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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. ROBERTO HERNANDEZ, Defendant and Appellant.	B279463 (Los Angeles County Super. Ct. No. NA098680)

APPEAL from an order of the Superior Court of Los Angeles County. Mark C. Kim, Judge. Reversed.

Patricia A. Dark, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General, and Stephanie A. Miyoshi, Deputy Attorney General, for Plaintiff and Respondent.

On June 18, 2014, Roberto Hernandez pleaded no contest to one count of carrying a concealed firearm in a vehicle in violation of Penal Code section 25400, subdivision (a)(1). The trial court suspended execution of the sentence and placed appellant on probation for three years, with conditions that included reporting to a probation officer. On December 1, 2016, following a contested revocation hearing, the trial court found appellant in violation of his probation for failure to report to his probation officer. The trial court terminated probation and imposed the previously suspended sentence of three years in state prison.

At the probation violation hearing on December 1, 2016, the District Attorney called a single witness, Deputy Probation Officer James Adkins. Adkins testified that he was not appellant's supervising probation officer, but worked in the Criminal Adult Investigation unit and had been assigned to write the report concerning appellant's violation of the terms of his probation. According to Adkins, one of the responsibilities of a probation officer is to input the probation requirements of each probationer into the "automatic probation system." The probation officer also enters the dates a probationer is required to report as well as whether the probationer reports on those dates. Adkins explained that, because it is common for a probationer to have multiple supervising probation officers over the term of probation, other probation officers typically rely on the information entered into the system.

In order to determine whether appellant had reported to his probation officer as required, Adkins reviewed the probation records in the system. Adkins testified that according to those records, appellant was required to report once a month to his probation officer, and he had last reported on July 13, 2016. Adkins further averred that the probation records indicated

appellant did not report even after a letter was sent instructing him to report.

None of the probation records upon which Adkins relied in preparing his report and in testifying at the hearing was admitted into evidence or produced.

Throughout the brief hearing, defense counsel objected forcefully to the admission of Adkins's testimony on foundational, hearsay, and due process grounds. The trial court overruled the objections, finding Adkins's testimony admissible under Evidence Code[1] section 1271. The court declared that section 1271, subdivision (c) requires only a "qualified witness"—not necessarily the custodian of the record—to testify, and noted that Adkins testified he "relied on [these records] for accuracy." The court added that there is no requirement under section 1271 that the document itself be present in the court.

DISCUSSION

Appellant contends that Adkins's testimony constituted inadmissible hearsay, and the trial court erred in admitting the testimony without a properly laid foundation under section 1271, or any other valid exception to the hearsay rule. Appellant further maintains that the trial court's failure to make any finding of good cause to admit the testimony violated appellant's due process confrontation rights. The error was prejudicial because no other evidence was presented to support the trial court's finding that appellant had violated the terms of his probation. In the absence of any evidence, much less a

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[1] Undesignated statutory references are to the Evidence Code.

preponderance of the evidence to support the court's finding, appellant argues that the trial court abused its discretion in terminating his probation.

" 'Hearsay evidence' is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (§ 1200, subd. (a).) Hearsay evidence is inadmissible except where the evidence "meets the requirements of an exception to the hearsay rule." (§§ 1200, subd. (b), 1201.) "[A] trial court's decision to admit or exclude a hearsay statement . . . will not be disturbed on appeal absent a showing of abuse of discretion." (*People v. Jones* (2013) 57 Cal.4th 899, 956.) In general, a trial court's erroneous admission of hearsay evidence does not require reversal "unless it is reasonably probable the defendant would have received a more favorable result had the evidence not been admitted." (*People v. Landau* (2016) 246 Cal.App.4th 850, 866.)

We review the trial court's factual findings in support of revocation of probation for substantial evidence (*People v. Superior Court* (*Jones*) (1998) 18 Cal.4th 667, 681) and the revocation order for an abuse of discretion (*People v. Butcher* (2016) 247 Cal.App.4th 310, 318; *People v. Rodriguez* (1990) 51 Cal.3d 437, 447). "[B]earing in mind that '[p]robation is not a matter of right but an act of clemency, the granting and revocation of which are entirely within the sound discretion of the trial court,' " we accord great deference to the trial court's decision. (*People v. Urke* (2011) 197 Cal.App.4th 766, 773.)

Nevertheless, where, as here, no admissible evidence supports the trial court's revocation decision, the trial court abuses its discretion in terminating probation, and the order must be reversed.

1. The trial court abused its discretion in admitting Adkins's testimony under the business records exception to the hearsay rule.

Section 1271 specifies four prerequisites for evidence of a writing to be admitted under the business records exception to the hearsay rule.[2] Putting aside the fact that no writing was actually offered into evidence or even produced, Adkins's testimony meets none of the foundational requirements under section 1271. Adkins testified that a probationer's reporting obligations as well as the dates when he or she actually reports or fails to report are "input into the system." Adkins then relies on this information to write his reports for the court. Adkins's testimony gave no indication that any writings based on the information entered into the system[3] were made in the regular

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[2] Section 1271 provides:

"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

"(a) The writing was made in the regular course of a business;

"(b) The writing was made at or near the time of the act, condition, or event;

"(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

"(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

[3] Appellant observes that Adkins never used the word "computer" in referring to the "system," leaving one to speculate whether the "system" was computer generated and/or maintained, an application, a spreadsheet, a database, a calendar system, or some kind of checklist or notes.

course of business, or that these writings were made or the information entered at or near the time of any act, condition or event. There was no testimony about the records themselves or their mode of preparation, much less who was responsible for maintaining the information or ensuring the integrity of the system. Finally, there was nothing to indicate that Adkins was qualified to testify about the accuracy of the information or competent to establish its trustworthiness.

Despite the fact that the prosecution failed to authenticate the probation records upon which Adkins relied as business records under section 1271, the trial court admitted Adkins's testimony about the contents of those records on the ground that Adkins had relied on them to write his report. This was error. The fact that Adkins relied on the information entered into the system did not make it reliable or trustworthy. Rather, only by satisfying the requirements under section 1271 could the court properly deem the records sufficiently reliable despite their hearsay character to qualify for admission under the business records exception.[4] (See *People v. Gardeley* (1996) 14 Cal.4th 605,

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[4] For the same reasons, the public records exception to the hearsay rule under section 1280 does not apply to Adkins's testimony. Section 1280 specifies three prerequisites which must be met before evidence of a writing made as a record of an act, condition, or event is admissible as a public record despite its hearsay character. The first requirement—that "[t]he writing was made by and within the scope of duty of a public employee"—was plainly not satisfied by Adkins's description of the scope of his own duties as a public employee since he had no part in creating the records. (§ 1280, subd. (a).) Nor did Adkins's testimony shed

619 ["a witness's on-the-record recitation of sources relied on for an expert opinion does not transform inadmissible matter into 'independent proof' of any fact"], disapproved on other grounds in *People v. Sanchez* (2016) 63 Cal.4th 665, 686, fn. 13.) In the absence of a proper foundation under section 1271, the trial court abused its discretion in admitting Adkins's testimony about the contents of the probation records under the business records exception to the hearsay rule.

2. The admission of Adkins's testimony violated appellant's due process confrontation rights.

Respondent contends that even if the business records exception were not established, Adkins's testimony was admissible for the same reason that we found a probation report properly admitted in a probation revocation hearing in *People v. Gomez* (2010) 181 Cal.App.4th 1028 (*Gomez*). In *Gomez*, we rejected defendant's contention that the trial court abused its discretion and violated his due process right of confrontation by admitting the hearsay report without specifically finding good

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any light on the identity or duties of the person(s) who actually did make the writings or enter information into the system.

Moreover, like section 1271, the public records hearsay exception requires a showing that "[t]he writing was made at or near the time of the act, condition, or event," and "[t]he sources of information and method and time of preparation were such as to indicate its trustworthiness." (§ 1280, subds. (b) & (c).) As discussed above, there was nothing to indicate that the information upon which Adkins relied was entered into the system at or near the time of the events recorded, much less anything to demonstrate the trustworthiness or reliability of the writings.

cause to admit it in lieu of live testimony. In so holding, we reasoned that "the evidence admitted was in the nature of documentary material that is admissible in a probation revocation hearing," and the testimony of a live witness would have added nothing to the proceedings. (*Id*. at pp. 1033, 1039.)

The Attorney General's reliance on *Gomez* is misplaced, however. Unlike the instant case, *Gomez* involved the introduction of an actual document, not the testimony of a witness with no personal knowledge who reviewed records and information in a "system" that were never produced or even described. By contrast, the supplemental probation report admitted in *Gomez* described the defendant's compliance and conduct while on probation in detail, and stated that the last probation officer to supervise the defendant could testify to the matters set forth in the report if needed. (*Gomez*, *supra*, 181 Cal.App.4th at p. 1033.) The issue presented in *Gomez* was thus whether the documentary evidence carried sufficient indicia of reliability to establish good cause for excusing live testimony and denying confrontation. (*Id*. at p. 1034.)

Here, we confront a different issue: Where no documentary support is offered, does the live testimony of a witness with no personal knowledge regarding the defendant's alleged probation violation contravene the defendant's due process confrontation rights? We begin by recognizing that "[t]he minimum due process requirements at a formal probation revocation hearing include written notice of the claimed violations, disclosure of evidence against the defendant, an opportunity for the defendant to be heard and to present evidence, and 'the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).' (*Morrissey v. Brewer* (1972) 408 U.S. 471, 489; see *Gagnon v.*

Scarpelli (1973) 411 U.S. 778, 782; *People v. Arreola* (1994) 7 Cal.4th 1144, 1152–1153 (*Arreola*).)" (*Gomez*, *supra*, 181 Cal.App.4th at pp. 1033–1034.) The defendant's right of confrontation at a formal revocation hearing arises not from the confrontation clause, but from due process, and it is not absolute. Indeed, confrontation in this context "may be denied if the trier-of-fact finds and expresses good cause for doing so." (*People v. Winson* (1981) 29 Cal.3d 711, 719 (*Winson*); *Gomez*, at p. 1034.)

Our Supreme Court has emphasized that a showing of good cause for the admission of hearsay at a probation revocation hearing is "*compelled* by the due process requirements imposed by the United States Supreme Court." (*Arreola*, *supra*, 7 Cal.4th at pp. 1157–1158; see *Winson*, *supra*, 29 Cal.3d at pp. 713–714.) As the high court explained, "The broad standard of 'good cause' is met (1) when the declarant is 'unavailable' under the traditional hearsay standard (see Evid. Code, § 240), (2) when the declarant, although not legally unavailable, can be brought to the hearing only through great difficulty or expense, or (3) when the declarant's presence would pose a risk of harm (including, in appropriate circumstances, mental or emotional harm) to the declarant." (*Arreola*, pp. 1159–1160; *Gomez*, *supra*, 181 Cal.App.4th at p. 1035.) Due process does not prohibit the "use where appropriate of the conventional substitutes for live testimony, including affidavits, depositions, and documentary evidence" (*Gagnon v. Scarpelli, supra*, 411 U.S. at p. 782, fn. 5), but even where good cause exists to admit otherwise inadmissible hearsay evidence, such evidence must be accompanied by reasonable indicia of reliability (*People v. Maki* (1985) 39 Cal.3d 707, 715, 716–717; *Gomez*, at p. 1034).

Here, although Adkins was a live witness, his hearsay testimony carried no indicia of reliability given his failure to

provide even the most basic foundational details about the records upon which he had relied. Because Adkins had no personal knowledge, and the documents from which he purportedly obtained the information he was offering as evidence were never produced, appellant could no more confront and cross-examine this witness about the alleged probation violation than if Adkins were the mute transcript of a prior proceeding. As our Supreme Court declared in *Winson*, a "transcript of a witness' testimony . . . is not a proper substitute for the live testimony of the witness at defendant's probation revocation hearing in the absence of the declarant's unavailability or other good cause." (*Winson*, *supra*, 29 Cal.3d at pp. 713–714; see *People v. Quarterman* (2012) 202 Cal.App.4th 1280, 1294–1295 [probation revocation order reversed where prosecution offered no justification for nonappearance of sole witness at combined preliminary/revocation hearing, and there was no evidence witness was legally unavailable].)

No good cause appears on this record to excuse the presence of a competent witness to testify to the facts underlying appellant's alleged probation violation. The admission of Adkins's testimony violated appellant's due process right of confrontation.

3. The error was prejudicial.

There was no admissible evidence to support the trial court's order terminating appellant's probation. "A court may not revoke probation unless the evidence supports 'a conclusion [that] the probationer's conduct constituted a willful violation of the terms and conditions of probation.' " (*People v. Cervantes* (2009) 175 Cal.App.4th 291, 295.) Thus, despite the breadth of a trial court's discretion in revocation proceedings, a court abuses that discretion when it relies solely on inadmissible evidence to find a

violation of probation. (*People v. Buford* (1974) 42 Cal.App.3d 975, 985 [a court may not act arbitrarily or capriciously in revoking probation; "its determination must be based upon the facts before it"].)

Given the lack of any other evidence that appellant failed to report to his probation officer, it is reasonably probable that a more favorable result would have obtained in the absence of the court's error in admitting Adkins's testimony. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) The error was prejudicial and requires reversal of the probation termination order.

DISPOSITION

The order of the trial court terminating appellant's probation is reversed.

NOT TO BE PUBLISHED.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.