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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. MARTIN GOVEA, Defendant and Appellant.	A141062 (Alameda County Super. Ct. No. H50113)

Martin Govea appeals from an order revoking his probation for possessing a forged check and sentencing him to two years in jail followed by a suspended one-year term of mandatory supervision. (Pen. Code, §§ 475, subd. (a), 1170, subd. (h).)[1] He contends (1) he was deprived of due process because he was not given adequate notice of the ground on which his probation was revoked, (2) the evidence did not support the trial court's determination he had violated probation, and (3) a $200 parole revocation fine imposed by the court under section 1202.45 was not authorized because appellant's sentence does not include a period of parole. We modify the judgment to strike the fine but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

On January 7, 2011, appellant was arrested after he tried to pass a fictitious check at a liquor store. He was charged by felony complaint with possessing a forged check,

[1] Further statutory references are to the Penal Code unless otherwise indicated.

along with allegations he had previously suffered prior convictions and had served two prior prison terms. (§§ 475, subd. (a), 667.5, subd. (b).) On February 7, 2011, appellant pleaded guilty to possessing a forged check in exchange for an initial grant of probation and dismissal of the recidivist allegations. The court suspended the imposition of sentence and placed appellant on probation for five years.

In October 2011, appellant admitted a probation violation based on his possession of drugs and was sent to jail for a 90-day period.

On June 4, 2013, the district attorney filed a petition to revoke appellant's probation on the following ground: "The defendant has violated the terms and conditions of probation in that he/she committed a violation of [Penal Code section 245, subdivision (a)(1)], on or about 06/02/13, in the County of Alameda, as set forth in the Declaration of Probable Cause, a copy of which has been attached hereto and incorporated by reference." (Boldface omitted.) Attached to the petition was a declaration of probable cause for a warrantless arrest, which was signed by Officer Eriksen of the Newark Police Department and listed felony charges/violations of aggravated assault under section 245, subdivision (a)(1), criminal threats under section 422, and battery of a spouse or cohabitant under section 273.5, subdivision (a).

According to the recitation of facts in the declaration of probable cause attached to the petition to revoke probation, Officer Eriksen was dispatched to a home in Newark after the victim (later identified as Mareia Oliveira) reported appellant had choked her, punched her, and thrown a knife at her. Oliveira reported that she and appellant had been in a dating relationship for over five years; that appellant was staying at her house as a guest though their relationship had ended; that appellant, who was drunk, came into Oliveira's bedroom at about 11:30 in the morning and tried to strangle her; that Oliveira left with her daughter but later returned to find appellant drinking alcohol while cooking in the kitchen; that appellant threw cherries and a kitchen knife at Oliveira; that Oliveira called out to her roommate to call the police; that appellant retrieved the knife and held it to Oliveira's neck with one hand while using his other hand to strangle her; and that appellant said, "I'll kill you, bitch."

The trial court summarily revoked probation and set the matter for a contested hearing. At the hearing, Officer Eriksen testified that he had responded to the call and had spoken with Oliveira, who related the facts set forth above. He also spoke to Rebecca Gould, who was present in the home and said she had seen appellant holding a steak knife in his hand while approaching Oliveira. Eriksen recovered a knife from the kitchen floor and detained appellant about a block away from the house.

Oliveira testified that that on the day the police came to her house, she had been home with appellant, whom she loved and had lived with for five years. At about 3:30 p.m., as she was preparing to go to the store, he pushed her to prevent her from leaving the house. They continued to argue outside and appellant told her, "I'm not leaving. You and I are going to talk." He threw a cherry plum at her, but it did not hit her. Oliveira denied telling the police appellant had choked her, thrown a knife at her or threatened her, and claimed he "never laid a hand on me the whole time we've been together." She explained she had called the police because she suspected appellant had taken her laptop computer and she wanted to get it back, but she also testified she had not called the police and did not know who had.

Rebecca Gould testified that on the date of the incident, Oliveira was living in her home and appellant, whom she had met a couple of times, was present. Appellant and Oliveira had an argument because appellant wanted Oliveira to drive him home, and at some point during the argument Oliveira yelled at Gould to call the police because appellant had stolen her laptop. Gould thought the situation was "out of hand," and heard Oliveira on the phone screaming to the police department. Gould saw appellant push Oliveira backward onto the couch because she was "very aggressive towards him and she's talking loudly in his face." She did not see appellant with a weapon of any kind.

The trial court found appellant "violated his probation by committing a violation of [section] 422, threats and by assaultive conduct against his ex-girlfriend." It explained that it found Officer Eriksen's testimony to be credible, and that even under the "attack light" version of events described by Oliveira during her testimony, appellant had pushed her. The court found by a preponderance of the evidence that what actually happened

was closer to what Oliveira and Gould had told the officer on the day of the incident than what they had testified to in court. The court noted that Gould as well as Oliveira had changed her story, and this made Gould's testimony at the hearing less credible: "I think the cop was getting the true story from [Gould] on that day."

II. DISCUSSION

A. Notice; Violation of Due Process

Appellant argues he was denied due process because the petition to revoke his probation alleged he had committed an aggravated assault under section 245, subdivision (a)(1), but the court found he had made a criminal threat under section 422. We disagree.[2]

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, 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 (*Quarterman*).) 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.)

We begin our analysis by noting appellant is mistaken about the basis of the trial court's ruling. In addition to its finding that appellant made a criminal threat under section 422, the court found he had committed "assaultive conduct against his ex-girlfriend." The petition to revoke probation clearly alleged appellant had violated section 245, subdivision (a)(1), and this allegation placed appellant on notice his probation could be violated if he were found to have committed assault by a deadly weapon or by means of force likely to produce great bodily injury, such as by choking the

[2] The People claim appellant has forfeited this contention by failing to object in the trial court. We review the substance of appellant's argument to forestall his claim of ineffective assistance of counsel. (*People v. Scaffidi* (1992) 11 Cal.App.4th 145, 151.)

victim or threatening her with a knife. It also placed appellant on notice his probation could be violated if he committed the lesser included offense of simple assault, such as by pushing Oliveira down on the couch. (See *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1237-1238 [accusatory pleading provides notice of specific offense alleged, as well as necessarily included offenses].) Appellant had sufficient notice his probation could be violated if the court found he had assaulted Oliveira and any defect in the notice regarding a violation based on a criminal threat was harmless beyond a reasonable doubt. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1161 [introduction of preliminary hearing transcript in violation of defendant's confrontation rights under federal Constitution was harmless beyond a reasonable doubt because evidence established defendant had violated his probation in other respects that were not affected by the error].)

Even if we were to ignore the trial court's finding that appellant committed "assaultive conduct" as alleged, we do not agree the petition failed to provide appellant with notice his probation would be revoked if he were found to have committed a criminal threat under section 422. The petition to revoke probation incorporated by reference a declaration of probable cause prepared by the arresting officer that cited section 422 and described a threatening statement: "I'll kill you, bitch." This was sufficient to place appellant on notice his probation could be violated based on a criminal threat.

A different result is not required by *People v. Mosley* (1988) 198 Cal.App.3d 1167, 1169-1170 (*Mosley*), on which appellant relies. In *Mosley*, the petition to revoke the defendant's probation was based solely on a rape charge of which the defendant was ultimately acquitted. During the trial on the 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 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, by contrast, the criminal threat was not the sole basis for the order revoking probation, because the court also found appellant had committed assaultive conduct as specifically alleged in the petition itself. But even more importantly, probation in this case was not violated on a ground totally unrelated to the facts alleged in the petition to revoke probation. The petition and accompanying declaration of probable cause in this case outlined in great detail the facts on which the prosecution was relying, and, unlike the defendant in *Mosley*, appellant cannot claim he would not have understood the need to defend against the allegation he had threatened to kill Oliveira.

B. Substantial Evidence of Criminal Threat

Appellant argues the order revoking his probation and sentencing him to prison must be reversed because the court's finding he committed a criminal threat was not supported by the evidence. We disagree.[3]

In a proceeding to revoke a defendant's probation, the People have the burden of showing the alleged violation by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 441; *Quarterman*, *supra*, 202 Cal.App.4th at p. 1292.) 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, 1002.)

Officer Eriksen testified that when he spoke with Oliveira on the day of the incident, she told him appellant had stated "I'll kill you, bitch" while holding a knife. Although Oliveira denied making this statement when she testified at the probation revocation hearing, the court could consider her prior inconsistent statement to Eriksen

[3] Although appellant does not argue the evidence was insufficient to show an assault, and although probation may be revoked based on a single violation, appellant argues the finding of a terrorist threat was prejudicial because absent the finding, there was a reasonable probability probation would have been reinstated.

for its truth as well as for impeachment purposes. (Evid. Code, § 1235; *People v. Brown* (1995) 35 Cal.App.4th 1585, 1596-1597.) A statement threatening the victim with death or great bodily injury is sufficient to constitute a criminal threat under section 422. (*People v. Butler* (2000) 85 Cal.App.4th 745, 752.)

Appellant argues he could not have committed a criminal threat because section 422 requires a specific intent that the statement be taken as a threat and the evidence shows he was too intoxicated to harbor that intent. (§ 29.4, subd. (b) [intoxication admissible on issue of whether defendant actually formed a required specific intent or mental state]; *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1136 (*Ricky T.*) [elements of section 422, including specific intent that statement be taken as a threat].) This was a factual question for the trial court, and we find no fault in the court's resolution of the issue when Gould, a witness generally favorable to appellant, testified that although appellant was drunk during the incident, "he was doing very well and holding up his end of the conversation." (See *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 97.)

Appellant also complains the evidence of a criminal threat was insufficient because Oliveira never experienced sustained fear for her safety, another element of section 422. (See *Ricky T.*, *supra*, 87 Cal.App.4th at p. 1136.) We disagree. "Sustained fear" has both an objective and a subjective component: it "must have been reasonable, and it must have been real." (*People v. Ortiz* (2002) 101 Cal.App.4th 410, 417.) Fear is "sustained" when it lasts for "a period of time that extends beyond what is momentary, fleeting and transitory." (*People v. Allen* (1995) 33 Cal.App.4th 1149, 1156.) Here, a reasonable person would be in sustained fear if someone threatened her with a knife and said he would kill her. And, although Oliveira told a different story at the probation revocation hearing, Officer Eriksen found her to be "upset, shaken up" when he interviewed her. This testimony supplies substantial evidence that Oliveira was subjectively afraid for a sustained period, even if she later changed her story to protect appellant.

C. Parole Revocation Fine

The trial court imposed and stayed a $200 parole revocation fine under section 1202.45, subdivision (a), equal to the amount of the restitution fine it imposed under section 1202.4, subdivision (b). As appellant notes, he was not subject to a parole revocation fine because his sentence includes a period of postrelease community supervision by the county probation department rather than a period of parole. (*People v. Cruz* (2012) 207 Cal.App.4th 664, 672 & fn. 6.)

Effective January 1, 2013, section 1202.45 was amended to add subdivision (b), which established an equivalent fine for defendants whose sentence includes a term of local supervision rather than parole. (Stats. 2012, ch. 762, § 1.)[4] However, this provision does not apply retroactively to appellant's 2011 offense. (See *People v. Callejas* (2000) 85 Cal.App.4th 667, 678 [ex post facto principles preclude imposition of parole revocation fine under § 1202.45 when the defendant committed the underlying crime before the enactment of the statute authorizing the fine].) We will direct the trial court to strike the fine, rather than modifying it to reflect imposition under section 1202.45, subdivision (b), as the parties suggest.

DISPOSITION

The $200 parole revocation fine imposed under section 1202.45 is stricken. The order revoking probation and imposing sentence is otherwise affirmed.

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[4] Section 1202.45, subdivision (b) provides: "In every case where a person is convicted of a crime and is subject to either postrelease community supervision under Section 3451 or mandatory supervision under subparagraph (B) of paragraph (5) of subdivision (h) of Section 1170, the court shall, at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional postrelease community supervision revocation restitution fine or mandatory supervision revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4, that may be collected by the agency designated pursuant to subdivision (b) of Section 2085.5 by the board of supervisors of the county in which the prisoner is incarcerated."

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.