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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

TOURK DY,

Defendant and Appellant.

B294010

(Los Angeles County  
Super. Ct. No. NA102639)

APPEAL from an order of the Superior Court of Los Angeles County, Tomson T. Ong, Judge. Reversed.

Emma Gunderson, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Steven D. Matthews, and Heidi Salerno, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Tourk Dy appeals from the trial court's order revoking and terminating his probation and ordering the execution of his suspended sentence. For the reasons set forth below, we reverse.

### **FACTUAL AND PROCEDURAL SUMMARY**

On October 6, 2015, Dy pleaded guilty to two counts of identity theft (Pen. Code, § 530.5, subd. (a)),<sup>1</sup> two counts of check forgery in an amount of \$950 (§§ 470, subd. (d), 473, subd. (a)), and two counts of second degree commercial burglary (§ 459). He also admitted a prison prior allegation. (§ 667, subd. (b).) The court sentenced him to 4 years 8 months in county jail pursuant to section 1170, subdivision (h), and imposed certain assessments and a restitution fine. The court then suspended execution of the jail term and placed Dy on probation for three years. Among other terms and conditions of probation, Dy was required to check in with the probation department as required—"usually once a month"—pay the fine and assessments, and complete 60 eight-hour days, or 480 hours, of service with the California Department of Transportation (Caltrans).

On August 13, 2018, Dy failed to appear in court for a hearing regarding a possible probation violation based on his failure to report to probation. As a result, the court revoked his probation and issued a warrant for his arrest.

In early September 2018, Dy was arrested after he reported to probation. The court set a probation revocation hearing for October 29, 2018.

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<sup>1</sup> Unless otherwise specified, subsequent statutory references are to the Penal Code.

According to the probation report prepared for the hearing, Dy's failure to report was his first potential probation violation.<sup>2</sup> During the preceding 35 months, Dy reported to probation 37 times, most recently on September 4, 2018. Dy had made 34 payments towards his financial obligations, including a \$25 payment on September 6, 2018.

The probation officer stated: "[Dy] is 37 years old and is before the court for his first potential violation of probation having failed to report to the probation officer as instructed. [Dy's] reporting history has some incomplete or conditional reporting dates, but despite that he has made an effort to report" and has "made an effort to pay" his financial obligations as well. The officer recommended that the court vacate the order revoking probation and reinstate probation on the original terms and conditions, but modified to allow for additional time "for him to pay his financial obligation, complete his 60 days Caltrans order, and . . . complete his grant of probation successfully."

On October 29, 2018, Dy appeared with counsel for the revocation hearing. At the outset of the hearing, the court stated: "The suspended time is four years and eight months. I don't have any wiggle room. The question is did he violate or did he not." As counsel began to discuss Dy's record of reporting to probation and questioned the court's lack of "wiggle room," the court interjected: "No, I have wiggle room. He didn't do Caltrans. I'm not inclined to extend probation to allow him to do his Caltrans. When he was ordered to do it . . . he should have [done] it." After some colloquy with counsel, the court added: "Here is the deal, he thinks he has

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<sup>2</sup> The probation report included in our record is unsigned. Both the Attorney General and Dy cite to the document in their briefs, however, and its authenticity is not questioned.

more important things to do such as his work. My answer is your most important thing is to do you[r] Caltrans.” This prompted references by counsel and the court to Abraham Maslow’s hierarchy of human needs, followed by Dy’s request for a hearing.

A probation officer testified that Dy was classified as “low risk,” and that he “has been reporting every month,” “has complied with 24 payments,” and “has not completed Caltrans.” The probation officer had never met or contacted Dy directly. His knowledge was based on reports he received, which stated that Dy had “not done 60 days of Caltrans.” When asked if he could tell from the reports whether Dy had completed “any” Caltrans work, the probation officer responded: “No. I don’t have any information on that. If [Dy] does he can provide it in court. If I did, I would report it.” Dy did not testify.

After argument, the court said to Dy: “[The court] ordered you to do the Caltrans in October of 2016, that’s all you need. The fact that you show up[,] that’s very nice. Time is up. I’m not reinstating probation.” The court then “revoked and terminated” probation, and ordered Dy committed to county jail for a total of 4 years 8 months.

## **DISCUSSION**

### ***A. Insufficiency of the Evidence***

Dy contends that the evidence was insufficient to support the court’s finding that he had not complied with his obligation to perform 60 days of work with Caltrans. More specifically, he argues that he had three years to perform the required 60 hours of Caltrans work, and the three-year period had not expired when the court revoked his probation in August 2018; he still had until October 6, 2018.

Although the People concede that, as of the August 13, 2018 revocation, Dy’s three-year probation term had not expired, the

Attorney General argues that it was not possible for Dy to complete the 60-day requirement because only 54 days remained in the probation term.

The Attorney General's argument might have merit if there was substantial evidence that Dy had performed fewer than six days of Caltrans work. If, for example, Dy had performed no Caltrans work, or no more than five days of such work, it might indeed be impossible to complete the 60-day requirement in the 54 days that remained in his probationary term. If, however, Dy had performed six or more days of Caltrans work by August 13, 2018, he still had time to fulfill the condition before his probation term expired.

Here, although there is evidence that Dy had not completed his required 60 days of Caltrans work, there is no evidence as to the number of days of Caltrans work, if any, he had performed.

The only evidence offered at the revocation hearing was the testimony of the probation officer. He testified that he supervises probationers by reviewing reports regarding them; from the reports, he can "check what is going on" and he reviewed Dy's report to find that Dy had "not done 60 days of Caltrans." When the probation officer was asked whether Dy had completed *any* days with Caltrans, he responded: "No. I don't have any information on that." The testimony does not establish that Dy had performed *no* Caltrans work or that he had performed so few days that it was impossible for him to complete his requirement in the 54 days that remained in his term.

The foregoing analysis assumes that the proper unit of measurement for the Caltrans work is one day—an assumption that is supported by certain statements in the record. Other statements, however, indicate that the proper unit is an hour, and that Dy is required to work 480 hours (the equivalent of 60 eight-hour days) for Caltrans. If Caltrans work is credited by the hour, it may be

possible to fulfill that requirement in fewer than 60 days. Thus, even if Dy has not performed any work for Caltrans, he may still be able to complete the required number of hours within the 54 days remaining in his probation term.

Because the time for Dy to complete his Caltrans work had not expired and the evidence does not establish that it was impossible to complete that work within the time required, the order revoking his probation on that ground was premature.

Nor can the court's order be upheld on another ground. Although the initial revocation of probation in August 2018 was apparently based upon an alleged single failure to report to the probation department, there was no evidence at either the August 13, 2018 hearing or the October 29, 2018 hearing of any instance of Dy failing to report. Indeed, the probation officer at the October hearing testified that Dy "has been reporting every month." In the absence of any substantial evidence to support the court's order, it must be reversed.

### **B. *The Order is an Abuse of Discretion***

Even if the evidence is sufficient to support the court's finding that Dy had violated his probation by failing to perform the required Caltrans work, we agree with Dy that the court abused its discretion in revoking probation and executing his sentence.

A court may revoke probation if the probationer "has violated any of the conditions of his or her supervision" and "the interests of justice so require." (§ 1203.2, subd. (a).) "[T]rial courts are granted great discretion in determining whether to revoke probation" (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445), and we will reverse that decision only if there has been an abuse of such discretion (*id.* at p. 441).

Initially, we note that the court appeared to misunderstand the nature and scope of its discretion. At the outset of the

hearing, the court stated that it did not “have any wiggle room. The question is did he violate or did he not.” Whether to revoke probation, however, is more complex than simply determining whether a probation violation occurred; the court must also consider whether “the interests of justice . . . require[s]” the revocation. (§ 1203.2, subd. (a).) As the Attorney General points out, “the inquiry of the court when considering probation revocation is not directed solely to the probationer’s guilt or innocence, but to the probationer’s performance on probation. Thus the focus is (1) did the probationer violate the conditions of his probation and, if so, (2) what does such an action portend for future conduct?” (*People v. Beaudrie* (1983) 147 Cal.App.3d 686, 691.) Here, the court gave no consideration to the second question.

Although the court appeared to correct itself, stating that it did “have wiggle room,” it continued to indicate that the existence or nonexistence of a probation violation was determinative. In announcing its ruling, for example, the court told Dy: The sentencing judge had “ordered you to do the Caltrans in October of 2016, that’s all you need. The fact that you show up that’s very nice. Time is up. I’m not reinstating probation. The court finds that you are in violation of probation,” and on that basis, ruled that “[p]robation is revoked and terminated.” At no point did the court refer to, or appear to consider, the interests of justice or Dy’s performance on probation beyond his Caltrans requirement.

Nor was the court limited to an all-or-nothing approach of either reinstating probation on the same terms or executing the suspended sentence. The court had the power, for example, to reinstate probation on modified terms, such as an extension of the probationary term to allow for completion of the Caltrans work. (*People v. Cookson* (1991) 54 Cal.3d 1091, 1095; *People v. Guzman* (2018) 23 Cal.App.5th 53, 59.) Indeed, the author of the probation report recommended that outcome. The court could also reinstate

probation on the additional condition that Dy serve some time in jail. (*People v. Bolian* (2014) 231 Cal.App.4th 1415, 1420 [if, after finding a probation violation, “the court decides to reinstate probation, it may order additional jail time as a sanction”].) Yet, when Dy’s counsel challenged the severity of executing the suspended sentence, the court stated: “After the hearing I could reinstate . . . probation or give him four years and eight months.” It does not appear that the court was willing to consider the possibility of an alternative remedy or a sanction less severe than execution of his sentence.

Even if the court understood the nature and scope of its discretion and we assume that the evidence is sufficient to establish that Dy had violated his probation on the ground the court relied upon, the court’s ruling is an abuse of discretion. Other than his failure to complete his Caltrans work, Dy’s performance during his probationary period appears to have been exemplary. There is no evidence of any violation of his probation conditions during the first 2 years 10 months of his three-year term other than the possible failure to complete his Caltrans work. According to the probation report, Dy reported to probation 37 times during the preceding 35 months, including a reporting in September 2018 after the court’s summary revocation of probation (and prior to his arrest), and he had made 34 payments on his financial obligations, including one payment made after the summary revocation. The probation officer who authored the probation report commented favorably on Dy’s efforts and recommended that probation be restored on the original terms and conditions, except that the term be extended for approximately two months “so that [Dy] could complete his grant of probation successfully.” Although the court was not required to accept this recommendation, it appears from our record that the court failed to even consider the



probation report and, if it did, failed to explain why it rejected the recommendation.

Based on our review of the record of the probation revocation hearing, we agree with Dy that the court focused its inquiry too narrowly, if not exclusively, on whether he completed his Caltrans work, and failed to consider whether, notwithstanding that possible violation, the interests of justice required revocation. Under these circumstances, the court's ruling was an abuse of discretion.

**C. *Request for Assignment to a Different Judge***

Dy requests that we direct that a different judge be assigned to his case upon remand to the superior court. We decline to do so.

Under Code of Civil Procedure section 170.1, subdivision (c), an appellate court may, in the “interests of justice[,] . . . direct that further proceedings be heard before a trial judge other than the judge whose judgment or order was reviewed by the appellate court.” Appellate courts exercise this authority “sparingly,” and ordinarily only when it finds bias or the need to dispel the appearance of bias. (*People v. LaBlanc* (2015) 238 Cal.App.4th 1059, 1079.) “Mere judicial error does not establish bias and normally is not a proper ground for disqualification.” (*Ibid.*) The error in this case is judicial error, and does not appear to be the result of bias against Dy.<sup>3</sup>

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<sup>3</sup> Because Dy's sentence included a one-year term for a prison prior under Penal Code section 667.5, subdivision (b), we requested the parties brief the question whether the enactment of Senate Bill No. 136 (2019–2020 Reg. Sess.) requires, or will require after January 1, 2020, modification of defendant's sentence. Because we reverse the order revoking Dy's probation, we need not decide this issue.

**DISPOSITION**

The order revoking probation dated October 29, 2018 is reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

JOHNSON, J.

BENDIX, J.