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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

THE PEOPLE, Plaintiff and Respondent, v. CORY ARNETT, Defendant and Appellant.	B266986 (Los Angeles County Super. Ct. No. MA051213)

APPEAL from a judgment of the Superior Court of Los Angeles County, Daviann L. Mitchell, Judge. Reversed.

Stephen M. Vasil, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Viet H. Nguyen, Deputy Attorneys General, for Plaintiff and Respondent.

Cory Arnett appeals from the revocation of his probation and execution of his previously suspended prison sentence. He contends the trial court erred when it determined he had violated the terms of his probation by failing to complete a drug treatment program and failing to pay victim restitution. We agree and reverse the court's order.

FACTUAL AND PROCEDURAL SUMMARY

In August 2010, Arnett walked out of a store with a child's stroller and a pair of shoes without paying for them. He was arrested and charged with commercial burglary and petty theft with priors. (Pen. Code, §§ 459, 666.)[1] While out on bail, he attempted to carjack one car, then carjacked a second car. (§§ 664, 215, 12022.1.)

In June 2011, Arnett pleaded no contest to each of the pending charges and admitted a prison prior that had been alleged in each case. The trial court accepted the plea and sentenced Arnett to 13 years and 6 months in prison, suspended execution of the sentence, and placed Arnett on five years of probation. Among other conditions of probation, the court required Arnett to "[c]ooperate with the probation officer . . . in a plan for drug treatment and rehabilitation" and to "[m]ake restitution to the victim . . . in an amount to be determined by the probation department." Arnett accepted the conditions.

The probation department subsequently established a restitution payment plan of $20 per month. Our record does not indicate what plan, if any, the probation department established for drug treatment and rehabilitation. During the next two and one-half years, Arnett tested negative for drugs 18 times, never tested positive for drugs, and reported regularly to his probation officer.

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[1] Unless otherwise specified, subsequent statutory references are to the Penal Code.

In January 2014, Arnett requested that his probation be transferred to Indiana, where he had an opportunity to work as a coach for a semi-professional basketball team. The next month, Arnett took the coaching job without getting the probation department's approval, and thereafter did not inform his probation officer of his whereabouts. On that basis, the court summarily revoked Arnett's probation in May 2014 and issued a bench warrant. Arnett returned to California.

In a probation report prepared for a July 2014 hearing, the probation officer stated that Arnett failed to keep the probation officer advised of his place of residence and employment, failed to report as directed to the probation officer, failed to complete a drug treatment program, and failed to make payments towards his financial obligations. Regarding restitution, Arnett had reportedly made two payments totaling $25. The probation officer recommended that probation be revoked, but stated that he "would not be opposed" to reinstatement of probation.

At a hearing in August 2014, the trial court noted that Arnett had not completed a drug program during the three years he had been on probation, which the court described as a "significant violation." The court indicated its intention to execute the sentence, but continued the hearing at defense counsel's request.

At an October 2014 hearing, Arnett admitted that he violated probation by failing to report to his probation officer. The court found that Arnett had violated probation on that basis, but declared the violation "de minimis."[2] The court revoked Arnett's probation and reinstated probation with, in the court's words, "very, very strict rules and regulations." The court ordered Arnett "to enroll and complete a drug treatment program" and to provide the court

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[2] At the October 2014 hearing, there was no mention of a then-existing drug treatment plan or any allegation that Arnett had violated any condition concerning such a plan.

with "proof of enrollment in [a] drug program" on November 20, 2014. Although Arnett needed to produce proof of enrollment by a certain date, neither the court nor the probation department set a deadline for Arnett to complete a drug treatment program. The court also ordered Arnett to "pay any restitution, if owed, through probation."

Arnett enrolled in the Matrix Institute (Matrix), a drug program located in the San Fernando Valley, and, on November 20, 2014, provided the court with proof of enrollment. The court accepted the proof and said that "everything else will go through [the probation department]." When Arnett attempted to address the court directly, the court interrupted him, stating: "Stop. Please. All I'm going to tell you is everything else will go through probation."

Within a few days after Arnett presented his proof of his Matrix enrollment, his probation officer gave him permission to move to Oceanside to find work and live with his wife and children, who were then homeless. Arnett agreed to report to the San Fernando Valley probation office once per month, which he did. After his move to Oceanside, he worked part-time on five days in late November and December 2014.

In February 2015, Arnett attended a hearing on his application to reduce his felony convictions of burglary and petty theft with priors pursuant to the Safe Neighborhoods and Schools Act.[3] At that hearing, the court asked Arnett's counsel about the status of Arnett's drug program. After counsel said he did not

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[3] The Safe Neighborhood and Schools Act, enacted by the electorate in 2014 as Proposition 47, reduces penalties for certain nonserious and nonviolent crimes and provides a procedure for those currently serving sentences for such crimes to petition to recall their sentence and be resentenced. (*People v. Contreras* (2015) 237 Cal.App.4th 868, 889-890.)

know, Arnett said, "Supposed to be a six-month program." The court then ordered Arnett to appear on May 29, 2015, to provide "a progress report in [his] drug program and a progress report in [his] restitution." The court did not specify any particular form or content of the progress report, and did not require that Arnett complete a program by that date. Regarding restitution, the court required "a copy of the money order" showing payment and a certified mail receipt.

Arnett, who was then living in Oceanside, continued to attend the Matrix program for some time, but stopped after his car was repossessed. He then enrolled in the McAlister Institute drug program in Oceanside. He was initially unable to begin the McAlister Institute program because of problems with his Medi-Cal insurance. Once the insurance issues were resolved, the McAlister Institute scheduled his orientation for June 5, 2015.

At the May 29, 2015, progress report hearing, Arnett and his counsel informed the court that Arnett had moved to Oceanside to be with his family, his car had been repossessed, he had enrolled in the McAlister Institute program, his entry into the program was delayed because of the Medi-Cal problems, and he has "been clean for four years." The court informed Arnett that it had previously told him, "no more chances," revoked his probation, and placed him in custody. The court then set a date for a formal probation revocation hearing.

At the probation revocation hearing in September 2015, the prosecution submitted a June 2015 probation report, then rested. In that report, Arnett's probation officer, Richard Torres, was somewhat inconsistent. Although he reported that Arnett was "currently in compliance," he also stated that he was "not in compliance with the [restitution] pay plan." Torres stated that he took over responsibility for Arnett's probation case on January 6, 2015, "at which time [Arnett] appeared to be in compliance with his

terms and conditions." He noted that Arnett "has been making the effort to remain in compliance with his probation [and] has been reporting in person as instructed and submitting to controlled substance testing. [Arnett] has been tested for controlled substances on four occasions," and each test "produced negative results." Torres further reported that he spoke with an intake counselor for the McAlister Institute, who confirmed that Arnett was scheduled for a group orientation on June 5, 2015. Torres concluded by recommending that probation be continued on the original terms and conditions because Arnett "is in compliance with all terms and conditions" of his probation.

Arnett testified in his defense. At the outset, Arnett began to explain why he left the Matrix program. The court interrupted Arnett in order "to shortcut this." After extensive questioning by the court as to the timing of Arnett's move to Oceanside, the court reminded Arnett that it had reinstated probation on "very, very strict rules and regulations," and asked him if he understood the court when it previously told him, "no more chances." The court questioned Arnett further as follows:

"Q. . . . you came back on November 20th and filed a proof of enrollment. [¶] At that point, I basically cut you loose to probation; correct?

"A. Yes, Ma'am.

"Q. You did not complete the program you presented to me; correct?

"A. No, Ma'am, because I –

"Q. Not because, it's a 'yes' or a 'no' correct?

"A. No Ma'am.

"Q. Okay.

"A. I enrolled in another program. [¶] . . . [¶]

"Q. And you knew I was not giving you any other chances, when you showed me the proof of enrollment in the Matrix? . . .

"A. Yes – Yes, Ma'am.

"Q. And you did not complete that program?

"A. How could I complete it? [¶] I was in Oceanside, Ma'am.

"Q. That's my point exactly."

The prosecutor did not cross-examine Arnett.

Two probation officers, Jason Toliver and Jesse Roberson, testified for the defense. Toliver testified on direct examination that Arnett was in compliance with his probation conditions. On cross-examination, however, Toliver conceded that Arnett was not in compliance with his restitution payment plan. Toliver further testified that each of Arnett's 22 drug tests were negative and that Arnett had been approved for temporary travel permits to Oceanside.

Roberson was Arnett's probation officer in November and December 2014, and had approved Arnett's relocation to Oceanside. Based on his review of the most recent probation report, Roberson stated that the probation department did not consider the change in Arnett's drug program from the Matrix to the McAlister Institute programs to constitute a violation of probation.

The court engaged in colloquy with Roberson regarding Arnett's drug program that included the following.

"The Court: Did [Arnett] show you proof of enrollment into a drug program?

"A. No.

"Q. Did he ever ask you if he could change drug programs?

"A. I don't remember that conversation.

"Q. Are there any notes in the file that indicate that he was given permission to not attend a drug program, as the court had ordered.

"A. Not to my knowledge. [¶] . . . [¶]

"Q. . . . Is there anything in [the] probation file that ever says the defendant was excused from attending the Matrix Institute?

"A. No.

"Q. . . . Did you ever tell him, 'you do not have to attend that program'?

"A. Not to my knowledge.

"Q. Okay. And did he ever ask you to be excused from attending that program.

"A. . . . Not to my knowledge.

"Q. Did you review the court file, to know that there was an ESS [execution of sentence suspended] pending and he was told to have no further violations, when you gave him permission to leave?

"A. No.

"Q. Okay. And there's nothing in the file to indicate that any probation officer gave him permission not to attend the program.

"A. That's my understanding.

"Q. All right. And so as far as you can see from the file, is there any proof that he's attended – actually attended any programs?

"A. There's no documentation.

"Q. At all, even on when he was reporting, there's no documentations regarding his drug programs?

"A. No."

When Arnett's counsel elicited from Roberson that he did not find Arnett to be in violation of probation, the court interjected the following:

"The Court: Did the defendant pay his restitution, as we was ordered to do, Sir?

"[A.]: From the probation report, he was in delinquency.

"[Q.]: So he – it's actual restitution, correct?

"[A.]: Yes.

"[Q.]: And he did not pay his restitution, as ordered, based on his payment plan?

"[A.]: Correct.

"[Q.]: Okay."

Arnett's counsel then asked Roberson if he knew whether Arnett had the ability to pay the restitution. Roberson said that his understanding was that Arnett "had no job" and "no place to live."

After hearing argument, the court revoked Arnett's probation and imposed and executed sentence of 12 years in prison.[4] Regarding the drug program requirement, the court stated: "I ordered him to enroll and complete the drug treatment program. He was to show proof of enrollment to me. [¶] He did. He was enrolled in Matrix. From that date, . . . we have no evidence that he ever attended one session, for any drug treatment program, Matrix or otherwise. [¶] Mr. Roberson testified for the two months . . . that he was supervising the defendant, he never excused the defendant from any of his obligations with respect to the drug treatment program. [¶] The defendant never requested a leave from the program, so he could get re-enrolled in a program down where he was living in Oceanside."

The court further explained that "there was never any excuses allowed for [Arnett's] failing to attend that drug treatment program, and from the date where he provided enrollment to me, to Matrix, on November 20th, through today's date, he has not attended one session. [¶] And from the defendant's own mouth, he indicated that he could have returned, because he did return, to attend his probation meetings once a month, that he was able to take the train to do so, and there was never any explanation why he could not have attended some of the Matrix or gotten re-enrolled down there in a program that was appropriate or ask for the assistance of probation or asked leave . . . not to attend and be excused until he was able to get back in."

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[4] The sentence was reduced from the original sentence because of the burglary and petty theft with prior convictions were resentenced as misdemeanors pursuant to Proposition 47.

The court also found that Arnett had violated the restitution payment plan requirement, stating: "he was ordered to pay $20 a month, and I have nothing before me that says that he had the inability to pay. He also testified he was working. I'm using his words, that – he testified that he was working to support his ability to pay."

Arnett appealed.

DISCUSSION

In order to revoke probation, the court must find that the probationer willfully violated the terms and conditions of probation. (*People v. Gonzalez* (2017) 7 Cal.App.5th 370, 382; *People v. Cervantes* (2009) 175 Cal.App.4th 291, 295; *People v. Galvan* (2007) 155 Cal.App.4th 978, 983.) The People have "the burden of producing evidence and the burden of persuasion showing a probation violation occurred by a preponderance of the evidence." (*People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1292, citing *People v. Rodriguez* (1990) 51 Cal.3d 437, 441.)

We review a trial court's factual findings supporting revocation to determine whether they are supported by substantial evidence, and we review the decision to revoke probation for an abuse of discretion. (*People v. Gonzalez*, *supra*, 7 Cal.App.5th at p. 381; *People v. Butcher* (2016) 247 Cal.App.4th 310, 318; *People v. Urke* (2011) 197 Cal.App.4th 766, 773.) We interpret a court's probation condition based on "what a reasonable person would understand from the language of the condition itself." (*People v. Bravo* (1987) 43 Cal.3d 600, 607.)

Arnett's terms of probation initially required him to "[c]ooperate with the probation officer . . . in a plan for drug treatment and rehabilitation." When the court revoked and reinstated probation after Arnett's unapproved move to Indiana, the court imposed the condition that Arnett "enroll and complete a drug treatment program" and required Arnett to provide the court with

"proof of enrollment in [a] drug program" on November 20, 2014. Although the court required Arnett to prove his enrollment by that date and to thereafter complete a drug program, the court never required that he complete a *particular* drug program or that he complete any program *by a certain date*.

Arnett did enroll in a drug program and presented proof of his enrollment by the date the court required. Upon receiving proof of the enrollment, the court informed Arnett that "everything else would go through [the probation department.]" In this context, "everything else" must reasonably be understood to include issues concerning the manner and timing of fulfilling the drug program condition; and the direction that such issues "go through" probation implies that the probation department would resolve them. (See *In re I.S.* (2016) 6 Cal.App.5th 517, 525 ["When interpreting a probation condition, we rely on 'context and common sense' [citation] and give the condition ' "the meaning that would appear to a reasonable, objective reader" '].)

After Arnett's enrollment in the Matrix program, issues arose and the probation department resolved them. Arnett requested and obtained his probation officer's permission to live in Oceanside. Even after the move, Arnett continued for some time to drive to the San Fernando Valley to participate in the Matrix program.[5] When his car was repossessed and he could no longer drive, he enrolled in the McAlister Institute program in Oceanside. His start date was delayed for three months because of issues concerning his Medi-Cal insurance. Significantly, his probation officer was aware of Arnett's efforts, confirmed his enrollment in the McAlister Institute

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[5] Although the court stated that Arnett did not attend any sessions of the Matrix program, there is no evidence to support that finding. Arnett stated that he attended sessions of the Matrix program, and there was no contradictory evidence.

program, and concluded that Arnett was still in compliance with the court's drug program condition. This conclusion implies that the probation department did not require Arnett to complete the *Matrix* program or to complete *any* program by May 29, 2015. Because the court deferred to the probation department "everything" other than proof of enrollment in a program, and the probation department concluded that Arnett continued to be in compliance with the drug program condition, the court abused its discretion in concluding that he had not complied with the condition.

The court's questioning of Arnett and probation officer Roberson at the revocation hearing and its rationale for finding a violation of the drug program condition indicate the court misunderstood or misapplied the drug program condition. The court asked Arnett, for example, whether he completed the Matrix program, and appeared to take no interest in the fact that Arnett had enrolled in the McAlister Institute program. The court asked Officer Roberson if Arnett "was excused from attending the Matrix" program" or if Roberson had told Arnett that he "[did] not have to attend that program." The court's questions suggest that it believed that Arnett was required to attend the Matrix program, which he was not. The court also questioned Roberson as to whether Arnett had produced any documents proving his attendance at Matrix. The only document Arnett was ever required to produce, however, was documentary proof of his enrollment in a drug program by November 20, 2014, which he supplied on time.

The court's explanation of its ruling also emphasized that the probation officers did not "excuse" or grant Arnett "leave" from the Matrix program. Arnett, the court stated, "was never given permission to take a . . . six-and-one-half month hiatus on his own." Neither the court nor the probation department, however, ever mandated that Arnett complete the Matrix program (as opposed to

another program), that he obtain permission to discontinue the Matrix program, or that he request a leave of absence from any program. As we interpret the court's statement of the drug program condition, it required only that Arnett complete a program under the auspices and direction of the probation department, which found Arnett to be in compliance with the condition. The court's rationale, in short, does not withstand scrutiny.

The court also indicated that it was revoking probation because the court had previously impressed upon Arnett that it was imposing "very, very strict rules and regulations," and "that there weren't going to be any further chances." The court, it appears, believed that it had drawn a line and that Arnett had crossed it. The court, however, did not draw that line as precisely as it appears to have assumed. If the court had, for example, imposed upon Arnett a "very strict" requirement that he complete a drug program no later than the May 29, 2015 hearing, and Arnett failed to do so, the court could have rationally concluded that Arnett did not fulfill the requirement. Here, however, the court never imposed such a requirement.[6] Rather, it left the details regarding fulfillment of the drug program condition, including determining when Arnett must complete a drug program, to the probation department. The probation officers, charged with constructing the line over which

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[6] The only act the court required Arnett to perform by May 29, 2015, was to provide the court with a "progress report" on his drug program and restitution payments. Arnett appeared at the May 29, 2015 hearing, and provided the court with his progress report – specifically, that he had moved to Oceanside, stopped attending the Matrix program, and was enrolled in the McAlister Institute program. Although the court's reaction to the report – summarily revoking Arnett's probation – indicates that the court was displeased with the report, Arnett did not violate any requirement that the court had imposed; the court required a progress report on a certain date and Arnett timely complied.

Arnett could not cross, ultimately determined that Arnett had not crossed it. Arnett, in short, did not need a "further chance" to comply with the drug program requirement because he had not violated any "rule or regulation," strict or otherwise, concerning the drug program condition.

Regarding the restitution requirement, the court was required to find that Arnett had the ability to pay the restitution as ordered before it could revoke probation. (§ 1203.2, subd. (a); *People v. Self* (1991) 233 Cal.App.3d 414, 418-419; *People v. Whisenand* (1995) 37 Cal.App.4th 1383, 1393-1394.) Here, the court made that finding based solely on Arnett's testimony that he was employed part-time for five days in November and December 2014 and the absence of evidence "that he had the inability to pay."[7]

Initially, we note that the court's statement that there was no evidence that Arnett "had the inability to pay" improperly suggests that Arnett had the burden of proving such inability. As noted above, the People have the burden of proving a violation of probation. (*People v. Quarterman*, *supra*, 202 Cal.App.4th at p. 1292.) Because the failure to pay restitution violates probation only if the probationer has the ability to pay, the People have the burden of establishing that fact. They failed to do so. The only affirmative evidence the People offered – the June 2015 probation report – states that Arnett's restitution "account is currently in a delinquent status." It does not, however, mention Arnett's employment or financial information or otherwise address whether Arnett had the ability to pay the restitution. When probation officer Roberson was

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[7] In explaining its ruling, the court initially relied on a letter submitted by Arnett's wife, as well as Arnett's testimony. In the letter, which had not been admitted into evidence, Arnett's wife stated that Arnett had worked six days a week. When Arnett's counsel inquired whether the court was relying on the letter in making the ability-to-pay finding, the court stated that it was not.

asked about Arnett's ability to pay restitution, he stated only that he understood that Arnett "had no job" or a place to live, facts that do not support a finding that Arnett had the ability to pay. Although Arnett testified that he had been employed on a part-time basis for five days on and after Thanksgiving Day 2014, there was no evidence of the income he received for his work, no evidence that he had any savings, and no evidence of his expenses or debts beyond the restitution obligation. The fact that Arnett worked part-time for five days is, based on our review of the entire record, insufficient to support the court's finding of his ability to pay.

Because the evidence is insufficient to support the court's findings as to Arnett's willful failure to comply with the drug program condition or the restitution condition, the court abused its discretion in revoking Arnett's probation.

DISPOSITION

The order revoking probation is reversed. Upon issuance of the remittitur, the trial court shall order that Arnett be released from custody, vacate the orders made at the September 15, 2015, probation revocation hearing, and reinstate probation on the original terms and conditions. Arnett shall be permitted a reasonable time to comply with the requirement that he complete a drug treatment and rehabilitation plan as established by the probation department.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, P. J. LUI, J.