Filed 3/30/11 In re X.T. CA1/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re X.T., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. X.T., Defendant and Appellant.	A128837 (Del Norte County Super. Ct. No. JDSQ08-6240)

Defendant X.T., a minor, appeals from an order finding him in violation of the terms and conditions of his probation on the basis of positive drug tests. This is defendant's third appeal from orders finding him in violation of probation on the basis of positive drug tests.[1] He once again maintains he was denied due process because a supervising toxicologist—in this case, the chief toxicologist of the laboratory—rather than the technicians who performed the lab tests, testified regarding the results at the revocation hearing. We again reject defendant's argument and affirm.

BACKGROUND

We recite only those facts relevant to the issue on appeal. On February 19, 2009, defendant was declared a ward of the state pursuant to Welfare and Institutions Code

[1] His prior appeals are: *In re X.T.* (July 27, 2010, A126369) [nonpub. opn.] and *In re X.T.* (Aug. 26, 2010, A127627) [nonpub. opn.].

section 602. He was placed on probation, one of the conditions of which included drug testing. This appeal involves conduct between May 17, 2010, and June 4, 2010.

On May 25, 2010, a probation violation notice alleged defendant failed to provide a urine sample for testing on May 17, 2010. On June 2, 2010, a second violation notice alleged defendant tested positive for marijuana and methamphetamine on May 24, 2010. On June 4, 2010, a third notice alleged appellant failed to attend school and to provide a sample for testing on May 31 or June 1, 2010. On June 14, 2010, a fourth violation notice alleged defendant tested positive for marijuana and methamphetamine on June 4, 2010.

A contested probation violation hearing was held on June 15, 2010. Redwood Toxicology Laboratory Chief Toxicologist Wayne Ross testified by telephone as to the drug testing procedures and results. As chief toxicologist, he is "a certifying scientist for the laboratory" and it is his "capacity to review all testing data, custody data and to supervise the gas chromatography mass spectrometry testing." He explained the three-step testing procedure—(1) presumptive testing, (2) radioimmunoassay and immunoassay testing, and (3) gas chromatography/mass spectrometry testing—in detail, including indentifying each employee involved in the processes. Ross did not perform or witness any of the testing. However, he spoke directly with the certifying scientists for the radioimmunoassay and immunoassay testing and the gas chromatography/mass spectrometry testing, verifying their work and signatures on the documentation. Defendant repeatedly objected to Ross's hearsay testimony on the ground he had a due process based right to confront the technicians who actually performed the testing.

The juvenile court sustained all allegations, except the allegation concerning school attendance. The court continued probation, with service of two to four days in Juvenile Hall. Defendant filed a timely appeal on June 17, 2010.

DISCUSSION

We review a decision to admit evidence at a probation revocation hearing for abuse of discretion. (*People v. Abrams* (2007) 158 Cal.App.4th 396, 400.) Probation revocation hearings are fundamentally different from criminal trials. Because

"[r]evocation deprives an individual, not of the absolute liberty to which every citizen is entitled, but only of the conditional liberty properly dependent on observance of special parole restrictions," "thus the full panoply of rights due a [criminal] defendant . . . does not apply." (*Morrissey v. Brewer* (1972) 408 U.S. 471, 480 (*Morrissey*).) In contrast to a criminal trial, at a probation revocation hearing there is no right to a jury, there is a lower burden of proof (preponderance of the evidence), and there are "[r]elaxed rules of evidence." (*Jones v. Superior Court* (2004) 115 Cal.App.4th 48, 60-61; see *People v. Maki* (1985) 39 Cal.3d 707, 715.)

"Probation revocation proceedings are not 'criminal prosecutions' to which the Sixth Amendment applies." (*People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411 (*Johnson*).) Accordingly, a due process standard is used to determine whether hearsay evidence admitted during revocation proceedings violates a defendant's rights. (*Morrissey, supra,* 408 U.S. at p. 482.) "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." (*Id*. at p. 481.) "As long as hearsay testimony bears a substantial degree of trustworthiness it may legitimately be used at a probation revocation proceeding." (*People v. Brown* (1989) 215 Cal.App.3d 452, 454; *People v. Maki, supra,* 39 Cal.3d at p. 715.)

Welfare and Institutions Code section 777, governing juvenile probation revocation proceedings, provides the court "may admit and consider reliable hearsay evidence at the [probation revocation] hearing to the same extent that such evidence would be admissible in an adult probation revocation hearing, pursuant to the decision in *People v. Brown*[, *supra,*] 215 Cal.App.3d [452] . . . and any other provision of law." (§ 777, subd. (c).) *Brown* held a probationer's confrontation rights were not infringed by allowing a police officer's testimony regarding the results of a drug test even though he had not been involved in the laboratory testing. (*Brown,* at pp. 454-455.) The court held "[a]s long as hearsay testimony bears a substantial degree of trustworthiness it may legitimately be used at a probation revocation proceeding. [Citations.] In general, the court will find hearsay evidence trustworthy when there are sufficient 'indicia of

reliability.' [Citation.] Such a determination rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion." (*Ibid.*)

In determining whether hearsay "bears a substantial degree of trustworthiness" such that it may be admissible at a probation revocation hearing, courts have distinguished between "testimonial" hearsay and nontestimonial hearsay. (*Johnson, supra,* 121 Cal.App.4th at pp. 1410-1413.) If the hearsay evidence sought to be introduced is testimonial in nature, such as prior testimony, "good cause" must be established for its admission. (*People v. Arreola* (1994) 7 Cal.4th 1144, 1158-1159.) The "need for confrontation is particularly important where the evidence is testimonial, because of the opportunity for observation of the witness's demeanor." (*Id.* at p. 1157.)

In contrast, if the hearsay evidence is nontestimonial in nature, it may be admissible if it bears sufficient indicia of reliability. (*People v. Maki, supra,* 39 Cal.3d at pp. 715-717.) "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." (*People v. Arreola, supra,* 7 Cal.4th at p. 1157.) Accordingly, in the context of probation revocation hearings, a "laboratory report does not 'bear testimony.' " (*Johnson, supra,* 121 Cal.App.4th at p. 1412.)

While defendant acknowledges the foregoing case law, he again asserts the "conclusions of these cases must be revisited" in the wake of *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. ___ [129 S.Ct. 2527] (*Melendez-Diaz*).

Crawford rejected a "reliability" standard under the Sixth Amendment, holding the amendment precludes evidence of out-of-court testimonial statements unless the declarant is unavailable and the defendant has had a prior opportunity to cross-examine the declarant with respect to the statement. (*Crawford, supra,* 541 U.S. at p. 59, fn. 9.)

"Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." (*Crawford, supra*, 541 U.S. at p. 61.)

Melendez-Diaz held, in turn, that *Crawford's* holding applied to a laboratory analyst's "certificates of analysis." The certificates setting forth the results of drug tests, explained the court, fell within the " 'core class of testimonial statements' " to which the Sixth Amendment right to confrontation applied. (*Melendez-Diaz, supra*, 129 S.Ct. at p. 2532.) The "analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to ' "be confronted with" ' the analysts *at trial*." (*Ibid.*, first italics omitted, second italics added.)[2]

In *People v. Gomez* (2010) 181 Cal.App.4th 1028 (*Gomez*), the court considered whether *Melendez-Diaz* barred the admission of a probation report which included information gleaned from "electronic probation records" showing the probationer did not "report to the probation department as directed, attend counseling sessions, make restitution payments, and submit verification of his employment." (*Gomez*, at pp. 1038-1039.) The court held "[a]lthough the probation report would constitute testimonial hearsay under the expansive definition developed in recent confrontation clause cases, such as *Melendez-Diaz* . . . the confrontation clause is inapplicable to the probation revocation context. But within the parameters established by the body of precedent applicable to probation revocation, we conclude that the probation report was admissible

[2] The California Supreme Court has granted review in *People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted December 2, 2009, S176213; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted December 2, 2009, S176620 and other cases to address whether the Sixth Amendment is implicated when a *supervising* criminalist at a trial testifies to the results of drug tests and reports prepared by another criminalist.

and its admission did not violate defendant's due process right of confrontation." (*Gomez,* at p. 1039.)

Defendant argues we should not follow *Gomez* because its statement that the confrontation clause is "inapplicable" to probation revocation hearings is "misleading." He maintains "the overall structure of the Sixth Amendment protection" applicable to trials "clearly informs courts' understanding of the due process-based right to confrontation" applicable to probation revocation proceedings. We do not disagree that cases discussing the Sixth Amendment right to confrontation are "helpful . . . in determining the scope of the more limited right of confrontation held by probationers . . . ." (*Johnson, supra*, 121 Cal.App.4th at p. 1412.) "Helpful," however, does not mean controlling. *Gomez* followed long-established precedent in holding due process, not the Sixth Amendment, establishes the parameters of the limited confrontation right at probation revocation hearings. (See *Morrissey, supra*, 408 U.S. at p. 472.) Federal courts considering the issue after the *Crawford* decision, have similarly held there is "no basis in *Crawford* or elsewhere to extend the Sixth Amendment right of confrontation to supervised release proceedings." (*United States v. Hall* (9th Cir. 2005) 419 F.3d 980, 985-986; *United States v. Martin* (8th Cir. 2004) 382 F.3d 840, 844, fn. 4; see also *Peterson v. California* (9th Cir. 2010) 604 F.3d 1166, 1170 [no Sixth Amendment right to confront witnesses at a preliminary hearing].)

While some of Ross's testimony was hearsay, it had ample indicia of reliability to satisfy due process concerns and thus be admissible at a probation revocation hearing. Ross had been at the laboratory approximately 15 years, had been licensed as a clinical laboratory scientist for approximately 35 years, and had qualified as an expert in toxicology more than 200 times. He testified and was subject to cross-examination about the procedures used at Redwood Toxicology for receiving evidence for analysis, chain of custody, tests performed and results of the laboratory tests. Though Ross, himself, did not conduct the tests, he personally reviewed with the certifying scientists their procedures, the test results and the documentation. Accordingly, the trial court did not abuse its discretion in admitting Ross's testimony about the laboratory results.

DISPOSITION

The order finding defendant in violation of his probation is affirmed.

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Banke, J.

We concur:

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Marchiano, P. J.

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Dondero, J.