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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. RICKY ANDRE PICKETT, Defendant and Appellant.	B283443 (Los Angeles County Super. Ct. Nos. BA447411, BA448257)

APPEAL from a judgment of the Superior Court of Los Angeles County, Craig Richman and Katherine Mader, Judges. Affirmed.

Jenny Macht Brandt, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Yun K. Lee and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Ricky Andre Pickett (defendant) was on probation when police officers arrested him for domestic violence. The arrest prompted the Los Angeles County District Attorney to seek revocation of defendant's probation. At the revocation hearing, the trial court, without objection, found defendant violated the terms of his probation not based on the grounds alleged in the revocation petition, domestic violence and grand theft, but because defendant admitted he had contact with the victim, which violated an existing protective order. We consider whether reversal is warranted for asserted violations of defendant's constitutional due process rights to notice and to present a defense.

I. BACKGROUND

In August 2016, defendant pled guilty to violations of Health and Safety Code sections 11351.5 (possession of cocaine base for sale) and 11352, subdivision (a) (selling, transporting, or offering to sell cocaine base) pursuant to a plea agreement that called for probation, including a condition for time served in jail. In October 2016, in a different case, defendant pled guilty to violations of Penal Code sections 245, subdivision (a)(1) (assault with a deadly weapon—a kitchen knife) and 166, subdivision (a)(4) (disobeying a domestic violence protective order) pursuant to a similar agreement that called for probation, a time served jail term, and compliance with a "stay-away and protective order."

Defendant was sentenced in both cases, in separate proceedings before different judges, on December 12, 2016. For the narcotics-related convictions, the court placed defendant on

formal probation for three years, including a condition that he serve 360 days in jail with credit for time served.[1]

For the assault and violating a protective order convictions, the trial court placed defendant on five years of formal probation and sentenced him to 365 days in jail, again with credit for time served. The sentencing court also issued a 10-year protective order prohibiting defendant from harassing, contacting, or coming within 100 yards of Shanika J. (Shanika), defendant's wife, who was the victim of the assault and the person protected by the earlier protective order defendant was convicted of violating.[2]

On May 1, 2017, Shanika called 911 and directed officers to defendant, who was sitting in a car with two other people about a block away. Shanika complained of pain and appeared to have a bruise or discoloration on her face. According to one of the responding officers, Julio Aguilar, defendant would not cooperate with requests to exit the vehicle and provide identification. Officer Aguilar arrested defendant and took him into custody.

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[1] At the time of sentencing, defendant was on probation in another case (BA425037) in which he had been convicted in 2015 of possessing or purchasing cocaine base for sale (Health & Saf. Code, § 11351.5). The court "revoked and reinstated" defendant's probation in that case under the "same terms and conditions."

[2] Defendant later pled guilty to yet another crime, a violation of Penal Code section 4573.8 (felony possession of narcotics in jail) and was sentenced to three years' probation and 600 hours of community service. After defendant admitted his conviction was a violation of his existing probation, the court revoked and reinstated defendant's prior probation.

The district attorney petitioned to revoke defendant's probation on two grounds: a violation of Penal Code section 273.5 (inflicting corporal injury on a cohabitant) and a violation of Penal Code section 487, subdivision (c) (grand theft).[3] The trial court subsequently held a probation revocation hearing.

Officer Aguilar was the sole prosecution witness. He testified to the injuries he observed on Shanika's face and explained she guided him to a nearby location where defendant was sitting in a vehicle. According to Officer Aguilar, once defendant was taken into custody and read his *Miranda* rights, he admitted he had an argument with Shanika. Defendant claimed, however, that he did not have a physical altercation with Shanika and "was just trying to get his property out of his house." On cross-examination, defense counsel questioned Officer Aguilar about whether he witnessed how Shanika got her injuries (the answer was "no"), whether he took pictures of the injuries (no), whether he wore a recording device when Mirandizing defendant (no), whether defendant said he was trying to retrieve his property (yes), and whether "there [was] a restraining order to your knowledge" ("No. I don't think we found one").

After Officer Aguilar completed his testimony, the trial court asked defense counsel if "there [was] any argument." Counsel argued Officer Aguilar did not witness how Shanika was injured, and counsel stated she would "submit on that." The court then stated it thought the People had proven a violation of

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[3] Several days before defendant's arrest, Shanika contacted law enforcement and reported defendant had taken her cell phone and approximately $100 from her.

defendant's probation "in numerous ways," explaining "there's obviously an incident involving the victim," which would alone be sufficient for a preponderance of the evidence, and there was "the fact that [defendant] did not cooperate with the police officer and refused to . . . get out of the car he was in, . . . [which] violates a condition of probation[ ] that he cooperate with law enforcement while he is on probation . . . ."

Defense counsel interjected to note the probation officer was present in court and had advised her that defendant had been in compliance with his probation "up to having this arrest." The prosecution said it would stipulate defendant was doing the "other things required for probation" "other than this violation with [Shanika]." When the court summarized defendant's recent criminal history, defense counsel interjected again, stating: "[Defendant] informed me that he would like to be heard. I don't know if he necessarily would like to testify, but he would like to be heard as to what happened that day." The trial court replied: "You want to be heard with respect to sentencing or you want to be heard— [¶] Because I've already made an order that I believe from what I have heard you violated you probation. It doesn't really matter in terms of the police officer asked you to come out of the police car and give your ID. If you don't do that, you're in violation of your probation."

Defendant then addressed the trial court personally, on the record. He stated he complied with police officer commands and gave the officer his identification. He also stated the following: "[Shanika] let me in the door to get my things. I said I want to have a witness. She came with me. Let me get my stuff, and I left. Never no altercation or anything. Even though she pushed me, I didn't do anything. Grabbed my backpack, went

downtown to my brother['s] store." A colloquy between defense counsel and the court ensued, with the court asking if the defense wanted to call any witnesses, defense counsel representing defendant would like to testify, the court asking if there was "a witness to this incident," defendant (personally) answering yes, the court asking defense counsel if she wanted to "get a witness . . . that might be less directly involved," defense counsel stating defendant had identified a witness counsel would like to contact, and the court responding "[o]kay."

At that point, the prosecution interjected to note it was "sure there's a court order that [defendant] not have any contact with the victim," which meant defendant's admission that he went to her house to get items was "a violation in itself." The court responded: "Find the court order. . . . That would be the easiest thing ever." After a brief recess, the court took judicial notice of a transcript of probation modification proceedings in May 2016, which included an order protecting Shanika from defendant. The trial court recited on the record the pertinent terms of the previously entered protective order, namely, that defendant was "'to have absolutely no contact with [Shanika] . . . , no electronic, telephonic, written or personal contact'" with her.[4]

The trial court then asked counsel for both sides if either wanted "to add anything . . . with respect to this violation." The prosecution responded it had nothing to add. The court then specifically asked defense counsel if "there [was] anything that you want to say about—" Defense counsel responded: "Just, your

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[4] According to the trial court's recitation of the transcript of the May 2016 proceedings, defendant confirmed on the record that he understood this requirement of the protective order.

Honor, that the officer testified that he [defendant] went there to retrieve the property. I don't believe the officer testified that he ever saw them together . . . just that he was there to retrieve his property." The trial court explained "[t]hat's not an exception to a protective order," and the prosecution highlighted defendant's admission that "he was there arguing with her." The court observed a "protective order has to mean something" and stated "the court does find . . . defendant in violation of probation after a formal hearing for failing to obey the protective order. [¶] Probation is revoked and terminated."

Defense counsel did not object to the court's formal revocation finding, either at the time it was made or when the parties later appeared for sentencing on that finding. The trial court ordered defendant to serve an aggregate term of six years in prison, calculated to account for defendant's status on probation in four separate cases.

II. DISCUSSION

Defendant contends his sentence is unconstitutional because the prosecution provided no advance notice it would seek to revoke his probation on the basis of a protective order violation and because the court revoked defendant's probation without permitting him to testify and present a defense. These arguments are forfeited because defense counsel made no due process objection in the trial court (despite ample opportunity). We therefore consider defendant's alternative argument, that his trial attorney was constitutionally ineffective for not raising a due process objection, and we conclude the argument fails because defendant cannot establish prejudice.

A. Due Process Principles

A court may revoke probation where the supporting facts are "proven by a preponderance of the evidence." (*People v. Rodriguez* (1990) 51 Cal.3d 437, 439.) The constitutional guarantee of due process entitles a probationer to certain safeguards before any revocation of probation. Those "minimum requirements of due process" include "written notice of the claimed violations," "disclosure to the [probationer] of evidence against him," the "opportunity to be heard in person and to present witnesses and documentary evidence," and "a 'neutral and detached' hearing body . . . ." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 488-489 (*Morrissey*) [enumerating due process requirements for revocation of parole]; *Gagnon v. Scarpelli* (1973) 411 U.S. 778, 782 [holding the conditions set forth in *Morrissey* also apply to probation revocations]; see also *People v. Vickers* (1972) 8 Cal.3d 451, 457-458 (*Vickers*).)[5]

"'The purpose of notice under the Due Process Clause is to apprise the affected individual of, and permit adequate preparation for, an impending "hearing."' (*Memphis Light, Gas and Water Division v. Craft* (1978) 436 U.S. 1, 14[ ], fn. omitted.) The content of notice depends on 'appropriate accommodation of the competing interests involved. [Citations].' [Citation.]"

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[5] The other due process requirements applicable to probation revocations are a hearing, the opportunity to "cross-examine adverse witnesses, unless the hearing body specifically finds good cause for not allowing confrontation," "a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation," and the assistance of counsel. (*Black v. Romano* (1985) 471 U.S. 606, 612; *Vickers*, *supra*, 8 Cal.3d at pp. 461-462.)

(*Gilbert v. City of Sunnyvale* (2005) 130 Cal.App.4th 1264, 1279; see also *In re Large* (2007) 41 Cal.4th 538, 552 [purpose of "notice and the opportunity to be heard is to give [a defendant] a chance to present information that may affect the decision"].)

B. Defendant's Due Process Arguments Are Forfeited

It is undisputed that defendant's trial attorney did not object, on due process or any other grounds, to the trial court's consideration of the May 2016 protective order as the basis for revoking defendant's probation. Nor did defense counsel call any witnesses to testify even though she had several opportunities to do so, including when the trial court invited her to be heard on the issue of the protective order violation. Controlling authority holds the absence of a contemporaneous objection forfeits the due process claims raised only now on appeal. (*People v. Abilez* (2007) 41 Cal.4th 472, 521, fn. 12; *People v. Cole* (2004) 33 Cal.4th 1158, 1205 ["Defendant never objected at trial to any lack of notice that the prosecution would attempt to prove lying in wait. Neither did defendant move for a continuance when the prosecution first indicated it might proceed on that theory, or move to reopen the taking of evidence when the prosecutor asked the court to instruct the jury on that theory. Accordingly, we find that defendant has failed to preserve this issue for review"]; see also *People v. Hendricks* (1987) 43 Cal.3d 584, 594, fn. 1 ["The decision on the part of counsel not to present a defense does not involve a question of waiver but rather the issue of effective assistance of counsel. [Citation.] In other words, if counsel does not put on a defense, the defendant's only real complaint can be that he was denied effective assistance, not that he was deprived of the

opportunity to waive in open court his right to present a defense"].)

Defendant seeks to evade forfeiture by arguing (1) the arguments on appeal should be deemed preserved because the trial court was "aware of the law" and (2) an objection would have been futile because the trial court was predisposed to find a probation violation. Neither assertion is convincing. There is no cause on this record to presume the trial court would have been aware of the objections defendant makes only now, particularly where the defense gave no hint of an objection despite ample opportunity to be heard after the issue of the protective order violation arose. Indeed, defendant's argument, if accepted, would eviscerate the well-established forfeiture doctrine because one can always assert, as defendant does, that a trial court can be "presumed . . . [to be] aware of the law" and therefore should have known of objections that were not in fact made. As to futility, the record of the probation revocation hearing demonstrates at most a degree of informality in the proceedings, not an improper predisposition of any sort.[6] At the stage of the hearing when the defense contemplated presenting testimony, the trial court was amenable to hearing additional evidence. There is no reason to believe the trial court would have been any less amenable to considering the merits of a properly raised due process objection.

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[6] Even if the better practice would have been for the trial court to expressly confirm on the record that the defense had no evidence to present before the court invited argument on revocation, the court could reasonably conclude the defense had nothing to present when defendant's trial attorney accepted the invitation to argue and told the court she would "submit on that."

C. The Record on Appeal Does Not Establish Ineffective Assistance of Trial Counsel

"'In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome. (*Strickland v. Washington* (1984) 466 U.S. 668, 694[ ]; *People v. Ledesma* (1987) 43 Cal.3d 171, 217[ ].)'" (*People v. Carter* (2005) 36 Cal.4th 1114, 1189.) "'Defendant . . . bears the burden of establishing constitutionally inadequate assistance of counsel. [Citations.]'" (*Ibid.*) And "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which . . . will often be so, that course should be followed." (*Strickland v. Washington*, *supra*, at p. 697.)

There is no reasonable probability of a different result had defendant received greater advance notice of an allegation that he violated the May 2016 protective order or had he formally testified in his own defense. At defendant's revocation hearing, Officer Aguilar testified defendant admitted he got into an argument with Shanika and was attempting to remove his personal property from her house. Then later, when defendant personally addressed the court, he said Shanika "let [him] in the door to get [his] things," came with him when he did so, and purportedly pushed him before he left.

Even assuming with greater advance notice defense counsel could have convinced her client to avoid making any statements during the revocation hearing, we still do not see any reasonable probability that defense counsel had an available avenue on cross-examination to undercut Officer Aguilar's testimony about

defendant's admissions. (Compare *People v. Mosley* (1988) 198 Cal.App.3d 1167, 1174 ["Defense counsel might well have cross-examined [testifying witnesses] with a different purpose" or "have called defendant as a witness" if he had "known that he was defending his client against [a different] allegation [than that alleged in the petition to revoke probation]]".) Nor could the defense claim defendant had no knowledge of the May 2016 protective order when, at the time it was entered, defendant was served with a copy in court and confirmed he understood it meant he could have "absolutely no contact" with Shanika. There is also no reasonable probability of a different result had defendant actually testified (which would have rendered him subject to cross-examination) because we already know from the transcript of the hearing what he would say—or at least what he could not truthfully deny, namely, having had contact with Shanika.[7]

In fact, defendant's appellate briefs make no showing at all of how he was prejudiced by the court's finding that he violated the May 2016 protective order as grounds for revoking his probation. Rather, his reply brief argues only that he had a potential witness who would have testified he was cooperative with the police and that there was only weak evidence he caused Shanika's injuries; neither, of course, is a defense to the protective order violation that served as the basis for revocation.

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[7] In addition, the possibility of calling a witness other than defendant does not alter our conclusion that there was no *Strickland v. Washington* prejudice given the broad terms of the protective order prohibiting contact with Shanika and Officer Aguilar's testimony about defendant's admissions and the location where he was found.

Thus, at a fundamental level, defendant has not carried his burden to demonstrate the possibility of a more favorable result absent the asserted deficient performance of counsel.

DISPOSITION

The judgment is affirmed.

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BAKER, Acting P. J.

We concur:

MOOR, J.

KIM, J.