

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 977(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 977(b). This opinion has not been certified for publication or ordered published for purposes of rule 977.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re EDGAR U., a Person Coming Under  
the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

EDGAR U.,

Defendant and Appellant.

A106779

(San Mateo County  
Super. Ct. No. 69925)

Edgar U. appeals from a juvenile court order committing him to the California Youth Authority (CYA). He contends he was denied due process and effective assistance of counsel and was wrongly committed to CYA. We reverse in part and remand for reconsideration of the disposition.

**BACKGROUND**

The day before his fifteenth birthday Edgar U. was adjudged a ward of the juvenile court for possessing marijuana for sale. He was placed on probation in his mother’s custody. Within six months he violated probation by testing positive for THC and served 25 days of detention.

On September 2, 2003, a new Welfare and Institutions Code section 602 petition was filed alleging that now 16-year-old Edgar had committed second-degree robbery and extortion by taking another teen-ager’s Walkman and “returning” it to him upon delivery

of \$13. Edgar admitted the extortion, the robbery charge was dismissed, and he was placed in Camp Glenwood, a county juvenile rehabilitation facility.

A probation violation notice filed on March 23, 2004 alleged Edgar had failed to obey camp rules and regulations in five separate instances. The court sustained three of the five allegations, struck the other two, and committed Edgar to CYA for a maximum of four years, eight months. Edgar filed a timely notice of appeal.

## **DISCUSSION**

### ***I. Sitting With Gang Members***

Edgar contends he was denied due process when the court sustained an allegation that “[t]he Minor is in violation of the Court order . . . directing that he obey the rules and regulations of the Camp Glenwood program, in that . . . [he] was sitting with other Nortenos gang members, a violation of rule #8 and #14.” He asserts, inter alia, that the written notice of probation violation failed to adequately state the nature of the charges against him.

Cecilia Figueroa, a camp staff member, testified she had observed Edgar sitting at a table with four or five other Hispanic wards, some of whom, she testified, “were known to be Norteno or affiliate members of Nortenos.” The minors at Camp Glenwood had been told by various staff members not to group together, “whether it’s by race or by gangs,” so Figueroa wrote Edgar up for failing to follow rules. She was “not saying [Edgar] is a gang member or anything,” but “[o]ne whole table should not be Hispanics. They need to mix it up with other races.” She clarified that the offense was that Edgar was “sitting with members of a particular ethnic group.”

Preliminarily, we note the point is cognizable on appeal despite Edgar’s failure to challenge the finding during the revocation hearing. “We cannot find waiver when denial of a party’s due process right to notice may have prevented him from formulating and advancing the legal arguments presented on appeal.” (*People v. Hackler* (1993) 13 Cal.App.4th 1049, 1055 [no waiver of due process violation where probation revoked in part on basis of violation not charged in notice].)

The written notice of the probation violation was inadequate. Edgar was put on notice to defend himself against an allegation that he had been sitting with Norteno gang members. No notice was given, however, of the charge that was asserted at the hearing: sitting with other Hispanic wards. The failure to give written notice of that charge violated his due process rights. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 489; *People v. Arreola* (1994) 7 Cal.4th 1144, 1152 (*Arreola*); *People v. Hackler, supra*, 13 Cal.App.4th at pp. 1054-1055 & fn. 5.)<sup>1</sup> While the People respond that Edgar also violated the rule against associating with “other Nortenos gang members,” as the notice alleged, the evidence is insufficient to support the finding on that ground. The other youths bore no visible gang markings; no evidence was introduced that Edgar knew of their gang affiliation; and no claim was made that he himself belonged to a gang. In any event, the uncontradicted testimony was that the violation was for sitting with other Hispanic wards. Accordingly, we reverse this finding.

## ***II. Fighting***

Edgar contends the finding that he challenged another ward to a fight in violation of camp rules was based on inadmissible hearsay. The People respond that the hearsay was sufficiently reliable to warrant admission and, in any event, that the objection was waived because defense counsel failed to raise it below.

Group supervisor Mario Fernando testified that he investigated an altercation after another ward was ejected from a classroom. He interviewed Edgar, the ejected ward and an unnamed staff member who had been in the classroom. Fernando did not witness the incident. Based on conversations with the staff member and the ward, Fernando testified Edgar and the ward had “a difference of opinion as to whose desk was whose.” Edgar put his binder down on the desk at which the other ward was seated. The other ward pushed Edgar’s binder away; Edgar pushed it back, striking the other boy on the chest.

---

<sup>1</sup> Because of this conclusion, we do not address whether, as Edgar claims, the prohibition against sitting with other Hispanics is an unconstitutional race-based regulation.

The law governing the admission of hearsay in this context is well established. Welfare and Institutions Code section 777 permits the court to consider reliable hearsay evidence to the same extent it would be admissible in an adult probation revocation hearing. (Welf. & Inst. Code, § 777, subd. (c).) Where, as here, the hearsay evidence sought to be admitted is testimonial, our Supreme Court has repeatedly emphasized that a showing of good cause is required before a defendant's right of confrontation at a probation revocation can be dispensed with. (*Arreola, supra*, 7 Cal.4th at pp. 1156-1159; *People v. Winson* (1981) 29 Cal.3d 711.) In *Arreola*, the Court explained: “ ‘former testimony is often only a weaker substitute for live testimony. It seldom has independent evidentiary significance of its own, but is intended to replace live testimony. *If the declarant is available and the same information can be presented to the trier of fact in the form of live testimony, with full cross-examination and the opportunity to view the demeanor of the declarant, there is little justification for relying on the weaker version.* When two versions of the same evidence are available, longstanding principles of the law of hearsay, applicable as well to Confrontation Clause analysis, favor the better evidence. . . .’ ” (*Arreola*, at pp. 1158-1159, quoting *United States v. Inadi* (1986) 475 U.S. 387, 394-395, emphasis in *Arreola*.)

Here there was no showing that the unnamed staff member or the other ward were unavailable, or that obtaining their live testimony would entail great difficulty, expense or risk of harm. (See *Arreola, supra*, 7 Cal.4th at p. 1160.) The other ward, having been reprimanded for his participation in the incident, was hardly without bias or motive to be less than candid. While, as both parties agree, Edgar suggests no particular reason why the staff member's account was *not* reliable, the argument misconstrues the standard. The admission of hearsay requires a finding of reliability. The burden is on the proponent to make such a showing, not on the opponent to show a lack of reliability. Due process requires a showing of good cause before the defendant may be denied the rights of confrontation and cross examination at a probation revocation hearing. The admission of Fernando's hearsay testimony, without any such showing, was thus erroneous.

The People alternatively assert that Edgar waived the error by failing to object during the revocation hearing. (Evid. Code, § 353, subd. (a); *People v. Bolin* (1998) 18 Cal.4th 297, 320.) Ordinarily, any objection to the admission of hearsay is waived by the failure to object. (Evid. Code, § 353, subd. (a); *People v. Bolin*, at p. 320.) We are persuaded, however, that defense counsel’s failure to object constituted ineffective assistance of counsel. No tactical reason appears to support a lack of objection. In light of the settled law in *People v. Winson*, *supra*, 29 Cal.3d 711 and *Arreola*, *supra*, 7 Cal.4th 1144, there was no basis for counsel to conclude a hearsay objection would have been overruled. As Fernando’s hearsay testimony was the only evidence supporting the violation, it is reasonably probable the court would have rejected the allegation had counsel raised a timely objection.

The People argue that if an objection had been sustained the prosecutor could have called the staff member as a direct witness. The contention is unpersuasive. Fernando testified as follows. “The staff in the classroom said she was sitting behind both [Edgar] and the other ward. There was a difference of opinion as to whose desk was whose. The other ward had claimed that it was his desk and [Edgar] had claimed that it was his. [¶] He *apparently* put down his binder on that ward’s desk. The ward pushed the binder away from him. Then *the ward reported* that [Edgar] had pushed the binder back toward him and struck him in the chest.” When the prosecutor then asked whether it was Edgar who had put his book down on the chair occupied by the other ward, Fernando replied: “*According to this ward, correct.*” (Italics added.) On this record, there is no indication the staff member actually saw the alleged altercation. Rather, it appears the unnamed staffer was herself relating hearsay to Fernando. There is no showing that the staff member would have been competent to testify. Questions as to whether the other ward could have been produced, testified as the People expected and been found credible, require too great a degree of speculation to be answered in the affirmative. Thus, it is reasonably likely that a hearsay objection to Fernando’s testimony would have prevented a true finding on this allegation. We therefore reverse the finding.

### *III. Gang Writing*

Edgar contends the court violated his First Amendment right of free expression in sustaining a probation violation allegation that he broke camp rules by possessing an “inappropriate gang related poem.”

Supervisor Philip Hubbell testified that he confiscated from Edgar’s locker a writing containing inappropriate references to gangs and violence.<sup>2</sup> He further testified that wards are permitted to write poetry. However, they were told at their initial orientation and frequently thereafter that writings referring to gangs and violence are strictly prohibited. The court sustained the allegation, finding that the writing violated camp Rule 8 requiring wards to follow all reasonable rules and directives, and Rule 6 prohibiting the use of foul language.

“Prison walls do not form a barrier separating prison inmates from the protections of the Constitution.” (*Turner v. Safley* (1987) 482 U.S. 78, 84 (*Turner*)). However, a prison regulation impinging on constitutional rights may withstand scrutiny when “the regulation . . . is reasonably related to legitimate penological interests.” (*Id.* at p. 89.)<sup>3</sup> Applying this principle, *Turner* upheld a prison rule barring correspondence between adult prisoners as a valid tool for controlling prison gangs. (*Id.* at p. 91.)

---

<sup>2</sup> The one-page handwritten text, titled “Frisco Flows,” reads as follows: “I’m on the block 24/7, with the rocks in my mouth ready for clientele. So what’s the deal. The deal is to get mills in my pocket. I spit flows like rockets, punch you in your motha fuckin eye socket. I get my gat and cock it, then I blast it. I wrap these niggas in plastic, put them in a body bag. This is how we treat these dirty fags I’ve been in the sco, puffin on that nitro. Pull out my 45 and let the bullets fly between your eyes. You better reconize fucking with us you will end up 6 feet deep in the ground. We be rolling with mobstas. Not no jkats we be carrying straps like backpacks cuz we some saus. We always ready to blast. I’m all about my cash busting niggas with macks. I’m making my money till it stack till the top putting frisco up on the map. [¶] We be always on the block with the glock ready to cock it back so you better watch out before we blast. Cuz is about getting our cash. Jacking niggas with ski mask we robbed these niggas in a flash.” A third and final paragraph is indecipherable. (Spelling and punctuation as in original.)

<sup>3</sup> *Turner* lists several factors relevant to the question of reasonableness: 1) a valid, rational connection between the regulation and a legitimate governmental interest, 2) the availability of alternative means of exercising the right, 3) the impact that accommodating the asserted right will have on guards, other inmates and allocation of prison resources, and 4) the presence or absence of easy alternatives to the regulation. (482 U.S. at pp. 89-91.)

While minors also possess constitutional rights, the state has somewhat broader authority to regulate their activities than those of adults. (*In re Binh L.* (1992) 5 Cal.App.4th 194, 204-205.) “A juvenile court is vested with broad discretion to select appropriate probation conditions. [Citation.] The court may impose any reasonable condition that is ‘fitting and proper to the end that justice may be done and the reformation and rehabilitation of the ward enhanced.’ [Citation.] A condition of probation that is impermissible for an adult probationer is not necessarily unreasonable for a minor. [Citation.] Juveniles are deemed to be more in need of guidance and supervision than adults, and their constitutional rights are more circumscribed. [Citation.] Further, when the state asserts jurisdiction over a minor, it stands in the shoes of the parents. A parent may curtail a child’s exercise of constitutional rights because a parent’s own constitutionally protected ‘ “ ‘liberty’ ” ’ includes the right to ‘ “ ‘bring up children’ ” ’ and to ‘ “ ‘direct the upbringing and education of children.’ ” ’ [Citation.] Thus, the juvenile court may impose probation conditions that infringe on constitutional rights if the conditions are tailored to meet the needs of the minor” (*In re Antonio C.* (2000) 83 Cal.App.4th 1029, 1033-1034) and “narrowly drawn to serve the important interests of public safety and rehabilitation.” (*In re Babak S.* (1993) 18 Cal.App.4th 1077, 1084.)

Here, it was a condition of Edgar’s probation that he obey all rules and regulations of the Camp Glenwood program. Assessed under the above principles, both that condition and the camp rules prohibiting gang writings and foul language pass constitutional muster. The finding of a violation is amply supported.

#### ***IV. CYA Commitment***

Finally, Edgar maintains the juvenile court erred in committing him to CYA. Because we reverse two of the three probation violation findings, we remand for disposition based on the remaining violation. This decision reposes in the court’s sound discretion. We neither express nor imply any view on the outcome of that determination.

**DISPOSITION**

The probation revocation order is reversed in part and the case is remanded to the juvenile court for reconsideration of the disposition.

---

Corrigan, Acting P.J.

We concur:

---

Parrilli, J.

---

Pollak, J.