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IN THE COURT OF APPEAL OF THE STATE OF
CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN PEREZ-SUCHITE,

Defendant and Appellant.

B292724

(Los Angeles County
Super. Ct. No. NA042895)

APPEAL from the Judgment of the Superior Court of Los Angeles County, James Otto, Judge. Reversed and remanded with directions.

Peter J. Boldin, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr.,

and Nicholas J. Webster, Deputy Attorneys General for Plaintiff and Respondent.

INTRODUCTION

After a formal probation violation hearing, the court below found appellant Juan Perez Suchite had violated the terms of his probation and sentenced him to six years in prison. Because no evidence in the record supports a finding that any such violation was willful, we reverse.

On June 26, 2000, after Suchite pled guilty to one count of committing a lewd act upon a child under 14, the court suspended sentence and placed Suchite on five years' probation under various conditions, including reporting to his probation officer within 48 hours of release from custody, keeping his probation officer informed of his whereabouts, and paying \$200 in restitution as directed by the Deputy Probation Officer. However, upon his release from custody, Suchite was immediately deported to Guatemala. Suchite later testified that those who deported him threw out his probation paperwork. On August 18, 2000, the court summarily revoked Suchite's probation because he never reported to his probation officer.

Nearly 17 years later, on June 9, 2017, Immigration and Customs Enforcement took Suchite into custody for "re-entry after deportation." On July 18, 2018, after the People presented evidence that Suchite never reported to his

probation officer, the court found Suchite had violated his probation and sentenced him to six years in prison.

Both parties agree that a willful violation of a condition of probation is required before the court may find a probation violation. The People urge us to affirm the court's ruling below because Suchite failed to report to his probation officer within 48 hours of release from custody, failed to keep his probation officer informed of his whereabouts, and failed to pay the \$200 in restitution, and "[t]he record supports a finding that appellant understood his obligations, had the ability to comply, but failed to do so." Because no evidence in the record supports a finding that any of these alleged violations was willful, we reverse.

STATEMENT OF RELEVANT FACTS

A. The Court Places Suchite on Probation

On June 26, 2000, Suchite entered a plea of guilty to one count of violating Penal Code section 288, subdivision (a) (lewd act upon a child). Suchite was advised that if he was not a citizen, "a conviction of the offense for which [he had] been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." The court suspended imposition of sentence and placed Suchite on five years' probation under conditions that included reporting to his probation officer within 48 hours of his release from custody, keeping his probation officer

advised of his telephone numbers, and paying restitution of \$200 as directed by the Deputy Probation Officer.

On August 18, 2000, the court held a hearing for a possible violation of probation. Suchite failed to appear, and the court revoked probation and issued a bench warrant for his arrest.

B. *The Court Finds Suchite Violated Probation*

On June 9, 2017, Immigration and Customs Enforcement placed Suchite into custody for “re-entry after deportation.” On June 2, 2018, he was transferred to the Long Beach Police Department, and on June 4, 2018, the bench warrant issued over 17 years earlier was recalled and quashed, and the matter was referred to the probation department for a supplemental probation report.

At a July 2, 2018 hearing, the court informed Suchite it would sentence him to three years in prison if he admitted the probation violation. Suchite begged for a lesser sentence, but the court explained three years was the lowest possible sentence for the count to which he pled guilty. To Suchite’s statement that he returned to the United States simply “to make some money,” the court responded it did not “understand why you left here when you were on probation.” When Suchite attempted to explain that he was deported, the court responded, “After you got deported, did you report to probation? Did you send a letter? No.” Suchite requested the court give him time to find a private lawyer, and the court set a probation violation hearing for July 18, 2018.

The court cautioned Suchite that if he insisted on a hearing, “I’ll cite you six or eight [years].”

On July 18, 2018, the court held a probation violation hearing. A deputy probation officer testified that Probation Department records showed Suchite never reported to his probation officer. Suchite testified that:

- 1) He was deported to Guatemala after his conviction and had no way of communicating with his probation officer because “Immigration threw out [his] paperwork.”
- 2) He had no way to check in with his probation officer because he was in Guatemala.
- 3) He was in Guatemala from the time he was deported until he returned to the United States.¹

No other witnesses testified. Suchite’s counsel argued that Suchite had not violated probation because “he was never ultimately released out of custody to any form of check-in with the probation officer. In fact, he was detained while in county jail, then transported to [the] custody of the Department of Homeland Security. [¶] Ultimately, for a finding [of] a probation violation, there has to be a willful

¹ Suchite’s trial counsel represented -- and the People did not contest -- that Suchite was detained “upon entry [to the United States],” and in imposing sentence, the trial court gave Suchite credit for time served “from the date he was detained from crossing the border” which defense counsel identified as “6/9/17.”

violation. This was ultimately an act outside [the] control of Mr. Suchite. This does not classify as a willful violation” The People argued Suchite “made no attempts to contact probation. He never reported.”

The court found Suchite in violation of probation and sentenced him to six years in prison, with 782 days of credit, and ordered him to pay a \$300 probation revocation fine. Suchite timely appealed.

DISCUSSION

A. *No Evidence Supports a Finding That Suchite Willfully Failed to Report to His Probation Officer*

A court abuses its discretion in finding a defendant violated a condition of probation unless “the evidence supports the conclusion that the conduct . . . constituted a willful violation of that condition.” (*People v. Zaring* (1992) 8 Cal.App.4th 362, 379; see also *People v. Galvan* (2007) 155 Cal.App.4th 978, 982 (*Galvan*) [“[T]he facts supporting revocation of probation may be proven by a preponderance of the evidence.’ (*People v. Rodriguez* (1990) 51 Cal.3d 437, 439 [272 Cal.Rptr. 613, 795 P.2d 783].) However, the evidence must support a conclusion the probationer’s conduct constituted a willful violation of the terms and conditions of probation. (See *People v. Zaring* (1992) 8 Cal.App.4th 362, 378-379 [10 Cal.Rptr.2d 263] [trial court abused its discretion by revoking probation for a tardy court

appearance caused by circumstances beyond probationer's control[.]”]; *People v. Cervantes* (2009) 175 Cal.App.4th 291, 295 [reversing finding that defendant violated probation by failing to appear for 30-day review hearing, where defendant was in custody of immigration authorities at time of hearing]; *People v. Sem* (2014) 229 Cal.App.4th 1176, 1188 (*Sem*) [“a willful violation is a prerequisite to revoking probation”].) The People agree that “it is an abuse of discretion to revoke probation for conduct over which the probation[er] has no control”

We find *Galvan* instructive. There, the defendant was ordered to report to his probation officer within 24 hours of his release from custody. (*Galvan, supra*, 155 Cal.App.4th at pp. 980-981.) It was further ordered that if the defendant left the United States and returned, he was to “report to the probation officer within 24 hours and present documentation which proves that he is in the United States legally.” (*Id.* at p. 981.)

A probation violation hearing was set for December 27, 2005. (*Galvan, supra*, 155 Cal.App.4th at p. 981.) When the defendant failed to appear, the court issued a bench warrant. (*Ibid.*) The defendant was arrested on April 12, 2006, and the court held a probation violation hearing two months later. (*Ibid.*) UCIS (United States Citizenship and Immigration Services) records showed the defendant had been deported to Mexico on November 1, 2005; there was no evidence as to when he reentered the United States. (*Ibid.*) The court found the defendant in violation of probation, both

for failing to report to his probation officer upon his release from custody, and for failing to do so upon returning to the United States. (*Ibid.*) The Court of Appeal reversed. (*Id.* at p. 986.)

“As for Galvan’s having failed to report to probation within 24 hours of his release from custody, he argues it was impossible to do so because the federal government immediately deported him and, therefore, his failure to report was not willful. We agree.” (*Galvan, supra*, 155 Cal.App.4th at p. 983.) “As for Galvan’s having failed to report to probation within 24 hours of reentry to the United States, the record contains no evidence showing how long Galvan had been back in the United States before he was arrested on April 12, 2006. Hence, there was no evidentiary basis for revoking probation on that ground.” (*Id.* at pp. 982-983.) Therefore, “[t]he trial court’s revocation of Galvan’s probation was an abuse of discretion because his failure to comply with the reporting condition had not been willful.” (*Id.* at p. 985.)

Like the defendant in *Galvan*, Suchite was immediately deported following his conviction and placement on probation, making it impossible for him to report to his probation officer within 48 hours of his release from local custody. The court abused its discretion in finding that Suchite violated probation by failing to report to his probation officer.

The People do not dispute the holding of *Galvan* but instead argue the instant case is distinguishable, because

Suchite “violated probation for several reasons other than simply failing to report to the probation officer within 48 hours. He also failed to report at all over the course of 17 years, he failed to keep probation notified of his location and contact information, and he failed to pay restitution.” The People contend that “[e]ven if appellant’s deportation prevented him from physically appearing, it did not prevent him from communicating with the probation department by other means regarding his obligations to report and pay restitution.” We address the People’s arguments in the following sections.²

² The People also rely on *People v. Campos* (1988) 198 Cal.App.3d 917, which held that “[a] defendant who is deported while on probation may be found in violation of that probation for failure to report to the probation department although his deportation makes it impossible for the defendant to fulfill this condition of his probation.” (*Id.* at p. 923.) As the *Galvan* court noted, “*Campos* was decided prior to *Zaring* and does not explain how a failure to report in the deportation situation could be willful.” (*Galvan, supra*, 155 Cal.App.4th at p. 985, fn. 4.) The People make no attempt to do so either. Moreover, unlike Suchite, the defendant in *Campos* returned to the United States while still on probation. (*People v. Campos, supra*, 198 Cal.App.3d at pp. 919-920.) The court found that “[e]ven if the fact that appellant had been deported could be considered a mitigating factor, the fact that appellant did not report during the time he was in Mexico does not excuse his failure to report after returning to the United States.” (*Id.* at p. 923.) Here, Suchite’s probation ended in 2005, and the record reflects he did not attempt to re-enter the United States until 2017. Moreover, the order placing Suchite on probation contained no requirement (*Fn. is continued on the next page.*)

B. *No Evidence Supports a Finding That Suchite Willfully Failed to Inform His Probation Officer of His Whereabouts*

The People argue Suchite also violated probation because he “failed to keep his probation officer informed of his location and contact information” Though they argue “[t]he record supports a finding that appellant understood his obligations, had the ability to comply, but failed to do so,” the People fail to cite anything in the record to support their argument, and our independent review of the record reveals none.

At the probation violation hearing, Suchite’s attorney asked him, “[In Guatemala, where you were deported to], did you have access to any way to communicate with your probation officer in the United States?” Suchite testified, “No, because Immigration threw out my paperwork.” His counsel followed up by asking, “So is it fair to say you’ve not had a chance to check in with your probation officer due to a federal agency deporting you?” Suchite answered, “Yes.” The prosecutor did not cross-examine Suchite, and no other testimony regarding his ability to contact his probation officer was elicited.

The People argue that “[p]er the court’s suggestion, appellant could have sent a letter to the probation department or contacted it in some other way, but for 17

that he report to his probation officer upon return to the United States.

years he did not.” But nothing in the record supports a finding that Suchite had the ability to contact his probation officer -- the only evidence is that he was unable to do so. No evidentiary basis supports revoking probation on that ground.

C. *No Evidence Supports a Finding That Suchite Willfully Failed to Pay Restitution*

Finally, the People argue Suchite violated probation because he “failed to pay any restitution as required by the terms of his probation.” Penal Code “[s]ection 1203.2, subdivision (a) prohibits revoking probation ‘for failure of a person to make restitution imposed as a condition of probation unless the court determines that the defendant has willfully failed to pay and has the ability to pay.’” (*Sem, supra*, 229 Cal.App.4th at p. 1188.)

Here, the People did not even attempt to show that Suchite had the ability to pay restitution, much less that he willfully failed to do so. In fact, the scant evidence in the record about Suchite’s ability to pay is indirect and supports only the inference of his inability to do so. Specifically, Suchite testified he was in Guatemala from the time he was deported until he returned to the United States. Moreover, Suchite testified he returned to the United States “just . . . to make some money,” implying he did not have much money.

Nothing in the record supports a finding that Suchite had the ability to pay the \$200 in ordered restitution, much less that he willfully failed to do so. Instead, the evidence

shows he likely was unable to pay, and even if he had the ability, would not have known where to send the money because “Immigration threw out [his probation] paperwork.”

D. *Effect of Reversal*

Pursuant to the court order placing Suchite on five years’ probation on June 26, 2000, his probation would have terminated on June 26, 2005. On August 18, 2000, the court revoked Suchite’s probation for failing to report to his probation officer. “The revocation [of probation], summary or otherwise, shall serve to toll the running of the period of supervision.” (Pen. Code, § 1203.2, subd. (a).) While this language might imply the August 18, 2000 revocation suspended the running of Suchite’s five-year term of probation, the Supreme Court has held otherwise.

In *People v. Leiva* (2013) 56 Cal.4th 498 (*Leiva*), the defendant was originally placed on three years’ probation, starting April 11, 2000, “which meant that probation would expire on April 11, 2003.” (*Id.* at p. 502.) “Included in the terms and conditions of probation were orders that defendant report to his probation officer within one business day of his release from custody and not reenter the country illegally if he left voluntarily or was deported. Because defendant was not a legal resident of the United States, he was deported to El Salvador on the day he was released from jail.” (*Ibid.*) The court revoked the defendant’s probation on September 21, 2001, based on his failure to report to his probation officer. (*Ibid.*) The defendant then illegally re-

entered the United States in February 2007 (i.e., after April 11, 2003), was arrested in November 2008, and appeared at a formal probation violation hearing on February 13, 2009, at which the trial court found he had violated probation. (*Id.* at p. 503.) The trial court “did not rely on the allegation that had led to the summary revocation on September 21, 2001, nor did it find any other violation of probation during the three-year probationary period imposed on April 11, 2000. Instead, the court found defendant violated his probation in 2007 when he failed to report to probation following his return to the United States.” (*Ibid.*) The Court of Appeal affirmed.

The Supreme Court reversed. Examining the language and history of Penal Code section 1203.2, the Court found “the tolling provision was enacted to preserve the trial court’s authority to hold a formal probation violation hearing at a time after probation would have expired with regard to a violation that was alleged to have occurred *during* the probationary period.” (*Id.* at pp. 514-515.) It was not intended to extend the probationary period. (*Id.* at pp. 516-517; see also *People v. Johnson* (2018) 29 Cal.App.5th 1041, 1046 [*Leiva* disapproved holding that under Penal Code section 1203.2, subdivision (a), “the time during which probation was revoked is not counted in calculating the end-date for supervision, thus serving to extend the end-date”].) “[A] trial court can find a violation of probation and then reinstate and extend the terms of probation ‘if, and only if, probation is reinstated based upon a violation that occurred

during the unextended period of probation.’ This result fairly gives the defendant, if he prevails at the formal violation hearing, the benefit of the finding that there was no violation of probation during the probationary period.” (*Leiva, supra*, 56 Cal.4th at p. 516, quoting *People v. Tapia* (2001) 91 Cal.App.4th 738, 741.) Because we have determined the record lacks evidence that Suchite willfully violated the terms of his probation, we reverse the order revoking probation and vacate the sentence imposed. As the period of probation has now expired, probation may not be reimposed. Absent any other basis to hold Suchite in custody, he is entitled to release.

DISPOSITION

We reverse the court's finding that Suchite violated his probation. We vacate the sentence imposed, including the custody portion and the \$300 probation revocation fine, and remand to the trial court. The trial court shall prepare a new abstract of judgment evidencing the vacating of the sentence, and shall forward the new abstract of judgment to the Department of Corrections and Rehabilitation.

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MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.