COURT OF APPEALS
SECOND DISTRICT OF TEXAS
FORT WORTH

NO. 02-16-00446-CR

MARCO MCCAIN — APPELLANT

V.

THE STATE OF TEXAS — STATE

FROM THE 431ST DISTRICT COURT OF DENTON COUNTY
TRIAL COURT NO. F-2012-1619-B

MEMORANDUM OPINION[1]

I. Introduction

In twelve issues, Appellant Marco McCain appeals his assault-family violence conviction that became final when the trial court revoked his community supervision and reformed his sentence to five years' confinement. We affirm.

[1]*See* Tex. R. App. P. 47.4.

II. Factual and Procedural Background

On October 19, 2012, McCain pleaded guilty to assault-family violence, which was enhanced to a third-degree felony because of his prior assault-family violence conviction,[2] in exchange for five years' confinement, a $500 fine, suspension of the imposition of his sentence, and placement on community supervision for six years.

Less than six months later, the State moved to revoke McCain's community supervision, alleging that he had violated terms and conditions of his community supervision by: not reporting to his community supervision officer; not paying his $500 fine, a reimbursement fee for appointed counsel, his supervision fees, a crime stoppers fee, and other fees; not completing his community service, a drug/alcohol assessment, and a batterer's intervention program; not submitting a DNA sample; and not participating in the family violence caseload. The State's motion listed the right offense but the wrong date of conviction: "the 6TH DAY OF NOVEMBER, 1999." A capias was issued for his arrest on March 22, 2013, but not executed until February 2, 2016.[3]

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[2]McCain was indicted for having intentionally, knowingly, or recklessly caused bodily injury to a member of his family or household or a person with whom he had or had had a dating relationship, by punching, choking, and slamming her with his hand while having previously been convicted of assault-family violence on February 7, 2008, in cause number 005-85296-07, in County Court at Law No. 5 of Collin County.

[3]On October 17, 2016, McCain filed a pro se application for writ of habeas corpus. In the application, McCain complained about his conviction in cause number F-2012-1619-B, entered on October 19, 2012, for assault-family

At the October 28, 2016 revocation hearing, the State presented the testimony of two probation officers regarding McCain's violations of the terms of his community supervision. Arnulfo Almager testified that he had been McCain's intake officer and met with him on October 19, 2012, the day the judgment placing McCain on community supervision was entered. Almager said that he went over the terms and conditions of McCain's community supervision with him, including what would be expected of him on community supervision and the referrals to community service and court-ordered classes. Almager testified that McCain had asked to transfer his community supervision to Collin County and that he explained to McCain that a transfer could take up to three months.

Cory Nau, a twenty-five-year employee of Denton County Adult Probation, was assigned McCain's case. Nau testified that McCain's requested transfer to Collin County was unsuccessful because McCain failed to report. Nau explained that even if McCain's transfer had been successful, McCain would have been required to complete the terms and conditions of his community supervision.

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violence, for which he was sentenced to five years' confinement that was suspended and probated for six years. In his application, McCain complained that the motion to revoke was filed March 22, 2013, but that he was not arrested until January 2016. On November 7, 2016, the trial court denied the petition. We affirmed the trial court's order while the instant appeal was pending. *See Ex parte McCain*, No. 02-16-00477-CR, 2017 WL 444386, at *1 (Tex. App.—Fort Worth Feb. 2, 2017, no pet.) (mem. op., not designated for publication).

Nau testified that he had never seen McCain[4] and had no record of McCain's ever reporting to Denton or Collin County probation offices after his October 19, 2012 intake. Moreover, Nau had no record of McCain's ever paying his monthly supervision fee, his $500 fine, the reimbursement for his appointed counsel, his crime stoppers fee, or his $100 payment to Friends of the Family or of McCain's performing his 400 hours of community service, completing his drug and alcohol evaluation, submitting a DNA sample, starting the batterer's intervention program, or participating in the family violence caseload.

McCain argued that the State could not meet its burden of proof on the motion to revoke because it stated the wrong date of the conviction as November 6, 1999. The prosecutor responded that this was just a clerical error and that McCain still received adequate notice in that the cause number, the case style, and the conditions (all dated after October 19, 2012) were contained in the motion. The trial judge observed that the flaw in describing the date McCain was placed on probation did "not carry over to the body of the motion" and that the correct date of judgment was reflected "relative to each violation throughout." He opined that special exceptions "or some other notice-related motion" should have been brought by McCain to the court to complain about the error.

[4]Nau agreed that he had no firsthand knowledge of any alleged violations other than the information and notes contained in the probation records that he did not personally enter.

The trial court found all of the alleged violations true, revoked McCain's community supervision, and reformed the judgment to reflect a sentence of five years.

III. Discussion

In his first issue, McCain complains that the trial court abused its discretion by revoking his community supervision because the motion to revoke was insufficient when it alleged that he had been convicted on November 6, 1999, thereby providing him with insufficient notice of the allegations against him. In his remaining eleven issues, he complains that the evidence is insufficient to support the trial court's "true" findings.

The State responds that McCain did not preserve his first issue regarding the sufficiency of the motion to revoke because he did not file a motion to quash but that even if McCain had preserved the issue, the trial court did not abuse its discretion when McCain had notice that the motion to revoke concerned his October 19, 2012 conviction.

A. Standard of Review

We review an order revoking community supervision for an abuse of discretion. *Rickels v. State*, 202 S.W.3d 759, 763 (Tex. Crim. App. 2006); *Cardona v. State*, 665 S.W.2d 492, 493 (Tex. Crim. App. 1984). In a revocation proceeding, the State must prove by a preponderance of the evidence that the defendant violated the terms and conditions of community supervision. *Cobb v. State*, 851 S.W.2d 871, 873 (Tex. Crim. App. 1993). The trial court is the sole

judge of the credibility of the witnesses and the weight to be given their testimony, and we review the evidence in the light most favorable to the trial court's ruling. *Cardona*, 665 S.W.2d at 493; *Garrett v. State*, 619 S.W.2d 172, 174 (Tex. Crim. App. [Panel Op.] 1981). Proof by a preponderance of the evidence of any *one* of the alleged violations of the conditions of community supervision is sufficient to support a revocation order. *Moore v. State*, 605 S.W.2d 924, 926 (Tex. Crim. App. [Panel Op.] 1980); *Sanchez v. State*, 603 S.W.2d 869, 871 (Tex. Crim. App. [Panel Op.] 1980).

B. Motion to Quash

In the absence of a timely motion to quash to point out an error in a motion to revoke probation, that error, if any, is waived. *Marcum v. State*, 983 S.W.2d 762, 767 (Tex. App.—Houston [14th Dist.] 1998, pet. ref'd). Absent a jurisdictional issue, the question of the sufficiency of a motion to revoke probation cannot be raised for the first time on appeal even if the motion is in fact defective. *Id.*; *see Gordon v. State*, 575 S.W.2d 529, 531 (Tex. Crim. App. [Panel Op.] 1978) ("[I]n the absence of a motion to quash, any error was waived."); *see also Dunavin v. State*, 611 S.W.2d 91, 98 n.22 (Tex. Crim. App. [Panel Op.] 1981) ("[I]n the absence of a motion to quash directed to the defect, we will not gratuitously set aside an order of revocation, particularly where, as here, the motion to quash reflects an awareness of that which appellant and his attorney were being called on to defend, and the sufficiency of one or more additional grounds to revoke is not attacked." (citations omitted)); *Spruill v. State*, 382

S.W.3d 518, 520 (Tex. App.—Austin 2012, no pet.) (citing *Martinez v. State*, 493 S.W.2d 954, 955 (Tex. Crim. App. 1973)); *cf. Campbell v. State*, 456 S.W.2d 918, 920 (Tex. Crim. App. 1970) (addressing appellant's complaint that the motion to revoke did not give him notice of his alleged violation when he timely filed a motion to quash on that basis prior to the revocation hearing).

McCain did not file a motion to quash and has not raised a jurisdictional issue. Accordingly, he has not preserved this complaint for our review, and we overrule his first issue.

C. Sufficiency

In his remaining eleven issues, McCain complains that the evidence is insufficient because Nau's and Almager's testimonies were based on notes from other probation officers. But McCain did not raise this or any other objections during the State's presentation of evidence. *See Clay v. State*, 361 S.W.3d 762, 765 (Tex. App.—Fort Worth 2012, no pet.). To preserve a complaint for our review, a party must have presented to the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling if they are not apparent from the context of the request, objection, or motion. Tex. R. App. P. 33.1(a)(1); *Douds v. State*, 472 S.W.3d 670, 674 (Tex. Crim. App. 2015), *cert. denied*, 136 S. Ct. 1461 (2016). And the trial court must have ruled on the request, objection, or motion, either expressly or implicitly, or the complaining party must have objected to the trial court's refusal to rule. Tex. R. App. P. 33.1(a)(2); *Everitt v. State*, 407 S.W.3d 259, 262–63 (Tex. Crim. App. 2013).

But more to the point, probation records can be admissible even if the testifying witness does not have personal knowledge of the records' contents. *See Simmons v. State*, 564 S.W.2d 769, 770 (Tex. Crim. App. [Panel Op.] 1978) (holding no error in the admission of complained-of testimony when the "proper predicate was laid whereby Pierce could testify from probation department records that appellant had admitted narcotics use to the probation department"); *Canseco v. State*, 199 S.W.3d 437, 440 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd) ("[T]he Court of Criminal Appeals has determined that a probation file is admissible as a business record, even though the testifying witness does not have personal knowledge of the entries in the file, so long as the personnel who made the entries did have personal knowledge of the facts therein.").

And the absence of a record can be probative that something did not occur.[5] *See* Tex. R. Evid. 803(7), (10) (setting out hearsay exceptions for absence of a record of a regularly-conducted activity); *Hardman v. State*, 614 S.W.2d 123, 128 (Tex. Crim. App. [Panel Op.] 1981) (holding that the failure-to-report ground was sufficiently supported when "there was no evidence to indicate that appellant never received the letters" that instructed him to report to a

[5]*But cf. Flournoy v. State*, 589 S.W.2d 705, 708 n.10 (Tex. Crim. App. [Panel Op.] 1979) (citing *Hartsfield v. State*, 523 S.W.2d 683, 685 (Tex. Crim. App. 1975), and *Davis v. State*, 563 S.W.2d 264, 265–66 (Tex. Crim. App. 1978), for the proposition that "[p]robation office records offered to show failure to report as directed may not be sufficient when the record does not show whether the probationer reported to some other probation officer during the months in question").

probation officer in Houston and when the probation officer verbally instructed appellant about the reporting requirement in Houston); *Colvin v. State*, No. 09-11-00206-CR, 2013 WL 2732050, at *17 (Tex. App.—Beaumont June 12, 2013, no pet.) (mem. op., not designated for publication) (observing that when excluded exhibit containing arrest records did not contain a July 27, 1984 arrest for misdemeanor theft and assault, "[t]he absence of such a record suggests the Houston Police Department did not arrest Dobson on July 27, 1984, but it does not prove that no entity in Harris County arrested Dobson on that date"); *Serrano v. State*, No. 08-08-00153-CR, 2010 WL 337679, at *2 (Tex. App.—El Paso Jan. 29, 2010, no pet.) (not designated for publication) (citing *Hardman* for the proposition that "the absence of a notation in a probation file can be sufficient to prove the violation of a term and condition of probation").

Accordingly, when Nau testified that the probation records contained no evidence of McCain's having complied with the terms and conditions of his community supervision listed in grounds D,[6] E, I, K, R, S, U, Z, AA, CC, or DD—as set out in their entirety in the terms and conditions attached to the judgment, in the motion to revoke, and in Nau's testimony—the trial court could have reasonably found by a preponderance of the evidence that McCain had failed to

[6]Ground D stated, "Report to the Community Supervision and Corrections Department of Denton County, Texas, immediately fol[l]owing this hearing, and no less than monthly thereafter, or as scheduled by the court or supervision officer and obey all rules and regulations of the department."

comply with these conditions.[7] *See Greer v. State*, 999 S.W.2d 484, 488–89 (Tex. App.—Houston [14th Dist.] 1999, pet. ref'd) (recognizing that although "slim at best," evidence was sufficient to support revocation when probation officer testified about failure to report based on contents of probation file), *cert. denied*, 531 U.S. 877 (2000). We overrule McCain's remaining issues.

IV. Conclusion

Having overruled McCain's remaining issues, we affirm the trial court's judgment.

/s/ Bonnie Sudderth

BONNIE SUDDERTH
CHIEF JUSTICE

PANEL: SUDDERTH, C.J.; KERR and PITTMAN, JJ.

DO NOT PUBLISH
Tex. R. App. P. 47.2(b)

DELIVERED: January 11, 2018

[7]Because there is sufficient evidence to support a single "true" finding on any of the State's grounds in the motion to revoke, we need not reach McCain's argument that he had an affirmative defense to ground D (failure to report), which he concedes he did not expressly raise at the revocation hearing for the trial court's consideration. *See* Tex. R. App. P. 33.1, 47.1.