id.* at p. 1031.) The report, prepared by one probation officer, relied upon electronic probation records and statements about defendant's failed reporting made by a different probation officer. (*Id.* at pp. 1032–1033.) Neither probation officer testified. As the *Gomez* court observed, "the probation report would constitute testimonial hearsay under the expansive definition developed in recent confrontation clause cases, such as *Melendez–Diaz v. Massachusetts* (2009) 557 U.S. [305]"; nevertheless, the *Gomez* court concluded that "within the parameters established by the body of precedent applicable to

probation revocation, . . . the probation report was admissible and its admission did not violate defendant's due process right of confrontation." (*Gomez, supra*, at p. 1039.)

The *Gomez* court distinguished *In re Kentron D.* (2002) 101 Cal.App.4th 1381 (*Kentron D.*), in which the court revoked the minor's probation solely on the basis of a probation report in which one probation officer recounted the observations of six other probation officers who witnessed the minor engage in a verbal altercation that nearly resulted in a physical fight with another minor. (*Gomez, supra*, 181 Cal.App.4th at pp. 1035–1036.) The *Kentron D.* court concluded the information contained in the report was more a substitute for live testimony, such as that described in *Winson* and *Arreola*, and less like the documentary evidence at issue in *Maki*. It found constitutional error because there was no showing of good cause to permit a report to substitute for live testimony that would have permitted the minor and the trier of fact "to observe the demeanor of appellant's accusers." (*Kentron D., supra*, 101 Cal.App.4th at p. 1393.)

To the same effect as *Gomez* is *Abrams, supra*, 158 Cal.App.4th 396, in which the defendant's probation officer testified that defendant had failed to report to probation or make required payments. The testifying probation officer also referenced another probation officer's later report, which documented another of defendant's failures to report, on a different occasion. (*Id.* at p. 404.) The probation officer had also reviewed the department's computer records, and he provided foundational testimony to explain "how calls are logged into the system and that the records showed defendant had not called the probation office." (*Ibid.*)

The *Abrams* court noted that the record on appeal did not reveal whether or not either of the two probation reports mentioned by the probation officer were received in evidence. But the *Abrams* court concluded: "We see no difference, in this setting, between receiving the reports in evidence and allowing [the probation officer] to testify to their contents. Defendant's objection was to the hearsay of the report's contents, not to the use of secondary evidence. (Evid. Code, §§ 1520–1523.)" (*Abrams, supra*, 158 Cal.App.4th at p. 404, fn. 4.)

Similarly, in *O'Connell, supra*, 107 Cal.App.4th 1062, the probation officer filed a report alleging that defendant had violated the terms of a deferred entry of judgment program by failing to attend a drug treatment program. Attached to the probation report was a written report by the manager of the drug counseling program stating the defendant completed none of the required 20 sessions and had been terminated from the program for excessive absence. At a hearing on the defendant's alleged violation of the requirement to participate in the program, the trial court overruled the defendant's hearsay objection and admitted the drug counseling program manager's report. (*Id.* at pp. 1064–1065.) On appeal, the court found the program manager's report was “akin to the documentary evidence that traditionally has been admissible at probation revocation proceedings” and “bore the requisite indicia of reliability and trustworthiness so as to be admissible.” (*Id.* at pp. 1066, 1067.)

*Shepherd, supra*, 151 Cal.App.4th 1193, on which defendant relies, is decidedly different from *Gomez, Abrams*, and *O'Connell*, but similar to *Kentron D.* In *Shepherd*, the defendant was accused of violating his probation by consuming alcohol. (*Id.* at p. 1196.) The court found a probation violation, based solely on the hearsay testimony of Shepherd's probation officer that a program administrator at Shepherd's treatment program had told him that Shepherd was dismissed from the program after smelling of, and testing positive for, alcohol. No documentary or other evidence of alcohol consumption was introduced, and it was not clear from the probation officer's testimony whether the program administrator herself had observed Shepherd's alleged probation violation, or whether she was simply reporting what she had been told by others. In reversing the revocation order, the *Shepherd* court observed that the program administrator's out-of-court statement to the probation officer was testimonial hearsay within the meaning of *Crawford, Winson*, and *Arreola*, and that the defendant had no opportunity to cross-examine the one person who purportedly observed defendant's alcohol consumption, thereby depriving defendant and the court of the opportunity to observe the accuser's demeanor. (*Id.* at pp. 1198–1199, 1203.)

If the court here had relied on Ms. Rodgers’s testimony for proof that defendant had pilfered goods from the program, and had violated his probation on that basis, defendant’s argument might find some traction. But this case is distinguishable from *Shepherd* in that the court here *declined* to rely on Ms. Rodgers’s testimony about the pilfering, and expressly did *not* find a violation of probation based on the pilfering allegation. The court found defendant had violated his probation on the basis of two grounds of which Ms. Rodgers had personal knowledge—his failure to report a change of address and his failure to report his dismissal from the program—and one ground for which Ms. Rodgers relied on her past practice, her record keeping, her relationships with program administrators, and her recognition of the Salvation Army program administrator’s name and/or signature.<sup>4</sup>

The lesson we draw from the case law is that, where a probation officer’s testimony is concerned, the touchstone of due process in a revocation hearing is not so much whether the probation officer’s hearsay statements are testimonial or nontestimonial, but whether the “need for confrontation is particularly important . . . because of the opportunity for observation of the witness’s demeanor” (*Arreola, supra*, 7 Cal.4th at p. 1157), or whether, as with documentary evidence, the witness’s “demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence . . . where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own

---

<sup>4</sup> Although defendant does not actually argue a lack of substantial evidence that he violated his probation, he suggests there was no evidence that defendant willfully violated his probation, without the evidence of pilfering. We disagree because the court was entitled to infer willfulness from the fact defendant knew he was not to leave the program prior to completion, and knew that he was to report to probation if he did leave it, and yet left the program without completing it, and did not report his departure from the program or his new address to probation. His probation had previously been revoked for a similar failure.

action.” (*Ibid.*) If confrontation and cross-examination of a witness/accuser would test the witness’s credibility and permit observation of his or her demeanor by the defendant and the trier of fact, then good cause must be shown before hearsay testimony may be substituted. But if the witness’s testimony would be foundational only, and likely based on the witness’s own records, then it should be allowable upon a showing of sufficient reliability and trustworthiness.

In our view, the probation officer’s testimony here was of the latter variety. The probation officer testified about the contents of letters from the Salvation Army treatment program upon which she relied to fulfill her supervisory duties over probationers placed in that residential treatment program. She incorporated the information received about dates of admission and dismissal into her own records, based upon necessity and her personal history of dealings with the personnel associated with her probationers’ treatment programs. The presence of the Salvation Army’s program administrator at the hearing would not have furthered the ascertainment of the truth or the evaluation of the foundation laid for admission of testimony about the faxed letters. The witness would have done no more than authenticate the information he or she conveyed to Ms. Rodgers. Moreover, as the recipient in the ordinary course of business of faxes on official Salvation Army letterhead from persons with whom she regularly dealt, the probation officer provided authentication for the reasonable reliability of faxes containing information about a client’s commencement and premature ending dates that the Salvation Army customarily reported.

Further, the defense offered no basis to dispute the facts related in Ms. Rodgers’s testimony about defendant’s dismissal from the program, did not contradict that evidence, or suggest how observation of the Salvation Army program administrator’s demeanor under cross-examination may have demonstrated the lack of credibility of the information he conveyed to the probation officer by fax.

We find no abuse of the trial court’s discretion in this instance. The fact that the letters themselves were never introduced into evidence did not violate due process. Like the *Abrams* court, we see no difference, in this setting, between receiving the letters in

evidence and allowing the probation officer to testify to their contents. Defendant's objection was to the hearsay of the letters' contents, not to the use of secondary evidence. (*Abrams, supra*, 158 Cal.App.4th at p. 404, fn. 4.)

**DISPOSITION**

The order revoking defendant's probation is affirmed.

---

Marchiano, P.J.

We concur:

---

Margulies, J.

---

Banke, J.