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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE,

Plaintiff and Respondent,

v.

TIMOTHY D. CROSBY,

Defendant and Appellant.

C066979

(Super. Ct. No. CR08-3533)

This is an appeal by defendant Timothy D. Crosby from an order of the Yolo County Superior Court finding him in violation of a condition of his probation and ordering him to serve 60 days in jail. On appeal, defendant contends the evidence is insufficient to support the court's finding and, therefore, reversal is required.¹ We agree and shall reverse the court's order.

¹ Because we are reversing defendant's revocation of probation, we need not address his contention that he was denied appropriate conduct credits.

PROCEDURAL BACKGROUND

On April 24, 2009, pursuant to a plea bargain, defendant pleaded no contest to possession of obscene matter depicting sexual conduct of a minor (Pen. Code, § 311.11, subd. (a)) and to misdemeanor evading a peace officer by means of a chase (Veh. Code, § 2800.1).

On June 5, 2009, defendant was placed on formal probation for three years. Among the conditions of probation were that he serve 150 days in county jail and that he "not possess any computers, printers or any related equipment."

On September 27, 2010, the probation department filed a declaration and order re violation of probation, stating that defendant was in violation of the above condition banning him from possessing a computer. The declaration stated that on September 23, 2010, the probation officer conducted a compliance check at defendant's residence and located a computer in an unlocked bedroom to which defendant had access. The court summarily revoked defendant's probation.

On December 15, 2010, the court conducted a contested hearing on the violation, found the violation true, and reinstated probation on the condition defendant serve 60 days in county jail.

FACTUAL BACKGROUND

Probation Officer Mike Ha testified that on or about August 23, 2010, he conducted a compliance search of defendant's apartment. Present at that time were defendant and defendant's

19-year-old son Robert. Robert's bedroom was locked and both Robert and defendant denied having a key to the room. Robert said there was another brother, and that brother had the key and was at work. Using a "card of some sort" Ha's partner was able to open the door. Inside the room Ha found a computer on the floor in front of the closet; he did not see a mouse attached to the computer and a keyboard may have been inside the closet. Ha told both Robert and defendant that the latter was not supposed to have a computer in the house and that it needed to be removed. Ha told defendant to get rid of the computer, and suggested that he take it to the son's girlfriend's home.

On September 23, 2010, Officer Ha conducted another compliance search of defendant's residence. Defendant was present and Ha had him sit on a couch in the living room. Robert was with his girlfriend in Robert's bedroom which was unlocked. They too were taken to the front room. The computer was still on the floor in front of the closet and appeared to be in the same condition as it was during the search on August 23. Robert's girlfriend said she had used the computer and knew there was "sexually explicit" material on the computer because "she looks at it."

Robert testified that either in 2009 or early 2010 he and defendant moved into the apartment at the same time. The apartment was in Robert's, not defendant's, name. Robert got the computer shortly before moving into the apartment to use for school. The computer was always in Robert's room. After about

two months the Internet connection stopped working, but the word processor program still worked. Robert knew that defendant was not supposed to have a computer, so he installed a lock on his (Robert's) room and defendant did not have a key. The only time the room was unlocked was when Robert was home. Robert never allowed defendant access to his room nor had he ever seen defendant in his room.

Trial Court's Ruling

Defense counsel argued that the evidence was insufficient to establish that defendant either actually or constructively possessed the computer.

The court ruled as follows: "This is the problem, [defense counsel], I think with that argument in the sense that if the Court were to believe that [defendant] never had access to that room, the problem is had there not been the event in August where [defendant] was told to get rid of the computer, the argument might be a little stronger, but the fact is they were told to get rid of the computer. He was told. [Officer] Ha said it was told to the son as well. They come back a month later, and the computer is still there. [¶] The court is not convinced that there was never a time when the defendant could not have had access. He lived in the same house for all intents and purposes. He was a full-blown occupier of that house, and even though his son said that he had the lock on the door at most times and the father could not have gone in there, the Court is not convinced that there would not have been, could not

have been, a time when the father could not have had access.
[¶] What's troubling to the Court is that a term of probation on a case of this kind is no computer. He's warned no computers, and they have to come back and find the computer there, and then say, well, it's my son's. That isn't going to cut it and I find that there's—under the circumstances here, the warning, the return, finding it there, it being in the house that he occupies—I do find a violation of probation has been made out, so the Court will sustain the allegation"

DISCUSSION

Defendant contends the evidence is insufficient to sustain the allegation, essentially arguing as he did in the trial court that neither actual nor constructive possession of the computer was proven. He is correct.

"We review a probation revocation decision pursuant to the substantial evidence standard of review" (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.) Under the substantial evidence rule, a reviewing court must "defer to a trial court's factual findings to the extent they are supported in the record, but must exercise its independent judgment in applying the particular legal standard to the facts as found." (*People v. Butler* (2003) 31 Cal.4th 1119, 1127.) "Before a defendant's probation may be revoked, a preponderance of the evidence must support a probation violation." (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1197.)

Insofar as defendant is concerned, a computer is similar to contraband, i.e., it is something that is illegal for him to possess. "Under California law, a defendant may be deemed to have constructive possession of contraband that is in the possession of another person . . . only when the person actually possessing the contraband does so 'pursuant to [the defendant's] direction or permission,' and the defendant 'retains the right to exercise dominion or control over the property.'" (*In re Rothwell* (2008) 164 Cal.App.4th 160, 169, quoting *People v. Showers* (1968) 68 Cal.2d 639, 644.) *Rothwell* further observed, at page 170, that under federal law interpreting constructive possession of narcotics, the defendant "'need not have them literally in his hands or on premises that he occupies but he must have the right (not the legal right, but the recognized authority in his criminal milieu) to possess them'" (*Rothwell*, at p. 170, quoting *United States v. Manzella* (7th Cir. 1986) 791 F.2d 1263, 1266.)

The circumstances in *People v. Sifuentes* (2011) 195 Cal.App.4th 1410 (*Sifuentes*) are analogous to those in our case. Insofar as is relevant to the instant case, officers entered a motel room to serve an arrest warrant on Sifuentes. Sifuentes was on a bed near the door; his companion, Lopez, was kneeling on the floor next to a second bed. Lopez was ordered to raise his hands, but initially only raised his left hand while he kept his right arm bent at the elbow. After Lopez eventually raised his hand, an officer found a loaded handgun

under the mattress next to Lopez. (*Sifuentes*, at pp. 1413-1414.)

Sifuentes and Lopez were each charged with and convicted by a jury of possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)) with a gang enhancement (*id.*, § 186.22, subd. (b)(1)). (*Sifuentes*, *supra*, 195 Cal.App.4th at p. 1413.) At their trial a gang expert testified that both the defendants were active participants in a criminal street gang. (*Id.* at p. 1414.) The expert also testified that gang members often use a "gang gun,"—that is a gun that is passed freely among the gang members—and, "aside from 'certain restrictions,'" is "accessible" to all gang members "[a]t most times." (*Id.* at p. 1415.)

On appeal, Sifuentes contended the evidence was insufficient to prove he either knew about the gun or that he had the right to control it. (*Sifuentes*, *supra*, 195 Cal.App.4th at p. 1417.) The appellate court reversed Sifuentes's conviction, reasoning as follows. The conviction was based on the doctrine of constructive possession of the gun. Under that doctrine the prosecution was required to prove Sifuentes "knowingly exercised a right to control the prohibited item, either directly or through another person." (*Ibid.*) There was no evidence the gun found in the motel room had been used in the manner described by the gang expert that would make it a "gang gun." (*Ibid.*) Noting the gang expert had not testified that "all gang members always have the right to control a gang gun,

whether kept in a safe place or held by another gang member," the court found that even assuming the gun "fell into the gang gun category, no evidence showed Sifuentes had the right to control the weapon." (195 Cal.App.4th at p. 1417.)

The court concluded, "We agree no substantial evidence shows Sifuentes had the right to control the firearm, even if Sifuentes knew a weapon was in the room." (*Sifuentes, supra*, 195 Cal.App.4th at p. 1417.) We see no significant difference between *Sifuentes* and the present case.

Defendant was prosecuted for the probation violation on the theory he constructively possessed a computer belonging to Robert. Thus, the People had to prove not only that defendant had access to the computer, but also that Robert had given or authorized defendant to use the computer to some degree. While there was some evidence of the former, there was no such evidence of the latter.

We agree that defendant could rather easily have gained access to Robert's room, as was demonstrated by Officer Ha's companion's use of a card to gain entry during the first search. But such a forcible entry is a far cry from demonstrating that Robert was acceding or agreeing to defendant's use of the computer. To the contrary, Robert testified he knew defendant was prohibited from possessing a computer and he did not give defendant permission to use it. That this was actually Robert's intent is buttressed by the fact that Robert installed a lock on his bedroom door and the door was locked during Officer Ha's

first compliance search. That the door was unlocked during the second search is of no moment because Robert, along with his girlfriend, was in the bedroom at that time and defendant was not in the bedroom. Although the truth of Robert's testimony may be suspect because defendant is his father, there was no evidence to contradict it. Even if Robert's testimony that he had not authorized defendant to use the computer is not believed, this does not convert Robert's testimony into affirmative evidence that he did so. Without affirmative proof, circumstantial or otherwise, that Robert had permitted defendant to use his computer, the matter remains since there is no substantial evidence to support it. Indeed, there was no evidence defendant was ever in Robert's room, or that defendant had a key to the room, or that defendant used or touched the computer, i.e., no fingerprints although the computer had been seized during the second search.

In sum, the evidence is insufficient to establish defendant exercised any control, joint or otherwise, over Robert's computer. Hence, the court's order finding defendant in violation of probation must be reversed.

DISPOSITION

The orders finding defendant in violation of probation for being in possession of a computer, revoking his probation, and imposing 60 days in county jail are reversed. The matter is

remanded to the Yolo County Superior Court with directions to amend its records to reflect the foregoing.

_____ BUTZ _____, J.

I concur:

_____ NICHOLSON _____, Acting P. J.

Dissenting Opinion of Duarte, J.

I respectfully dissent.

Although two different *trial courts* could reach different results in this case, in my view the trial court's action in revoking probation was neither abusive nor arbitrary. (See *People v. Urke* (2011) 197 Cal.App.4th 766, 773-776 (*Urke*).) Substantial evidence supported the trial court's ruling.

The People proved the forbidden computer was in the apartment where defendant was living with his son in a bedroom that was *unlocked* on the occasion of the search. Further, when questioned, defendant told the probation officer the bedroom was "locked at times" and "sometimes it's locked, sometimes it's not[.]" Defendant knew the computer was in his apartment, because the month before, during an earlier probation search, the probation officer ordered defendant to remove it. At that time, the probation officers discovered the computer in the same room, this time locked, and neither defendant *nor his son*--the same son that testified one month later he had exclusive control of the room--would admit to having a key.

During that earlier search, the probation officer told defendant "to get rid of" the computer, and defendant appeared to understand what the probation officer was ordering him to do. There is no evidence that defendant protested his ability to remove the computer or denied sufficient control over the computer to facilitate its removal from the apartment.

When asked at the later search why he had not complied with the order to remove the computer, defendant told the probation officer that "[h]e was aware that he was supposed to get rid of it, but he just didn't," because "he forgot about our conversation and didn't get rid of it." By claiming merely that he "forgot" he was told to get rid of the computer, defendant implicitly conceded his power to do so, and thereby conceded some modicum of control over the computer.

Thus, viewed in the light most favorable to the trial court's ruling, the People proved (1) defendant knew the computer was in the apartment and that its presence was in violation of his probation; (2) defendant had at least intermittent access to the computer, both by his own admission as well as by what could be viewed as an attempt to hide the computer at the time of the first search; and (3) defendant had at least some control over the computer due to his tacit acknowledgment of his ability to "get rid of it," followed by his implicit admission of that ability when he excused his failure to do so by claiming he "forgot."

The majority credits the son's testimony, but the trial court clearly did not. On these facts, the trial court was not required to find that the computer belonged to the son, or that the door was consistently locked, or that the son had exclusive control over the computer merely because the son so testified. "Provided the trier of the facts does not act arbitrarily, he may reject *in toto* the testimony of a witness, even though the witness is uncontradicted." (*Hicks v. Reis* (1943) 21 Cal.2d

654, 659-660.) As explained above, although finders of fact might disagree, the trial court could reasonably infer from defendant's statements and the surrounding circumstances of both searches that defendant had sufficient access to as well as control of the computer to find he possessed it by a preponderance of the evidence.

Therefore, I would affirm the trial court's decision to revoke defendant's probation. The decision fell within the trial court's broad discretion and was supported by substantial evidence. (See *Urke*, *supra*, 197 Cal.App.4th at pp. 772-773.)

DUARTE, J.