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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

JULIAN ACUNA COSTILLA,

Defendant and Appellant.

F068489

(Super. Ct. No. MCR035791)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Madera County. Ernest J. LiCalsi, Judge.

Cynthia L. Barnes, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Lewis A. Martinez and Charity S. Whitney, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Poochigian, J. and Franson, J.

Appellant, Julian Acuna Costilla, pled no contest to inflicting corporal injury on a cohabitant (Pen. Code, § 273.5, subd. (a)). Following several violations of probation, the court sentenced him to prison for four years.

On appeal, Costilla contends: (1) the evidence is insufficient to prove that he willfully violated his conditions of probation; and (2) he was denied the effective assistance of counsel. We affirm.

FACTS

On July 25, 2009, during a fight with his girlfriend, Costilla hit her on the hand and broke her thumb.

On August 20, 2009, Costilla entered his no contest plea in exchange for a grant of probation.

On September 14, 2009, the court suspended imposition of sentence and placed Costilla on probation for five years on the condition that he serve 60 days in custody.

From January 27, 2010, through August 22, 2012, on four separate occasions after Costilla admitted allegations that he violated his probation, the court revoked and then reinstated probation on the condition that Costilla serve additional time in local custody.

On September 1, 2012, Costilla was released from custody.

On September 19, 2012, Costilla met with Probation Officer Mary Ann Dawkins. Dawkins instructed Costilla, verbally and in writing, to report to her again on September 28, 2012, and weekly thereafter. She also ordered him to enroll in an inpatient treatment program by that date, although she allowed him to defer enrollment until after he underwent a medical procedure that was allegedly scheduled for October 2012. Costilla never reported to her again and did not enroll in a treatment program by September 28, 2012.

On October 10, 2012, Dawkins went to Costilla's residence, which was at a house owned by his sister. Dawkins spoke to Costilla's sister and was informed that Costilla was not there and no longer lived at the house.

On October 22, 2012, the probation department filed a petition alleging Costilla violated his probation by failing to report monthly or as directed by his probation officer, being away from his residence for more than 24 hours without prior notification to his probation officer, changing his residence without providing advance notice to his probation officer, failing to enroll in an inpatient substance abuse treatment program, and by possessing or using illegal drugs. On that date, the court summarily revoked Costilla's probation and issued a warrant for his arrest.

On July 26, 2013, Costilla was arrested.

On August 23, 2013, at a probation revocation hearing, defense counsel advised the court that Costilla wanted to admit that he violated his probation but first he wanted to address the court. Costilla then explained that "the second day after [he] got out," he suffered a stroke that precipitated a seizure and that he woke up in some grass by a river. Costilla also stated that the probation department had been erroneously informed he no longer lived at his sister's house because her daughter moved back into the house and he was sleeping in the back. However, his clothes were still there. Costilla also asserted that the hospital had sent him written notice that they wanted to perform a CAT scan on him. Costilla asked the court to release him so he could undergo the CAT scan and fill out a disability application, but the court refused.

The court then attempted to take Costilla's admission. However, after Costilla said he did not understand and protested that he had been in a daze, the court decided to conduct a probation violation hearing instead. During the hearing, Probation Officer Dawkins testified to the facts noted above regarding her September 19, 2012 meeting with Costilla and her October 10, 2012 visit to Costilla's residence.

Costilla testified that the Salvation Army and the Mission programs would not accept him because he was on medication. He tried to get into another program but he had a seizure by the river the second day after he met with Dawkins and had been in a daze since then. According to Costilla, beginning October 10, 2012, he was unaware he was on probation and he did not regain awareness of his probationary status until July 2013, when he was informed at a hospital that he did not have Medi-Cal because he was a felon.

In finding the probation violations true, the court stated:

“Well, I don’t believe Mr. Costilla so the Court finds by more than a preponderance of the evidence that the defendant has violated the conditions of his probation. Report monthly or as directed to his probation officer, not to be away from his reported residence more than 24 hours without prior notification to his probation officer and not to change residence address without advance notification to his probation officer. Court finds the defendant in violation of probation for violation of those conditions.”

DISCUSSION

The Sufficiency of Evidence Claim

Costilla contends the evidence presented at the revocation hearing established that he suffered from a number of medical conditions, including alcohol addiction, and that he demonstrated a willingness to participate in a residential treatment program. He further contends he was trying to schedule a doctor’s appointment to obtain medical clearance to enroll in a treatment program and had a medical procedure scheduled for October 2012. However, two days after meeting with Probation Officer Dawkins, he suffered a seizure, blacked out, and was hospitalized. Thus, according to Costilla, because the evidence was insufficient to prove that he *willfully* violated the terms of his probation, the court abused its discretion when it revoked his probation. There is no merit to this contention.

“A court may revoke probation ‘if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation officer or otherwise that the person has violated any of the

conditions of his or her probation' ([Pen. Code,] § 1203.2, subd. (a).) 'As the language of section 1203.2 would suggest, the determination whether to ... revoke probation is largely discretionary.' [Citation.] '[T]he facts supporting revocation of probation may be proven by a preponderance of the evidence.' [Citation.] However, the evidence must support a conclusion the probationer's conduct constituted a willful violation of the terms and conditions of probation." (*People v. Galvan* (2007) 155 Cal.App.4th 978, 981-982.)

"Where a probationer is unable to comply with a probation condition because of circumstances beyond his or her control and defendant's conduct was not contumacious, revoking probation and imposing a prison term are reversible error." (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295.)

"[W]here the trial court was required to resolve conflicting evidence, review on appeal is based on the substantial evidence test. Under that standard, our review is limited to the determination of whether, upon review of the entire record, there is substantial evidence of solid value, contradicted or uncontradicted, which will support the trial court's decision. In that regard, we give great deference to the trial court and resolve all inferences and intendments in favor of the judgment. Similarly, all conflicting evidence will be resolved in favor of the decision." (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848-849, fn. omitted.)

Probation Officer Dawkins's testimony was sufficient to establish that Costilla violated his probation by failing to report as directed by his probation officer, failing to report a change in his residence address, and failing to provide prior notification that he would be away from his reported residence for more than 24 hours.

Costilla attributed his failure to report to Probation Officer Dawkins on his alleged medical problems including a stroke he testified occurred two days after his September 19, 2012 meeting with Dawkins. According to Costilla, this stroke left him dazed and caused him to forget he was on probation. Costilla, however, did not provide any medical records or other documentation to substantiate these claims and the court did not believe his testimony. Further, Costilla's testimony did not address his failure to report a change of address to his probation officer or to provide her with prior notification that he would be away from his reported residence for more than 24 hours. Nor did he call his

sister to testify that he was still living at her house. Thus, the record supports the court's conclusion that Costilla violated the conditions of his probation. Further, since Costilla did not provide any credible evidence to support his claim that the violations occurred because of circumstances beyond his control, it also supports the court's implicit conclusion that his violation of these conditions was willful. Accordingly, we reject Costilla's insufficiency of evidence and abuse of discretion claims.

The Ineffective Assistance of Counsel Claim

Costilla contends he was denied the effective assistance of counsel by his attorney's failure to elicit testimony from Costilla of the following information from Costilla's pre-testimony statements to the court: (1) Costilla was staying in the back of his sister's house because her daughter had moved back into the house; (2) his clothes were still at the house; and (3) this was the reason his sister told Dawkins he no longer lived there. Costilla further contends that he was prejudiced by the failure to elicit this testimony because it would have countered Dawkins's testimony that she was informed he no longer lived there. We disagree.

“In order to demonstrate ineffective assistance, a defendant must first show counsel's performance was deficient because the representation fell below an objective standard of reasonableness under prevailing professional norms. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688.) Second, he must show prejudice flowing from counsel's performance or lack thereof. Prejudice is shown when there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” (*People v. Williams* (1997) 16 Cal.4th 153, 214-215.)

However, “a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies.... If it is easier to dispose of an ineffectiveness claim on the ground

of lack of sufficient prejudice, which we expect will often be so, that course should be followed.” (*Strickland v. Washington, supra*, 466 U.S. at p. 697.) We, therefore, turn to the prejudice issue.

As discussed earlier, Probation Officer Dawkins testified she went to Costilla’s residence and was told by his sister that Costilla no longer lived there. Costilla did not call his sister to contradict Dawkins’s testimony or to explain that she was mistaken when she informed Dawkins that Costilla no longer lived at her house. Further, in his pre-testimony statements, Costilla failed to explain why his sister, the owner and an apparent resident of the house Costilla lived in, would not know that Costilla was still living there, especially if Costilla still had his clothes there as he claimed. Given these circumstances, and that the court did not find Costilla’s testimony credible, it is extremely unlikely Costilla would have been able to convince the court that his sister mistakenly told Dawkins he no longer lived there. Therefore, since Costilla has not shown that he was prejudiced by defense counsel’s failure to elicit from him information from his pre-testimony statements to the court, we also reject his ineffective assistance of counsel claim.

DISPOSITION

The judgment is affirmed.