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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN GUZMAN PARDO,

Defendant and Appellant.

G045310

(Super. Ct. No. 10HF0806)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Vickie L. Hix, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Renée Paradis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Meredith S. White, Deputy Attorneys General, for Plaintiff and Respondent.

Juan Guzman Pardo appeals from a judgment after the trial court revoked his probation for failing to submit to drug tests. Pardo argues the trial court erred in admitting into evidence the petition for arraignment on a probation violation over his hearsay objection. But that was not the only evidence before the court to support the conclusion Pardo willfully violated probation. Pardo testified and admitted he willfully violated the condition he submit to drug testing. The judgment is affirmed.

FACTS

In May 2010, a complaint charged Pardo with the following: possession of a controlled substance, cocaine (Health & Saf. Code, § 11350, subd. (a)) (count 1), battery on a peace officer with injury (Pen. Code, § 243, subd. (c)(2)) (count 2), resisting and obstructing an officer (Pen. Code, § 148, subd. (a)(1)) (count 3), being under the influence of a controlled substance, cocaine (Health & Saf. Code, § 11550, subd. (a)) (count 4), battery (Pen. Code, § 242) (count 5), and trespass on posted lands and refusing to leave (Pen. Code, § 602, subd. (1)(1)) (count 6).

Four months later, Pardo pled guilty to counts 1, 3, and 5, and the trial court, on the prosecutor's motion, dismissed counts 2, 4, and 6. The trial court suspended imposition of the sentence, placed Pardo on three years of formal probation, and imposed the standard probation terms and conditions, including that he "[u]se no unauthorized drugs, narcotics, or controlled substances[] [and] [s]ubmit to drug or narcotic testing as directed by [p]robation [o]fficer or [p]olice [o]fficer."

The following year, Pardo's probation officer filed a petition for arraignment on a probation violation. The petition alleged that on January 3 and 4, 2011, and April 4 and 11, 2011, Pardo failed to submit to drug testing (count 1). The petition also alleged that on March 17, 2011, Pardo submitted a diluted urine sample (count 2). The petition explained Pardo was given a seven-hour time frame to report for drug testing. The petition stated that when Pardo arrived, he was unprepared to drug test and offered excuses as to why he could not drug test. The petition stated that on February 7,

2011, Pardo did not have difficulty drug testing and he provided a negative sample. The petition alleged that on January 3 and 4, 2011, and April 4 and 11, 2011, Pardo failed to test because he “has a problem testing in front of people” and “he has a ‘bladder problem.’”

Pardo was arraigned on the petition and the trial court revoked probation. The court set a formal hearing for the following month. At the formal hearing, the prosecutor moved to admit into evidence the petition for arraignment on a probation violation. Defense counsel objected on hearsay and foundation grounds. The court overruled the objection, stating the probation officer’s recitation of the facts of the probation violations was reliable hearsay. The prosecutor offered no other evidence.

Pardo testified on his own behalf. Pardo stated he “wasn’t able” to provide a urine sample on January 3 or January 4, 2011. Pardo also said “[he] was not able to” provide a urine sample on January 18, 2011. Pardo admitted he did not have difficulty providing urine samples for his treatment program, but he described that process as more relaxed. On cross-examination, Pardo admitted he provided urine samples on February 7 and March 17. The trial court found the prosecutor had not met its burden of proving by a preponderance of the evidence Pardo had submitted a diluted urine sample. The court stated that “based on the evidence before [her],” she concluded by a preponderance of the evidence that Pardo failed to submit to testing as alleged in count 1 on January 3, 2011, and April 4, 2011.

The trial court found Pardo in violation of probation but ordered probation reinstated. The court ordered Pardo to serve 72 days in jail, which was the equivalent of time served. Pardo appealed.

DISCUSSION

“[S]ection 1203.2 provides the court may revoke probation if it has reason to believe that the person has violated any of the probation conditions.” (*People v. McGavock* (1999) 69 Cal.App.4th 332, 337 (*McGavock*)). Before the court may revoke

probation however, the court must conduct the following two-step procedure to afford probationers due process of law: “an initial preliminary hearing to determine whether probable cause exists to believe that a [probation] violation has occurred, and thus to justify temporary detention, and a more formal, final revocation hearing requiring factual determinations and a disposition based upon those determinations.” (*People v. Arreola* (1994) 7 Cal.4th 1144, 1152, fn. omitted (*Arreola*); see *Gagnon v. Scarpelli* (1973) 411 U.S. 778; *Morrissey v. Brewer* (1972) 408 U.S. 471 (*Morrissey*); *People v. Vickers* (1972) 8 Cal.3d 451.)

“When the evidence shows that a defendant has not complied with the terms of probation, the order of probation may be revoked at any time during the probationary period. [Citations.]’ [Citation.]” (*People v. Johnson* (1993) 20 Cal.App.4th 106, 110.) The evidence must prove a willful violation of a probation condition. (*People v. Zaring* (1992) 8 Cal.App.4th 362, 379.) “More lenient rules of evidence apply than at criminal trials [citations], and the facts supporting revocation need only be proved by a preponderance of the evidence [citation]. . . .’ [Citation.]” (*McGavock, supra*, 69 Cal.App.4th at p. 337.)

Because probation revocation proceedings are not part of a criminal prosecution, “the full panoply of rights due a defendant in [a criminal] proceeding does not apply” (*Morrissey, supra*, 408 U.S. at p. 480; see *People v. Winson* (1981) 29 Cal.3d 711, 716 (*Winson*)). Nevertheless, one facing revocation of probation typically has the right to confront and cross-examine adverse witnesses unless the hearing officer specifically finds good cause for not allowing confrontation. (*Arreola, supra*, 7 Cal.4th at pp. 1154, 1159; accord *Winson, supra*, 29 Cal.3d at pp. 718-719.) That right is not absolute, however, and in appropriate circumstances, witnesses may give evidence by documents, affidavits, or depositions. (*Arreola, supra*, 7 Cal.4th at p. 1156.)

Our Supreme Court has recognized a distinction between the admission of “testimonial” evidence and the admission of traditional documentary evidence that does

not have, as its source, live testimony. (See *Arreola, supra*, 7 Cal.4th at pp. 1156-1157.) Testimonial evidence is admissible only on a showing of unavailability or other good cause, whereas documentary evidence is admissible (even if it would not be admissible under traditional rules of evidence) if it bears sufficient indicia of reliability. (*Ibid.*) While the court has not expressly defined the terms testimonial and documentary evidence, it has discussed testimonial evidence in the context of a preliminary hearing transcript (*Arreola, supra*, 7 Cal.4th at pp. 1160-1161 [preliminary hearing transcript inadmissible at probation revocation hearing absent witness unavailability or other good cause]; *Winson, supra*, 29 Cal.3d at pp. 713-714 [same]), and documentary evidence in the context of business records (*People v. Maki* (1985) 39 Cal.3d 707, 709, 716-717 (*Maki*) [copies of hotel receipt bearing defendant's name and car rental invoice bearing his signature admissible at probation revocation hearing to establish defendant traveled out of state in violation of probation terms].) We review a trial court's decision to admit or exclude evidence in a probation revocation hearing for abuse of discretion. (*People v. O'Connell* (2003) 107 Cal.App.4th 1062, 1066.)

Moreover, in *Arreola*, the court explained why testimonial and documentary evidence merit different levels of scrutiny. “[T]he need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness’s demeanor. [Citation.] Generally, the witness’s demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action.” (*Arreola, supra*, 7 Cal.4th at p. 1157, fn. omitted.)

For the admission of routine documentary hearsay evidence at a probation hearing, due process requires only a showing of sufficient indicia of the document's reliability. (*Maki, supra*, 39 Cal.3d at p. 709 [car rental invoice and hotel receipt]; *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1410-1413 [laboratory report showing that seized substance was cocaine].) Sufficient reliability appears from admissible testimony, or the document itself, indicating that the document is what it purports to be, and the absence of any evidence to the contrary. (*Maki, supra*, 39 Cal.3d at p. 717 [car rental invoice and hotel receipt had sufficient indicia of reliability where they each bore the issuing company's name and the defendant's signature, the documents appeared to be of the type customarily relied upon, and there was no evidence tending to contradict the information in the invoice or the inference for which it was used].)

The question in this case, therefore, is whether *the petition for arraignment on a probation violation* is "testimonial" or "documentary" for purposes of due process. In this regard, we need not write on a blank slate. *People v. Gomez* (2010) 181 Cal.App.4th 1028 (*Gomez*), is instructive.

In *Gomez, supra*, 181 Cal.App.4th 1028, the court considered the admission of a probation report that included information gleaned from "electronic probation records" showing the probationer did not "report to the probation department as directed, make restitution payments, or submit verification of his employment and attendance at counseling sessions." (*Id.* at p. 1038.) The court reasoned any testimony by the probation officers "would necessarily have been based upon an examination of the probation department's records." The court opined "their demeanor while testifying would not have been helpful in determining the truth of the facts they reported. . . . Nor would cross-examination of either officer have been likely to elicit any facts pertinent to the inquiry facing the trial court." (*Id.* at pp. 1038-1039.) The court reasoned that "[a]lthough the probation report would constitute testimonial hearsay under the expansive definition developed in recent confrontation clause cases, such as *Melendez-Diaz v.*

Massachusetts (2009) 557 U.S. 305 . . . , the confrontation clause is inapplicable to the probation revocation context. But within the parameters established by the body of precedent applicable to probation revocation, we conclude that the probation report was admissible and its admission did not violate defendant's due process right of confrontation." (*Gomez, supra*, 181 Cal.App.4th at p. 1039.)

Admittedly, the prosecutor did not submit a probation report with the petition. However, the petition includes two pages, the first is the accusatory pleading alleging the probation violations, and the second page is a one-page statement of findings that includes "Collateral Information," "Circumstances of the Violation," "Progress on Probation," "Evaluation and Discussion," and "Recommendation." In other words, it is a truncated version of a probation report. The "Circumstances of the Violation" section states, "On the above dates, [Pardo] failed to test as directed." It also describes Pardo's claimed physical difficulties in providing a sample. The "Collateral Information" section states Pardo did provide a sample on February 7, 2011. This statement of findings is analogous to a probation report, which the *Gomez* court concluded was admissible in a probation revocation hearing. Thus, the trial court did not abuse its discretion in admitting the petition after concluding it possessed sufficient indices of reliability.

Pardo argues the probation officer who was present when Pardo could not provide a urine sample on the violation dates was required to testify to establish whether the violation was willful. Similar to *Gomez*, the probation officer's testimony would have been based upon probation department records and would not have been helpful in determining the truth of the facts they reported.

Pardo also claims his failure to submit to drug testing was not willful because "he wasn't able" to provide a urine sample. The probation officer would not have been able to testify as to whether Pardo "was able" to provide a urine sample, only that he did not provide a urine sample.

Even if the trial court erred by admitting the petition, we conclude any error was harmless beyond a reasonable doubt. (*Arreola, supra*, 7 Cal.4th at p. 1161.) Pardo's testimony provided a rational inference he willfully failed to submit to testing. Pardo testified he could not provide a sample on January 3 or 4, 2011. Based on his admission he provided a urine sample on at least one other date, this was sufficient evidence from which the trial court could conclude based on a preponderance of the evidence that Pardo *willfully* violated the terms and conditions of his probation. (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295.)

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

MOORE, J.

IKOLA, J.