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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. ELMER FRANCO CABRERA, Defendant and Appellant.	G051879 (Super. Ct. No. 13CF2152) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed.

Erica Gambale, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant Elmer Franco Cabrera appeals from the court's revocation of his mandatory supervision, contending the trial court improperly admitted into evidence (1) a handwritten note on the probation department's monthly reporting form, and (2) his probation officer's testimony about an out-of-court statement made by the probation department receptionist who allegedly wrote the note. The note stated defendant had been instructed to return to the probation department on a certain date. Defendant concludes the court erred by revoking his supervision based on inadmissible evidence that he had violated his supervision by failing to report as instructed on that date. We disagree and affirm the court's postjudgment order.

FACTS

In September 2013, defendant pleaded guilty to a repeat commission of felony vehicle taking, and admitted a prior prison term allegation. The court sentenced him to four years in county jail for the felony, imposed but struck a one-year sentence for the prior prison term enhancement, and ordered him to spend one year in county jail, followed by three years of mandatory supervision. The court ordered him to report to the probation department within 72 hours of his release from custody.

Defendant's mandatory supervision began on December 30, 2013.

On March 11, 2015, the People petitioned for revocation of defendant 's supervision, alleging the following. In April, July, and December of 2014, defendant had violated the terms of his supervision and had served custody time for each violation. On February 21, 2015, he was released from custody.[1] On February 24, he reported to the probation department's office and "completed a Monthly Reporting Form indicating he was homeless without a telephone contact number." On that day, he was instructed "to

[1] All further dates refer to the year 2015, unless otherwise stated.

return to Probation on February 26," but he "never reported and his whereabouts remain[ed] unknown."

The Revocation Hearing

On April 23, at a contested revocation hearing, Probation Officer Elvia Nicole Waldron testified as follows: She had supervised defendant since around October 1, 2014; the terms of his mandatory supervision required him to "report as required by [his] probation officer"; and she had personally made an entry in the probation office's database reflecting that defendant reported on February 24 and filled out a monthly reporting form, on which he indicated he was homeless and had no cell phone contact number. Waldron was not in the office on February 24.

Waldron testified the probation department uses its monthly reporting form to document when a probationer shows up for an appointment when his or her probation officer is absent; the form ensures the probationer gets credit for reporting. Under these circumstances, a receptionist will normally give the probationer "further reporting instructions." The receptionists are in charge of this function and they do it regularly. Waldron had worked for the Orange County Probation Department for 18 years. She had discussed the monthly reporting form with her supervisors and at department meetings. In Waldron's experience, a receptionist would note on a probationer's monthly reporting form the date on which the probationer is instructed to return. Defendant's monthly reporting form showed he reported on February 24 and was told to return on February 26. Waldron's contact history log showed that on February 25, she tried to contact defendant at his last known reporting address, but he was not there. Waldron spoke with his girlfriend who said she had not seen him since his release from custody.

On cross-examination, defense counsel asked Waldron for the name of the receptionist who spoke with defendant on February 24, and whether that person was still employed by the probation department. Waldron replied the receptionist's name was

"Alex" and he was still employed by the department. Defense counsel asked Waldron how she knew that Alex spoke with defendant. Waldron testified she asked Alex, "Whose writing was this?" — referring to the handwritten return date on defendant's monthly reporting form — and Alex said, "That's my writing. I ordered him to return." Waldron clarified that defendant himself "basically signed and filled out" the monthly reporting form, but the receptionist had written "a return date on that same form" ordering defendant to come back on that date.

Defense counsel objected on hearsay grounds to Waldron's testimony about Alex's out-of-court statement that he wrote the return date.

The court ruled the evidence was admissible under *People v. Maki* (1985) 39 Cal.3d 707 (*Maki*) and *People v. Brown* (1989) 215 Cal.App.3d 452. The court stated that hearsay (such as police or chemist reports, signatures on an account, documents from a probationer, or business records used by probation officers to determine someone's whereabouts) is admissible if done in the regular course of business, and a probation officer can testify to these facts. The court found defendant's monthly reporting form was produced in the regular course of business and appeared trustworthy.

Defense counsel argued that, without basic information such as Alex's last name, the evidence was not reliable. She further argued that, without Alex present to testify, it was impossible to know whether defendant was present when the return date was written on his monthly reporting form.

The court again found the evidence was reliable, based on Waldron's testimony and the fact that Alex sits in the front reception area, fills out this paperwork regularly, and confirmed to Waldron that it was his writing on the document.

Defense counsel asked Waldron when she had asked Alex to identify the writing on defendant's monthly reporting form. Waldron testified she asked Alex the question only *after* defendant had failed to report on February 26. Waldron believed Alex to be a credible person based on his punctuality and hard work as a probation

department receptionist for "quite a few years," and due to the background check performed on all probation department workers.

Waldron testified defendant was "classified as a high risk" due to his gang ties, failures to report, drug history, and prior probation. As such, he would have been required to report to his probation officer twice a month. On March 6, Waldron had filed a warrant for his arrest.

Defense counsel again objected to the admission into evidence of the monthly reporting form.

The court found the probation department's system was reliable and had been used for over 13 years. The court noted, "[T]he date does say 'return' or r-e-t, which I would take as return, 2-26-15." The court suggested, however, that the department should improve their procedure in the future.

The court found defendant had violated the terms of his supervision.

At the continued hearing on May 1, the court terminated defendant's supervision and sentenced him to 306 days in custody, with 88 days of credit for time served.

DISCUSSION

Defendant contends the court improperly admitted into evidence (1) the monthly reporting form with Alex's handwritten note, and (2) Waldron's testimony that she spoke to a receptionist named Alex, who had instructed defendant to report on February 26. Defendant concludes no admissible evidence shows he was instructed to return to the probation department on February 26.

Citing *Maki*, *supra*, 39 Cal.3d 707, defendant argues that, "while the monthly reporting form itself may be admissible documentary evidence, the handwritten note on the form lacks any indicia of reliability and should have been excluded." He

argues: "Without someone explaining what the handwriting on the form meant, when the handwriting was placed on the form, and whether [defendant] was advised of the handwritten note requesting his return, the monthly reporting form is nothing more than proof that [he] reported as directed on February 24, 2015."

Defendant further contends (1) Alex's statement to Waldron was the sole evidence that he was told to return on February 26, and (2) the People made no showing of good cause for allowing Waldron to testify in lieu of Alex's live testimony. He relies on *People v. Arreola* (1994) 7 Cal.4th 1144, 1159 (*Arreola*) and *People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1202 (*Shepherd*). He asserts there is no evidence of *when* Alex noted the return date on the monthly reporting form, and suggests Alex could have added this notation *after* defendant left the office on February 24.

We apply the abuse of discretion standard of review to a trial court's decision to admit or exclude evidence in a probation or mandatory supervision revocation hearing. (*Shepherd*, *supra*, 151 Cal.App.4th at pp. 1197-1198; *Williams v. Superior Court* (2014) 230 Cal.App.4th 636, 643, fn. omitted [realignment legislation established uniform process for revocation of probation, parole, and postrelease supervision of most felons]; see *People v. Catalan* (2014) 228 Cal.App.4th 173, 178 [court did not *abuse discretion* when imposing custody term for violation of mandatory supervision].)

In *Maki*, our Supreme Court, seeking "to clarify the standards for admitting documentary evidence at probation and parole revocation hearings," concluded that "documentary hearsay evidence which does not fall within an exception to the hearsay rule may be admitted if" supported by "sufficient indicia of reliability . . . ." (*Maki*, *supra*, 39 Cal.3d at p. 709.) *Maki* noted the United States Supreme Court's statement in *Morrissey v. Brewer* (1972) 408 U.S. 471, 489, that, at revocation hearings, "'the process should be flexible enough to consider evidence including letters, affidavits, and other material that would not be admissible in an adversary criminal trial.'" (*Maki*, at p. 714.) Applying the "reasonable indicia of reliability" standard (*id*. at p. 715), *Maki* affirmed the

trial court's revocation of the defendant's probation based on its finding he violated his probation terms by traveling out of state without permission, as evidenced by two pieces of documentary evidence. (*Id.* at p. 717.) That evidence consisted of a Hertz car rental invoice and a Hyatt hotel receipt seized from the defendant's home. (*Id*. at p. 716.) Significantly, the car rental invoice bore the defendant's signature in two places (*id.* at pp. 716-717), as well as the Hertz emblem (*ibid.*). "[S]tamped in the box in which is printed 'Vehicle Rented at (City/State)' are the words 'O'Hare Field, Chicago, IL.' This stamp is followed by an additional handwritten inscription: 'Hyatt.'" (*Id.* at p. 716.) Standing alone, the Hyatt receipt had "at best minimal probative value," but, when viewed together with the Hertz invoice showing "'O'Hare Field, Chicago, IL "Hyatt",'" it corroborated the information in the Hertz invoice. (*Id.* at p. 717.) The printed Hertz invoice was "an invoice of the type relied upon by parties for billing and payment of money." (*Ibid.*) "Imprinted with a Hertz emblem, the invoice appears to be a typical one utilized by Hertz in transacting business, and it contained internal evidence of its place of issue to which had been affixed an identifiable signature by defendant." (*Ibid.*)

In *Arreola*, *supra*, 7 Cal.4th at page 1148, our Supreme Court clarified that *Maki* did *not* overrule our high court's holding in *People v. Winson* (1981) 29 Cal.3d 711, 713-714 (*Winson*) "that, at a probation revocation hearing, the prosecution may not introduce the transcript of a witness's preliminary hearing testimony in lieu of the witness's live testimony 'in the absence of the declarant's unavailability or other good cause.'" *Arreola* reiterated three well-established functions served by the confrontation clause: A witness's live testimony (1) enables the trier of fact to observe his or her demeanor and (2) allows the defendant to cross-examine the adverse witness (*id*. at p. 1155), while (3) forcing the witness to testify — "face-to-face" — in the defendant's presence (*id*. at p. 1158). *Arreola* articulated a clear "distinction between a transcript of former live testimony and the type of traditional 'documentary' evidence involved in *Maki* that does not have, as its source, live testimony": "[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." (*Id.* at p. 1157, fn. omitted.)

In *Shepherd*, the appellate court quoted *Arreola's* foregoing articulation of the distinction between traditional documentary evidence and a transcript of former live testimony. (*Shepherd*, *supra*, 151 Cal.App.4th at p. 1201.) The evidence at issue in *Shepherd* was the defendant's probation officer's testimony that a program administrator for a treatment program had informed the probation officer that the defendant had been "asked to leave the treatment program after smelling of, and testing positive for, alcohol consumption." (*Id.* at p. 1198.) *Shepherd* recognized that the probation officer's "live testimony [concerned] a declarant's out-of-court statements rather than, as in *Winson* and *Arreola*, a declarant's prior testimony." (*Id.* at p. 1201.) Nonetheless, because "[b]oth, however, are forms of testimonial hearsay evidence" (*ibid*.), *Winson's* and *Arreola's* good cause standard applied, "rather than the more lenient indicia of reliability standard set forth in *Maki*." (*Id.* at p. 1202.)

In *People v. Abrams* (2007) 158 Cal.App.4th 396 (*Abrams*), at the defendant's probation violation hearing (*id*. at p. 399), the trial court allowed probation officer Dangerfield to testify that the defendant had failed to report to probation (*id*. at p. 404). "Dangerfield had prepared a report to that effect." (*Ibid.*) On cross-examination, Dangerfield referred to a report prepared by another probation officer, Smith. (*Ibid.*) Dangerfield testified the Smith report indicated that the defendant had been ordered to report on June 13th, 2006, but never showed up. (*Ibid.*) The defendant appealed. (*Id.* at

p. 398.) The Court of Appeal affirmed the trial court's order revoking probation. (*Ibid.*) The appellate court held "that whether or not a defendant has reported to his probation officer [is] essentially non-testimonial; thus, even if hearsay, [the evidence is] admissible at a probation violation hearing." (*Ibid.*)

Abrams summarized two cases that had applied the "Supreme Court's distinction between *Winson* and *Arreola*, on the one hand, and *Maki*, on the other hand." (*Abrams*, *supra*, 158 Cal.App.4th at p. 403.) First, in *People v. O'Connell* (2003) 107 Cal.App.4th 1062, "the Third District affirmed the admission into evidence of a report from a drug treatment program recounting the defendant's absences from counseling sessions. 'Contrary to appellant's assertions, we believe [the] report is akin to the documentary evidence that traditionally has been admissible at probation revocation proceedings. Unlike the fact patterns in *Winson*, *supra*, 29 Cal.3d 711, and *Arreola*, *supra*, 7 Cal.4th 1144, where the prosecution proposed to use former testimony, [the] report was prepared contemporaneously to, and specifically for, the hearing where appellant's lack of compliance with the deferred entry of judgment program was at issue.'" (*Abrams*, at p. 403.)

Second, in *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1412-1413, "the First District affirmed the admission of a laboratory report that confirmed that the substance the defendant had sold was cocaine." (*Abrams*, *supra*, 158 Cal.App.4th at p. 403.) *Johnson* stated: "A laboratory report does not 'bear testimony,' or function as the equivalent of in-court testimony. If the preparer had appeared to testify at [the defendant's probation] hearing, he or she would merely have authenticated the document." (*Johnson*, at p. 1412.)

The *Abrams* court concluded *Maki*, *Johnson* and *O'Connell* applied to the facts before it (*Abrams*, *supra*, 158 Cal.App.4th at p. 404) and *Maki* was "more factually analogous" than *Winson* (*Abrams*, at p. 401). *Abrams* found "the evidence from the probation reports had sufficient 'indicia of reliability.'" (*Id.* at p. 404.) But *Abrams*

caveated: "This is not to say that everything in a probation report is necessarily admissible at a violation hearing. Evidence that is properly viewed as a substitute for live testimony, such as statements to a probation officer by victims or witnesses, likely falls on the *Winson-Arreola* side of the line. [Citations.] We hold the rule is otherwise where the evidence involves more routine matters such as the making and keeping of probation appointments . . . , and similar records of events of which the probation officer is not likely to have personal recollection and as to which the officer 'would rely instead upon the record of his or her own action.'" (*Abrams*, *supra*, 158 Cal.App.4th at p. 405.)

Here, the facts are quite similar to those in *Abrams*. The probation department's monthly reporting form is essentially non-testimonial: It is not a substitute for live testimony, but instead involves the routine matter of the making and keeping of probation appointments (events of which a probation officer or a probation receptionist is unlikely to have personal recollection and as to which the officer or receptionist would probably rely "'upon the record of his or her own action'"). (*Abrams*, *supra*, 158 Cal.App.4th at p. 405.) The monthly reporting form has sufficient indicia of reliability because it has been routinely used by the probation department for over 18 years.

But defendant objects to the handwritten note on his form, asserting, as a factual matter, that Waldron "needed to speak to 'Alex' to clarify [the] meaning" of the "shorthand written note." This assertion is inaccurate. Waldron asked Alex whose writing was on the note, *not* what the note meant. In fact, Waldron asked Alex this question only after Waldron determined defendant had failed to report on February 26, as instructed.

Contrary to defendant's assertion, Waldron testified that, in her experience, the receptionists routinely "note" on the monthly reporting form the date that someone is told to come back. If Alex had testified, he likely would have referred to defendant's monthly reporting form, rather than searching his memory for a specific recollection of his interaction with defendant, especially considering the high volume of his contact with individuals reporting to their probation officers over the course of "quite a few years."

Although the record on appeal contains no copy of defendant's monthly reporting form, the lower court had the opportunity to view the handwritten note. The court found the note, "return 2-26-15," indicated that defendant was to return on February 26, and was reliable since the receptionist fills out the paperwork regularly.

Nor was Waldron's testimony that Alex stated he ordered defendant to return on February 26 the sole evidence that defendant was supposed to report on that date. Waldron testified on direct examination that, based on defendant's monthly reporting form, his return date was February 26. She did not mention Alex or any statements by him until defense counsel elicited that testimony in cross-examining Waldron (testimony of which defendant now complains on appeal). Obviously, defendant did not object below to Waldron's testimony about Alex.

The court did not abuse its discretion by admitting the evidence.

Because we agree with the People that the challenged evidence was reliable, we do not address their alternate claim that the evidence was admissible under the business records and official records exceptions.

DISPOSITION

The postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

MOORE, ACTING P. J.

ARONSON, J.