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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

COUNTY OF LOS ANGELES,

Plaintiff and Respondent,

v.

EMILIANO LOPEZ,

Defendant and Appellant.

B231222

(Los Angeles County Super. Ct.  
No. BY733661)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen M. Moloney, Judge. Affirmed.

Emiliano Lopez, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

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Appellant Emiliano Lopez appeals from the order dated December 13, 2010,<sup>1</sup> denying his request to modify child custody and visitation orders. Lopez argues the trial court erred in denying modification orders because he is incarcerated in state prison and was denied access to a telephone which would have allowed him to appear at the hearing. Lopez also contends he has been deprived of a relationship with his daughter for seven years without due process of law, in violation of the Fourteenth Amendment. We affirm.

### **PROCEDURAL HISTORY**

Lopez filed an order to show cause re: child custody and visitation on October 7. Mediation was scheduled for November 15 and the hearing on the order to show cause was set for December 13. On November 9, Lopez filed a request to appear by telephone at the December 13 hearing because he is incarcerated in state prison. The mother of Lopez's child, Sheree Valdiviezo,<sup>2</sup> filed a responsive declaration opposing the order to show cause.

In an ex parte application filed on November 9, Lopez requested a court order directing the warden at the Pleasant Valley State Prison to allow him to appear telephonically at the mediation and hearing. In the application, Lopez stated he had been unable to appear telephonically at an earlier mediation, because CourtCall LLC did not service the courtroom where the mediation was held.<sup>3</sup> Lopez stated in his request that prison authorities refused to assist him in arranging to appear telephonically.

On December 13, Lopez filed a request for an extension of time on the hearing on the order to show cause. Lopez stated he was having a difficult time communicating with the Litigation Coordinator at the Pleasant Valley State Prison regarding access to a

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<sup>1</sup> All dates in this opinion are in 2010, unless otherwise stated.

<sup>2</sup> Valdiviezo has not filed a brief on appeal.

<sup>3</sup> Attached to the ex parte application was a letter from CourtCall indicating it did not provide service to Department 27.

telephone for appearance on the order to show cause, because the prison authorities insisted he use CourtCall. Lopez had earlier requested an order from the trial court to allow his use of an institutional phone to attend the mediation and court hearing. He missed the mediation and does not want to miss the hearing. Lopez asserted there would be no prejudice if he were granted a 30-day extension due to the extraordinary circumstances.

On December 13, the trial court filed its Findings and Order After Hearing. According to the minute order, the court, sitting in Department 27, found on December 13 that there was no appearance by Lopez, denied Lopez's order to show cause for child custody and visitation, and reserved jurisdiction over those issues. The order specifically stated that Lopez had not appeared, and the court made its orders in open court "as fully reflected in the official notes of the Court Reporter." The record on appeal does not contain a reporter's transcript or settled statement of the court's findings on December 13.

On December 22, Lopez wrote to the clerk of the court, indicating he had a hearing scheduled for December 13 and he had made a request for an order for access to a telephone in prison. He missed the hearing because he was not allowed to use the telephone.

Lopez filed his notice of appeal from the December 13 order on February 25, 2011.

## **DISCUSSION**

Lopez argues the December 13 order must be reversed because he was not present, through no fault of his own, he was denied access to a telephone to appear, and the resulting order was a violation of due process. Because Lopez has not provided a complete record demonstrating prejudicial error, we affirm.

The record on appeal presented by Lopez consists only of a clerk's transcript, which is woefully incomplete. Because Lopez is incarcerated, on our own motion we

take judicial notice of the entire contents of the superior court file in case No. BY733661. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) As a result of our judicial notice order, the deficiencies in the clerk's transcript have been cured.

Our review of the record also revealed that there was no reporter's transcript or settled statement from the hearing of December 13, which is the subject of this appeal. We notified Lopez by letter of the deficiency in the record due to the lack of a reporter's transcript or settled statement, specifically noting the minute order's reference to rulings contained in the notes of the official court reporter. Lopez responded with a letter arguing that record on appeal is accurate, complete, and satisfactory for review of his contentions. Lopez is incorrect.

“It is well settled, of course, that a party challenging a judgment has the burden of showing reversible error by an adequate record.” (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574.) “‘A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent. . . .’ (Orig. italics.) [Citation.]” (*Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 712.) In the absence of a proper record on appeal, the judgment is presumed correct and must be affirmed. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296.) A proper record includes a reporter's transcript or settled statement of any hearing leading to the order being challenged on appeal. (See *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1532; *Berg v. Investors Real Estate Loan Co.* (1962) 207 Cal.App.2d 808, 817-818; *Utz v. Aureguy* (1952) 109 Cal.App.2d 803, 806-807.)

Without a reporter's transcript, we cannot determine what findings, if any, the trial court made regarding Lopez's request for an order for telephone access and his motion to continue the hearing. We cannot determine if the court conducted a hearing and found that Lopez had voluntarily decided not to appear, or that Lopez's unilateral decision not to use the services of CourtCall was tantamount to a waiver of his appearance. Because we must presume the judgment is correct in the absence of a record showing prejudicial error, the judgment is affirmed.

## **DISPOSITION**

The judgment is affirmed.

KRIEGLER, J.

We concur:

TURNER, P. J.

ARMSTRONG, J.