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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. JUAN GUTIERREZ RODRIGUEZ, Defendant and Appellant.	2d Crim. No. B232099 (Super. Ct. No. CR42746) (Ventura County)

Juan Gutierrez Rodriguez appeals the order revoking his probation and sentencing him to 11 years in state prison following his guilty plea conviction on five counts of committing a lewd act upon a child under the age of 14 (Pen. Code,[1] § 288, subd. (a)). Appellant contends (1) the evidence is insufficient to support the trial court's finding that he willfully violated the terms of his probation; and (2) the court abused its discretion in sentencing him to state prison instead of reinstating him on probation. We affirm.

FACTS AND PROCEDURAL HISTORY

From 1991 until 1996, appellant repeatedly sexually abused his two stepdaughters, both of whom were under the age of 14. On April 5, 1998, he pled guilty to five counts of committing a lewd act on a child under the age of 14. In exchange for

[1] All further undesignated statutory references are to the Penal Code.

his plea, two additional counts alleging a violation of section 288, subdivision (a), and one count for continuous sexual abuse of a child under the age of 14 (§ 288.5) were dismissed. In the felony disposition statement, appellant acknowledged his understanding that if he was not a citizen of the United States he could be deported, excluded from admission, or denied naturalization.

On June 4, 1998, the court suspended imposition of sentence and placed appellant on five years formal probation with various terms and conditions that required him to, among other things, (1) serve one year in county jail; (2) register as a sex offender; (3) report to the probation department within five days of his release from custody; (4) be under the supervision of a probation officer and report as directed; (5) refrain from leaving the state or changing his residence without his probation officer's permission; (6) participate in a sex offender treatment program as approved and directed by his probation officer; (7) immediately seek and obtain individual psychotherapy approved by probation; and (8) refrain from residing with any children under the age of 18 without the probation officer's prior approval. Appellant was also ordered to pay fines totaling $3,700, payable at $135 a month beginning on October 1, 1998, and to "notify [the court] immediately if there is any problem with payments." The agreement further provided that appellant could "petition the court at any time to modify or vacate th[e] judgment if there is a change of circumstances in [his] ability to pay."

On September 23, 1998, appellant was released from county jail to INS[2] detention. Appellant was deported to Mexico on October 22, 1998. On January 21, 1999, the court summarily revoked appellant's probation and issued a bench warrant for his arrest after he failed to appear in court.

On July 28, 2010, appellant visited the immigration office in Juarez, Mexico, for the purpose of initiating the process to legally reenter the United States. Appellant was directed to the border in El Paso, Texas, where he was detained on the

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2 "INS" stands for the Immigration and Naturalization Service. After appellant's deportation, the agency was reorganized and is now known as Immigration and Customs Enforcement, or "ICE." (*People v. Villa* (2009) 45 Cal.4th 1063, 1066-1067, fn. 1.)

warrant for his arrest. He was subsequently transported back to California. When appellant appeared in court on August 9, 2010, the court referred the matter to probation for a formal notice of charged violations. On August 16, 2010, the probation department filed a notice alleging that appellant had violated his probation by (1) failing to report to probation since his release from custody; (2) failing to register as a sex offender; (3) failing to pay restitution and fines; and (4) failing to submit a blood sample for AIDS testing. An amended notice was subsequently filed adding the allegation that appellant had violated his probation by failing to participate in sex offender treatment.

At the conclusion of a contested probation violation hearing, the court found appellant in violation of his probation. The court revoked probation and sentenced appellant to 11 years in state prison, consisting of the low term of three years on the base count and consecutive two-year terms (one-third the six-year midterm) on the remaining four counts. This appeal followed.

DISCUSSION

Appellant contends the court abused its discretion in revoking probation because the evidence is insufficient to show that his violation of probation was willful. We conclude otherwise.

Background

The amended notice of alleged violations (notice) charged appellant with violating his probation by, among other things, failing to (1) report to probation upon his release from custody and thereafter report as directed; (2) pay $3,700 in fines and fees, payable at the rate of $137 a month; and (3) participate in sex offender treatment and psychotherapy as approved and directed by probation. At the probation violation hearing, the parties stipulated that the court could consider the facts alleged in the notice as true, the only issue being whether those facts established a willful probation violation.

The notice included a summary of the interview appellant gave after his arrest. Appellant stated that he had not reported to probation because he lost the relevant paperwork when he was deported and did not know how or where to report. He lived in the same town the entire time he was deported and worked to support his family by

selling vegetables. He tried to enroll in sex offenders classes, but was told "the classes would not count" because he was in a different country.

At the probation violation hearing, appellant testified that he had not enrolled in any sex offender programs because he was told that "they didn't have anything like that in Mexico." He acknowledged that he never tried to participate in any form of therapy. He further acknowledged that he had made no attempts to pay the fines and fees he agreed to pay as a condition of his probation, but only because he "didn't have the money to do it."

After hearing argument from the parties, the court revoked appellant's probation on its finding that he had willfully violated probation as alleged in the notice. The court stated: "I do find that based on the defendant's testimony and the record and that of the probation officer, that his physical absence from the county was not of his own doing. It was apparently assisted by the U.S. Government, and he was deported. [¶] But he is in violation of probation for failing to obtain the required treatment and failing to report to the probation officer in any way during the time of his absence and failing to make any payments whatsoever on his financial obligations in this case. [¶] I'm astonished that someone such as the defendant, who was given probation, which I find surprising—I wouldn't use the word shocking, but it is surprising to me that based on this record, these violations, that [appellant] was placed on probation by the court. [¶] I don't mean to criticize the judgment of people in the past, but it is a surprisingly good outcome for a defendant such as him. And that for him to simply blow off all of his obligations just because he crossed the border doesn't make a lot of sense. [¶] What he needed to do and what he didn't do was to maintain contact with the Ventura County Probation Department, explain his circumstances, and do his best to comply with the things he had agreed to do in terms of probation. He didn't do anything, anything like that. He just acted as though because he was in Mexico none of this mattered."

With regard to appellant's failure to participate in treatment, the court added: "[T]he safety and security of children in Mexico is every bit as important as is the safety and security of children in California. And someone such as the defendant, who is

a child molester, agreed to be undergoing treatment to make sure that other kids weren't molested. And he just blew off that obligation. [¶] And I can't say this strongly enough. The idea is to protect children. I don't care where they are. And the defendant acted as though he had no responsibility to meet his obligations once he cleared the border. That's wrong, and he's in violation of probation."

Analysis

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 . . . ." (§ 1203.2, subd. (a); *People v. Galvan* (2007) 155 Cal.App.4th 978, 981 (*Galvan*); *People v. Stanphill* (2009) 170 Cal.App.4th 61, 72.) We apply the substantial evidence standard when reviewing a trial court's finding of a probation violation. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848–849.) The facts supporting revocation of probation may be proved by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 439; *Galvan*, at p. 982; *People v. Kelly* (2007) 154 Cal.App.4th 961, 965.) The evidence must support a conclusion that the probationer's conduct constituted a willful violation of the terms and conditions of probation. (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295 (*Cervantes*); *Galvan*, at p. 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." (*Cervantes*, at p. 295.) Trial courts have great discretion in deciding whether or not to revoke probation. (*Galvan*, at pp. 981–982.) Absent abuse of that discretion, we will not disturb the trial court's decision. (*Kelly*, at p. 965.)

Appellant challenges the court's findings that his failure to report to probation, pay his fines and fees, and participate in sex offender treatment were willful. He claims that his deportation rendered it impossible for him to report to probation or enroll in treatment. He further claims that he lacked the ability to pay his fines and fees, and that the court was required to make an express finding on his ability to pay.

We are not persuaded. Appellant's deportation did not prevent him from contacting the probation department by telephone or mail to notify them of his deportation and give them his current address and other contact information. Moreover, appellant never purported to espouse a belief that his deportation absolved him of the duty to report. Rather, he merely claimed that he did not know how to report because he lost the paperwork. Under the circumstances, the court did not err in finding that appellant was aware of his duty to report to probation and had willfully failed to do so.

The cases appellant cites in support of his position on this point are inapposite. In *Galvan*, the trial court found a probationer who was deported upon his release from custody in willful violation of the conditions that he "'report to the probation office'" and "'contact the community assessment service center in Tarzana and the probation officer assigned to that center' within 24 hours of his release from custody." (*Galvan, supra*, 155 Cal.App.4th at p. 985.) In reversing, the Court of Appeal concluded among other things that "a reasonable person in Galvan's position would have understood these instructions to require a personal appearance before the probation officer . . . [and] would have assumed that, in these circumstances, the 24–hour reporting requirement would be excused." (*Ibid.*, fn. omitted.)

As we have noted, appellant did not merely agree to report to the probation officer upon his release from custody. He also agreed to "[b]e under the supervision of a probation officer and report as directed." The trial court acknowledged that appellant's deportation prevented him from reporting in person, yet faulted him for failing to make any effort to contact the probation department during his 11-year absence from the state. Under the totality of the circumstances, we believe that a reasonable person in appellant's position would construe the instruction that he "be under the supervision of a probation officer and report as directed" as requiring him to maintain contact with the probation department notwithstanding his deportation. Indeed, appellant effectively conceded that he interpreted the instruction in this manner.**3**

3 In *People v. Campos* (1988) 198 Cal.App.3d 917, the Court of Appeal held the trial court was not required to consider the probationer's deportation as a mitigating factor and

Appellant's reliance on *People v. Sanchez* (1987) 190 Cal.App.3d 224, is also unavailing. In *Sanchez*, the court stated: "[I]n the typical case, an illegal alien will have at best limited ties to the general community and, upon deportation, such ties to the community as do exist will necessarily be terminated. Obviously, a convicted illegal alien felon, upon deportation, would be unable to comply with any terms and conditions of probation beyond the serving of any period of local incarceration imposed." (*Id.* at p. 231.) Aside from the statement being dicta, we disagree with the proposition that a deported alien will be unable to comply with any term or condition of probation. For example, deportation does not prevent an alien from notifying the probation department of his or her new address, nor does it prevent the alien from sending payments for fees and fines he or she agreed to pay. Moreover, appellant, unlike the deported aliens in *Sanchez*, had and continues to have ties to the general community. By appellant's own admission, he has an adult daughter in the United States who was helping prepare his immigration papers. He could have just as easily asked her to assist him in obtaining contact information for the probation department.[4]

In arguing that his failure to participate in sex offender treatment was not a willful violation of his probation, appellant offers that he "was not ordered to seek treatment in Mexico. Rather, [he] was ordered to 'participate as directed in any treatment program *designated by the probation officer*.'" Appellant fails to appreciate that no treatment program could have been designated by the probation officer unless he had

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stated: "A defendant who is deported while on probation may be found in violation of that probation for failure to report to the probation department although his deportation makes it impossible for the defendant to fulfill this condition of his probation." (*Id.* at p. 923.) The court in *Galvan* disagreed with the statement and noted that it "does not explain how a failure to report in the deportation situation could be willful." (*Galvan, supra*, 155 Cal.App.4th at pp. 984-985, fn. 4.) As the People aptly put it, "the specific situation here falls squarely within the realm of how a failure to report in the deportation context could be willful."

[4] Appellant also cites *Cervantes, supra*, 175 Cal.App.4th at page 295, in which we reversed an order finding the defendant in violation of probation for missing a review hearing while in ICE custody. In reaching that conclusion, we reasoned that a probationer cannot be held in willful violation of probation for failing to comply with the terms and conditions of probation "because of circumstances beyond his or her control." (*Ibid.*) As we have explained, that is not the situation here.

contacted probation to notify them of his whereabouts. While he also asserts that California courts have no jurisdiction to compel treatment or enforce probation conditions on individuals who are in foreign countries (see *People v. Espinoza* (2003) 107 Cal.App.4th 1069, 1076), this does not mean that our courts cannot find those who willfully refuse to participate in treatment in violation of their probation. The fact that appellant was deported did not preclude him from seeing a psychotherapist for treatment, and his unapologetic admission that he made no effort to do so is a willful violation of yet another express term and condition of his probation. Moreover, appellant's admission that he sought out sex offender treatment in Mexico is a tacit acknowledgment that he knew he was expected to comply with this term and condition of his probation notwithstanding his deportation.

Appellant fares no better in challenging the sufficiency of the evidence supporting the finding that he willfully violated his probation by failing to pay the fines and fees he was ordered and agreed to pay as a condition thereof. Appellant claims that the ruling cannot stand because the court made no express finding that he had the ability to pay. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1096; *People v. Quiroz* (2011) 199 Cal.App.4th 1123, 1129.) In this context, however, no such express finding was necessary. Appellant not only agreed to pay $3,700 in fines and fees by making monthly payments of $137, but also agreed that he would immediately notify the court of any problems with his payments. Appellant was also given the opportunity to petition the court to modify the payment schedule if any change arose with regard to his ability to pay. Appellant made no effort to notify the court or seek modification of his agreed-upon payments. Had he done so, the court could have reduced or even terminated the payments if necessary. Moreover, over the course of more than 11 years appellant made no effort to make any payment toward his obligation. In these circumstances, the court could reasonably infer that appellant had willfully violated the terms and conditions of probation that required him to either make monthly payments, notify probation of his inability to do so, or petition the court for modification of the payment schedule.

Sentencing

Appellant argues that the court abused its discretion in sentencing him to prison instead of reinstating him on probation. He claims the court failed to state its reasons for choosing prison over probation and imposed a sentence that was not supported by the evidence.

The first claim is forfeited because it was not raised below. (*People v. Scott* (1994) 9 Cal.4th 331, 353-357.) In any event, the claim lacks merit. Although the imposition of a state prison sentence following a revocation of probation is a sentencing choice requiring a statement of reasons (Cal. Rules of Court,[5] rule 4.406(b)(2); § 1170, subd. (c)), the court gave such a statement here. In arguing to the contrary, appellant highlights the court's comment, "There is no need to talk about probation. That's really out of the question at this point." That comment was made, however, while the prosecutor was arguing against probation. While the court may have bluntly revealed its thinking on the point, it did not, as appellant suggests, preclude defense counsel from arguing in favor of probation.

Moreover, the court gave a detailed statement of reasons in support of its decisions to sentence appellant to prison in lieu of probation and impose an 11-year term.[6] Contrary to appellant's claim, nothing in the record compels or supports a

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[5] All further references to rules are to the California Rules of Court.

[6] The court stated: "I don't see anything here about the defendant that is mitigating at all. The only thing that gives me pause is the letter that I studied that was written by his wife talking about the effect on the defendant's family of what's happened here. And that is very sad. There is nothing that the defendant has done that causes this to become a mitigated case. [¶] But the strange reality of this case is that in the intervening time when the defendant, essentially, absconded from Probation's supervision, he appears to have started a new family, and if the Court, from his wife, is believing that, that family is depending on him to some extent. That is the only mitigating thing that I see here. [¶] The defendant is a child molester, as I said last time. The idea of him getting counseling for that was to prevent a recurrence of his abusive activities. And children in Mexico are just as important as our children in California. Whether he was there or here, the idea was that he was to receive this counseling to forestall the likelihood of him abusing another child. I don't have anything before me that says he has done that.

conclusion that the court's statements in support of its sentencing decision were confined to its determination whether to impose the lower, middle, or upper term. Although the court did not expressly identify as an aggravating factor that appellant's prior performance on probation was unsatisfactory (rule 4.414(b)(2)), its statement plainly reflects such a finding. Moreover, this aggravating factor is sufficient by itself to support the court's decision to deny probation and sentence appellant to prison. (*People v. Yim* (2007) 152 Cal.App.4th 366, 369.)

The record is also sufficient to support the court's decision. '"The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]' [Citation.] 'In reviewing [a trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or capricious or exceeds the bounds of reason considering all the facts and circumstances.' [Citation.]" (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311.)

Appellant fails to meet his burden of showing that the court's decision to sentence him to prison amounts to an abuse of discretion. He claims our decision in *Cervantes* compelled the court to consider reasonable alternatives to prison in light of appellant's immigration status (*Cervantes, supra*, 175 Cal.App.4th at p. 298), then offers that the court should have reinstated him on probation with instructions on how to comply after he was again deported to Mexico. *Cervantes*, however, does not purport to establish a requirement that other alternatives must be considered where, as here, a previously deported defendant has been found in willful violation of probation. Even assuming that such a requirement exists, appellant fails to demonstrate that the alternative he advocates would have been reasonable under the circumstances. His attempt to make

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[¶] . . . I do see that there is that one mitigating factor, and that is the impact on innocent children of locking the defendant up for what would otherwise be the correct period of time. There aren't any reasons to impose concurrent sentences in this case. It would be an abuse of my discretion for me to do so. The defendant was astonishingly fortunate that he wasn't tucked away in prison for as long as possible when he was first sentenced in this case."

that showing minimizes the willful nature of his failure to comply with any of the terms and conditions of his probation, the granting of which allowed him to avoid a lengthy prison sentence.

As the court put it, "[For appellant] to simply blow off all of his obligations just because he crossed the border doesn't make a lot of sense. [¶] . . . He just acted as though because he was in Mexico none of this mattered." The court found only one mitigating factor, i.e., the negative impact of his incarceration on his wife and minor children. By contrast, the court was faced with a convicted child molester who "blew off his obligation" to comply with the terms and conditions of his probation. Considering the relevant facts and circumstances, it cannot be said the court acted arbitrarily or capriciously or exceeded the bounds of reason in deciding to sentence appellant to prison in lieu of a second grant of probation. Appellant's claim that the court's sentencing decision amounts to an abuse of discretion accordingly fails. (*People v. Weaver, supra*, 149 Cal.App.4th at p. 1311.)

The judgment (order revoking probation) is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James P. Cloninger, Judge

Superior Court County of Ventura

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Eric R. Larson, under appointment by the Court of Appeal, for Defendant and Appellant.

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