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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re JOE S., a Person Coming Under the
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

JOE S.,

Defendant and Appellant.

A145622

(Contra Costa County
Super. Ct. No. J0601204)

In August 2009, appellant Joe S. (then 15 years old) was committed to the Department of Juvenile Justice (DJJ) after the juvenile court sustained an allegation that he committed first degree robbery of an inhabited dwelling. He was released in May 2012.

In June 2015, Joe (by then, 21 years old) was ordered returned to DJJ for 11 months, an order entered 10 days after the juvenile court found he had violated probation by possessing an illegal substance (MDMA/ecstasy) and failing to notify his probation officer within 24 hours of police contact.

Joe appeals, asserting nine challenges to the court’s orders sustaining the probation violations and returning him to DJJ. We conclude that two claimed errors are meritorious: the DJJ commitment form must be corrected to conform to the court’s order

on the record at the dispositional hearing, and the probation conditions imposed by the court must be stricken. In all other regards, the orders are affirmed.

BACKGROUND

Joe's Commitment Offense and First Probation Violation

In 2009, the juvenile court sustained an allegation that Joe committed first degree robbery of an inhabited dwelling. As described in a probation report: “[Joe] was an active participant [in] an extremely violent home invasion which was sophisticated in nature. A group of 6 total participated, forcing their way into the home after the victim answered the door. After pulling all the phone lines out of the wall, they spent over an hour collecting valuables throughout the home, including securing the victim's ATM PIN number. A second victim, a young 16 year old boy who was showering at the time, was cut all over his body with no purpose or reason, and then the bloody knife was shown to his mother to terrorize her.” Joe was committed to the DJJ until May 2012, when he was released on probation.

In December 2014, a notice of probation violation alleged that Joe was discovered sleeping in the home of a cousin who was the subject of a no-contact order. Joe admitted the violation.

In its report and recommendation for disposition on that violation, the probation department reported that Joe had “a violent history, dating back to when he was very young, and has received intensive supervision since being released from DJJ in 2012. However, he has not incurred any new sustained criminal offenses, had made all Probation appointments he was directed to attend, and has always tested negative or ‘clean’ for illegal substances. Though he has tested negative, the undersigned has discovered through investigation that [Joe] is an active partier, including routine consumption of alcohol; the preceding is concerning to Probation as the minor has not made any serious efforts to work or address restitution for his most recent offense, but appears to find the preceding a priority instead.”

As to “placement/institutional screening,” the department noted: “Due to age, and the egregiousness of [Joe]'s original committing offense to the Department of Juvenile

Justice (DJJ), he does not appear appropriate for placement, YOTP [Youth Offender Treatment Program], or any other local and less restrictive options of rehabilitation. However, [Joe] is eligible for ‘return’ to DJJ for the above probation violation for a period of 3–12 months.”

Despite this, the probation department believed that home monitoring would assist Joe by providing him “more structure to help guide him in his choices of how he uses his spare time” and “help him to refrain from behaviors that cause him to drop from school enrollment and associate with his negative peer group.” It did not believe he needed to be returned to DJJ “at this point.” Accordingly, it recommended that Joe be continued on probation with 30 days of home supervision.

On January 2, 2015, the court ordered Joe placed on electronic monitoring at his mother’s home for 30 days, subject to standard terms and conditions of probation.

Probation Violation Allegations at Issue

On April 10, the probation department filed a notice of probation violation alleging that Joe: (1) failed to keep an appointment with his probation officer scheduled for that day; (2) was in possession of MDMA/ecstasy the day before; and (3) had been arrested the day before on charges of robbery and possession of a controlled substance.

At a contested probation violating hearing on May 4, the prosecutor sought to amend the notice of probation violation to add allegations that Joe: (4) failed to notify his probation officer within 24 hours of police contact; and (5) violated a no-contact order with a cousin. The court permitted the amendment.

The Evidence at the Contested Probation Violation Hearing

The contested probation violation hearing commenced on May 4 as scheduled, with the testimony of Deputy Probation Officer (DPO) R.J. Dutra. Dutra, who was Joe’s probation officer at the time of his arrest, testified that on April 9, he was contacted by the Fremont Police Department and learned they had made contact with Joe. He confirmed that he had an appointment with Joe scheduled for April 10 but Joe failed to appear. He did not have any contact with Joe until April 15, when he transported him from a detention facility in Alameda County to one in Contra Costa County. Dutra

testified that based on his “history in working detention, any time that you enter a facility, you’re allowed one phone call. You get to choose who you call.”

Fremont Police Detective Matthew Stone testified next. Stone had been a member of the Fremont Police Department since 2010 and began specializing in drug investigations as soon as he joined the force. As part of the police academy, he completed an eight-hour course on drugs.

In 2011, Stone became a member of the California Narcotics Officers’ Association (CNOA), which required that he complete a three-day Drug Abuse and Recognition (DAR) course in which he learned “the differences between drugs, how to look for them, how to identify them, how to test them and so forth.” When asked to detail what drug recognition included, he testified, “The recognition of different types of drugs so anywhere from marijuana to heroin, ecstasy, cocaine, methamphetamine. The different types that it comes in, different shapes, different substances. . . . [¶] So . . . just understanding and knowing the differences between the different types.” And as a member of CNOA, Stone attended an annual, weeklong conference that included a broad range of classes pertaining to drugs, “from street-level drugs to cartel-style drugs, methamphetamine to heroin, cocaine. [¶] . . . [O]ur focus is on almost every single drug that we can possibly study.”

In addition to classes and conferences, Stone was experienced in “live research,” “doing field sobriety exams, and testing of subjects on the street” He had been trained to identify a drug just by looking at it. When asked how many drug investigations he had done in the field, he responded, “Ballpark number, I would say 1 to 200. I mean, in between there, just myself on the street. But if we’re talking about the entire five years, I would say I’ve probably been involved in anywhere close to a thousand investigations.”

Stone estimated that he had been involved in 500 to 1,000 investigations concerning the seizure of drugs in the field. In all of those, he personally looked at the drugs. He was trained in the identification of ecstasy, and was personally involved in at least 10 investigations in the field involving ecstasy.

Turning specifically to Joe's drug possession arrest, Stone was the lead detective on an active case. At his direction, Officers Bobbit and Zemlock took Joe into custody and transported him to the police department. When Stone took custody of him at the department, Bobbit advised Stone that they had found drugs in Joe's possession. He gave Stone an evidence bag of Joe's belongings, which included a clear plastic baggie containing 10 capsules of an off-white powder.

Stone believed the capsules contained ecstasy, although the contents "could have been a few different things." He explained: "[E]cstasy comes in a few different forms. It can come mainly in a pill form, which is popular at raves or whatnot. Usually the dealer will put his own stamp on there so it makes [it] kind of identifiable based on that. [¶] However, what I received was ten capsules—ten clear capsule[s] with an off-white powder inside of each one with a consistent amount, which appeared to be a crushed-up pill or it could possibly have been cocaine, as well. So I was a little bit torn between why cocaine would be in a pill form. However, it wouldn't be the first time I have seen it either. However, I needed to test it to be clear."

Stone then conducted a NIK test on the substance.¹ As he described the NIK test, "It's a test that is commonly referred to as, like a field—a field test, which we don't use them in the field. We only test these at the station under a sterile environment. It's a way for the officer to get a read and a presumptive test on a drug." Stone received training on how to complete a NIK test both at the police academy and at the Fremont Police Department. He had conducted over 200 NIK tests. After doing a test, he "[a]lways" then had the substance tested by a lab. The lab test was never inconsistent with the NIK test results, nor had he ever had a false positive on a NIK test.

As to the capsules in Joe's possession, believing the substance was MDMA/ecstasy, Stone used the amphetamine MDMA NIK test. The test sample turned blue, indicating a "presumptive positive for MDMA amphetamines." When asked on

¹ Stone believed NIK "stands for narcotic information kit, but that's probably a trademark term, but whoever—whatever company makes them will always have the NI for narcotics identification."

cross-examination whether he knew by looking at it what the substance was, Stone responded, “Just by looking at it, it could be chalk.”

Stone identified pictures he had taken of the capsules in the plastic baggie that was found in Joe’s possession. He identified the pictures as fair and accurate representations of what he received from Officer Bobbit. The pictures were admitted into evidence.

That same day, Stone interviewed Joe after reading him his *Miranda* rights. Joe said he did not know what the capsules were, and that he had found them and was going to try to make money from them.

Stone also asked Joe about his cousin. Joe told the officer that he saw her approximately every other week.

The prosecutor then called her final witness, Fremont Police Officer Rick Zemlock. Zemlock testified that on April 9, 2015, he had searched Joe and found in his front pocket a clear baggie containing “press-lock pills” with a light-colored powder substance that the officer suspected to be MDMA. He identified photographs of the plastic bag and its capsules as the items he found in Joe’s pocket.

Joe was the sole witness in his defense. He testified that he spoke with DPO Dutra on April 9 and scheduled an appointment with him for the following day. He did not make it to the appointment, however, because he was detained on April 9 and had been in custody ever since. He had Dutra’s phone number in his cell phone but he did not have the phone with him in jail, nor did he know Dutra’s number. He had never missed a prior probation appointment.

The Court’s Ruling

The juvenile court ruled on the probation violation allegations as follows:

“[T]he allegation on number one is that he failed to keep an appointment with probation. And in this instance, I agree with defense counsel that it wouldn’t be fair to the minor since he was in custody or he can’t be at two places at once to hold to number one. So the court finds that number one has not been proven.

“With regard to number two, that he possessed ecstasy, the proof was presented by the officer that the substance received was MDMA. It’s presented through a NIK test and

also through a foundation regarding his experience, which was quite extensive. The defendant said he didn't know what it was. The court isn't required to believe that that is true. He did possess it. The court does find that there's been proof by a preponderance of the evidence that he possessed ecstasy, and he knew it was ecstasy.

"With regard to number three, the People have withdrawn number three. The court would find number three not to be true, in any event.

"With regard to number four—and number three was that he was arrested—number three was that he was arrested for new crimes. So it's really that he committed new crimes. That's the allegation for number three.

"Number four is that he failed to notify probation regarding his police contact within 24 hours. The court does find that to be true. The testimony was un rebutted that he did not do that. And I think it is fair in this instance because he apparently made no effort to contact the probation officer. That was Officer Dutra's testimony, as he hadn't heard from him from April the 9th to April the 15th. So even had he done [so] within five days, that would have been mitigating. The allegation is that he didn't do it within 24 hours, and that was certainly true.

"As to number five, the defense has put on a strong defense that the term that he have no contact with [his cousin] was not violated because that was . . . deleted in 2010 has merit, and so number five is not proven.

"So the defendant has been found in violation of his probation from allegations number two, possession of the ecstasy, and number four, failure to notify the probation of [his] police contact within 24 hours."

The Probation Department's Report and Recommendation

In a probation department report and recommendation prepared in advance of the dispositional hearing, DPO Dutra described the event that precipitated the probation violation notice: "On April 9, 2015, at approximately 5:30 p.m., Fremont Police contacted the undersigned, and reported that [Joe] was being investigated for an armed robbery in Fremont that occurred on March 10, 2015. Fremont Police further reported that [Joe] was one of the alleged gunmen, and that they had probable cause to arrest. The

undersigned informed Fremont Police [Joe] had a Probation appointment at the Richmond Probation office, and offered to coordinate the arrest. Fremont Police reported that they were conducting undercover surveillance of [Joe], and that they would inform me by the end of the evening if they had arrested him. Fremont Police later reported that [Joe] had been taken into custody for felony violations of PC 211 Robbery, and H&S 11377(a) Possession of a Controlled Substance. . . . On Monday April 13, 2015, the undersigned was notified that the new charges were going to be temporarily dropped, and that [Joe] would need to be arrested by Probation by the evening of 4/15/15.”

Dutra also summarized the prior treatment and preventative services provided to Joe as follows:

“[Joe]’s prior treatment and preventative services are extensive, and have progressed greatly since being adjudged a Ward of the Court in 2006 in response to a misdemeanor violation of PC 484/488 Petty Theft. [Joe] and two accomplices (both cousins), broke into a school through a skylight and removed property. [Joe] was placed on ankle monitor, and was ordered to complete work detail and attend school. [Joe] failed to follow the orders, was out of control at home, and absconded supervision, causing a warrant to be issued for his arrest.

“[Joe] later cut off his ankle monitor, and sustained a misdemeanor violation of PC 529.3, which subsequently resulted in his commitment to the OAYRF [Orin Allen Youth Rehabilitation Facility]. [Joe] completed his commitment to the OAYRF including treatment groups such as Anger Management, Gang Diversion, and Impact of Crime on Victims, Substance Abuse classes and Work Experience. Following a sustained felony violation of PC 487(c) Grand Theft Person, in 2008, [Joe] was committed to the OAYRF a second time, but immediately escaped.

“[Joe]’s whereabouts were unknown for months until his DJJ committing offense, which was a felony violation of PC 211/212.5(a) First Degree Robbery of an Inhabited Dwelling. He was then committed to DJJ where he received intensive treatment groups, and counseling from August of 2009 to June of 2012.

“Since release from DJJ, [Joe] has received intensive supervision from Probation, assistance with employment resources, assistance obtaining needed documents such as his HS Diploma and transcripts, and had continuous one on one counseling with the undersigned prior to his case being reassigned . . . in April.

“In January of 2015, [Joe] sustained a probation violation for violating a no contact order he had with a cousin and codefendant in his DJJ committing offense. [Joe] was discovered in the home of his cousin when the undersigned and a Department of Justice task force (CASE Team), executed a high risk search of the residence to investigate whether a firearm from a shooting was in the home. [Joe] was given 60 days of GPS Supervision for the preceding, offering added structure in the hope that he would obtain employment or go to school.”

Dutra informed the court that Joe, who was at a high risk to reoffend, was screened for return to the DJJ but “was not screened for any other institutions as he is not appropriate for any other programs offered at this time due to his age, history of violence/severity of delinquency.”

Dutra noted that the probation violation was Joe’s second in four months and that he was under investigation for multiple robberies occurring in the north and east bay areas. He was continuing to associate with family with whom he had committed past offenses. In light of this, Dutra recommended that Joe “be returned to DJJ for 12 months to provide him all of the rehabilitative services he needs. The undersigned is aware that [Joe] has not been found to have sustained a new W&I 602 offense at this point, but is asking for the length of 12 months to insure he is able to benefit from a full complement of rehabilitative services at DJJ.”

At a contested disposition hearing on June 9, defense counsel called Dutra to testify. Dutra confirmed that Joe was released from the DJJ on May 3, 2012. Since that time, he had made every appointment with probation (except for April 10) and had not tested positive for any narcotics. And he had no sustained criminal offenses during that time period. He had only the probation violation in December 2014 for violating a no-contact order with his cousin.

Dutra confirmed that while at DJJ, Joe graduated from high school and engaged in “all of the programming available.” He believed, however, that Joe lacked motivation to move forward with his life and that he needed “further treatment in . . . essentially his way of thinking, cognitive restructuring.” If Joe returned to DJJ, Dutra would like to see him involved in Project Impact, “an evidence-based gang programming that addresses . . . who you surround yourself with, gang activity, things of that nature. A lot to do with . . . independent thinking, giving you the skills to essentially separate yourself from that type of thought.” Dutra acknowledged that Joe already participated in Project Impact at DJJ, but he testified that “evidence-based treatment doesn’t always take on the first try.”

When asked about local options, Dutra answered, “Well, for his age and history and his sophistication level, there really are no local options, besides referring him to resources in West County. And, unfortunately, with the lack of motivation, he hasn’t . . . taken any of those resources historically prior to DJJ or after.”

At the conclusion of the contested hearing, the trial court ordered Joe returned to the DJJ for 11 months, 10 days.

A DJJ commitment order was entered on June 11, 2015.

Joe filed a timely notice of appeal.

DISCUSSION

1. There Was No Reversible Error as a Result of the Court’s Admission of the NIK Test Results

A. Background

As detailed above, at the probation violation hearing, Fremont Police Detective Stone testified about his experience with NIK tests and the results of the NIK test he performed on the contents of the capsules found on Joe. During his testimony, defense counsel objected, arguing that Stone was not qualified as a forensic expert, which would be necessary in order for him to testify about the reliability of the NIK test results. The court allowed Stone’s testimony about the test result, but sustained an objection to the prosecutor’s question about how reliable Stone believed the NIK test to be.

After the prosecutor rested, Joe’s counsel again argued that Stone’s testimony regarding the NIK test was inadmissible, prompting the following exchange:

“MR. McCARDLE [defense counsel]: I would like to move to exclude any evidence brought forward on the NIK presumptive test for lack of foundation based on *Kelly-Frye* standard for the general acceptance of scientific evidence.

“I believe the State is moving to sustain one of these charges against my client based on scientific evidence. They have failed to lay a foundation for it that is proper under the *Frye* standard.

“If the People have rested, there are no forensic laboratory tests coming to conclusively establish what they’re attempting to establish, and, therefore, that evidence should be stricken.”

“THE COURT: All right. Ms. Nop [the prosecutor], your response?”

“MS. NOP: . . . [Stone] did testify extensively to his experience in recognizing specifically MDMA and his experience with conducting the NIK test.

“Given that the standard here is by a preponderance of the evidence, I believe that the evidence—the evidence is appropriate and sufficient to sustain the probation violation.

“MR. McCARDLE: Your Honor, in response to that, this is a threshold question before we get to whether the evidence is—what level the evidence is at and whether it has been met. This evidence to be introduced at all is [of] a scientific nature, and under *Frye* a foundation has to be laid that it is generally accepted in the scientific community, or it is not to be considered by this court.

“So I believe Ms. Nop’s argument doesn’t really address the fundamental issue. It goes instead to the weight of the evidence, which is not before the court at this time.

“THE COURT: All right. Really, the basis of the objection is that the officer’s testimony about the NIK test was made without a sufficient foundation. Is that true, Mr. McCardle?”

“MR. McCARDLE: Well, foundation specifically because he’s testifying about scientific evidence. If the court recalls, we were going down the path where he may have

laid the foundation for expert testimony on narcotics dealings, but that detective is not a scientist.

“And, more importantly, the fact that this is a presumptive test, I believe, that we have no evidence, but I believe it’s because it is not generally accepted as something within the scientific community that can prove, for example, whether or not these capsules contained MDMA.”

Following that exchange, the court ruled as follows:

“The court did have sufficient foundation, it believes, that the NIK test was properly performed. The detective testified that the test—he had done the NIK test approximately 200 times. He had been trained in how to perform the test, and he had performed the test as his training required.

“And, in fact, going one step further, he said that—that the test had not produced any false-positives in that he was approximately—this is from my memory—but it was approximately 200-for-200 in its accuracy.

“So the objection as to the foundation for the presumptive test is overruled.”²

B. Analysis

Joe contends the juvenile court erred by denying his counsel’s motion to exclude the results of the NIK test because the prosecutor failed to satisfy the *Kelly* three-prong test for admission of scientific results. Under the *Kelly* test, “The first prong requires proof that the technique is generally accepted as reliable in the relevant scientific community. [Citation.] The second prong requires proof that the witness testifying about the technique and its application is a properly qualified expert on the subject. [Citation.] The third prong requires proof that the person performing the test in the particular case used correct scientific procedures.” (*People v. Bolden* (2002) 29 Cal.4th 515, 544–545;

² The court also stated that “objections to foundation need to be—to be made at the time so that the People have a time—have the ability to cure it,” and it did not believe defense counsel had made such an objection. The People likewise argue here that defendant forfeited this argument by failing to object at the time of Stone’s testimony. In fact, defense counsel objected during Stone’s testimony and thus preserved the issue for appellate review.

see *People v. Kelly* (1976) 17 Cal.3d 24, 30; see also *People v. Lucas* (2014) 60 Cal.4th 153, 244.) He argues that the prosecutor failed to satisfy that standard because Stone was not qualified to testify as an expert about the acceptance of the NIK test within the scientific community. As a result, he submits, the court’s finding on allegation 2 (possession of ecstasy) must be reversed. We need not address the admissibility of the NIK test result because even assuming the NIK test result was improperly admitted, there was other substantial evidence supporting the court’s finding on allegation 2. Thus, any such error—if error there was, an issue we do not decide—was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The preponderance of the evidence standard of proof applies at probation violation hearings. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447.) The prosecution bears the burden of proving the substance at issue is a controlled substance. (*People v. Davis* (2013) 57 Cal.4th 353, 362; *In re Waylon M.* (1982) 129 Cal.App.3d 950, 952.) “[T]he nature of a substance, like any other fact in a criminal case, may be proved by circumstantial evidence. [Citations.] It may be proved, for example, by evidence that the substance was a part of a larger quantity which was chemically analyzed [citations], by the expert opinion of the arresting officer [citation], and by the conduct of the defendant indicating consciousness of guilt.” (*People v. Sonleitner* (1986) 183 Cal.App.3d 364, 369.)

Stone described in detail the education he received in drug recognition. This included an eight-hour course while in the police academy, a three-day DAR course as part of his NCOA membership, and continuing education on the subject at an annual, weeklong NCOA conference. Through this education, he learned “the differences between drugs, how to look for them, how to identify them, how to test them and so forth.” Stone also had extensive experience with “live research,” having been involved in “close to a thousand investigations.” In the cases involving seizure of drugs in the field, he personally looked at the drugs and was trained to identify them. He was specifically trained in the identification of ecstasy, and was personally involved in at least 10 field investigations involving ecstasy. Stone examined the capsules that had been found on

Joe and, based on this vast experience, believed them to contain ecstasy. This was substantial evidence supporting the court's finding.

2. There Was No Lapse in the Chain of Custody of the Drug Capsules

In his second argument, Joe contends that the prosecutor failed to establish a chain of custody for the capsules because “[n]o one testified that Detective Zemlock gave pills seized from the Minor to Detective Bobbit, and that Detective Bobbit passed the same pills on to Detective Stone. Notably, no one attached an evidence label to the plastic [bag] containing the pills.” As a result, he contends, there was no substantial evidence supporting the court's finding on allegation 2. The testimony of Stone and Zemlock establishes the necessary chain of custody.

The officers' testimony established that Bobbit and Zemlock were together when Zemlock searched Joe and found the baggie of pills containing what Zemlock believed was MDMA; they took Joe into custody and transported him to the department; custody of Joe was transferred to Stone; Bobbit advised Stone that they had found drugs in Joe's possession and gave him the bag of Joe's belongings, which included the plastic baggie containing the capsules. Given this evidence, we see no lapse in the chain of custody.

3. The Juvenile Court Did Not Err in Permitting Amendment of the Notice of Probation Violation

A. Background

As noted, on May 4, the date set for the contested probation violation hearing, the prosecutor moved to amend the notice of probation violation to add two additional allegations: (4) failure to notify probation within 24 hours of police contact, and (5) violation of a no-contact order. Joe's counsel opposed the motion, objecting, “I can't think of a more gross violation of due process than to begin a hearing, and I am being told of new charges that I have had no time to prepare for that could easily have been included on the 10th of April when this was filed. But now, suddenly, on the day of trial, when the prosecuting attorney is having trouble proving the allegations, they decide to shift to another playing field. I think it's highly inappropriate, unfair, and hampers my ability to effectively represent my client.”

Following discussion concerning discovery that would be necessitated by the proposed amendment (essentially copies of the no-contact order), the court allowed the amended allegations. It observed, “[T]he failure to notify the police—to notify probation of police contact, that’s a very common probation violation, and that would be from the items number two and three. So court will allow that. [¶] The court will also allow number five, which is that he violated a no-contact order, but the defense needs the discovery and so does the court.”

The contested probation violation hearing then commenced with DPO Dutra’s testimony. After his testimony, the hearing resumed the following day (Tuesday, May 5) with Detective Stone’s testimony. It was then continued to Friday, May 8, and at the outset of that day’s hearing, defense counsel renewed his objection to the notice of probation violation amendment, arguing:

“Well, so this is how I see the situation:

“Probation officer decided that Joe is up to no-good, and they want to keep him in custody. They show up on the day of hearing, and they realize that they have some evidentiary problems for the probation violations they have listed so they amend it. They add two brand new allegations as the contest is about to begin. And these aren’t clerical errors. These aren’t lesser-included offense amendments. They are brand new allegations where I have zero notice, and I received discovery on them after the trial has already begun.

“The analogy to a criminal defense trial, which is of course what we’re doing here, there would never be such—the idea that the prosecutor can add cases or charges on the day of trial would never happen. Say, if a defense attorney was scheduled for a battery trial, and on the day of it, the prosecutor says we’re adding a DUI count, and I’ll provide the discovery for you after we begin. It would never happen under the law.

“And the only difference between probation violation and a criminal charge is a different burden of proof, but procedur[al] due process rights, notice requirements, discovery requirements, they are the same, and they have been blatantly violated and disregarded by this maneuver. I don’t believe it was intentional. I believe they realized

they were coming up short on the day of trial, and, frankly, by that time, it was too late for them.

“So I’m asking the court not to allow them to amend the probation violation on the day of contest.”

After discussion about the no-contact order that was the subject of allegation 5, the court asked the prosecutor, “What’s your response to the argument by Mr. McCardle that it really isn’t fair, that he’s basically been sandbagged?”

The prosecutor responded: “[T]he original petition, I think, alleged that . . . [Joe] did not make his appointment on the 10th, and I think that they are close enough, the allegation that he did not make his appointment and that he did not report the arrest, that it would not be an unfair surprise to the defense as to that allegation.”

The court then observed that the hearing commenced on Monday, at which point the prosecutor moved to amend the notice, and it was now four days later. Accordingly, it asked defense counsel how Joe was prejudiced by allegation 5, and counsel responded: “The procedural due process rights afforded to my client have been prejudiced by number five. I understand the minute orders are there, but I think it sets an alarming precedence to allow such behavior to happen. [¶] The law is based on notice—and I do not believe that—I may be wrong—but I do not believe that I have to demonstrate due prejudice to prevent the District Attorney bringing forth new allegations on the day of trial.”

The court then ruled: “All right. Well, the burden doesn’t shift to you, but if you had prejudice that certainly is something I would consider. For example, if you said that you hadn’t been able to do an investigation or something like that then—then what they could do is they could split it, and, you know, do another 777. I think you’ve had sufficient time. [¶] . . . [¶] I don’t believe that [Joe] has been prejudiced by the amendments, and so the amendments will stand.”

B. Analysis

Joe contends that the trial court erred in granting the prosecutor’s motion on the date the contested hearing commenced to amend the notice of probation violation. The court did not sustain allegation 5 (that Joe violated a no-contact order), and there could

thus be no error with regard to that amendment. As to the addition of allegation 4, we conclude there was no abuse of discretion. (See *In re Man J.* (1983) 149 Cal.App.3d 475, 481 [court has discretion in criminal proceeding to permit amendment to accusatory pleading].)

Due process requires that a minor, like an adult defendant, have sufficient notice of the charges against him so that he may intelligently prepare his defense. (*In re Robert G.* (1982) 31 Cal.3d 437, 442; *In re Arthur N.* (1976) 16 Cal.3d 226, 233.) Here, at the commencement of the contested hearing on Monday, May 4, the prosecutor moved to amend the notice of probation violation to add the allegation that Joe failed to notify his probation officer of police contact within 24 hours. The prosecution rested on Friday, May 8. Given the four days' notice and the fact that allegation 4 was closely related to allegation 1 (that Joe failed to keep an April 10 meeting with DPO Dutra), Joe was not prejudiced by the amendment. The juvenile court therefore did not abuse its discretion in permitting it.

4. The Juvenile Court's Finding That Joe Failed to Timely Notify Probation of His Arrest Was Supported by Substantial Evidence

The court found that Joe failed to timely report his April 9 arrest to his probation officer (allegation 4). Joe argues here, as he did below, that because he was in custody, he was unable to contact probation such that his failure to notify probation within 24 hours of police contact was not willful. (See *People v. Cervantes* (2009) 175 Cal.App.4th 291, 295 [probation may not be revoked absent a willful violation of the terms and conditions of probation].) The record supports the court's contrary finding.

There was evidence that Joe was allowed a telephone call upon his detention. His counsel asked DPO Dutra, "Are you aware of any protocol that would allow someone in Alameda County to call their Contra Costa County probation officer?" The officer responded, "My history in working detention, any time that you enter a facility, you're allowed one phone call. You get to choose who you call." Despite this opportunity, Joe did not call his probation officer or, apparently, ask the person he elected to call to notify Dutra on his behalf.

Joe contends that his testimony “affirmatively demonstrated that he was *not* able to telephone his probation officer and inform him that he had been arrested.” This is so, he submits, because he testified that when he was arrested, his cell phone, which contained Dutra’s telephone number, was seized and he did not have the phone number memorized. This merely established that Joe was unable to use his phone to contact Dutra; it did not establish that there was no other possible way (such as through whomever he contacted with his one phone call or through anyone at the detention facility) to communicate his police contact to probation.

There was thus sufficient evidence to support the court’s finding of a willful probation violation.

5. There Was an Adequate Written Statement of the Court’s Findings

In his fifth argument, Joe contends that the juvenile court failed to provide an adequate written statement of its findings. In support, he relies on *Black v. Romano* (1985) 471 U.S. 606. There, the United States Supreme Court stated: “Thus, the final revocation of probation must be preceded by a hearing, although the factfinding body need not be composed of judges or lawyers. The probationer is entitled to written notice of the claimed violations of his probation; disclosure of the evidence against him; an opportunity to be heard in person and to present witnesses and documentary evidence; a neutral hearing body; and *a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation.*” (*Id.* at pp. 611–612, emphasis added.) It is, however, well settled that “a reporter’s transcript of a court’s oral statement of reasons for revoking probation satisfies the due process requirement of a written statement as to the evidence relied on and the reasons for revocation.” (*People v. Moss* (1989) 213 Cal.App.3d 532, 534; see also *People v. Ruiz* (1975) 53 Cal.App.3d 715, 718; *People v. Scott* (1973) 34 Cal.App.3d 702, 708.)

Due process requirements were easily satisfied here, where the juvenile court detailed on the record the basis for sustaining allegations 2 and 4:

“With regard to number two, that he possessed ecstasy, the proof was presented by the officer that the substance received was MDMA. It’s presented through a NIK test and

also through a foundation regarding his experience, which was quite extensive. The defendant said he didn't know what it was. The court isn't required to believe that that is true. He did possess it. The court does find that there's been proof by a preponderance of the evidence that he possessed ecstasy, and he knew it was ecstasy. [¶] . . . [¶]

“Number four is that he failed to notify probation regarding his police contact within 24 hours. The court does find that to be true. The testimony was un rebutted that he did not do that. And I think it is fair in this instance because he apparently made no effort to contact the probation officer. That was Officer Dutra's testimony, as he hadn't heard from him from April the 9th to April the 15th. So even had he done [so] within five days, that would have been mitigating. The allegation is that he didn't do it within 24 hours, and that was certainly true.”

Joe maintains that the California Supreme Court's opinion in *People v. Bonnetta* (2009) 46 Cal.4th 143 “casts grave doubt upon the continued viability of *People v. Moss*.” Not so. The statute construed in *Bonnetta*, Penal Code section 1385, subdivision (a), explicitly required that the reasons for the court's order “ ‘be set forth in an order entered upon the minutes.’ ” (*Bonnetta, supra*, at pp. 145–146 & fn. 1.) The reasoning and holding in *Bonnetta* do not apply to the present case because there is no express requirement that the reasons be set forth in an order entered upon the minutes.

6. The Juvenile Court Exercised Its Discretion in Returning Joe to the DJJ for 12 Months

Next, Joe contends that the juvenile court failed to exercise its discretion as to the length of Joe's return to the DJJ, claiming the court “may well have been misled by the probation officer who stated at the dispositional hearing: ‘DJJ calculates the twelve month return from the date the offense is sustained.’ ” Based on this, Joe argues, the court “mechanically computed the term of confinement as 11 months and 10 days, which was the maximum term of 12 months with credit for 21 days served post violation

hearing.”³ Joe’s claim that “[n]owhere in the record does the juvenile court indicate that the full range of 90 days to 12 months of return to DJJ was considered” is expressly contradicted by the record.

In his report and recommendation, DPO Dutra informed the court that on May 15, 2015, Joe was screened for return to DJJ. Dutra reported that Joe was found to be eligible for a return of three to 12 months. Elsewhere in his report, Dutra reiterated that DJJ had accepted Joe “as a ‘returnee’ for a period of up to 12 months.” Finally, in discussing the “case needs,” Dutra stated, “If [Joe] continues to associate with a negative peer group, ignore the orders of the Court, and participates in criminal behavior, his future outcomes will not change from his past ones. Serious intervention and guidance, before it is too late remains critical, as his options have become limited due to his age. [Joe] needs to be returned to DJJ for 12 months to provide him all of the rehabilitative services he needs. The undersigned is aware that [Joe] has not been found to have sustained a new [Welfare and Institutions Code section] 602 offense at this point, but is asking for the length of 12 months to insure he is able to benefit from a full complement of rehabilitative services at DJJ.” The juvenile court read and considered Dutra’s report and recommendation and was thus aware of and considered the punishment range.

7. Joe Has Not Established That His Counsel Provided Ineffective Assistance at the Disposition Hearing

In his seventh argument, Joe asserts an ineffective assistance of counsel claim based on his counsel’s failure to advocate for a lower maximum term of confinement at DJJ because his counsel purportedly “was not aware” of the court’s discretion in selecting a term between 90 days and 12 months. Joe’s ineffective assistance of counsel argument lacks merit.

In *People v. Mackey* (2015) 233 Cal.App.4th 32, 119, we recently summarized the well-established standard for a successful ineffective assistance of counsel claim: “A

³ Welfare and Institutions Code section 1767.35, which authorizes the return of a juvenile to DJJ for a “serious violation or a series of repeated violations of the conditions of supervision” on parole, provides that return to DJJ, if ordered, shall be for “a specified amount of time no shorter than 90 days and no longer than one year.”

defendant claiming ineffective assistance of counsel must demonstrate both deficient performance and resulting prejudice. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 691–692 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216–218.) On the first prong he must show that ‘counsel’s representation fell below an objective standard of reasonableness . . . [¶] . . . under prevailing professional norms.’ (*Strickland, supra*, at p. 688.) And under the second, he must show that in the absence of the error it is reasonably probable that a result more favorable to him would have been obtained. A reasonable probability is ‘a probability sufficient to undermine confidence in the outcome.’ (*Id.* at p. 694.)” Where defendant fails to show prejudice, we may reject a claim of ineffective assistance of counsel without reaching the issue of deficient performance. (*Id.* at p. 697.) Here, Joe has not established prejudice.

The probation department’s report and recommendation detailed the treatment and preventative services Joe had received over the years, as well as the assistance he had received since his release from DJJ. Despite this and numerous referrals to community-based services, he had “made no tangible progress in his rehabilitation” It advised that Joe was at a high risk to reoffend and that he was continuing to associate with family with whom he had committed past offenses. And Dutra testified at the contested hearing that Joe lacked motivation to move forward with his life and that he needed “further treatment in his . . . way of thinking, cognitive restructuring,” treatment he could receive through Project Impact at DJJ. Dutra thus recommended that Joe be returned to DJJ for 12 months so he could “benefit from a full complement of rehabilitative services” available there. In light of this support for Dutra’s recommendation, it is not reasonably probable that the court would have returned Joe to DJJ for anything less than the maximum allowable time.

8. The DJJ Commitment Must Be Corrected to Reflect the Juvenile Court’s Ruling

In his penultimate argument, Joe correctly identifies the following discrepancies between what occurred at the dispositional hearing and the DJJ commitment form:

- (1) the form fails to reflect that Joe’s counsel was present at the hearing;

(2) the form erroneously cites Welfare and Institutions Code section 1767.36 (an expired statute) as the authority pursuant to which Joe was returned to DJJ, rather than section 1767.35, as correctly referenced by the juvenile court;

(3) the form fails to indicate that Joe was given 20 days custody credit as of June 9, 2015;

(4) the juvenile court did not set Joe's maximum period of confinement as 10 years, two months, as indicated on the form;

(5) the form erroneously states that Joe was to be returned to DJJ for a period of 12 months, when the court ordered him returned for 11 months, 10 days;

(6) the form identifies Joe's remaining custody time as "6 years, 5 months, and 18 days as of June 9, 2016," rather than June 9, 2015;

Because the juvenile court's statements on the record are controlling (*People v. Garcia* (2008) 162 Cal.App.4th 18, 24, fn. 1, overruled on other grounds in *People v. Bryant* (2013) 56 Cal.4th 959, 970; *People v. Hong* (1998) 64 Cal.App.4th 1071, 1075), the DJJ commitment form must be corrected to accurately reflect the dispositional order of the juvenile court.

9. The Probation Conditions Should Be Stricken

In addition to returning Joe to DJJ, the juvenile court also imposed the following probation conditions: no contact with two of his cousins and all prior probation condition orders were to remain in effect. As Joe correctly argues, and the People correctly concede, a juvenile court may not simultaneously place a minor at DJJ and impose probation conditions. (*In re Edward C.* (2014) 223 Cal.App.4th 813, 829; *In re Travis J.* (2013) 222 Cal.App.4th 187, 202; *In re Allen N.* (2000) 84 Cal.App.4th 513, 515–516.) Accordingly, the juvenile court's dispositional order must be modified to strike all conditions of probation.

DISPOSITION

The clerk of the superior court is ordered to prepare a corrected DJJ commitment form (Form JV-732) that accurately reflects the juvenile court's dispositional order and to forward a copy of the corrected commitment form to the DJJ. The terms of probation imposed by the juvenile court are stricken. In all other regards, the orders sustaining allegations 2 and 4 in the notice of probation violation and returning Joe to DJJ are affirmed.

Richman, Acting P.J.

We concur:

Stewart, J.

Miller, J.

A145622; *P. v. J.S.*