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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

ALFONSO GARCIA-RODRIGUEZ,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

Case No. 2D19-2969

Opinion filed December 11, 2020.

Appeal from the Circuit Court for Lee County; J. Frank Porter, Judge.

James J. Zonas, Naples, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Laurie Benoit-Knox, Assistant Attorney General, Tampa, for Appellee.

VILLANTI, Judge.

Alfonso Garcia-Rodriguez (Garcia) appeals from an order revoking his probation and the resulting sentence. The trial court found Garcia to have willfully and substantially violated Conditions 32 and 26 of his probation. However, because the State failed to prove that he had violated Condition 32 by visiting a school and failed to

prove a willful and substantial violation of Condition 26 by turning in an incomplete driving log, we reverse the order of revocation and remand for vacation of the sentence.

The facts pertinent to this appeal are as follows: Garcia was placed on probation in January 2019. As a condition of his probation, Garcia was required to wear a GPS ankle monitor. On or about April 26, 2019, Garcia's probation officer discovered during a review of the GPS data that Garcia had entered the parking lot of a small strip mall in Cape Coral, drove to the north end and stopped for about seven minutes, then drove to the south end and stopped for "maybe three-and-a-half minutes." Located in the mall near the south end was a small private elementary school. This formed the factual basis for the alleged violation of Condition 32, which prohibits, in pertinent part, "visiting a school."

On April 30, 2019, the probation officer called Garcia and directed him to report to the probation office the next day. This was not Garcia's normal reporting day. Garcia does not speak English and his probation officer does not speak Spanish, so the interview was conducted with the assistance of a fellow probation officer who reportedly speaks Spanish. Garcia brought his April driving log with him to the May 1 meeting and surrendered it to his probation officer. The log, which consisted of a photocopy of what appears to be one side of an approved form, contained entries for most of April 2019, but ended with an entry dated April 24, 2019. The absence of entries for the remaining five days of the month comprised the factual basis for the alleged violation of Condition 26, which requires that the probationer "maintain[] a driving log."

A. Violation of Condition 32

On appeal, Garcia argues that the State failed to prove he was "visiting" a school.[1] We agree. The order of probation imposes "[a] prohibition on visiting schools, child[-]care facilities, parks, and playgrounds, without prior approval from the offender's supervising officer." The affidavit of violation states that Garcia violated Condition 32 "by visiting a school . . . as evidenced by the offender's GPS electronic monitoring location points." At the violation hearing, Garcia's probation officer testified, "I showed him on my computer and he admitted to being parked there; and so then I asked him why were you parked there, and he said he was lost and he needed to ask for directions and he indicated there was a woman under a tree having lunch and was going to ask her for directions." This formed the factual basis for the violation of Condition 32.

As worded, Condition 32 prohibits visiting a school without permission. The order does not define "visiting." "Visiting" is commonly defined as "to go to see or spend time with (someone); call on socially: visit friends." Visit, The American Heritage Dictionary of the English Language (5th ed. 2020),

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[1]Garcia also argues that the admission of the GPS tracking data and the probation officer's testimony should have been excluded as inadmissible hearsay. In theory, he is right. See Laing v. State, 200 So. 3d 166, 168 (Fla. 5th DCA 2016) (stating that GPS data offered to prove that the probationer was at specific locations on particular dates is "definitive hearsay"); Alarcon v. State, 814 So. 2d 1180, 1184 (Fla. 4th DCA 2002) (concluding that community control officer's recounting of statements made by the defendant via an interpreter were inadmissible hearsay where "no facts were adduced . . . to bring the [CCO's] testimony within the section 90.803(18)(c) hearsay exception"). And "while hearsay is admissible in a revocation proceeding, it may not be the sole basis for the revocation." Carrington v. State, 168 So. 3d 285, 287 (Fla. 2d DCA 2015) (citing Lee v. State, 67 So. 3d 1199, 1201 (Fla. 2d DCA 2011)). However, the argument was not preserved, and Garcia does not argue on appeal that his trial counsel was ineffective on the face of the record for failing to raise this issue below. We also observe that Garcia said nothing to his probation officer that constituted an admission to violating Condition 32 anyway.

https://www.ahdictionary.com/word/search.html?q=visit (last visited Oct. 16, 2020). To the extent the word "visit" might be subject to other interpretations, its use in this case renders Condition 32 ambiguous, and it is well established that probation may not be revoked based on a violation of a condition that is ambiguous or vague. See Johnson v. State, 701 So. 2d 367, 370 (Fla. 2d DCA 1997) ("[A]ny ambiguity in a condition imposed at sentencing will affect the state's ability at a later date to establish a willful violation of that condition."); Miller v. State, 679 So. 2d 1186, 1186 (Fla. 2d DCA 1996) (condition prohibiting loitering in high drug areas stricken as vague); Wilson v. State, 781 So. 2d 1185, 1187 (Fla. 5th DCA 2001) (condition prohibiting contact with victim was ambiguous as applied); People v. Barajas, 131 Cal. Rptr. 3d 412, 422 (Cal. Ct. App. 2011) (condition prohibiting defendant from being "adjacent" to a school campus was impermissibly vague). In this case, we conclude that parking for three and one-half minutes in a strip mall parking lot near where a private school happens to be located is not, by any reasonable definition, "visiting" a school.

We also note that Condition 32 does not prohibit a probationer from knowingly being in the vicinity of a school or even being in a location from which the probationer can see children while they are attending school (or are in a park or a playground). Such a prohibition might seem reasonable, but we cannot read it into Condition 32. Even if we could, there was no evidence that Garcia was aware that a school existed in that strip mall. In fact, Garcia's probation officer stated that he could not see into the school "from the outside in the daytime," and that there was no outside area (such as a playground) adjacent to the school where children might go. There was simply nothing to look at there.

When considering whether to revoke a defendant's probation, "[t]he trial court must first determine whether the State proved by the greater weight of the evidence that the probationer willfully and substantially violated probation." Savage v. State, 120 So. 3d 619, 621 (Fla. 2d DCA 2013) (citing Del Valle v. State, 80 So. 3d 999, 1012 (Fla. 2011)). This is also frequently described as a "preponderance" standard. See, e.g., Nieves v. State, 277 So. 3d 745, 747 (Fla. 2d DCA 2019). In this case, we need not examine whether the State proved the violation by the greater weight of the evidence because there was no evidence at all that could support a violation of Condition 32.

B. Violation of Condition 26

Garcia also argues that the State failed to prove that he willfully and substantially violated Condition 26. Again, we agree. The order of probation requires the probationer to "maintain[] . . . a driving log." "Maintain" is not defined. At the violation hearing, Garcia's probation officer testified that he had instructed Garcia that

> any time he is operating a motor vehicle, he must maintain the log by entering the date, time, who was with him, his place of destination, and all of his locations where he's driving and document it in writing on a log, a form that we provide the offenders to document all of the driving to and from every location that they're driving.

Except for "all of his locations where he's driving," this verbal instruction appears to align with the column titles on the approved form. The affidavit of violation states that Garcia violated his probation by failing to maintain a driving log as evidenced by the lack of entries from April 25, 2019, through April 30, 2019.

On appeal, Garcia presents several arguments. First, Garcia argues that he is suffering from significant cognitive decline resulting in confusion and an inability to

fully understand how to follow instructions, in this case, with respect to the proper completion of the driving log. This is compounded, he argues, by his inability to read or write English. Second, prior to the date of the alleged violation, he had relied on his son's help to fill out the log. Third, he argues that he made reasonable efforts to comply with Condition 26 and believed he was doing so when he turned in the April log. Fourth, he argues that because he was ordered to report to the probation office on short notice and not on his normally scheduled day, he did not have time to obtain the help he needed to complete the log. All of these arguments have merit.

As to his mental state, Garcia presented unrebutted evidence via the testimony of his court-appointed psychotherapist, as well as Garcia's wife, son, and grandson, that Garcia had been experiencing symptoms of cognitive decline and confusion. In particular, the psychotherapist, who was the state-approved provider of Garcia's court-ordered sex offender treatment program, testified that Garcia had been exhibiting confusion and "cognitive issues in terms of understanding even the interpreter"; explaining by way of example that it had taken three months to get Garcia through the initial intake part of the program, and that she could not discharge him from the sex offender treatment program because of his cognitive issues and because she had been unable to find a Spanish-speaking provider to whom she could refer him for further treatment. The psychotherapist also opined that Garcia's cognitive issues would likely continue to interfere both with his treatment program and his probation.[2] This

[2]Although the psychotherapist did not testify as an expert witness, her testimony carried the weight of an independent and qualified professional who had examined the defendant as a patient in a clinical setting. Cf. Gutierrez v. Vargas, 239 So. 3d 615, 622 (Fla. 2018) (treating physicians not testifying as experts may testify as to their diagnostic opinions regarding their patients).

evidence strongly supports Garcia's argument that the alleged violation of Condition 26 was not willful, see Williams v. State, 728 So. 2d 287, 288 (Fla. 2d DCA 1999) ("Either a mental or a physical illness can be debilitating to the point that a probationer cannot comply with the terms of his probation."); Copeland v. State, 864 So. 2d 1197, 1200 (Fla. 1st DCA 2004) (holding that the trial court abused its discretion by revoking a defendant's probation in the face of evidence that the violation was not willful because the defendant was suffering from a mental illness), and the trial court was not at liberty to ignore it, see Coday v. State, 946 So. 2d 988, 1005 (Fla. 2006) ("The expert testimony from the defense could be rejected only if it did not square with other evidence in the case. While we have given trial judges broad discretion in considering unrebutted expert testimony, we have always required that rejection to have a rational basis."); cf. Chesapeake & O. Ry. Co. v. Martin, 283 U.S. 209, 216 (1931) ("We recognize the general rule . . . that the question of the credibility of witnesses is one for the [factfinder] alone; but this does not mean that the [factfinder] is at liberty, under the guise of passing upon the credibility of a witness, to disregard . . . testimony, when from no reasonable point of view is it open to doubt.").

The State suggests that Garcia's claim of diminished cognitive capacity conflicts with his "claim[] that he could, days later, remember every driving trip he took, their destination, the time at which he left and the time at which he returned, who was in the car with him, and the mileage on his odometer." But Garcia never made such a claim, and the State fails to cite to any place in the record where Garcia said anything similar. Instead, it cites the testimony of the probation officer, who was simply explaining what he expected to see in a driving log. The State also suggests that Garcia's trial counsel should

have sought a competency hearing. We disagree. It is not necessary to have a probationer declared incompetent to proceed in order to support the argument that a technical violation such as this one was not willful because of mental illness. See Copeland, 864 So. 2d at 1200 ("Competency to proceed to a hearing and the willful nature of a violation are not necessarily the same determination."); see also Williams, 728 So. 2d at 288 (uncontroverted testimony of psychiatrist regarding the defendant's severe depression established that the defendant's technical violations of probation were not willful and substantial); cf. Warren v. State, 421 So. 2d 808, 808 (Fla. 3d DCA 1982) (trial court erred in "deny[ing] the defendant an opportunity to present lay testimony on the issue of his sanity at the time of the alleged violation of probation"). Indeed, the failure to offer evidence of mental illness at a probation violation hearing could support a claim of ineffective assistance of counsel. See Medrano v. State, 892 So. 2d 508, 509 (Fla. 3d DCA 2004) (defense counsel's failure to offer evidence of probationer's mental illness constituted ineffective assistance). Here, Garcia's counsel offered unrebutted evidence of Garcia's declining mental condition; it was not necessary to have Garcia declared mentally incompetent to proceed in order to support this defense.

As to Garcia's other arguments, we observe that Garcia had only been on probation for three months, and, as noted above, his son had been helping him fill out the driving logs until shortly before the date of the alleged violation.[3] In addition, although

[3]The State argues that Garcia "no longer used anyone's help at the time of the violation." This is a hollow argument. Garcia's son had, in fact, helped him with the logs until shortly before the date of the alleged violation and was unavailable to help at the end of April because of his work schedule. If anything, this is a defense argument: Given his cognitive difficulties, the fact that he did not have help to complete the log supports the argument that his failure to complete it was not willful.

there was evidence that Garcia was given written instructions, the instructions were in English, which was useless to him. Moreover, Garcia *did* submit a driving log for April, but his probation officer deemed it incomplete. And although Garcia's probation officer asked him whether he had driven after April 24, he did not tell Garcia that the log was incomplete or ask Garcia to complete the log or to explain the apparent omission.

In sum, Garcia's reliance on his son's help to complete the driving log throughout almost the entire three months of his probation, the fact that the log was missing only a few entries at the end of the month, that he was ordered to report to the probation office on short notice on a day that was not his normal day to report (giving him no time to obtain help to complete the log), the language barrier, and questions about the adequacy and/or his understanding of instructions given to him by the probation officer, combined with the unrebutted evidence that he was suffering from declining mental health affecting his ability to follow detailed instructions, support Garcia's claim that his failure to make entries for the last few days of April did not constitute a willful or substantial failure to "maintain a driving log." See State v. Carter, 835 So. 2d 259, 261-62 (Fla. 2002) (although the failure to file a single monthly report may, under certain circumstances, justify revocation, "[t]here may be circumstances where revocation is patently unfair"); Butler v. State, 775 So. 2d 320, 321 (Fla. 2d DCA 2000) (holding that the failure to submit a single monthly report was not a substantial violation of Butler's probation); Love v. State, 606 So. 2d 755 (Fla. 2d DCA 1992) (noncompliance based on confusion or miscommunication is not willful); Shaw v. State, 391 So. 2d 754, 755 (Fla. 5th DCA 1980) ("Where a defendant makes reasonable efforts to comply with probation conditions, his failure to do so may not be willful.").

We conclude that the State failed to prove that Garcia violated Condition 32 and that the greater weight of the evidence did not support the finding that Garcia had willfully and substantially violated Condition 26. Accordingly, we reverse and remand for vacation of Garcia's prison sentence and reinstatement to probation.

Reversed and remanded with directions.

CASANUEVA and LABRIT, JJ., Concur.