Filed 6/6/14 P. v. Curlee CA1/4

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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. BRYAN K. CURLEE, Defendant and Appellant.	A137097 (City & County of San Francisco Super. Ct. No. 213702)

Bryan K. Curlee appeals a judgment revoking his probation and sentencing him to a two-year prison term. Defendant contends that the trial court allowed hearsay evidence to be used against him in violation of Evidence Code section 1240, and that he qualifies for additional good-behavior credits under California Penal Code section 4019.[1] We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Underlying Offense

On October 20, 2010, defendant pled guilty to a felony complaint filed by the San Francisco District Attorney for failure to update his sex offender registration (§ 290.012, subd. (a)) and failing to file a change of address (§ 290.013). On November 10, 2010, the trial court suspended imposition of sentence and placed defendant on probation for three years.

[1] Unless otherwise specified, all section references are to the California Penal Code.

B. First Probation Violation

On April 15, 2011, defendant was arrested for domestic violence against Essie Mary Dunmore. On May 6, 2011, defendant admitted to violating the terms of his probation. The court revoked, then reinstated defendant's probation and issued a protective order, requiring defendant not to threaten, molest, or have contact with Dunmore and to stay away from her residence. On May 6, 2011, a second protective order was issued, ordering defendant to stay away from Dunmore until December 2, 2013.

C. Second Probation Violation and Revocation Hearing

On June 24, 2012, at approximately 11:39 p.m., San Francisco Police Officer Daniel Owens responded to a 911 call from Dunmore's address. When Officer Owens entered Dunmore's apartment he witnessed Dunmore and defendant engaged in a verbal dispute. Officer Owens testified that when he arrived, Dunmore "was screaming, shouting, upset, telling me she wanted [defendant] to leave the apartment." Officer Owens explained that "she was talking very loudly" and it was "[v]ery clear that she was upset." Defense counsel objected to the admission of Dunmore's statements on grounds that they were hearsay, and violated defendant's due process rights because Dunmore did not appear at court due to a medical appointment.

The trial court overruled defense counsel's hearsay and due process objections and allowed Officer Owens to repeat Dunmore's out of court statements as a spontaneous statement exception pursuant to Evidence Code section 1240.

Based upon Officer Owens's testimony and defendant's arrest in Dunmore's apartment on June 24, 2012, the trial court found defendant in violation of two protective orders, and revoked his probation, sentencing him to two years in state prison. The court took notice of defendant's 379 days of actual credit for time served, and calculated 188 days good-conduct credit applying section 4019 as it existed at the time of defendant's October 2010 offense, allotting two days of good-conduct credit for every four days of actual custody. Defendant objected to this calculation, claiming the present version of

section 4019 should apply to his conduct credits, which provides for two good-conduct credits for every two days of actual custody (§ 4019, subds. (c) & (f)).

II. DISCUSSION

A. General Legal Principles

Under the prior Penal Code, "the court may revoke and terminate . . . probation if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the conditions of his or her probation . . . or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses." (§ 1203.2, subd. (a), rewritten Stats. 2012, ch. 43.) "The court shall have authority at any time during the term of probation to revoke, modify, or change its order of suspension of imposition or execution of sentence." (§ 1203.3, subd. (a).) "Before any sentence or term or condition of probation . . . is modified, a hearing shall be held in open court before the judge." (§ 1203.3, subd. (b)(1).)

"The full panoply of rights due in a criminal trial does not apply to probation revocations" because probation is not part of a criminal prosecution but an act of clemency by the state. (*People v. Stanphill* (2009) 170 Cal.App.4th 61, 72 (*Stanphill*); *People v. Rodriguez* (1990) 51 Cal.3d 437, 441.) The state takes a risk on the probationer and has a great interest in being able to withdraw probation without the burden of a new trial. (*Rodriguez, supra,* 51 Cal.3d at p. 445.) Thus, the standard of proof in probation revocation proceedings is proof by a preponderance of the evidence. (*Id.* at p. 447.)

B. The Trial Court Properly Admitted Dunmore's Statements

At defendant's probation revocation hearing, Officer Owens gave testimony about his initial conversation with Dunmore when he arrived at the scene on June 24, 2012. Defendant claims that these statements were hearsay that did not qualify as "spontaneous statements." (Evid. Code, § 1240). Thus, according to defendant, Officer Owens' testimony about Dunmore's statements was inadmissible.

We review hearsay challenges for abuse of discretion. (*Stanphill, supra,* 170 Cal.App.4th at p.73.) Whether a statement is hearsay is largely a question of fact, and the

trial court exercises some discretion in its finding. (*Ibid.*) Thus, we will uphold the trial court's determination of facts if its finding is supported by substantial evidence. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.) There was no abuse of discretion here.

1. Dunmore's Statements Were Not Offered for the Truth of the Matter Asserted

" 'Hearsay evidence' " is defined by Evidence Code section 1200, subdivision (a), as, "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter asserted." By this definition, a statement offered for a purpose other than to prove the fact stated therein is not hearsay. (*Smith v. Whittier* (1892) 95 Cal. 279.)

The question at the probation revocation hearing was whether defendant had violated the two protective orders that required him to stay away from Dunmore and her residence. Upon defendant's objection, the court noted that Officer Owens's recitation of Dunmore's statements did not go to the fact of the matter, adding that the officer was merely collecting information. We agree. The State did not offer Dunmore's statements to prove the truth of the matter asserted (i.e., that she wanted defendant to leave the apartment), but to show that defendant had violated two protective orders. Thus, substantial evidence supports the determination that Officer Owens's narration of Dunmore's statements did not violate the rule against hearsay. (See, e.g., *Davis v. Washington* (2006) 547 U.S. 813, 822.)

2. Dunmore's Statements Were Properly Admitted as Spontaneous Statements

Even assuming arguendo that Dunmore's statements were offered for the truth of the matter asserted, the record establishes that the statements were admissible under the spontaneous statement exception to the hearsay rule. Evidence Code section 1240 states that "[e]vidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) [p]urports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) [w]as made spontaneously while the declarant was under the stress of excitement caused by such perception." (*McClaflin v. Bayshore Equipment Rental Co.* (1969) 274 Cal.App.2d 446, 454.) In short, a statement that is spontaneous, unreflecting, and relates the occurrence preceding it is considered

trustworthy and an exception to the rule against hearsay. (*People v. Nelson* (2012) 209 Cal.App.4th 698, 709.)

" '[T]he discretion of the trial court is at its broadest' when it determines whether an utterance was made while the declarant was still in a state of nervous excitement. [Citation.]" (*People v. Thomas* (2011) 51 Cal.4th 449, 496.) To fall within the spontaneous statement exception to hearsay, an utterance must be made before there was time to misrepresent or contrive, which "is informed by a number of factors, including the passage of time between the startling occurrence and the statement, whether the statement was a response to questioning, and the declarant's emotional state and physical condition." (*People v. Clark* (2011) 52 Cal.4th 856, 925.) The length of time between the incident and the statement is not dispositive because it is only an indicator of the mental state of the declarant when the statement is made. (*People v. Saracoglu* (2007) 152 Cal.App.4th 1584, 1588.) Similarly, the statement being in response to a question is merely a measure of the statement's spontaneity, with detailed questioning more likely to be disqualifying than an answer to a simple inquiry. (*People v. Brown* (2003) 31 Cal.4th 518, 541; *People v. Morrison* (2004) 34 Cal.4th 698, 719.) Thus, the critical inquiry is the mental state of the speaker, not the nature of the circumstances surrounding the statement. (*People v. Williams* (2006) 40 Cal.4th 287, 318.)

The record reflects that Officer Owens was, "dealing with an extremely angry, screaming individual, and her statements come in as an exception to the hearsay rule." Clearly, Dunmore's statements described an event that she had perceived, and that she was still quite excited about that event as it was *ongoing* when Officer Owens arrived. While the statement was in response to Officer Owens' question, that question was a simple situational inquiry, which was unlikely to affect Dunmore's powers of reflection. (*People v. Morrison* , *supra*, 34 Cal.4th at p. 718.) In our view, there is substantial evidence that Dunmore was in an excited, unreflecting state when she responded to Officer Owens's inquiry, and that the trial court properly applied Evidence Code section 1240 in the instant case.

C. Defendant's Due Process Rights Were Not Violated

1. Non-Testimonial Statements

Defendant claims the trial court violated his due process rights under the Sixth Amendment confrontation clause by failing to find good cause for Dunmore's absence at the revocation hearing before admitting her out of court statements. We review the record de novo where defendant raises a question of law and fact that implicates a constitutional right. (*People v. Cromer* (2001) 24 Cal.4th 889, 894-904.)

The Confrontation Clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford v. Washington* (2014) 541 U.S. 36, 53-54.) According to *Davis v. Washington, supra,* 547 U.S. at p. 822, fn. omitted), statements are "testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." Statements are nontestimonial when they are "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency." (*Ibid.*) Thus, when police first respond to an ongoing emergency, any statements they elicit are likely nontestimonial when the purpose of the statements was to help police determine how to proceed. (*People v. Thomas, supra,* 51 Cal.4th at p. 497.)

"Although the *Sixth Amendment* confrontation clause does not apply in probation revocation proceedings, probationers have a general *due process* right to confrontation and cross-examination in such proceedings. [Citations.]" (*Stanphill, supra,* 170 Cal.App.4th at p. 78.) Yet, "spontaneous statements under section 1240 are a special breed of hearsay exception which automatically satisfy a probationer's due process confrontation/cross-examination rights without the court having to find good cause for the witness's absence. . . ." (*Id.* at p. 81.) Because the out of court utterance is likely to be more reliable than testimony on the matter from the same person, such statements are reliable and satisfy confrontation clause challenges. (*Ibid.*)

In the instant case, the trial court noted, "[t]his officer is trying to figure out what kind of situation he has. He's trying to get information." The record is clear that Dunmore's statements were elicited by Officer Owens when he first arrived at the scene and that he was trying to determine what needed to be done. Dunmore's statements, that she desired defendant to leave her apartment, were otherwise wholly irrelevant to the probation revocation hearing. The sole purpose of Officer Owens's testimony on Dunmore's statements was to show that there was an ongoing emergency because defendant was in Dunmore's apartment and within her presence in violation of two protective orders. The trial court properly admitted Dunmore's out of court statements as nontestimonial. Thus, there was no violation of defendant's Sixth Amendment rights.

Nevertheless, defendant insists that his Sixth Amendment rights were violated, claiming that *Stanphill* was wrongly decided. We decline defendant's invitation to depart from *Stanphill* and to apply *People v. Arreola* (1994) 7 Cal.4th 1144 in the instant case.

In *Arreola*, the sole prosecution witness who testified at the preliminary hearing was absent from the probation revocation hearing without a finding of good cause. (*Arreola, supra,* 7 Cal.4th at pp. 1160-1161.) At the revocation hearing, the court admitted the preliminary transcript in lieu of requiring the witness's live testimony. (*Ibid.*) While the *Arreola* court admitted that the probationer's due process rights *were* violated by this act, it found the admission harmless error due to substantial, independent evidence of the probationer's guilt. (*Ibid.*) By contrast, in *Stanphill* the court found the improper admission of a preliminary transcript distinguishable from the admission of spontaneous statements. (*Stanphill, supra,* 170 Cal.App.4th at p. 79.) In so holding, the court explained that the admission of spontaneous statements, without a chance to confront the speaker, did *not* violate a probationer's due process rights. (*Ibid.*)

In the instant case, we have already found Dunmore's response to Officer Owens to be a spontaneous statement under Evidence Code section 1240. Under *Stanphill*, this negates defendant's due process challenges to Dunmore's absence at his probation revocation hearing. (*Stanphill, supra,* 170 Cal.App.4th at p. 79.) Moreover, even if we were to apply *Arreola*, and find Dunmore's absence violated defendant's due process

rights, the admission of her statements would be harmless error due to substantial independent evidence of his guilt. (*Arreola, supra,* 7 Cal.4th at pp. 1160-1161.)

D. Defendant is Not Entitled to Additional Good-Conduct Credits

Former section 4019, subdivisions (c) & (f) provided those convicted of serious felonies with two days of good-conduct credit for every four days of actual custody. This section was revised, effective October 1, 2011, to provide prisoners with two days of good conduct credit for every two days in actual custody. (§ 4019, subds. (c) & (f).) The amendment added clear language requiring that "this subdivision shall apply prospectively . . . for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law." (§ 4019, subd. (h).)

Defendant challenges the trial court's calculation of his presentence credits under former section 4019, subdivision (f), claiming that he is entitled to the calculation of credits under the revised statute, or at least a hybrid of the two for each period he served time in prison. Defendant claims that section 4019 affects two similarly situated classes in an unequal manner without a rational basis for this discrepancy. These two alleged classes are persons who committed a crime before October 1, 2011, and those who committed a crime after. Specifically, defendant argues that section 4019, which became effective on October 1, 2011, should apply retroactively "by virtue of the equal protection clauses found in Article I, section 7 of the California Constitution and the Fourteenth Amendment to the United States Constitution." When the constitutionality of a statute is challenged, we review the record de novo. (*People v. Superior Court (Mudge)* (1997) 54 Cal.App.4th 407, 411.)

" 'The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' " (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199 (*Hofsheier*); *In re Eric J.* (1979) 25 Cal.3d 522, 537.) "This initial inquiry is not whether persons are similarly situated for all purposes, but 'whether they are similarly situated for purposes of the law challenged.' [Citations.]" (*Cooley v. Superior Court*

(2002) 29 Cal.4th 228, 253.) Since the class status in this instance involves prisoners, not constitutionally protected suspect classes, we apply the rational relationship test to resolve this equal protection issue. (*Hofsheier, supra,* 37 Cal.4th at p. 1200.)

The rational relationship test requires the law in question to reasonably promote a legitimate government interest. (*U.S. v. Carolene Products Co.* (1938) 304 U.S. 144, 151.) The court gives great deference to the legitimacy of the government interest unless the Legislature is restrained by some express prohibition in the Constitutions of the United States or California. (*FCC v. Beach Communications, Inc.* (1993) 508 U.S. 307, 314-315 (*FCC*); *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 444.) Since there are no such restraints in this instance, a party wishing to defeat the rational-basis of the legislation has the burden " 'to negative every conceivable basis which might support it.' " (*FCC, supra,* 508 U.S. at p. 315; *Hofsheier, supra,* 37 Cal.4th at p. 1201.)

In the instant case, defendant pled guilty on October 20, 2010, for failing to update his sex offender registration (§ 290.012, subd. (a)) and to file a change of address. (§ 290.013.) Section 4019, subd. (h)[2] is clear that the statute applies prospectively to all persons confined for a crimes committed on or after October 1, 2011. (*People v. Kennedy* (2012) 209 Cal.App.4th 385, 397.) Under the plain language of section 4019, subdivision (h), any good-conduct credits earned while incarcerated as a result of an offense occurring before October 1, 2011, are calculated under the prior version of section 4019, subdivisions (c) & (f), which provides two days of credit for every four days served. (*People v. Brown* (2012) 54 Cal.4th 314, 321-322 (*Brown*); *People v. Rajanayagam* (2012) 211 Cal.App.4th 42 (*Rajanayagam*).)

Defendant argues that section 4019, subdivision (h) treats similarly situated prisoners differently, that there is no legitimate state interest behind this disparity, and

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[2] Section 4019, subdivision (h) states: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law."

even if there were, this subsection would not reasonably promote that interest as applied. In support of this assertion, defendant relies on *In re Kapperman* (1974) 11 Cal.3d 542 (*Kapperman*), which awarded presentence credit for actual time spent in custody. The court in *Kapperman* stated that there was no legitimate public purpose for providing presentence credit to some, but not all prison inmates, which violated the equal protection laws. (*Id.* at p. 547.) Here, unlike *Kapperman*, the issue is conduct credits, not actual credits. Conduct credits must be earned by a defendant, whereas custody credits are constitutionally required and awarded automatically on the basis of time served. (*Brown, supra*, 54 Cal.4th at p. 321.)

Rajanayagam, supra, 211 Cal.App.4th 42 is directly on point and is dispositive of the issue on appeal. In *Rajanayagam*, the court explored the legislative history of section 4019, subdivision (h), and concluded that legitimate state interests do, in fact, exist. (*Rajanayagam, supra*, 211 Cal.App.4th at p. 55.) The amendment to section 4019 arose as part of the Realignment Act under Assembly Bill No. 109 (2011-2012 Reg. Sess., § 482.) (*Rajanayagam, supra*, 211 Cal.App.4th at pp. 49-56.) "Section 17.5, subdivision (a)(7), puts it succinctly: 'The purpose of justice reinvestment is to manage and allocate criminal justice populations more *cost-effectively*, generating savings that can be reinvested in evidence-based strategies that increase public safety while holding offenders accountable.' " (*Rajanayagam, supra*, 211 Cal.App.4th at p. 55.)

The *Rajanayagam* court held that section 4019, subdivision (h), which awards fewer conduct credits to those who committed their offenses prior to October 1, 2011, than those who offended after *does* bear a rational relationship to cost savings and public safety. (*Rajanayagam, supra*, 211 Cal.App.4th at p. 55.) "[I]n choosing October 1, 2011, as the effective date of Assembly Bill No. 109, the Legislature took a measured approach and balanced the goal of cost savings against public safety. The effective date was a legislative determination that its stated goal of reducing corrections costs was best served by granting enhanced conduct credits to those defendants who committed their offenses on or after October 1, 2011. To be sure, awarding enhanced conduct credits to everyone in local confinement would have certainly resulted in greater cost savings than

awarding enhanced conduct credits to only those defendants who commit an offense on or after the amendment's effective date. But that is not the approach the Legislature chose in balancing public safety against cost savings. [Citation.] Under the very deferential rational relationship test, we will not second-guess the Legislature and conclude its stated purpose is better served by increasing the group of defendants who are entitled to enhanced conduct credits when the Legislature has determined the fiscal crisis is best ameliorated by awarding enhanced conduct credit to only those defendants who committed their offenses on or after October 1, 2011." (*Rajanayagam*, *supra*, 211 Cal.App.4th at pp. 55-56.)

Finally, defendant argues that his conduct credits should be calculated under a hybrid of both statutes because his custody time straddles the effective dates of former and present section 4019. Defendant claims that to read the first sentence of subdivision (h) as precluding a hybrid calculation would render the second sentence meaningless, since it would not have been possible to earn days in presentence confinement for an offense that had not yet been committed. We disagree. "The second sentence does not extend the enhanced rate to any other group, but merely specifies the rate at which all others are to earn conduct credits. So read, the sentence is not meaningless. . . ." (*People v. Ellis* (2012) 207 Cal.App.4th 1546, 1553.) "To isolate the verbiage of the second sentence would defy the Legislature's clear intent in subdivision (h)'s first sentence and contradict well-settled principles of statutory construction. In conclusion, we find the enhanced conduct credit provision applies *only* to those defendants who committed their crimes on or after October 1, 2011." (*Rajanayagam*, *supra*, 211 Cal.App.4th at p. 52; Realignment Act under Assembly Bill No. 109, Stats. 2011, ch. 15, § 482 (2011-2012 Reg. Sess.).)

III. DISPOSITION

Judgment is affirmed.

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REARDON, ACTING P. J.

We concur:

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RIVERA, J.

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HUMES, J.