Filed 2/20/13 P. v. Gallegos CA2/3

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

| | |
|---|---|
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>RAMON GALLEGOS,<br><br>Defendant and Appellant. | B240368<br><br>(Los Angeles County<br>Super. Ct. No. LA060557) |

APPEAL from an order revoking the suspension of execution of sentence of the Superior Court of Los Angeles County, Martin L. Herscovitz, Judge. Affirmed.

Ellen G. Rheaume, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Ramon Gallegos appeals from an order revoking the suspension of execution of his sentence previously imposed after his plea of no contest to second degree robbery (Pen. Code, § 211). The revocation resulted in appellant's commitment to prison for three years. We affirm the order revoking the suspension.

## *FACTUAL SUMMARY*

On January 9, 2009, appellant pled no contest to second degree robbery pursuant to an indicated sentence.[1] Pursuant to the indicated sentence, the court sentenced appellant to prison for three years, suspended execution of sentence, placed him on formal probation for three years, and ordered him to serve one year in the county jail with 91 days precommitment credit.

The court imposed as probation conditions that "[appellant] [r]eport to [his] probation officer within 48 hours of [his] release from custody, . . ." "[i]f you are deported from the United States, do not reenter illegally," and "[i]f you do reenter [the] United States, report to your probation officer within 48 hours and show proof that you are lawfully within the United States." The court also imposed as a probation condition that "if you live outside this country, you are to write a letter to the probation department and this court telling us exactly where you are living." We will refer to this last probation condition as the letter condition. Appellant told the court he understood and accepted his probation conditions. The court asked appellant what would happen if appellant returned to court following a violation of probation, and appellant replied, "I understand I'll go to state prison for three more years."

As discussed *post*, appellant was deported to Mexico on May 20, 2009. On August 25, 2009, the court called the case for a possible probation violation. Appellant was not in court. The court summarily found appellant in violation of probation for failure to report to the probation department, revoked his probation, and issued a no-bail bench warrant for his arrest.

---

[1] The facts of the robbery are not pertinent to this appeal. Suffice it to say the record reflects that on October 26, 2008, appellant committed the offense in Los Angeles.

On February 23, 2012, the court called the case for a probation violation hearing. Appellant was present in court, having been arrested on the bench warrant. The court ordered that appellant's probation remain revoked. The February 23, 2012 minute order reflects appellant's counsel told the court that appellant recently had been released from federal custody. The court continued the case, ultimately to March 29, 2012.

A probation report prepared for a March 12, 2012 hearing states, "[a]ccording to the adult probation system (APS), the defendant never reported to the probation department. He was deported on [May 20, 2009.]" The report reflects that on August 25, 2009, the court issued a bench warrant that remained outstanding until appellant "came to the attention of . . . the Los Angeles Police Department – detective support division, 2/22/10 [*sic*]."[2] (Some capitalization omitted.)

The report also reflects appellant had not reported for probation supervision since January 9, 2009, he had failed to comply with his probation condition that he "report to the probation department upon his return to the United States" and he had "made no effort to comply with his probation conditions."

On March 29, 2012, the court called the case for a probation violation hearing. The court marked for identification two probation reports, i.e., one prepared for an August 25, 2009 hearing,[3] and the previously mentioned report prepared for a March 12, 2012 hearing. The prosecutor stated, "I would ask to submit those two reports and also . . . ask the court to take judicial notice. It is my understanding that one condition of probation is that the defendant notify the court in writing, as well as probation, of his whereabouts, and that the

---

[2] In his opening brief, appellant treats the above reference to the year 2010 as a typographical error and asserts the date refers to February 22, 2012, a date discussed *post*.

[3] There is no probation report prepared for an August 25, 2009 hearing in the record before this court.

court file contains no such correspondence." The People rested and the court admitted the reports into evidence as reliable hearsay.[4]

The court asked if appellant wished to present evidence, then the court stated, "[a]nd the court will also take notice that an express condition of probation in this case was – this is on page 9 of his sentencing hearing: [¶] 'If you live outside this country, you're to write a letter to the probation department and the court telling us exactly where you are living' . . . ." Appellant indicated there was no defense evidence.

During argument, appellant noted the probation report prepared for the March 12, 2012 hearing stated appellant had failed to comply with his probation condition that he "report to the probation department upon his return to the United States." Appellant argued there was insufficient evidence that any such failure was willful. He maintained, inter alia, there was no evidence as to when and where he had been arrested, and if he had been arrested at the United States border when attempting to reenter, it would have been impossible for him to comply with the above-quoted probation condition. Appellant presented no argument concerning the letter condition.

Appellant submitted the matter.

The court then stated, "Okay. Anyone can write a letter to the court and the probation department. There's a huge passage of time here from the time the defendant was apparently deported on May 20, 2009, after he was placed on probation on January 9th, 2009. [¶] . . . He was either not reporting and living somewhere for the last three years and either was not reporting in this country or did not notify the probation

---

[4] The court cited *People v. Gomez* (2010) 181 Cal.App.4th 1028 (*Gomez*), in support of the court's conclusion the probation reports were reliable hearsay. We note the probation report prepared for the March 12, 2012 hearing was submitted by deputy probation officer Wanda Tharpe. The report stated, "[t]his report was prepared from electronic records and/or statements from the supervision officer. The undersigned has had no direct contact with the probationer. The undersigned declares that the information in this report accurately reflects the information contained in the probation records and any information conveyed by the supervision deputy. The supervision office is the Alhambra area office . . . . The last supervision deputy of record is Gabriela Escandon . . . . The supervising deputy probation officer is Nathaniel Tyler . . . ."

department and the court where he was living. [¶] So, based on the evidence before me, I do find the defendant in violation of probation, so -- ." (*Sic*.)

Appellant's counsel interrupted and stated, "[i]n regards to potential sentencing, your Honor, I understand he has suspended time. From what I understand, he was picked up at the border. He served 33 months in federal custody." Appellant's counsel later commented "a warrant was placed upon [appellant] upon his completion of the 33 months." Appellant's counsel indicated he wanted to show to the court a letter that appellant had written to the public defender's office regarding appellant's whereabouts. Appellant's counsel suggested the letter indicated that at the time appellant wrote it, he was in federal custody but wanted to appear before the trial court in the present case. Appellant's counsel also suggested the court consider appellant's efforts to write that letter as a mitigating factor for purposes of sentencing. Appellant submitted the matter.[5]

The court denied probation, revoked the January 9, 2009 suspension of execution of sentence, and awarded precommitment credit. The award included credit for the periods January 9, 2009 through May 20, 2009, and February 22, 2012 through March 29, 2012. Appellant's counsel represented February 22, 2012 was the date appellant "was brought from federal custody" to, apparently, a form of custody permitting him to appear before the trial court in the present case. The court accepted that date as correct. After the court advised appellant of his appellate rights, appellant argued the letter condition was illegal.

***ISSUE***

Appellant claims there is insufficient evidence he violated probation.

---

[5] The record does not reflect appellant's counsel gave to the court the alleged letter to the public defender's office or that said letter was admitted into evidence. The alleged letter is not part of the record on appeal.

## *DISCUSSION*

*There Was Sufficient Evidence Appellant Violated Probation.*

1. *Applicable Law.*

Appellant claims as previously indicated. We reject his claim. Penal Code section 1203.2, subdivision (a) provides that "the court may revoke and terminate . . . 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 . . . that the person has violated any of the conditions of his or her probation . . . ." Proof of a probation violation by a preponderance of the evidence is sufficient to revoke probation. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 440-447 (*Rodriguez*).) 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 find a probation violation. (*People v. Kurey* (2001) 88 Cal.App.4th 840, 843, 848-849.)

2. *The Letter Condition Was Lawful.*

On January 9, 2009, the court imposed the letter condition and appellant indicated he understood and accepted it. Appellant did not, on January 9, 2009, object to the letter condition on any ground. We assume without deciding that appellant did not waive any challenge to the letter condition for the reason he failed to object to the condition on January 9, 2009. (See *People v. Welch* (1993) 5 Cal.4th 228, 232-237.) We also assume appellant did not waive any such challenge by his belated raising of the issue on March 29, 2012, after the court had advised appellant of his appellate rights.

Appellant, citing *People v. Espinoza* (2003) 107 Cal.App.4th 1069 (*Espinoza*), argues the letter condition was illegal and he quotes *Espinoza's* comment that "[o]ur courts lack jurisdiction to enforce their probation conditions . . . on foreign soil." (*Id.* at p. 1076.) The argument is unavailing because appellant failed to seek relief from the allegedly illegal letter condition by appealing within 60 days from the January 9, 2009 order granting probation. (Cf. *People v. Ramirez* (2008) 159 Cal.App.4th 1412, 1420-1421; Pen. Code, § 1237, subd. (a); Cal. Rules of Court, rule 8.308(a); see *People v. Vournazos* (1988)

198 Cal.App.3d 948, 953; but see *People v. Hackler* (1993) 13 Cal.App.4th 1049, 1055-1057.)

Moreover, we reject on the merits appellant's argument that the letter condition was illegal. In *Espinoza*, the defendant claimed, inter alia, he was entitled to probation and drug treatment pursuant to Proposition 36 even if he was going to be deported to Mexico. (*Espinoza*, *supra*, 107 Cal.App.4th at p. 1076.)

*Espinoza* rejected the claim, stating, "Nothing in the text of the proposition, or in the ballot arguments and analyses regarding it, suggested that if this measure was enacted California would be compelled to license, certify, and fund drug treatment programs on a worldwide basis. Such an undertaking would be utterly impractical as well as prohibitively expensive. California authorities have no effective means to evaluate or certify treatment programs based in other jurisdictions. Moreover, no California court can lawfully compel a noncitizen to attend a drug treatment program in his country of origin. Our probation departments cannot force foreign treatment providers to make the reports and notifications required by the statute. [Citation.] Our courts lack jurisdiction to enforce their probation conditions or to remand the defendant into custody on foreign soil." (*Espinoza*, *supra*, 107 Cal.App.4th 1075-1076.)

*Espinoza* does not help appellant. A condition requiring that a defendant himself or herself simply write a letter to the probation department and the court is different from a requirement that a defendant continually attend a drug treatment program funded and supervised by California but operating in another country. The writing of a letter while the defendant is living in another country is neither utterly impractical nor prohibitively expensive. We note appellant's counsel suggested to the trial court that appellant wrote a letter to the public defender's office even though appellant was in federal custody at the time. Appellant's counsel did not then explain why appellant, when he wrote the alleged letter to the public defender's office, did not also write a letter to the probation department and to the court to comply with the letter condition.

In *Espinoza*, the defendant faced the prospect of deportation but had not yet been deported. (*Espinoza, supra*, 107 Cal.App.4th at pp. 1071-1072.) The *Espinoza* court could not have known whether the defendant in that case would have returned to the United States after deportation; therefore, *Espinoza* had no occasion to discuss what might have happened if he did. Appellant, on the other hand, returned to the United States after he was deported. Our courts may lack jurisdiction to enforce probation conditions on foreign soil, but our courts do not lack jurisdiction to enforce conditions once a defendant reenters the United States and is on California soil.

3. *Appellant Violated the Letter Condition.*

The trial court found appellant in violation of probation based on the alternate ground that he failed to comply with the letter condition. Appellant concedes the trial court revoked appellant's probation on, inter alia, this ground. The sole issue is whether substantial evidence supported the trial court's finding appellant violated the letter condition.

The probation report prepared for a March 12, 2012 hearing states appellant was deported to Mexico on May 20, 2012, and appellant concedes he was deported on the latter date. The trial court reasonably could have concluded appellant was living in Mexico immediately following his deportation on May 20, 2012. Appellant indisputably reentered the United States, and the trial court reasonably could have concluded appellant continued to live in Mexico (or otherwise outside this country) until the time immediately prior to his reentry into the United States.

In sum, there was substantial evidence that during the period immediately after appellant's deportation but immediately prior to his reentry into the United States, appellant "live[d] outside this country" for purposes of the letter condition, triggering its application. Indeed, as far as the *evidence* is concerned, the trial court reasonably could have concluded appellant was in Mexico or otherwise outside this country from May 20, 2009 through February 22, 2012.

The probation report prepared for the March 12, 2012 hearing and admitted into evidence at the March 29, 2012 probation revocation hearing states, "the defendant has made no effort to comply with his probation *conditions*, . . ." (Italics added.) This was admissible evidence appellant had made no effort to comply with the letter condition. (Cf. *Gomez, supra*, 181 Cal.App.4th at pp. 1033-1039; *People v. Abrams* (2007) 158 Cal.App.4th 396, 404-405; *People v. Evans* (1983) 141 Cal.App.3d 1019, 1021-1022.)

Moreover, at the March 29, 2012 probation revocation hearing, the prosecutor's comments, fairly read, indicate he wanted the court to take judicial notice of the letter condition and the fact "the court file contains no such correspondence." The court later stated it would "take notice" of the letter condition and referred to a page of a reporter's transcript of the January 9, 2009 proceeding during which the court had orally pronounced that condition.

After argument by appellant at the probation revocation hearing, the court stated, "Anyone can write a letter to the court and the probation department." The court also stated appellant "did not notify the probation department and the court where he was living." Both comments indicated the court had concluded appellant had not written the subject letter.

The court obviously had reviewed the court file to the extent the court had located in the file the reporter's transcript of the January 9, 2009 proceeding and had read that transcript. The trial court could not have concluded appellant had not written the subject letter to the court unless the court had reviewed the court file and determined the letter was not in the file.

In sum, the record, fairly read, reflects the prosecutor asked the court to take judicial notice not only of the letter condition, but of the records in the court file so the court could confirm the subject letter was not in the file, and the court granted that request. (Evid. Code, § 452, subd. (d)(1).) The record, fairly read, also reflects the trial court judicially noticed what records were in the court file and concluded the file did not contain the subject letter. No evidence was presented appellant ever wrote the subject letter or that

he had been unable to do so. There was substantial evidence and proof that appellant failed to write the subject letter at any time.

Appellant's counsel, during *sentencing* arguments, commented upon several alleged facts, e.g., appellant's arrest at the border, subsequent service of 33 months in federal custody, the placement of a warrant on him after he served the federal custody, and a letter appellant wrote to the public defender's office. However, no *evidence* was presented on these issues, much less prior to the trial court's finding that appellant violated probation.

There is no dispute appellant knew about the letter condition based on the trial court's oral pronouncement, and appellant's acceptance, of the letter condition on January 9, 2009. We conclude there was substantial evidence and proof that appellant willfully violated the condition that "if you live outside this country, you are to write a letter to the probation department and this court telling us exactly where you are living." [6]

[6] In light of our analysis, there is no need to reach the issue of whether the trial court properly found appellant in violation of probation based on the alternate ground he violated a probation condition(s) other than the letter condition.

## *DISPOSITION*

The order revoking the suspension of execution of appellant's previously imposed sentence of three years in prison is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, J.

We concur:

KLEIN, P. J.

ALDRICH, J.