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Court of Appeal, Third District, California.

The PEOPLE, Plaintiff and Respondent,
v.
John Price WIEGANT, Defendant and Appellant.

No. C040464. | (Super.Ct.No. LF005735A). | April 28, 2003.

Synopsis

Background: Probationer was barred by the Superior Court, Sacramento County, No. LF005735A, from participating in home detention program due to positive drug test. Probationer appealed.

[Holding:] The Court of Appeal, Raye, J., held that laboratory reports providing that probationer tested positive for methamphetamine were admissible hearsay.

Affirmed as modified.

Attorneys and Law Firms

Office of the State Attorney General, Clayton S. Tanaka, Sacramento, CA, for Plaintiff and Respondent.

James Lozenski, Berkeley, CA, for Defendant and Appellant.

Opinion

RAYE, J.

***1** Following a guilty plea on June 6, 2001, to manufacturing methamphetamine (Health & Saf.Code, § 11379.6, subd. (a)), defendant John Price Wiegant was placed on probation on the condition, among others, that he serve 300 days in the county jail, which time could be served in alternative programs, including home detention. After a contested hearing on November 19, 2001, the trial court barred defendant from participating in the home detention program because of a positive drug test.

On appeal, defendant argues the trial court violated his Sixth Amendment right to confrontation and cross-examination of witnesses by relying on a hearsay document reporting his positive "patch test" for methamphetamine. Defendant also contends he is entitled to additional custody and conduct credits.

We conclude the trial court properly admitted the laboratory reports because the records have sufficient indicia of trustworthiness to qualify as reliable hearsay without violating defendant's constitutional rights. We agree with defendant that he is entitled to additional conduct credit and have discovered an order requiring correction. We shall modify the judgment accordingly.

FACTUAL AND PROCEDURAL BACKGROUND

Because defendant challenges only the hearing resulting in a probation modification, we omit any reference to the underlying facts of the crime.

On June 6, 2001, defendant entered a guilty plea to manufacturing methamphetamine. Imposition of sentence was suspended, and defendant was placed on five years' probation with a variety of conditions, including that he spend 300 days in the county jail. The trial court stated:

"The Court will not oppose any of the alternative programs available through the jail. [¶] You will need to contact them within a week if you want to set up a program. If not, you are to report July 9th at 9:00 a.m. to start serving the time."

The written conditions of probation, apparently signed by defendant, stated that the court did not object to "work furlough" or "home detention."

Court minutes dated October 29, 2001, reflect that defendant was advised of his rights and given a copy of an "OSC/VOP." Defendant denied violating his probation. [1] Defendant was remanded into custody.

1 Defendant made a motion to augment the record with a copy of the OSC/VOP, which we granted. According to a declaration filed with this court on September 4, 2002, the San Joaquin County deputy appellate clerk could not locate this document.

On November 19, 2001, defendant appeared for what the trial court described as "a hearing regarding a violation of OSC, Sentencing Concepts. The Court is in

possession of paperwork from [Sentencing Concepts, Inc.] indicating a notice of violation regarding Pharm-Chem Laboratory patches that were received testing positive for methamphetamine." The "Notice of Violation" dated October 22, 2001, is a form from Sentencing Concepts, Inc. (SCI), an electronic monitoring/program supervision agency. Signed by case manager Toni Galvez, it states that defendant was tested for illegal drugs seven days a week. On October 20, 2001, a fax from PharmChem Inc. notified SCI that defendant tested positive for methamphetamine at "21 ng." A laboratory report from PharmChem reflects "patch" testing for a number of drugs, received by PharmChem October 9, 2001. A certification of the results is included by one Phildres Casilang, explaining procedures used in handling specimens. Defendant tested positive for methamphetamine.

***2** The prosecution submitted its case on these documents, which it characterized as "under [Evidence Code section] 1281, the documents that came to the Court's file through the normal course of business." [2]

2 The prosecution mischaracterized the applicable exceptions to the hearsay rule. Business records are admissible under Evidence Code section 1271. Official records are admissible under Evidence Code section 1280. We do not reach defendant's arguments that these hearsay exceptions are inapplicable because we conclude the evidence is admissible hearsay.

The defense objected to the admission of the documents as hearsay, without sufficient foundation to qualify under the "business records" exception to the hearsay rule. Defense counsel argued that in *People v. Arreola* (1994) 7 Cal.4th 1144, 31 Cal.Rptr.2d 631, 875 P.2d 736 (*Arreola*), the Supreme Court held that even hearsay in the form of sworn testimony was insufficient to support a probation violation. The trial court stated defendant's hearing was not "technically" a probation violation hearing because defendant had not violated the terms of his probation. The trial court said it had allowed defendant the opportunity to do jail time on home detention, and it had the right to decide to take that opportunity away. The trial court admitted the October 22 "Notice of Violation" from SCI and the laboratory report from PharmChem. [3]

3 The prosecutor argued the trial court could take judicial notice of its own file, and any documents that come to the court's file as business records, and rely upon them. Defense counsel objected that noncourt documents in a file are subject to evidentiary standards. The trial court stated that although business records do need authentication, it was declining to take judicial notice of the documents.

Defendant testified he joined the home detention/electronic monitoring program on July 9. When he attended a drug class at SCI as part of his probation, he was told that a "sweat patch" he had worn came up positive for drugs. Defendant denied using drugs. Defendant was told by SCI staff that his positive test could have come from contact with drugs when he moved methamphetamine laboratory equipment from his garage, but that SCI was required to send in a report to the Lodi court.

Defense counsel argued there was insufficient evidence of drug use because there was no evidence as to how the "patch test" worked. The prosecutor argued that the court must rely on the "supporting people" who monitor defendant's participation in court-ordered programs. The trial judge asked the parties if he could contact PharmChem and SCI. Defense counsel argued defendant's due process and confrontation rights were violated because defendant had a right to a full and fair cross-examination of the representatives.

The trial court found defendant was in violation of the "*program* " (italics added) and continued defendant's county jail custody. The trial court modified the county jail condition of probation to allow for alternative jail programs "with the exception of home detention." The trial court awarded defendant credit for 26 actual days served but awarded no conduct credit.

DISCUSSION

I

[1] Defendant argues admission of the PharmChem drug test report and SCI "Notice of Violation" violated his constitutional rights of confrontation and cross-examination, rights that could only be abridged at his probation hearing upon a finding of "good cause." Further, defendant contends the documents were not admissible under any recognized exception to the hearsay rule and did not bear substantial guarantees of trustworthiness so as to make them otherwise admissible. We conclude the trial court did not abuse its discretion in finding the documents, though hearsay, were sufficiently reliable to support a modification of a probation condition.

***3** Preliminarily, the People argue that this was not a probation violation hearing because the court "merely

rescinded" defendant's electronic monitoring order and "merely reinstated" conditions of probation.

We will assume for the sake of argument that this hearing was tantamount to a probation violation hearing because a modification to a probation condition-the county jail condition-ultimately resulted. In addition, defendant was served with a notice of violation and requested a contested hearing. Although the trial court did not specifically find defendant violated probation, it continued defendant on probation with a modified condition.

At a probation revocation hearing, a defendant has due process protection and the right to confront and cross-examine adverse witnesses. (*Gagnon v. Scarpelli* (1973) 411 U.S. 778, 786 [36 L.Ed.2d 656, 664].) However, the right to confrontation at a probation revocation hearing is not absolute. Certain hearsay evidence is admissible under certain conditions.

In a probation violation hearing, reliable hearsay evidence is admissible so long as it "bears a substantial degree of trustworthiness," namely, if "there are sufficient 'indicia of reliability.' " (*People v. Brown* (1989) 215 Cal.App.3d 452, 454, 263 Cal.Rptr. 391 (*Brown*).) Whether hearsay evidence is trustworthy "rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." (*Id.* at pp. 454-455, 263 Cal.Rptr. 391.)

In *People v. Maki* (1985) 39 Cal.3d 707, 711-712, 217 Cal.Rptr. 676, 704 P.2d 743 (*Maki*), our Supreme Court explained that the relaxed rules of evidence at a probation revocation hearing may permit the admission of hearsay under certain conditions evidencing reliability. A court may consider otherwise inadmissible hearsay when accompanied by sufficient indicia of reliability. The *Maki* opinion noted the opinion of the Eleventh Circuit in *United States v. Penn* (11th Cir.1983) 721 F.2d 762 (*Penn*) concerning laboratory tests:

"[A] probation officer testified to results of urine tests over defendant's objection and the court admitted laboratory reports and an unsworn letter from the laboratory summarizing various test results. The appellate court found that the trial court reasonably determined that the laboratory reports were trustworthy and reliable and therefore worthy of consideration because they were 'the regular reports of a company whose business it is to conduct such tests.' In addition, 'Although there was no corroboration of the specific results of the lab reports, there was general corroboration of the allegation that Penn had been taking drugs.' [Citation.]" (*Maki, supra,* 39 Cal.3d at p. 715, 217 Cal.Rptr. 676, 704 P.2d 743.)

The laboratory reports in *Penn, supra,* 721 F.2d 762 were reliable hearsay. In *Maki,* the decision was closer. Our Supreme Court permitted reliance on out-of-state hotel and car rental receipts that bore the defendant's signature as evidence he was out of state. The court noted that without the defendant's signature, the evidence would be insufficient to support a revocation of probation. However, the court noted that no evidence contradicted this evidence, again relying on the *Penn* decision, which admitted unsigned laboratory records of drug testing. (*Maki, supra,* 39 Cal.3d at p. 717, 217 Cal.Rptr. 676, 704 P.2d 743.)

***4** In *Arreola, supra,* 7 Cal.4th 1144, 31 Cal.Rptr.2d 631, 875 P.2d 736, our Supreme Court again explained that some documentary hearsay evidence is more reliable than other hearsay evidence. Although concluding that a preliminary hearing transcript should not be presented in lieu of live witness testimony, the high court noted that live witness testimony is rarely helpful when a laboratory report is at issue:

"Generally, the witness's demeanor is not a significant factor in evaluating foundational testimony relating to the admission of evidence such as laboratory reports, invoices, or receipts, where often the purpose of this testimony simply is to authenticate the documentary material, and where the author, signator, or custodian of the document ordinarily would be unable to recall from actual memory information relating to the specific contents of the writing and would rely instead upon the record of his or her own action." (*Arreola, supra,* 7 Cal.4th at p. 1157, 31 Cal.Rptr.2d 631, 875 P.2d 736.)

In *Brown, supra,* 215 Cal.App.3d 452, 263 Cal.Rptr. 391, a police officer read aloud the report of a police laboratory as to the narcotic content of a seized substance. The Court of Appeal found the evidence to be admissible hearsay, stating, "In the instant case, Officer Quinn testified that he routinely passed the confiscated substances on to the police chemist who subsequently conducted the test. We have no reason to believe the test results were anything but trustworthy and reliable as it is the 'regular business' of the police laboratory to conduct such tests.... Although Officer Quinn was not able to read one of the words on the back of the test envelope, he clearly and definitely stated that the sample tested positive for .84 grams of cocaine. Appellant did not introduce any evidence tending to contradict this, the dispositive part of the officer's testimony." (*Id.* at pp. 455-456, 263 Cal.Rptr.

391; see also *In re Kentron D.* (2002) 101 Cal.App.4th 1381, 1388-1389, 125 Cal.Rptr.2d 260.)

Applying this line of reasoning, we conclude the trial court did not abuse its discretion in admitting these hearsay documents. Routine reports of testing and laboratory results are precisely the kind of hearsay that have sufficient indicia of reliability to be considered trustworthy. The reports were not offered in lieu of live testimony. Had defendant wished to challenge the scientific reliability of the test itself, nothing prevented him from doing so. However, defendant's own testimony did not actually challenge the positive methamphetamine reading. Defendant attempted to *explain* the positive test result based on his moving methamphetamine laboratory materials from his garage. Defendant did not challenge the scientific nature of the test or claim there was an error in administration.

Accordingly, we hold that the trial court properly admitted the laboratory reports as trustworthy hearsay without violating any constitutional prohibitions or evidentiary rules. Because the documentary evidence is intrinsically reliable, no "good cause" is needed to introduce it in lieu of live testimony. (*Arreola, supra,* 7 Cal.4th at pp. 1156-1157, 31 Cal.Rptr.2d 631, 875 P.2d 736.)

II

***5** **[2]** On November 19, 2001, the trial court awarded defendant actual credit of 26 days but failed to award any conduct credit under Penal Code section 4019.[4] The parties now agree this was error.

4 According to a footnote in defendant's opening brief, the trial court changed its award of time to 27 days in response to defendant's letter. Defendant has filed a copy of the letter with this court, but the trial court has not filed an updated minute order as required by California Rules of Court, rule 35(e).

Defendant argues he was entitled to 28 days of actual credit, which, under the Penal Code section 4019 formula, would yield 14 days of conduct credit. Respondent claims defendant is only entitled to 27 days, which would yield 12 days of Penal Code section 4019 credit.[5] The only difference between the parties' current arguments is that defendant seeks credit for July 9, 2001, the day he reported to the county jail to serve his term. We shall grant defendant the credit because defendant was apparently in jail for part of one day. Because of the vagaries of the formula, 28 actual days will permit an award of 14 days of conduct credit, for total credit of 42 days.

5 Penal Code section 4019 credit is only available for increments of four days actually served; no credit is given for extra days and rounding up is not permitted. (*People v. Bravo* (1990) 219 Cal.App.3d 729, 734-735, 268 Cal.Rptr. 486; *People v. Smith* (1989) 211 Cal.App.3d 523, 527, 259 Cal.Rptr. 515.)

III

[3] We note a further error requiring correction. The trial court failed to impose a $50 criminal laboratory analysis fee, as required by Health and Safety Code section 11372.5, plus penalty assessments of $50 under Penal Code section 1464 and $35 under Government Code section 76000. The fee and penalty assessments are mandatory, and we shall impose them. (*People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157, 119 Cal.Rptr.2d 922, 46 P.3d 388; *People v. Martinez* (1998) 65 Cal.App.4th 1511, 1519, 77 Cal.Rptr.2d 492.)

DISPOSITION

The order of the trial court is affirmed, as modified. The trial court shall prepare a minute order (1) reflecting credit for time served of 28 actual days, plus 14 days served under Penal Code section 4019, and (2) reflecting a $50 criminal laboratory analysis fee (Health & Saf.Code, § 11372.5), a $50 state penalty assessment (Pen.Code, § 1464), and a $35 county penalty assessment (Gov.Code, § 76000). The trial court shall forward a certified copy of said order to the San Joaquin County Probation Department.

We concur: NICHOLSON, Acting P.J., and CALLAHAN, J.

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