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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. ARTHUR RAY JOHNSON, Defendant and Appellant.	B270247 (Los Angeles County Super. Ct. No. MA058914)

APPEAL from an order of the Superior Court of Los Angeles County, Lisa Mangay Chung, Judge. Affirmed.

Jared G. Coleman, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Kathleen Kenealy, Acting 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 Stacy S. Schwartz, Deputy Attorney General, for Plaintiff and Respondent.

In January 2014, Arthur Ray Johnson (Johnson) pleaded no contest to one count of transporting marijuana for sale (Health & Saf. Code, § 11360, subd. (a)[1]). The court sentenced Johnson to four years in state prison. However, in exchange for his plea, the court suspended the sentence and placed Johnson on three years formal probation. As part of his probation, the court prohibited Johnson from owning, using or possessing any marijuana, including medical marijuana.

One year later, in January 2015, police arrested Johnson for driving under the influence of marijuana. Following a formal probation violation hearing, the trial court found Johnson in violation of probation and, as a result, re-imposed the previously suspended sentence.

On appeal, Johnson claims the evidence presented against him was insufficient to warrant revocation of his probation. He is mistaken. The record contains sufficient evidence to support a finding of a willful, non de minimis violation. Accordingly, we hold that the court did not abuse

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[1] All further statutory references are to the Health and Safety Code unless otherwise indicated.

its discretion in revoking probation and ordering execution of the previously suspended sentence.

BACKGROUND

I. The underlying crime and conviction

In March 2013, the police arrested Johnson and found on his person and in his car the following items: four pounds of marijuana; two digital scales with marijuana residue on them; 11 boxes of zip-lock bags; and over $1,500 in "loose miscellaneous cash."

In April 2013, the People filed an information alleging two felonies: transportation of marijuana for sale (§ 11360, subd. (a)) (transportation count); and possession of marijuana for sale (§ 11359) (possession count). The People also alleged that Johnson had been previously convicted of a serious or violent felony (Pen. Code, § 136.1 [intimidating or threatening witnesses] the prior strike allegation.)

Initially, Johnson pleaded not guilty to both counts. However, in January 2014, Johnson reached a plea agreement with the People whereby the People would dismiss the possession count and the prior strike allegation in return for a no contest plea to the transportation count. As part of the plea agreement, the court sentenced Johnson to the upper term of four years for the transportation count and then suspended the sentence, placing Johnson on three years of formal probation. Among the terms of his probation was the following: "Do not own, use, or possess any narcotics, dangerous, restricted drugs or associated paraphernalia, except with a valid prescription. [¶] . . . [¶]

No medical marijuana, even with a valid prescription."[2] Without objection, Johnson accepted these marijuana-related conditions and all other terms of his probation.

II. The probation violation

A. *Johnson's arrest*

On January 10, 2015, a California Highway Patrolman stopped Johnson for driving with "expired tags"—i.e., an expired registration. As the patrolman approached Johnson's vehicle, he smelled "burnt" marijuana. Although Johnson's passenger explained that she had a license for medical marijuana and that she had been smoking marijuana, the patrolman observed that Johnson's eyes were red, his pupils dilated, and his speech slurred. As a result of these observations, the patrolman conducted a number of field sobriety tests, both while Johnson was in his vehicle and then later outside the vehicle on the sidewalk. The patrolman, who had conducted approximately 700 driving-under-the-influence (DUI) investigations, concluded that Johnson's performance on those tests was consistent with marijuana impairment. For example, during the "walk-and-turn" test, Johnson was unable to walk in a straight line on

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[2] The minute order omits the prohibition on the use of medical marijuana. However, the hearing transcript clearly indicates that trial court conditioned probation on such a prohibition. "Where there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls." (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385.)

all steps or keep his arms by his side. Similarly, on the "finger-to-nose" test, Johnson was unable to touch the tip of his finger to the tip of his nose, was very unsteady, swaying two to three inches, and had rapid eye flutters. In addition, the patrolman took Johnson's pulse twice during the DUI investigation and on each occasion the pulse was elevated, suggesting marijuana impairment.

During the course of the DUI investigation, Johnson admitted to the patrol officer that he ate edible marijuana the night before. Based on the results of the officer's DUI investigation—his interview of Johnson and the results of the field sobriety tests—and believing that it would be unsafe for Johnson to continue operating his vehicle, the patrolman arrested Johnson for driving under the influence in violation of California Vehicle Code section 23152, subdivision (e) (as of January 1, 2017 subdivision (f)). Following his arrest, Johnson consented to a blood test, which was conducted at the county jail.

B. *Probation violation hearing*

On October 14, 2015 and February 11, 2016, the court held a probation violation hearing. In addition to the testimony of the arresting officer, the People presented testimony by a board-certified forensic toxicologist who contracts with various police departments, including the California Highway Patrol, to provide toxicology testing of blood samples. The toxicologist testified that the sample of Johnson's blood showed the presence of active cannabinoids, indicating that Johnson had used marijuana within "several

hours" of the blood sample being taken. In addition, the People's toxicologist testified that the combination of the blood test results and the results of the field sobriety tests were indicative of marijuana impairment.

In his defense, Johnson did not dispute that he had "consumed marijuana or that marijuana was in his blood when he was driving." Instead, he argued that his driving was not impaired. In support of this argument, he presented a lay witness and an expert witness. The lay witness, who was the passenger riding in Johnson's car at the time of his arrest, testified that she was the only one who had been smoking marijuana in the car. In addition, she testified that while she had seen Johnson consume edible marijuana on the day before his arrest, she had not seen him consume any marijuana on the day of his arrest and she had been with him the whole day. In addition, she testified that he had driven safely on the day of his arrest.

Johnson's expert was a medical doctor with expertise in both toxicology and forensic toxicology. Johnson's expert testified that Johnson had told him that he had consumed edible marijuana on the morning of his arrest. Based on Johnson's long history of marijuana use—"daily use" for more than 20 years— and the tolerance for the drug built up in Johnson's body as a result of such "frequent consumption," the expert opined that Johnsons was not under the influence of marijuana at the time of his arrest.

On February 11, 2016, the trial court found, based on the "totality of the evidence," that there was a violation of

probation based on Johnson's admitted use and possession of marijuana. In addition, the court found that there was sufficient evidence that Johnson had violated his probation by driving while under the influence. Accordingly, the trial court lifted the stay of the suspended sentence and ordered the previously imposed sentence to be executed.

Johnson timely appealed.

DISCUSSION

I. Standard of review

A court is authorized to revoke probation "if the interests of justice so require and the court, in its judgment, has reason to believe from the report of the probation . . . officer or otherwise that the person has violated any of the conditions of his or her supervision, has become abandoned to improper associates or a vicious life, or has subsequently committed other offenses, regardless whether he or she has been prosecuted for such offenses." (Pen. Code, § 1203.2, subd. (a).) The narrow inquiry in a revocation hearing is whether conditional release has been violated and whether, as a result, parole or probation should be terminated. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 479–480; *In re Eddie M.* (2003) 31 Cal.4th 480, 504.)

The standard of proof sufficient to give the court " ' "reason to believe" ' " that a probationer has violated the conditions of his or her probation is preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 445, 447 (*Rodriguez*).) "[T]he evidence must support a conclusion the probationer's conduct constituted a willful violation of

the terms and conditions of probation." (*People v. Galvan* (2007) 155 Cal.App.4th 978, 982 (*Galvan*); *People v. Zaring* (1992) 8 Cal.App.4th 362, 375–379.)

We apply the substantial evidence standard when reviewing a trial court's finding of a probation violation. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 848–849.) In determining whether a decision was supported by substantial evidence, we " 'view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor.' " (*Wilson v. County of Orange* (2009) 169 Cal.App.4th 1185, 1188.) However, substantial evidence is not " ' "synonymous with 'any' evidence." ' " *(DiMartino v. City of Orinda* (2000) 80 Cal.App.4th 329, 336.) Rather, " 'substantial evidence' " is evidence " 'of ponderable legal significance, . . . reasonable in nature, credible, and of solid value.' " (*Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873, italics omitted.) Substantial evidence "may consist of inferences," but the "inferences must be 'a product of logic and reason' and 'must rest on the evidence.' " (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) An inference based on "mere speculation or conjecture cannot support a finding" of substantial evidence. (*Ibid.*)

Trial courts have "great discretion in deciding whether or not to revoke probation." (*People v. Kelly* (2007) 154 Cal.App.4th 961, 965 (*Kelly*); *Galvan*, *supra*, 155 Cal.App.4th at pp. 981–982.) "Although that discretion is very broad, the

court may not act arbitrarily or capriciously; its determination must be based upon the facts before it." (*People v. Buford* (1974) 42 Cal.App.3d 975, 985 (*Buford*).) However, "only in a very extreme case should an appellate court interfere with the discretion of the trial court in the matter of denying or revoking probation." (*People v. Lippner* (1933) 219 Cal. 395, 400.) And the burden of demonstrating an abuse of the trial court's discretion rests squarely on the defendant. (*People v. Vanella* (1968) 265 Cal.App.2d 463, 469.) Absent a showing of an abuse of that discretion, we will not disturb the trial court's findings. (*Kelly*, at p. 965.)

II. The trial court did not abuse its discretion

Johnson argues that the trial court abused its discretion in revoking Johnson's probation because there was no evidence of a return to his prior "pattern of criminal behavior"—that is, "there was no evidence that [Johnson] was involved in the sale or transportation for sale of marijuana." There was, Johnson argues, evidence of only a "technical but *de minimis*" violation of the terms of probation. In other words, because Johnson's actions did not depart "from the spirit of the probation," the trial court's decision was contrary to "the interests of justice."

The sole authority upon which Johnson relies for his "technical but *de minimis*" argument is *Buford*, *supra*, 42 Cal.App.3d 975, a case in which a trial court's revocation of probation was reversed on appeal. Johnson's reliance on *Buford* is misplaced. In *Buford*, there was scant evidence that the defendant's probation officer made any meaningful

effort to contact the defendant regarding his conditions of probation and later noncompliance. (*Id.* at pp. 984–985, 987.) Thus, on review, the Court of Appeal found an abuse of the court's discretion to revoke probation when the probation department and law enforcement authorities were more lacking in diligence than the defendant.[3] (*Id.* at pp. 986–987.)

Here, in contrast to *Buford*, *supra*, 42 Cal.App.3d 975, there is substantial evidence that Johnson's noncompliance with his probation was a direct and willful result of his own actions. Johnson told the arresting officer that he ingested edible marijuana prior to his arrest. Both of Johnson's witnesses—his passenger and his expert toxicologist—confirmed that they either saw Johnson freely consume a marijuana edible or that Johnson stated that he freely ate marijuana. Moreover, instead of a one-time-only violation of probation, the evidence showed that there was likely a sustained pattern of violations. Johnson told the patrolman that "he does not smoke marijuana. He only does edible

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[3] It should be noted that *Buford* employed a standard for revocation no longer permitted: As established in *People v. Rodriguez*, *supra*, 51 Cal.3d 437, the " 'correct standard of proof to be used by the trial court in assessing whether there exists "reason to believe" the probationer has violated his probation or committed a new offense' " is by a "preponderance of the evidence." (*Id.* at p. 445.) *Buford* was explicitly disapproved for its reliance on "clear and convincing evidence" as the standard. (*Id.* at p. 444, fn. 3.)

marijuana"—a statement suggesting that at the time of his arrest he had used marijuana on more than one prior occasion. Indeed, according to his own expert, Johnson had been using marijuana on a "daily basis" since he was 19. In fact, it was Johnson's "frequent consumption" of marijuana that led his expert to conclude that Johnson's high tolerance for marijuana prevented him from being impaired while driving on the day of his arrest despite having consumed both marijuana "butter candy" and marijuana "brownies" prior to his arrest. A reasonable inference from such testimony is that Johnson had been violating the terms of his probation on a repeated basis from the time he was first placed on probation.

A deliberate failure to obey a central condition of probation is not a "*de minimis*" violation. Accordingly, under these circumstances, it was not an abuse of discretion for the trial court to revoke Johnson's probation and to execute the previously imposed prison sentence.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.