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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CARNELL RAMON TAYLOR,

Defendant and Appellant.

A140367

(San Francisco County
Super. Ct. No. 216775)

Carnell Ramon Taylor appeals from an order revoking his probation and sentencing him to prison based on his statement to police he had fired a gun at a shooting range at some point during a period of time that included dates within his term of probation. He contends he was not given adequate notice he faced a revocation of probation based on his gun possession at the shooting range, and further argues the evidence was insufficient to show he possessed a gun within the probationary period. We agree and reverse the order.

BACKGROUND

On December 9, 2011, appellant pleaded guilty to a single count of inflicting corporal injury on a spouse or cohabitant under Penal Code section 273.5, subdivision (a).¹ On January 9, 2012, he was placed on felony probation for a three-year period with conditions that included a requirement he obey all laws.

¹ Further statutory references are to the Penal Code.

On February 1, 2013, the district attorney filed a felony complaint in case No. 13002971 charging appellant with murder (§ 187), shooting at an occupied motor vehicle (§ 246), unlawfully possessing a firearm having been previously convicted of a felony (§ 29800, subd. (a)(1)), and unlawfully possessing a firearm having been previously convicted of a crime of domestic violence (§ 29805), along with various enhancement allegations. The complaint alleged each crime had occurred on January 19, 2013.²

On February 6, 2013, the People filed a motion to revoke appellant's probation in the instant case based on the new felony charges. The motion recited appellant's history on probation and stated, "The undersigned petitioner recommends that action be taken in this matter for violation of probation in that: [¶] On 1-30-13, the defendant was arrested for violation of Sections 187(a) PC/F (Murder), 246 PC/F (Discharge of Firearm OCC Vehicle), 29800(a)(1) PC/F (Possession of a Firearm by Felon) and 29805 PC/F (Person Prohibited from Possessing a Firearm), Court #13002971, pending disposition as of 2-5-13 in Dept. 11."³

The motion to revoke probation was heard concurrently with the trial in the murder case. The evidence presented at trial included a recording of a police interrogation of appellant conducted on January 31, 2013, in which he denied any role in the shooting on which the charges were based. Gunshot residue had been found on a jacket linked to appellant, and he was asked a series of questions regarding the last time he had fired a gun. Appellant told police he had fired a rented gun at a shooting range "I think about, like, a year ago, year and a half ago. Shit, I'd say, like, around there, like around there." This was the only evidence presented regarding the "shooting range" incident.

² Having previously granted appellant's motion to augment the record to include a copy of the felony complaint in case No. 13002971, we deny as moot his concurrent request to take judicial notice of the document.

³ Probation had been revoked and reinstated in May 2012 after appellant admitted committing an auto burglary. It was revoked administratively in October 2012 based on appellant's failure to appear at a hearing.

The jury acquitted appellant of all charges in the murder case. Turning to the probation violation, the court asked counsel about appellant's admission to police he had fired a gun at a shooting range. The district attorney stated that would be a violation of probation because appellant had been prohibited from possessing firearms since a felony conviction he sustained in 2008. Defense counsel objected that the motion to revoke probation was based on the charges in the murder case, not the shooting range incident. The district attorney responded the motion had put appellant on notice the "totality of the evidence presented in this case" could be used to revoke probation. The court revoked probation based on the shooting range incident.⁴

Appellant filed a motion to set aside the order revoking probation, noting the sole evidence of the violation was appellant's statement on January 31, 2013, he had shot a gun at a shooting range "a year ago, year and a half ago," a period that largely predated the probation order entered on January 9, 2012. The court rejected this argument, concluding appellant's possession of a gun at a shooting range could, based on his admission, "be reasonably viewed to be within the timeframe of the probation in this case." The court specifically stated the revocation was based on the shooting range incident alone, and not on a finding appellant had committed murder or the other charges of which he had been acquitted. (See *In re Coughlin* (1976) 16 Cal.3d 52, 58-59 [fact of acquittal establishes only that the jury entertained a reasonable doubt and does not preclude a probation violation under a preponderance of the evidence standard based on the charged conduct].) It sentenced appellant to prison for the four-year upper term on the underlying conviction of section 273.5, subdivision (a).

DISCUSSION

Appellant argues he was denied due process because he was not given adequate notice the shooting range incident could be used as a basis for revoking probation. He

⁴ The court initially found appellant had also violated a stay-away order in the underlying probation matter, but later concluded the evidence of a stay-away order was insufficient and withdrew its finding probation had been violated on that basis. That aspect of the court's order is not at issue in this appeal.

alternatively claims the evidence was insufficient to show the shooting range incident occurred within the probationary period and thus amounted to a violation. We agree with both points.

Although a probationer facing revocation is not entitled to the full panoply of rights due a criminal defendant, he is entitled to due process including written notice of the claimed violation, the disclosure of the evidence against him, and an opportunity to be heard. (*Black v. Romano* (1985) 471 U.S. 606, 611-612; *People v. Vickers* (1972) 8 Cal.3d 451, 459; *People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1295.) As a mixed question of law and fact implicating constitutional rights, we review de novo the question of whether the notice of a probation violation was sufficient to comport with due process. (See *People v. Cromer* (2001) 24 Cal.4th 889, 894-904.)

The motion to revoke appellant's probation was based solely on the murder count and other charges arising from the shooting on January 19, 2013. It did not provide notice a revocation could be based on the separate shooting range incident. No authority has been cited to support the district attorney's suggestion at the hearing that appellant was on notice a revocation could be based on anything within "the universe of evidence" produced at the trial in the murder case. Such a rule would be unfair in light of the broad and unanticipated range of evidence that might be admissible in a criminal trial.

The People suggest appellant was placed on notice his possession of a firearm at any time could constitute a probation violation because the petition to revoke probation was based in part on the firearm possession charges in counts three and four of case No. 13002971, and the jury instructions on those charges did not specify the date on which the crimes were alleged to have been committed. We are not persuaded. The complaint on which appellant was held to answer alleged those counts occurred on January 19, 2013. Moreover, in discussing the need for a unanimity instruction based on evidence appellant had possessed a firearm at a different location on the same day of the shooting, the court indicated the firearm counts were "part and parcel of the timing of this murder case" and it would not entertain argument on the theory appellant was guilty of firearm possession at a different time. The court also stated it viewed the petition to

revoke probation “in the same theoretical framework.” The firearm possession charges did not provide notice of the shooting range incident as a possible ground for violating probation because those possession charges were based solely on appellant’s alleged possession of a gun at the time of the shooting on January 19, 2013.

In reaching this conclusion, we are guided by the decision in *People v. Mosley* (1988) 198 Cal.App.3d 1167, 1169-1170 (*Mosley*), in which a petition to revoke probation was based solely on a rape charge of which the defendant was ultimately acquitted. During the trial on the new rape charge, which was held concurrently with the hearing on the probation violation, the complaining witness testified she had seen the defendant drinking Thunderbird wine and an investigating officer testified he had found a bottle of Thunderbird in the area of the alleged attack. (*Id.* at p. 1172.) After ascertaining the contents of the probation order, the trial court in that case found the defendant had violated a probation condition requiring him to abstain from consuming alcohol. (*Id.* at pp. 1172-1173.) The Court of Appeal reversed, concluding the defendant was deprived of due process because he received no notice his probation could be revoked based on alcohol consumption. (*Id.* at p. 1174.)

“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. . . . 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.” (*Mosley, supra*, 198 Cal.App.3d at p. 1174.) In this case, similarly, the issue of using the shooting range incident as the basis for the probation violation first arose after the close of evidence at trial. No continuance was offered to allow appellant to address the newly alleged violation.

It does not matter that evidence of the shooting range incident came from appellant’s own words during a police interrogation. His use of a gun at a shooting

range, though apparently unlawful in light of his 2008 felony conviction, could only be used to revoke probation if it violated a condition of that probation—that is, if it occurred while appellant was actually on probation. Appellant’s statement, made on January 31, 2013, was that he had fired a gun at a shooting range “a year, year and a half ago.” A year ago from January 31, 2013, was January 31, 2012. A year and a half ago from January 31, 2013, was July 31, 2011, almost six months before appellant was placed on probation on this case, on January 9, 2012. Had appellant known his probation could be violated for the shooting range incident, he might have been able to narrow the time frame and show it did not take place within the probationary period. Absent advance notice probation could be revoked based on the shooting range incident, appellant had no incentive to more precisely pinpoint the date, particularly during a criminal trial at which he had a constitutional right not to testify.

Apart from the notice issue, substantial evidence did not support the probation violation, which required the People to prove, by a preponderance of the evidence, that appellant fired a gun at a shooting range within the probationary period. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447 [burden of proof at probation revocation hearing is preponderance of the evidence].) As noted, appellant was not placed on probation until January 9, 2012. The only evidence supporting the probation violation was his statement, on January 31, 2013, that he had fired a gun at a shooting range “a year, year and a half ago.” Taken literally, this means appellant visited the shooting range sometime between July 31, 2011, and January 31, 2012. Only 22 days of this six-month period in which the shooting range incident might have occurred actually fall within the probationary period.⁵

A trial court’s decision to revoke probation is reviewed for abuse of discretion, with its factual findings reviewed for substantial evidence. (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.) “Evidence is substantial only if it ‘ ‘reasonably inspires confidence and is of ‘solid value.’ ” ’ ” (*People v. Cluff* (2001) 87 Cal.App.4th 991,

⁵ Appellant was initially ordered to serve 61 days in local custody as a condition of probation and was given 61 days of credits, so presumably he was out of custody as of January 9, 2012, the date he was placed on probation.

1002.) “By definition, ‘substantial evidence’ requires *evidence* and not mere speculation. In any given case, one ‘may *speculate* about any number of scenarios that may have occurred A reasonable inference, however, “may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [¶] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.” ’ [Citations.]” (*Ibid.*)

Given the time range provided by appellant to the police, the most we can say is it is *possible* the shooting range incident occurred within the probationary period. This does not suffice for substantial evidence and the order revoking probation cannot stand.

DISPOSITION

The judgment (order revoking probation and sentencing appellant to prison) is reversed. The case is remanded for further proceedings as may be appropriate in light of our decision.

NEEDHAM, J.

We concur.

SIMONS, Act. P. J.

BRUINIERS, J.