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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

BRITTON FRANKLIN MODE,

Defendant and Appellant.

A142666

(Del Norte County  
Super. Ct. No. PR-CS-14-0000024)

Following a postrelease community supervision (PRCS) revocation hearing, defendant Britton Franklin Mode was found in violation of the conditions of his PRCS.<sup>1</sup> Defendant contends the trial court abused its discretion because it failed to grant a continuance to allow him to secure evidence which would show his violations were excusable. We disagree and affirm.

**I. BACKGROUND**

On January 2, 2013, defendant was released from custody on PRCS. As a condition of his release, defendant was required to check in with the probation department every month. The probation department maintains records of both physical and telephone contacts with probationers. Defendant testified he was in constant contact

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<sup>1</sup> PRCS applies to certain low-level offenders who are released from prison on or after October 1, 2011, or whose sentences have been deemed served pursuant to Penal Code section 2900.5 after serving a prison term for a felony. (See Pen. Code, § 3451.) “Although monitored by county probation officers, a defendant on PRCS is not on probation and PRCS is similar to parole.” (*People v. Jones* (2014) 231 Cal.App.4th 1257, 1266.)

by phone, but the probation department had no record of defendant checking in for a 10-month period beginning in October 2013.

Defendant's probation officer testified defendant was ordered to "surrender" in November 2013, and after he failed to do so, his PRCS status was revoked.<sup>2</sup> The probation department then filed a petition to revoke on January 22, 2014.<sup>3</sup> On April 28, 2014, defendant was arrested during a traffic stop based on an outstanding warrant and was remanded into custody. When defendant was remanded to serve the remainder of his PRCS sanction, the January 22 petition to revoke was dismissed, and defendant's PRCS status reinstated. Defendant was ordered to contact the probation department upon release from custody on May 6, 2014, but he failed to do so.

In early May 2014, defendant's brother allegedly threatened defendant with a knife at the Fort Dick Market. Shortly thereafter, defendant absconded from the state. He left a message with the district attorney's office explaining he would be unable to appear at his postrelease hearing scheduled for May 8, 2014, based on concerns for his safety. After defendant failed to appear, the court issued a no bail warrant.

Defendant testified he contacted Sergeant Grant Henderson at least eight times after the incident with his brother. Though defendant claimed he believed he was no longer on PRCS, he testified he also called the probation department once or twice during this period. The probation department had no record of any contact from defendant, much less any contact regarding defendant's concern for his safety. Defendant remained out of the state until July 7, 2014. He was arrested soon after he returned, presumably on an outstanding warrant.

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<sup>2</sup> It is not clear from the record why and to whom defendant was required to surrender.

<sup>3</sup> As noted above, though the probation officer testified that defendant's PRCS status was revoked in November 2013, and thereafter in January 2014, a petition to revoke was filed, Penal Code section 3455, subdivision (a) provides, "the supervising county agency shall petition the court pursuant to Section 1203.2 to revoke, modify, or terminate postrelease community supervision." There is no provision for automatic revocation prior to the filing of a petition.

On July 14, 2014, the probation department again filed a petition for revocation of PRCS pursuant to Penal Code section 3455. It alleged defendant violated the conditions of his PRCS by (1) failing to check in with his supervising probation officer from December 2013 to April 2014; (2) failing to check in when he was released from custody on May 6, 2014; and (3) failing to check in from May to July 2014. Defendant denied all allegations.

In preparation for the July 29 hearing, defendant served Sergeant Henderson with a subpoena requiring him to testify and bring the surveillance video from the Fort Dick Market incident. At trial, defendant argued Sergeant Henderson and the surveillance video would corroborate his claim that he was threatened by his brother and afraid for his life. Defendant further argued this fear justified his violation of the PRCS terms, as well as his choice to leave the state.

Sergeant Henderson failed to appear with the video. After hearing arguments from both sides about the importance of the evidence, the trial court decided to proceed with the hearing without the surveillance video or Sergeant Henderson's testimony. The trial court found defendant violated specific terms of his PRCS alleged in the petition, and sentenced him to serve a 180-day sanction.<sup>4</sup>

## **II. DISCUSSION**

Defendant contends the trial court abused its discretion in failing to grant a continuance to allow him to secure the presence of Sergeant Henderson and acquire the surveillance video.<sup>5</sup> We disagree.

Defendant argues a continuance was necessary because the surveillance video and Sergeant Henderson's testimony would have corroborated defendant's claim that he was

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<sup>4</sup> It appears from the record that defendant's PRCS was never revoked. Rather, it was modified and reinstated. Defendant was sentenced to serve a 180-day sanction.

<sup>5</sup> Defense counsel did not formally request a continuance at trial. But, defense counsel's insistence the video and Sergeant Henderson's testimony were necessary to mount a defense may be reasonably construed as such a request.

afraid for his life. Furthermore, defendant argues this evidence would have shown compliance with his PRCS conditions was “impossible.”

A continuance in a criminal case may be granted only for good cause. (Pen. Code, § 1050, subd. (e).) Section 1050 also applies to probation revocation proceedings. (*People v. Johnson* (2013) 218 Cal.App.4th 938, 942.) The granting or denial of a continuance in the midst of trial “ ‘rests within the sound discretion of the trial judge.’ ” (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1548.) The trial court must consider not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court, and above all, whether substantial justice will be accomplished or defeated by granting the continuance. (*People v. Doolin* (2009) 45 Cal.4th 390, 450.) Absent a showing of abuse of discretion and prejudice, the trial court’s denial does not warrant reversal. (*Ibid.*)

Here, we need not decide the relevance of Sergeant Henderson’s testimony or the surveillance video. Even if the evidence would have corroborated defendant’s claim that he was justifiably concerned for his safety, it would not have affected the disposition of the petition for revocation. Accordingly, we find the trial court did not abuse its discretion in declining to grant a continuance.

As an initial matter, defendant’s fear for his safety does not explain why he failed to check in with the probation department before he was allegedly assaulted by his brother. Defendant last reported to the probation department in October 2013, seven months before the incident at the Fort Dick Market. Defendant has no reasonable excuse for failing to report during this seven-month period.

In his opening brief, defendant implies that because he was not on PRCS release from November 2013 to April 2014, he could not have violated any PRCS conditions during those months. The trial court rejected this argument and so do we. “ ‘[A]ctual revocation of probation cannot occur until the probationer has been afforded . . . due process hearing rights.’ ” (*People v. Hunter* (2006) 140 Cal.App.4th 1147, 1154, italics omitted.) Thus, probation conditions remain in effect until a formal revocation hearing is

held. (*Id.* at pp. 1154–1155.) Here, defendant’s PRCS status was allegedly revoked when he failed to “surrender” in November 2013. And after defendant’s April 28, 2014 arrest, his PRCS status was reinstated. No formal revocation hearing was held from November 2013 to April 2014. As a result, his PRCS conditions, including the requirement he regularly contact the probation department, remained in effect during this period.

Additionally, it is entirely unclear how the incident at the Fort Dick Market and defendant’s subsequent departure from the state prevented defendant from making telephone contact with the probation department during and after May 2014. There is no indication defendant felt threatened by anyone within the probation department, or that he feared the probation department would reveal his location to others wishing him harm.

Though defendant claimed he was in constant contact with the probation department throughout his time on PRCS, the trial court found this testimony not credible. The trial court explained it was conceivable for the probation department to fail to record a single phone call, but the notion defendant left numerous messages and each of those were somehow lost was implausible. This reasoning is sound, and in any event, we must defer to the trial court’s credibility determinations. (*Lenk v. Total-Western, Inc.* (2001) 89 Cal.App.4th 959, 968.)

In sum, we find no abuse of discretion. Even if we assume Sergeant Henderson’s testimony and the surveillance tape prove what defendant contends, it does not excuse defendant’s failure to check in, at least by telephone contact. For similar reasons, we also reject defendant’s contention that the denial of a continuance resulted in a violation of his due process rights and prejudice warranting reversal. As defendant’s own authority holds, the denial of a continuance should be affirmed where there is no indication the continuance would be useful. (*People v. Mungia* (2008) 44 Cal.4th 1101, 1118–1119.)

### **III. DISPOSITION**

We affirm the trial court’s denial of the continuance and the sanction imposed on defendant.

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Margulies, J.

We concur:

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Humes, P.J.

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Dondero, J.