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THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DEREK OTIS TUCKER,

Defendant and Appellant.

A116409

(San Mateo County
Super. Ct. No. SC056880A)

Appellant Derek Otis Tucker appeals from a judgment revoking his probation and sentencing him to 16 months in state prison. He seeks reversal of the judgment, arguing that the trial court revoked his probation based solely on inadmissible hearsay evidence. The People concede that the trial court committed reversible error by relying exclusively on hearsay testimony without a showing of good cause for its admission. Accordingly, we reverse the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On December 6, 2004, pursuant to a negotiated plea agreement, appellant pled no contest to one count of inflicting corporal injury on the mother of his child, in violation of Penal Code¹ section 273.5, subdivision (a). He further pled no contest to an allegation he had suffered a prior conviction for a violation of section 273.5 within seven years of the present offense (§ 273.5, subd. (e)(1)). On January 5, 2005, the trial court suspended imposition of the sentence, admitted appellant to three years' supervised probation, and

¹ All further statutory references are to the Penal Code unless otherwise specified.

ordered appellant to pay certain fines and fees. As a condition of probation, appellant was ordered not to contact, call, or otherwise communicate with the victim, Lynette Broussard, during the probation period.

On May 23, 2005, a deputy probation officer filed an affidavit seeking to revoke appellant's probation, alleging that appellant had transported and possessed for sale heroin and cocaine. An amended affidavit filed April 28, 2006, further alleged that appellant had violated the terms of his probation by contacting the victim and by possessing a firearm.

The trial court conducted a contested probation revocation hearing on October 27, 2006. Defense counsel announced that appellant wished to request a continuance to permit the victim to be subpoenaed. The court denied the request.

The prosecutor called one witness, Officer Melinda Lopez of the South San Francisco Police Department. When the prosecutor asked Lopez to testify as to what the victim, Broussard, had told her, defense counsel objected that the testimony would be hearsay. The prosecutor responded that, at a probation violation hearing, hearsay is admissible if the court concludes it is "reasonable to find this testimony believable." The court agreed to hear the evidence subject to a motion to strike.

Lopez proceeded to testify that Broussard told her she had previously dated appellant and had one child with him. According to Lopez, Broussard said that she received a phone call from appellant saying he wanted to see her. Broussard did not want to speak with appellant or see him, but she agreed to meet him after he threatened to "shoot up her residence." Lopez further testified that Broussard told her appellant arrived at her residence and drove her to a desolate area. Lopez said Broussard reported that appellant pulled out a firearm and told her that if she did not get back together with him he was going to shoot her, the children, and himself. Broussard told Lopez she believed appellant. After appellant dropped Broussard off at her house, she initially failed to report the events to law enforcement because she felt appellant's threat was credible. Lopez testified that Broussard said she eventually decided to report the incident after speaking with a domestic violence counselor and a probation officer. Broussard made the report on May 27, 2006, but said that the events took place on May 13, 2006.

At the conclusion of Lopez's testimony, the trial court denied the motion to strike her testimony, finding it reliable and credible. The court then found that appellant had violated the term of his probation barring him from contacting or communicating with Broussard. The court also found true the allegation relating to appellant's possession of a firearm in violation of his probation. The court found the allegations true based solely on the officer's testimony. No evidence aside from the officer's testimony was offered to support the revocation of appellant's probation, and no evidence was offered to support the allegations that appellant had violated the terms of his probation by possessing or transporting drugs for sale.

After the court found that appellant had violated the terms of his probation, it sentenced him to the middle term of four years on the conviction for inflicting corporal injury on the mother of his child. (§ 273.5, subs. (a) & (e).) The court ordered appellant to serve the term consecutively with a term he was already serving.² On November 1, 2006, the trial court recalled the matter to correct appellant's sentence and provide that appellant would serve a consecutive term of 16 months in state prison, representing one-third of the middle term for his section 273.5 conviction.

Appellant filed a timely notice of appeal.³

DISCUSSION

Appellant contends the trial court committed reversible error by relying solely on hearsay testimony to establish his probation violation. The People concede that the trial court erred and join with appellant in requesting reversal of the judgment.

Because revocation of probation is not part of a criminal prosecution, the full panoply of rights due a defendant in a criminal proceeding does not apply to a revocation proceeding. (*Morrissey v. Brewer* (1972) 408 U.S. 471, 480.) Nonetheless, "due process requires that a defendant at a probation revocation hearing be afforded, at a minimum,

² At the time of appellant's probation violation hearing, he was serving a four-year sentence for violating his felony probation in a San Francisco County case.

³ The People concede that appellant's notice of appeal was constructively filed with prison authorities on December 20, 2006, rendering it timely pursuant to *In re Jordan* (1992) 4 Cal.4th 116, 130.

certain rights, including ‘ “the right to confront and cross-examine adverse witnesses (*unless the hearing officer specifically finds good cause for not allowing confrontation*).” ’ [Citations.]” (*People v. Shepherd* (2007) 151 Cal.App.4th 1193, 1198-1199.)

A showing of good cause is required “before a defendant’s right of confrontation at a probation revocation hearing can be dispensed with by the admission of a preliminary-hearing transcript in lieu of live testimony.” (*People v. Arreola* (1994) 7 Cal.4th 1144, 1159 (*Arreola*); accord *People v. Winson* (1981) 29 Cal.3d 711, 719.) Good cause is determined on a case-by-case basis. (*Arreola, supra*, 7 Cal.4th at p. 1160.) Generally speaking, good cause exists “(1) when the declarant is ‘unavailable’ under the traditional hearsay standard [citation], (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. [Citation.]” (*Ibid.*) Additionally, the showing of good cause must be considered together with other relevant circumstances, including the purpose for which the evidence is offered, the significance of the evidence to the factual determination upon which the alleged probation violation is based, and whether other admissible evidence, including the probationer’s admissions, corroborates the evidence. (*Ibid.*)

In *Arreola*, the defendant objected on several grounds to the use of a preliminary hearing transcript at a probation revocation hearing. (*Arreola, supra*, 7 Cal.4th at p. 1150.) The defendant asserted hearsay and lack of foundation in that there had been no showing of the declarant’s unavailability or other good cause. (*Ibid.*) Reaffirming its holding in *People v. Winson, supra*, 29 Cal.3d 711, the Supreme Court in *Arreola* concluded that the arresting officer’s testimony at a preliminary hearing on new charges, which formed the basis for revocation of probation, was inadmissible at the probation revocation hearing absent a showing of good cause or witness unavailability. (*Arreola, supra*, 7 Cal.4th at pp. 1159-1161.)

Recently, a panel of this court decided *People v. Shepherd, supra*, 151 Cal.App.4th 1193. In *Shepherd*, the prosecution presented hearsay testimony in the form of defendant’s probation officer who testified as to what he was told by a drug treatment provider regarding the defendant’s conduct. (*Id.* at p. 1197.) This court found the trial court erred in its

admission of the testimony because there was no justification offered for the declarant's absence, the defendant had no opportunity to cross-examine the declarant or observe her demeanor, and there was no corroborating evidence that would bolster the reliability of the hearsay testimony. (*Id.* at p. 1202.)

Here, the prosecution offered no reason for the victim's absence from the proceedings, nor was there any suggestion her attendance could only be obtained at great inconvenience or at a risk to her physical or emotional well being. The trial court erred in admitting Lopez's hearsay testimony in the absence of a showing of good cause. "Because such error is of federal constitutional dimension, we must assess prejudice under the 'harmless-beyond-a-reasonable-doubt' standard. [Citations.]" (*Arreola, supra*, 7 Cal.4th at p. 1161.) As the People concede, the error here was not harmless beyond a reasonable doubt in light of the fact the hearsay testimony was the only evidence supporting the allegation that appellant violated the terms of his probation.

Because we reverse the order revoking appellant's probation, we need not reach appellant's claim of sentencing error.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings consistent with this opinion.

McGuiness, P.J.

We concur:

Siggins, J.

Horner, J.*

* Judge of the Alameda County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.