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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. FREDDIE DELGADO CASTRO, Defendant and Appellant.	2d Crim. No. B272077 (Super. Ct. Nos. 2015015107, 2015026423) (Ventura County)

Freddie Delgado Castro appeals the trial court's order revoking his probation in two cases and sentencing him to three years and eight months in state prison. The court found appellant violated his probation by (1) failing to appear in court; (2) failing to report to probation; (3) failing to submit to drug and alcohol tests; (4) leaving his treatment program; and (5) failing to give prior notice of his change of residence. Appellant contends the first finding must be reversed for lack of proper notice, and that the other four findings are based on inadmissible hearsay. We shall order the abstract of judgment corrected to reflect the

proper award of presentence custody credits. Otherwise, we affirm.

FACTS AND PROCEDURAL HISTORY

On September 29, 2015, in Ventura County Superior Court case number 2015015107, appellant pled guilty to vandalism over $400 (Pen. Code,[1] § 594, subd. (b)(1)) and admitted a prior strike conviction and prior prison term (§§ 667, subds. (c)(1) & (e)(1), 667.5, subd. (b), 1170.12, subds. (a)(1) & (c)(1)). Imposition of sentence was suspended and appellant was placed on three years of formal probation with terms and conditions including that he serve 250 days in county jail.

That same day, in Ventura County Superior Court case number 2015026423, appellant pled guilty to destruction of a court document (Gov. Code, § 6201) and admitted a prior strike. Imposition of sentence was suspended and appellant was placed on three years probation with terms and conditions including that he enroll and participate in the Salvation Army's one-year treatment program in Anaheim. Pursuant to that condition, appellant "authorize[d the] release of information between [his] probation officer and [the] treatment program." The conditions of probation further state: "You must remain in the . . . Salvation Army treatment program as directed by the probation agency. In the event you leave the program without prior permission, you must notify the court or the probation department immediately."

An initial review hearing was set for November 4. The court told appellant he was not required to appear at the November 4 hearing unless he was not then participating in the Salvation Army treatment program. The court also set a further

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

review hearing on December 1, and ordered appellant to be present at that hearing.

Appellant's attorney appeared on appellant's behalf at the November 4 hearing. The minute order of the hearing reflects that the court read and filed a letter from the Salvation Army.[2] The court also reiterated that appellant was ordered to appear at the December 1 hearing.

Appellant did not appear at the December 1 hearing. The court revoked probation and issued a no bail warrant. Appellant was arrested and was present in court on December 9 for arraignment on the warrant. The reporter's transcript of that hearing is not included in the record on appeal, but the minute order reflects that the matter was set for arraignment on the notice of charges on December 15.

The Ventura County Probation Department subsequently filed a "Notice of Charged Violations of Probation and Declaration re: Probable Cause" (hereafter referred to as the notice/probation report). The notice/probation report alleged that appellant had violated his probation by (1) failing to regularly report to probation since November 25; (2) failing to submit to drug and alcohol testing since November 25; (3) failing to participate in the Salvation Army treatment program; and (4) changing his residence without his probation officer's prior approval.

The notice/probation report, which is signed under penalty of perjury by Deputy Probation Officer Jordan Clegg, states that "[a]ccording to Jin Kim from the Salvation Army treatment program in Anaheim, on 10-29-15, [appellant] was admitted to the program. However, on 11-25-15, he voluntarily checked out of the program after completing only 27 days." Officer Clegg also

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[2] The record on appeal does not include the reporter's transcript of the hearing or the Salvation Army's letter.

attested that since November 25 appellant had not reported to probation or submitted to drug and alcohol tests, and had changed his residence without probation's prior approval. Officer Clegg added that "[appellant] was interviewed via teleconference at the Ventura County Jail on 12-10-15. He provided the following information: [¶] He wanted to be at a place where he could do gods [*sic*] work and did not feel like that was the place. He stated he was not abusing drugs while out to warrant and was attempting to find transportation to bring him back to the area."

At the continued probation violation hearing, the prosecution introduced the notice/probation report as a "probation report." Appellant did not object to this characterization, but objected to the document being admitted into evidence on "due process grounds and hearsay and right to confrontation." The prosecution argued that the notice/probation report was admissible under *People v. Gomez* (2010) 181 Cal.App.4th 1028 (*Gomez*).

Before it decided whether the notice/probation report was admissible, the court found that "at a very minimum" appellant's failure to appear in court on December 1 "clearly is a violation of probation." The court proceeded to find that the notice/probation report was admissible. Based on the evidence contained in that document, the court found that "[appellant] has failed to do what it is he promised to do when the Court made the sentencing agreement with him." The court ordered that probation remain revoked and be terminated as unsuccessful. Appellant was sentenced to three years in state prison in case number 2015015107, plus a consecutive eight months in case number 2015026423. He was also ordered to pay fines and victim restitution and was awarded presentence custody credit.

DISCUSSION

Probation Violation

The court found appellant violated his probation by (1) failing to appear in court on December 1; (2) failing to regularly report to probation since November 25; (3) failing to submit to drug and alcohol testing since November 25; (4) failing to participate in the Salvation Army treatment program; and (5) changing his residence without his probation officer's prior approval. Appellant contends that the first finding was made in violation of his due process rights because he was not given notice that his failure to appear in court would be considered grounds for revoking his probation. He claims the other four findings are also invalid because they are based on inadmissible hearsay.

Appellant forfeited his right to challenge the first finding on due process grounds by failing to object to the lack of notice below. (See, e.g., *People v. Lara* (2012) 54 Cal.4th 896, 907; *People v. Buford* (1974) 42 Cal.App.3d 975, 982.) His assertion that an objection would have been futile is wholly unpersuasive.

In any event, a lack of notice is not fatal to the court's finding that appellant violated his probation by failing to appear in court. Although a defendant should generally receive notice of claimed violations of probation (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786; *Gomez*, *supra*, 181 Cal.App.4th at p. 1033), a lack of such notice does not warrant reversal unless it is prejudicial (*People v. Arreola* (1994) 7 Cal.4th 1144, 1161-1162; *In re La Croix* (1974) 12 Cal.3d 146, 154). Appellant makes no showing of prejudice here. As the People note, he appeared in court on December 9. The reporter's transcript of that hearing is not included in the record on appeal. Without the transcript, we must presume that appellant was given notice of the allegation that he had violated probation by failing to appear at the last

court hearing. (See *People v. Akins* (2005) 128 Cal.App.4th 1376, 1385 [reviewing courts must presume the judgment is correct; the appellant bears the burden to produce a record that affirmatively shows otherwise].) Even if no such notice was given, appellant fails to show how the proceedings would have terminated in his favor had he received such notice.

Appellant also fails to demonstrate that the court's additional findings are all based on inadmissible hearsay contained in the notice/probation report. Aside from its title and opening, the document is substantially identical in form and substance to a probation report. The probation officer signed it under penalty of perjury and stated that its contents were based on "[o]fficial [r]ecords," "[r]ecords of the probation office," "[i]nformation supplied by other probation officers," and "[p]ersonal knowledge." Moreover, appellant did not object when the prosecution and court referred to the document as a probation report. The court thus did not err in treating it as one.

Violations of probation may be established by hearsay evidence contained in a probation report, if that hearsay is trustworthy and has sufficient indicia of reliability. (*Gomez*, *supra*, 181 Cal.App.4th at p. 1039; *People v. Abrams* (2007) 158 Cal.App.4th 396, 404-405.) Here, the notice/probation report was offered to prove that appellant had (1) failed to regularly report to probation since November 25; (2) failed to submit to drug and alcohol testing since November 25; (3) failed to participate in the Salvation Army treatment program; and (4) changed his residence without his probation officer's prior approval. Appellant's challenge primarily relates to the third finding, which is based on Officer Clegg's statement that "[a]ccording to Jin Kim from the Salvation Army treatment program in Anaheim, . . . on 11-25-15, [appellant] voluntarily

checked out of the [Salvation Army treatment] program." Appellant asserts that this statement is inadmissible hearsay because it is not trustworthy and lacks sufficient indicia of reliability.

We are not persuaded. As a condition of his probation, appellant consented to permit the Salvation Army to provide information about him to the court and the probation department. As we have noted, the Salvation Army submitted such information but it is not included in the record on appeal. Appellant also admitted he had left his treatment program and stated his reasons for doing so.[3] Even aside from the information attributed to Mr. Kim, Officer Clegg was qualified to state whether appellant had properly reported to probation or submitted to drug and alcohol testing, or changed his residence without probation's approval. "[W]hether or not a defendant has reported to his probation officer . . . [is] essentially nontestimonial; thus, even if hearsay, [it is] admissible at a probation violation hearing." (*People v. Abrams*, *supra*, 158 Cal.App.4th at p. 398.) These admissible statements were

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[3] Appellant asserts that his own statement "is not sufficiently reliable to find appellant in violation of his probation." His support for this assertion is two cases recognizing that a defendant's confession is insufficient to sustain his or her conviction absent evidence of the corpus delicti of the offense. (*People v. Alvarez* (2002) 27 Cal.4th 1161; *People v. Powers-Monachello* (2010) 189 Cal.App.4th 400.) But this is not a criminal trial; it is a probation violation proceeding, which is subject to different procedural and evidentiary rules and a lesser burden of proof. Moreover, appellant made his statement from jail, after he was arrested on a warrant for, among other things, failing to appear in court. Common sense would dictate that he was no longer in his treatment program.

sufficient to sustain the court's findings that appellant had violated his probation.

Presentence Custody Credits

Appellant was awarded 237 days of actual presentence custody credit and 210 days of good conduct/work credit. As the People correctly note, the trial court incorrectly calculated these credits as totaling 437 days rather than 447. This error is repeated in both the minute order and the abstract of judgment. Appellant agrees that these errors should be corrected, and we shall order that the judgment be so modified.

DISPOSITION

The superior court is ordered to correct the abstract of judgment and the minute order for the March 2, 2016 sentencing hearing to reflect that appellant was awarded a total of 447 days of presentence custody credit. The superior court clerk shall forward copies of the corrected abstract of judgment and minute order to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

YEGAN, J.

Patricia M. Murphy, Judge
Superior Court County of Ventura

Michelle T. Livecchi-Raufi, under appointment by the Court of Appeal, for Defendant and Appellant.

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