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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ORLANDO HINKSTON, Defendant and Appellant.	B265925 (Los Angeles County Super. Ct. No. BA406481)

APPEAL from an order of the Superior Court of Los Angeles County, Henry J. Hall, Judge. Affirmed.

Heather L. Beugen, 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, Michael R. Johnsen and Paul S. Thies, Deputy Attorneys General, for Plaintiff and Respondent.

Orlando Hinkston appeals from an order revoking probation previously granted upon his plea of guilty to possessing cocaine base for sale. (Health & Saf. Code, § 11351.5.) We affirm.

FACTUAL AND PROCEDURAL SUMMARY

1. The Underlying Offense and Related Proceedings.

The record reflects as follows. On January 5, 2013, Los Angeles police officers observed appellant hand another man an off-white solid resembling rock cocaine in exchange for currency. After officers detained appellant, he said, " 'I'm a crack dealer. I don't like the police, that's why I shot the police in the face.' " Appellant possessed additional off-white solids resembling rock cocaine, plus about $414 in various denominations.

On August 13, 2013, appellant, in propria persona, pled guilty to possessing cocaine base for sale with the understanding that the court would strike a Three Strikes law prior felony conviction, sentence him to prison for five years, but suspend execution thereof. Under the terms of the plea agreement, the court would place him on formal probation for three years, order him to serve time in local custody with credit for time served, and, if he later violated probation, the court would revoke the suspension of the five-year sentence. The court sentenced him pursuant to the agreement. One probation condition was that appellant "obey . . . all rules, regulations, and instructions of the probation officer." Appellant accepted the probation conditions.

2. Probation Violation Proceedings.

a. *The Probation Violation Report.*

On May 5, 2015, the probation department filed a supplemental report reflecting the following. A few weeks after entering his guilty plea, appellant, on September 5, 2013,

reported to the probation office and underwent orientation on his probation conditions. Appellant had been instructed to report to probation on February 20, 2015, but failed to do so. He had last reported on February 9, 2015, and a desertion report was submitted on March 17, 2015.

The report also reflects as follows. Appellant was in violation of the following probationary terms: (1) appellant failed to report to probation as instructed, (2) he failed to attend court-ordered drug treatment and rehabilitation program meetings, (3) he failed to keep the probation officer advised of his residence at all times, (4) he failed to pay his financial obligations,[1] (5) he failed to register as a narcotic offender, and (6) he had access to weapons on multiple occasions. In the report, the probation officer stated appellant's actions illustrated his unwillingness to conform to the orders of the court, and the probation officer recommended that the court "revoke and impose."

b. *The Probation Violation Hearing.*

(1) Evidence presented at the hearing.

A probation violation hearing was held on May 21, 2015, and appellant represented himself. Los Angeles County Probation Officer Christopher Mendiola testified that appellant would report when he decided to come in, but he would not come in on specific dates as instructed. Appellant reported monthly when he had a residence, and weekly when he did not. Officer Mendiola testified that, "[a]lthough it may not have been at the

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[1] The report noted appellant's total financial obligation was $478, the balance due was about $379, and he was not in compliance with the payment plan.

times that [appellant] was scheduled," appellant "ma[d]e those weekly and monthly reports," "up until his last one."

Officer Mendiola further testified that on February 9, 2015, he met with appellant and told him to report back on February 20, 2015. However, on February 20, 2015, appellant failed to report. Officer Mendiola tried to contact appellant on February 20, 2015, but the number on record was invalid. Appellant did not attempt to contact Mendiola after February 20, 2015.[2]

The prosecutor represented that approximately a month before, on April 15, 2016, appellant had made statements about probation to a different judge in a different case in Department 83. Probation Officer Mendiola was present at the Department 83 hearing where appellant made the statements. During the May 2015 probation violation hearing in the present case, the following colloquy occurred between the prosecutor and Mendiola about the statements appellant made in Department 83:

> "Q At some point did the defendant give his opinion of what probation --
>
> "A Yes, sir.
>
> "Q And who did he give that opinion to?
>
> "A To the court.
>
> "Q And what was his opinion?
>
> "A That he was not going to report to probation, that he was going to go to Cincinnati, Ohio, fuck probation. What the fuck can probation do?"

During cross-examination at the violation hearing, Mendiola testified, "I was your probation officer for a couple

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[2] Another probation officer testified concerning an alleged weapons-related probation violation not pertinent to this appeal.

weeks prior to . . . you not reporting when I instructed you to do so." Appellant cross-examined Mendiola about other alleged probation violations.

The court in the present case ordered the transcript from the April 2015 Department 83 hearing. The court continued appellant's probation violation hearing to June 18, 2015.

On June 18, 2015, the court took judicial notice of the superior court file in the Department 83 case.[3] Appellant did not testify as a witness and was not under oath during the June 18, 2015 probation violation hearing in the present case. The prosecutor indicated an "officer" (apparently a probation officer) was present whom the prosecutor had not subpoenaed. Appellant later said, "Actually I asked them to subpoena her because she could shed light on a lot of the allegations. Even though they didn't have nothing to do with my actual charge of absconding they . . . could shed light as far as me being in compliance with going to the drug classes and stuff like that."

Appellant raised alleged discovery issues but the court advised appellant that discovery rules did not apply at probation violation hearings. Appellant replied, "I understand. But it would actually shed light on the actual charges because . . . all the allegations he's making against me on there, here's the paperwork that prove that I was . . . in compliance with it. [¶] The only thing I wasn't in compliance with actually was my—was paying the money and absconding and that's because my social security was cut off."

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[3] The court referred to the Department 83 case (superior court case No. 5PR01478) as a "Proposition 115, . . . mandatory supervision" case.

(2) The court's comments and ruling.

At the June 18, 2015 continued hearing, the court stated, "Here's what I'm going to do, Mr. Hinkston. [¶] If you want to hear from the other probation officer, that's fine. [¶] In reviewing the probation or the court file in 5PR01478 [the Department 83 case] it actually gave me some insight into your particular situation. [¶] I think that the only violation that's really been established in this matter will be absconding from probation." The court later stated, "what I'm inclined to do with this matter is the following: [¶] . . . I don't see that there's anything to be gained whatsoever from leaving Mr. Hinkston on probation. He's a poor reporter. He's got a crummy attitude toward probation. [¶] . . . He had numerous violations of his . . . mandatory supervision. . . . [¶] And what I'm inclined to do with this matter is to revoke probation, impose the five-year sentence that was imposed and stayed. Impose two years on it and place him on mandatory supervision for the remaining three." The prosecutor submitted the matter.

The court then stated, "So, Mr. Hinkston, that's what I'm inclined to do in this matter. [¶] . . . I don't think that the violations rise to the level of just slamming you in jail for five years, but your reporting and your attitude toward probation [have] been pretty pathetic." The prosecutor noted the original sentencing bargain was that if appellant violated probation he would serve five years in prison. However, the prosecutor indicated he was not objecting to the court's proposed incarceration of appellant in county jail.

The court later stated without objection, "In this matter then I find the defendant in violation of probation for failing to report. The one thing that we all seem to be agreed on.

[¶] I think that he has been in moderate compliance with probation otherwise, but he has failed to report and he's failed to report on a regular basis and his attitude toward reporting which is one of the keys of probation was struck [*sic*] by the language of the probation officer at the last hearing that he reports when he wants to. . . . [¶] I find the defendant in violation of probation for failing to report to probation as ordered. This was a marginal probation grant in the first place. [¶] Additionally, Mr. Hinkston is on another grant of mandatory supervision and it seems duplicative of probation's resources to keep him or to place him on both. [¶] So in this matter probation is revoked for failing to report to probation. [¶] The five years county jail commitment that was previously imposed and execution of which was stayed is hereby imposed. [¶] The defendant is to serve two years in the Los Angeles County jail forthwith."

ISSUE

Appellant claims the trial court abused its discretion and violated his right to due process by revoking his probation. He argues that, because his failure to report to probation was due to his poverty, there is insufficient evidence his probation violation for failing to report was willful, therefore, revocation of his probation was improper. We reject the claim.

DISCUSSION

The Trial Court Properly Revoked Appellant's Probation.

A probation violation must be willful to justify revocation of probation. (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 594.) "While it is an abuse of discretion to revoke probation for conduct over which the probationer has no control (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295 [95 Cal.Rptr.3d 858] [inability of immigration detainee to appear for review hearing not willful];

[citation]), the mens rea standard in revocation proceedings is difficult to state with precision beyond that. (See [*People v. Zaring* (1992) 8 Cal.App.4th 362,] 379 [absent 'irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court,' probationer's conduct was not willful].)" (*In re Kevin F.* (2015) 239 Cal.App.4th 351, 362-363.)

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 (*Kurey*).) 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.)

Appellant concedes (1) he failed to report for his probation appointment on February 20, 2015, (2) the court found a probation violation based on that failure, and (3) the court revoked probation because of that violation. We accept the concessions. The issue before us is whether there was substantial evidence from which the trial court could have found by a preponderance of the evidence that appellant's February 20, 2015 failure to report was a violation that was willful.

We conclude there was. The trial court heard evidence that appellant reported on dates of his own choosing, failed to report on specific scheduled dates, failed to report on the scheduled February 20, 2015 date, and made no subsequent attempt to contact Probation Officer Mendiola. Moreover, the People presented evidence that about a month before the May 2015 probation violation hearing, appellant, in Department 83, stated that he was not going to report to probation, he was going to Cincinnati, "fuck probation," and "What the fuck can probation do?" The trial court did not abuse its discretion or violate appellant's right to due process by revoking his probation on June 18, 2015.[4]

None of appellant's arguments compel a contrary conclusion. This includes appellant's argument concerning his June 18, 2015 statement to the trial court that, "[t]he only thing I wasn't in compliance with actually was my - - was paying the money and absconding and that's because my social security was cut off." First, appellant did not make this statement under oath or pursuant to a lawful equivalent. The trial court was not obligated to believe appellant's unsworn statement. (See *People v. White* (2011) 191 Cal.App.4th 1333, 1340 [" '[u]nsworn

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[4] As mentioned, the trial court (1) found appellant in violation of probation for failing to report and (2) later stated, "Additionally, Mr. Hinkston is on another grant of mandatory supervision and it seems duplicative of probation's resources to keep him or to place him on both." The court then revoked appellant's probation. Although the above quoted language appears to provide an independent valid ground supporting revocation of probation, there is no need to decide that issue in light of our conclusion that revocation of probation was proper because appellant willfully failed to report to probation.

testimony does not constitute "evidence" within the meaning of the Evidence Code.' "]; Evid. Code, §§ 140, 710.)

Second, appellant asserts that, by his above June 18, 2015 statement about cutoff funds, "he explained to the judge that the only reason he couldn't report was because his social security funds had been cut off." However, in that statement, appellant did not say "report." He said "absconding." Indeed, our previous recitation of the evidence presented at the probation violation hearing makes clear that appellant twice used the term "absconding" in his June 28, 2015 comments to the court. The term "abscond" means "to go away hastily and secretly; run away and hide, [especially] in order to escape the law."[5] Accordingly, appellant's June 18, 2015 statement about cutoff funds, reasonably understood, indicated the alleged cutoff caused (1) not a failure to *report* due to a lack of funds (e.g., to pay for transportation), but (2) a failure to *"pay[] the money"* (i.e., his financial obligations (see fn. 1, *ante*)), with the result appellant secretly fled to escape the legal consequences of his nonpayment.

Third, appellant never stated to the trial court that he failed to report to probation because of poverty. Respondent does not raise the issue of whether, because of the absence of that statement, appellant forfeited the issue of whether the trial court erred by allegedly revoking his probation for his failure to report where that failure was due to his poverty. Accordingly, we need not reach that issue. We do note, however, that because appellant never stated he failed to report to probation because of

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[5] Webster's New World Dictionary of the American Language (2d. college ed. 1986) page 5.

poverty, the People had no opportunity to present any evidence on this new justification for his failure to report.

Fourth, even if appellant stated to the trial court that he failed to report to probation because of poverty, appellant did not explain why that was the case. He did not explain when the cutoff occurred, what funds were needed, why he could not obtain funds from other sources, and why the cutoff prevented him from even attempting to contact Officer Mendiola by phone or any other means after February 20, 2015. Moreover, we note that Officer Mendiola testified appellant reported more frequently (weekly) when he was transient than when he had a residence. Under all of the circumstances, the trial court was not obligated to believe appellant's failure to report was due to conduct over which appellant had no control.[6] To the extent appellant's June 18, 2015 statement meant the cutoff of funds caused his failure to report, the trial court reasonably could have disbelieved appellant's vague statement as self-serving. (See *People v. Ewing* (2016) 244 Cal.App.4th 359, 378 ["[i]t is well settled that a

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[6] *Zaring*, cited by appellant, does not compel a contrary conclusion. In *Zaring*, the trial court accepted the probationer's explanation she was 22 minutes late because she had to take her children to school due to a "last minute unforeseen circumstance," but the trial court nonetheless found her in violation of probation for failing to appear in court on time. (*People v. Zaring*, *supra,* 8 Cal.App.4th at p. 379.) *Zaring* concluded the trial court abused its discretion because there was no evidence the defendant's tardiness was "the result of irresponsibility, contumacious behavior or disrespect for the orders and expectations of the court." (*Ibid.*)

rational trier of fact may disbelieve those portions of a defendant's statements that are obviously self-serving"].)[7]

Finally, even if we construed appellant's June 18, 2015 statement about cutoff funds to provide an explanation for why he failed to report, we review the record in the light most favorable to the judgment to determine whether there is substantial evidence from which the trial court could have found a probation violation. (*Kurey, supra,* 88 Cal.App.4th at pp. 848-849.) The People's evidence provided that substantial evidence.

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[7] Appellant notes that, at one point during the June 18, 2015 probation violation hearing, appellant stated to the court, "It's evident that I'm not going to – whatever I'm saying won't make any matter in the case." To the extent appellant suggests this statement demonstrates that revocation of appellant's probation was error because, prior to the revocation, the court did not afford appellant an opportunity to be heard, we reject the suggestion. *Prior* to the above quoted statement, (1) appellant cross-examined Mendiola, (2) the court continued the probation violation hearing from May 2015 to June 2015 to obtain full information about appellant's Department 83 case, (3) the court heard from appellant, (4) the court indicated that, if appellant wanted, he could call his subpoenaed witness (whose testimony, according to appellant, would have shed light on several allegations but not on the absconding allegation), and (5) the court indicated its comments concerning its ruling were tentative by stating three times it was discussing what it was "inclined" to do. We also note the court twice indicated without objection from appellant that everyone seemed to agree that appellant violated probation by failing to report.

DISPOSITION

The order revoking appellant's probation is affirmed.

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GOSWAMI, J.*

We concur:

EDMON, P. J.

LAVIN, J.

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