

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH WYRICK,

Defendant and Appellant.

B272089

(Los Angeles County
Super. Ct. No. TA125384)

APPEAL from an order of the Superior Court of
Los Angeles County, Laura R. Walton, Judge. Affirmed.

Erik Harper, under appointment by the Court of Appeal,
for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Appellant Keith Wyrick appeals from an order revoking probation granted upon his plea of no contest to corporal injury to a cohabitant. (Pen. Code, § 273.5, subd. (a).)¹ We affirm.

FACTUAL AND PROCEDURAL SUMMARY

1. The Underlying Offense and Related Proceedings.

A preconviction probation report reflects as follows. On October 13, 2012, appellant and his wife, Deborah Dow, were arguing in their Compton home. She entered her bedroom and locked the door, but appellant entered, pushed her down on the bed, and repeatedly hit her face. Dow's 10-year-old son saw appellant repeatedly punching her. Dow fled and called 911.

Sheriff's deputies arrived and the child ran towards them, crying and saying, " 'He is hitting my mommy.' " Deputies saw that Dow's face was red and she had a laceration on her right jaw. The child told deputies that appellant and Dow had been "fighting again" and " 'Every time you guys come, he always acts all innocent.' " Appellant told deputies, " 'I only pushed her, if I wanted to hit her I would break her nose.' " The report reflects appellant's extensive criminal history.

Based on the incident, an information filed November 13, 2012, alleged that on or about October 13, 2012, appellant committed corporal injury to a cohabitant, with four strikes and a prior prison term. (§§ 273.5, subd. (a), 667, subd. (d), 667.5, subd. (b).) On November 13, 2012, the court arraigned appellant and he pled not guilty and denied all allegations. At all proceedings herein mentioned, appellant was represented by counsel.

¹ Subsequent section references are to the Penal Code.

At the December 11, 2012 pretrial conference, the court discussed appellant's section 17, subdivision (b) motion to reduce the present offense to a misdemeanor. The court indicated as follows. The court had read the preliminary hearing transcript. Dow gave two versions of what had happened, one to the police, and one in court. In court, she minimized everything that had happened. The court stated Dow was "a pretty good co-dependent, here standing by her guy now, ready to say, 'Okay. Yeah, it's okay.'" The court later denied appellant's section 17, subdivision (b) motion.

The People had offered a plea bargain and appellant's counsel indicated appellant was prepared to accept it. The court indicated that, under the terms of the offer, "if you snap or if you mess up, you're going to state prison." Appellant replied, "Okay." The court indicated it would issue a protective order and appellant would have to obey its terms. Appellant indicated he understood.

A "criminal protective order – domestic violence" (order) issued and filed on December 11, 2012, reflects as follows.² A box was checked on the order, indicating it was a "probation condition order (Pen. Code, § 1203.097)." (Some capitalization omitted.)

² The superior court file in this case has been transmitted to this court and the file contains the original of the above protective order, and the People's motion to revoke probation discussed *post*.

The order stated appellant was not to strike, threaten, or assault Dow, was not to have contact with her, and was not to come within 100 yards of her. The order stated the exception was that appellant and Dow could attend church, and related counseling, together.³ The order reflects that on December 11, 2012, appellant was personally served with a copy of the order.

Item 2 on the front of the order has a space where an expiration date can be listed, then the order states, “If no date is listed, this order expires three years from the date of issuance.” No date is listed. The back of the order contains a section entitled, “Effective date and expiration date of orders.” (Some capitalization omitted.) The section then states, in relevant part:

“• These orders expire as explained in item 2 on the reverse. [¶] . . . [¶]

• Orders under Penal Code section 1203.097 *are probationary orders and the court has jurisdiction as long as the defendant is on probation.* (Pen. Code, § 1203.097(a)(2).” (Italics added.)

Pursuant to negotiations, appellant pled no contest to “corporal injury to a co-habitant” as previously indicated. The court sentenced appellant to prison for the four-year upper term for the present offense, suspended execution of sentence, and placed him on formal probation for five years on the conditions, inter alia, that he serve 120 days in the county jail, comply with the protective order, and obey all laws.

³ On December 11, 2012, the court orally stated that appellant was to have peaceful contact with Dow. This statement is not in the written order.

The court dismissed the remaining allegations and released appellant on his own recognizance. The court observed that Dow needed counseling too and she “acted crazy in this situation.” Dow agreed.

2. The Current Probation Violation and Related Proceedings.

Four years later, on March 8, 2016, the court received a People’s motion to revoke appellant’s probation (motion). The motion sought revocation on the grounds, in relevant part, that “(1) [appellant] [v]iolated the protective order . . . and [(2)] committed a new violation of Penal Code section 273.5(a)” against Dow. On March 8, 2016, the court, Judge Laura R. Walton, presiding, called the matter for a possible probation violation.⁴ The court stated it had read and considered the motion. The court summarily revoked appellant’s probation and remanded him to custody without bail.

A probation report prepared for a March 22, 2016 hearing reflects that the probation department received a sheriff’s department arrest report indicating the following. On March 5, 2016, appellant and Dow were at her Compton home when they argued because appellant allegedly had used cocaine in her house. Dow stated appellant became angry when she told him to leave. Appellant, using his left hand, slapped Dow on the right side of her face. Dow stated the slap caused redness and swelling on her face, and loss of hearing in her right ear.

⁴ Judge Walton presided over all proceedings on and after March 8, 2016, but not over proceedings before that date. In particular, she did not issue the December 11, 2012 protective order.

Dow also stated she did not notify the police because appellant had said he would hurt her. Someone else notified deputies. Deputies observed redness and swelling on the right side of Dow's face. Dow told deputies that the present incident was the third domestic violence incident involving appellant and Dow. Following appellant's arrest, he told deputies that "he pushed [Dow] as she was trying to hit him." Appellant remained in custody from March 5, 2016, to May 2, 2016.

On May 2, 2016, the court called the case for a probation violation hearing. Dow's testimony at that hearing was consistent with her statements to deputies at the time of the arrest. Dow also testified the protective order expired in 2015. During cross-examination, Dow testified appellant could have stayed if he had left her alone but she had wanted him to leave. The following later occurred: "Q. And, in fact, you had to push or slap him to get him to start moving to the door? [¶] A. And he hit me back. I hit him. He hit me back."

Los Angeles County Sheriff's Deputy Calvin Lane testified as follows. On March 5, 2016, Lane went to a Compton address in response to a call. He met with Dow and she told him what had happened. There was redness and a little swelling on the right side of Dow's face. Lane or his partner took a photograph of Dow's face. Dow told Lane that appellant struck her but she did not tell Lane that she struck appellant first.

After the People's presentation of evidence, the prosecutor referred the court to the protective order and argued appellant violated probation by violating the protective order and by striking Dow's face.

Appellant subsequently testified as follows. Appellant had a problem with cocaine, he had accidentally scratched Dow's face, and he had been told the protective order had expired. Appellant had never been violent with his wife and had never tried to hurt her. During the March 5, 2016 incident, Dow hit him and he reflexively hit her back.

The court, which had read the probation report prepared for a March 22, 2016 hearing, stated, "She says that she hit you in an effort to get you to leave the house, maybe, maybe not, but the issue is she is not on probation to the court. You are. So you should have never been at her house, and you definitely, definitely should have never hit her again." The court found appellant violated probation based on his violation of the protective order and his assault upon Dow. The court revoked the suspension of execution of appellant's previously imposed four-year prison sentence.⁵

The court indicated appellant had "120 days credit" at the time of the no contest plea. The court asked what appellant's additional credits were, and his counsel stated, "He has 59 actual from this incident." The court stated, "So you get another 59 actual, plus another 59 good time/work time." The court later stated, "So you have a total of 238 days in the county jail against your four-year state prison sentence." On May 3, 2016, appellant filed a notice of appeal.

⁵ The May 2, 2016 minute order reflects a commitment order was issued forthwith, and the abstract of judgment indicates that, on that date, appellant was remanded to the custody of the sheriff forthwith for delivery to prison.

The superior court file contains a memorandum dated June 3, 2016, from appellant's counsel to the trial court. In the memorandum, appellant's counsel indicated as follows. Appellant's counsel was asking the court to recall the case to clarify the record concerning the protective order. The protective order did not list an expiration date, therefore, it expired three years from "October 16, 2012,"⁶ i.e., on October 16, 2015. The incident for which the court had violated appellant's probation occurred after the expiration date. Appellant's counsel added, "I think Judge Walton found more than one ground for violating Mr. Wyrick's probation but if the sole ground was violation of the [protective order] that ground would, I believe, not be valid."

On June 13, 2016, the court called the case, noting counsel for the parties were present but appellant was not. The court indicated as follows. Appellant's counsel had brought to the court's attention an issue regarding the protective order. The court stated, "the protective order reads, 'This order expires three years from the date of issuance.'" The court observed the order was issued on "December 11, 2012," therefore, the court concluded it expired on December 11, 2015 and, on March 5, 2016, appellant had not violated the protective order.

⁶ Appellant's memorandum to the trial court referred to the wrong protective order. The memorandum referred to a protective order issued on October 16, 2012, by Commissioner Wallenstein against appellant and in favor of Dow. However, the protective order, the violation of which was a basis for Judge Walton's May 2, 2016 finding that appellant violated probation, was the previously mentioned protective order issued on December 11, 2012.

However, the court indicated that although it had found appellant in violation of probation based in part on a violation of the protective order, “the biggest violation, to me, and my reason for imposing the four years state prison was . . . that he went to her residence and physically assaulted her, . . .” After quoting from the transcript of the May 2, 2016 probation violation hearing, the court stated, “I still stand [by my] four-year sentence on the probation violation because . . . he still assaulted her at her residence.” The court stated it thought “the assault of her is a violation of his probation” and was the same type of domestic violence conduct for which the court originally had placed appellant on probation.

CONTENTIONS

After examination of the record, appointed appellate counsel filed an opening brief which raised no issues and requested this court to conduct an independent review of the record. By notice sent on December 29, 2016, the clerk of this court advised appellant to submit within 30 days any contentions, grounds of appeal, or arguments he wished this court to consider.

In a letter filed January 11, 2017, appellant stated, “There is a conflict of interest with my counsel. Counsel stated there was a hearing after my revocation hearing, due to my notice of appeal had already been filed, thereby denying the courts jurisdiction to conduct any new hearing. It was founded that I was violated for a keep away order which had been expired. Counsel explained he would figure out a strategy. I’ve written several times in a 3½ month time span with no response, until recently he stated he was filing a *Wende* brief. He didn’t notify me that I could relieve him, I was under the impression that he

was working on a strategy. He doesn't have my best interest at heart. I would like him to be relieved of counsel." (*Sic.*)

In a letter filed January 19, 2017, appellant again raised the above issue and added, "Also Pen C 2900.5 (a),(c), when probation is revoked, court must credit any time served, as a condition of probation and any time served awaiting the hearing on the motion to revoke toward the term probationer is ordered to serve. These arguments I wish the courts to consider." (*Sic.*)

1. The Protective Order.

We reject appellant's suggestion that, because the court relied on the protective order when, on May 2, 2016, the court revoked appellant's probation, the revocation was erroneous. Proof of a probation violation by a preponderance of the evidence is sufficient to revoke probation. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 446 (*Rodriguez*).) Trial courts have broad discretion to determine whether a defendant has violated probation and whether, as a result, the court should revoke probation. (*Id.* at pp. 443, 445.)

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.) Moreover, we review the trial court's finding that appellant violated probation, and the court's decision to revoke probation, for abuse of discretion. (*Rodriguez, supra*, 51 Cal.3d at p. 443; *People v. Angus* (1980) 114 Cal.App.3d 973, 987-988.) A trial court does not abuse its discretion by revoking probation if the record shows the defendant violated a condition of his probation. (*People v. Hawkins* (1975) 44 Cal.App.3d 958, 968.) "[O]nly in a very extreme case should an appellate court interfere with the

discretion of the trial court in the matter of denying or revoking probation.’ ” (*Rodriguez*, at p. 443, quoting *People v. Lippner* (1933) 219 Cal. 395, 400.)

Appellant’s probation conditions included requirements that he comply with the protective order, including the order’s stay-away provision and the order’s prohibition against appellant assaulting Dow. An independent probation condition was that appellant obey all laws. The People’s motion to revoke appellant’s probation alleged, as separate grounds for violating appellant’s probation, his violation of the protective order, and his new offense of violating section 273.5, as to Dow.

During the May 2, 2016 probation violation hearing, the trial court effectively took judicial notice that appellant’s probationary period was five years and the December 11, 2012 protective order indicated compliance therewith was a condition of probation (Evid. Code, § 452, subd. (d)(1); see also Evid. Code, § 1280 [official records hearsay exception].) The court therefore properly inferred the protective order would remain in effect through December 11, 2017, and thus was in effect at the time of the March 5, 2016 incident.

Moreover, it is true that item 2 on the front of the protective order, read by itself, might suggest the protective order expired in three years, i.e., on December 11, 2015. However, as mentioned, on the front of the order, a box was checked, indicating the order was a “probation condition order (Pen. Code, § 1203.097).” Fairly read together, the front and back of the order clearly indicate that, notwithstanding item 2, the court had jurisdiction concerning the protective order as long as appellant was on probation (i.e., up to and including December 11, 2017).

There was sufficient proof presented at the probation revocation hearing that the protective order was in effect on March 5, 2016.

Dow and appellant testified that he hit her on March 5, 2016. The trial court was free to accept some but not all of their testimony (see *People v. Fuiava* (2012) 53 Cal.4th 622, 715, fn. 34), therefore, the court was not obligated to believe Dow's testimony that she hit him first (with the result he hit her in self-defense; see *People v. Forrest* (2015) 237 Cal.App.4th 1074, 1083) or appellant's self-serving testimony that he hit her accidentally or reflexively (with the result the elements of assault were not proven). The court also reasonably could have concluded Dow, as appellant's wife, was biased towards him. Moreover, Dow testified appellant was "high" on what she believed was cocaine but also testified he could have stayed "if he [had] left [her] alone."

Deputy Lane testified Dow did not tell Lane that she hit appellant first. The trial court reasonably could have concluded that if, as she had testified at the preliminary hearing, Dow had hit appellant first, she would have told this to Lane, and the fact she did not tell him this meant it did not happen. The trial court expressed doubt as to Dow's claim that she hit appellant first when the court mentioned that claim and said, "maybe, maybe not." The court's conclusion appellant assaulted her implied the court rejected any evidence he hit her in self-defense, accidentally, or reflexively.

There was sufficient evidence to convince a rational trier of fact, to a preponderance of the evidence, that (1) on March 5, 2016, appellant went to Dow and assaulted her in violation of the protective order's stay-away provision and prohibition against appellant assaulting her, and (2) on that date, he assaulted her

(§ 240) in violation of his probation condition that he obey all laws. The revocation of appellant's probation was well within the court's discretion.⁷

Appellant has failed to demonstrate a conflict of interest with his appellate counsel or ineffective assistance of appellate counsel, and we deny appellant's request that we relieve appellant of his appellate counsel.

2. Presentence Credit.

We also reject appellant's presentence credit claim. In addition to the 120 days that appellant was in custody as a result of the original probationary grant, appellant served 59 days in custody from March 5, 2016, through May 2, 2016, inclusive. The trial court awarded him 238 days of presentence credit, consisting of the 120 days (§ 2900.5, subds. (a) & (c)), plus 59 days of custody credit (see § 2900.5, subd. (a)) and 59 days of conduct credit (see § 4019). Nothing more was required.

⁷ In light of the above, there is no need to reach the issue of whether the trial court would have revoked appellant's probation absent the violation of the protective order and based solely on the violation of his probation condition that he "obey all laws" that occurred when he assaulted Dow. Moreover, we do not rely on the trial court's statements during the June 13, 2016 proceeding.

REVIEW ON APPEAL

We have examined the entire record and are satisfied counsel has complied fully with counsel's responsibilities. (*People v. Wende* (1979) 25 Cal.3d 436, 443; *Smith v. Robbins* (2000) 528 U.S. 259, 278-284.)

DISPOSITION

The order revoking appellant's probation is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

GOSWAMI, J. *

We concur:

ALDRICH, Acting P. J.

LAVIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.