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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>DENNIS RAY VALLEY<br>Defendant and Appellant. | A128289<br><br>(Napa County<br>Super. Ct. No. CR150328) |

This is an unfortunate exercise in frustration and futility.

Appellant was placed on felony probation, pursuant to a plea agreement, for a drug possession offense. It was alleged that he violated the terms and conditions of his probation. At a contested probation revocation hearing, the court found that he had violated his probation by failing to submit to drug testing. The court, however, sustained an objection to the only evidence that appellant had actually been ordered to test. As appellant contends, and as the People concede, there was consequently no evidence to support a determination that appellant had failed to do anything required by his probation terms.

We reverse.

## I. FACTUAL AND PROCEDURAL BACKGROUND

On March 11, 2010, appellant pled no contest to a single felony count of possession of methamphetamine (Health & Saf. Code, § 11377), and admitted one of five originally charged strike priors under Penal Code section 1170.12. He was placed on

formal probation for a term of three years, with probation conditions that included "Proposition 36" drug terms.

A petition seeking to revoke appellant's probation was filed on March 29, 2010. It was alleged that appellant had failed to actively participate in a substance abuse treatment program and that he had failed to submit as directed to a urinalysis test on March 18, 2010.

A contested hearing on the petition was held on March 29, 2010. A county probation officer, Christina Pearson, was the only prosecution witness. She testified that appellant reported to her office on March 16, 2010, but that she had not personally met with him.[1] She said that she received an email from a counter clerk advising her that appellant had been told to return on March 18, 2010, to submit to drug testing and meet with her. Appellant objected to the testimony as hearsay and asked that it be stricken. The court granted the motion. The court overruled an objection to a subsequent statement that appellant had been directed to return on March 18 to see Pearson. Pearson testified that appellant did not return on March 18, and that she was unable to set up a required drug program for appellant because he had not appeared.

The court denied appellant's motion to dismiss the petition at the close of the prosecution's evidence, but did dismiss the allegation that he had failed to participate in a drug treatment program. Appellant then testified that he had returned to the probation department on March 18 and spoke briefly to Pearson, but that Pearson was unable to meet with him and said she would meet him after a March 22 court appearance.[2]

The court found that appellant had violated the terms of his probation by failing to submit to urinalysis. Probation was revoked and reinstated on condition that appellant serve a term of four days in county jail with credit for four days time served.

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[1] Appellant was apparently directly referred to the probation department from court on March 16, after being released from custody for having failed to appear on March 15.

[2] Appellant failed to appear on March 22 and a warrant was again issued for his arrest.

Appellant filed a timely notice of appeal.

## II. DISCUSSION

The standard of proof in probation revocation proceedings is proof by a preponderance of the evidence. (*People v. Rodriguez* (1990) 51 Cal.3d 437, 447; *People v. Stanphill* (2009) 170 Cal.App.4th 61, 72.) We review a probation revocation decision pursuant to the substantial evidence standard of review.

Appellant challenges the sufficiency of the evidence to support the court's finding that he violated his probation terms. He points out that the record contains no evidence establishing that he was ordered to submit to testing. He is correct. The People properly concede the obvious—that the only testimony that appellant had been directed to appear for testing on March 18 had been stricken by the trial court.

## III. DISPOSITION

The judgment is reversed.

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Bruiniers, J.

We concur:

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Jones, P. J.

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Needham, J.