Circuit Court for Prince George's County
Case No. JA160330

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2135

September Term, 2016

IN RE: U.R.

Kehoe,
Leahy,
Salmon, James P.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Salmon, J.

Filed: October 4, 2017

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At a June 28, 2016 adjudicatory hearing, the Circuit Court for Prince George's County, sitting as a juvenile court, found 13-year-old U.R., appellant, involved in what would constitute the crimes of second-degree assault and theft of property with a value under $1,000 if committed by an adult. The juvenile court placed U.R. on an indefinite period of supervised probation, with conditions. On November 21, 2016, the juvenile court found that U.R. had violated the conditions of his probation and committed him to the custody of the Department of Juvenile Services ("DJS") to be detained in a community residential group home.

U.R. noted a timely appeal of the juvenile court's ruling that he had violated the conditions of probation, raising the following questions for our consideration:

1. Did the juvenile court deprive [a]ppellant of his confrontation rights?
2. Assuming, *arguendo*, that the juvenile court did not violate [a]ppellant's confrontation rights, did the State fail to show that [a]ppellant actually violated his probation?

The State concedes, and we conclude that the concession is well-taken, and that the juvenile court's finding that U.R. violated his probation must be vacated. We therefore vacate the juvenile court's order and remand to that court for a new violation of probation hearing to proceed in accordance with the views expressed in this opinion. As to the second question presented, we reject appellant's argument that the evidence presented did not show that he violated a condition of his probation.

FACTS AND LEGAL PROCEEDINGS

At the June 28, 2016 adjudicatory hearing, U.R. entered a plea of involvement to the charges of second-degree assault and theft of property with a value under $1,000. The

court accepted, as the factual predicate of the offenses, the allegations contained in the delinquency petition, which read:

> On May 26, 2016 at 1703 hours, Prince George's County Police Department patrol units responded to 7311 Good Luck Road, New Carrollton, Prince George's County, Maryland, for a report of a robbery. On the scene, officers were advised that Victim 1 . . ., Victim 2 . . ., and a witness ([Y.M]) were approached by this Respondent, [U.R.], and Co-Defendant/Respondent, [C.G.H], in the vicinity of 7301 Good Luck Road, New Carrollton, Prince George's County, Maryland. Respondent [U.R.] grabbed Victim 1's phone (valued at approximately $500) from her hand and the two began to fight over the phone, with Respondent [U.R.] ultimately gaining control over the phone. Respondent [U.R.] then began striking Victim 1 in the head with the phone repeatedly causing minor injury. During the struggle, Victim 2 attempted to help Victim 1, but Respondent [U.R.] advised that he had a taser, and a knife, and to step away. Respondent [U.R.] then slapped Victim 2 in the face with an open hand before fleeing the scene.

Based on the proffered facts, the juvenile court found U.R. involved with regard to the two offenses and dismissed the remaining charges, per the plea agreement.

At a July 26, 2016 disposition hearing, the juvenile court placed U.R. on an indefinite period of probation with conditions,[1] and on "community detention" for 30 days, to expire on August 26, 2016.[2] At an August 15, 2016 restitution hearing, U.R. was ordered

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[1] The conditions included obeying all laws and rules of the home, reporting to the probation officer as directed, attending school regularly and maintaining a 3.0 grade point average, writing a two-page apology letter to the victims, having no contact with the victims, and enrolling in the Family Functioning Therapy ("FFT") and "CHOICE" programs.

[2] Community detention provides "supervision to youth who are in the community on home detention; no additional programming beyond supervision is provided. Youth on DJS CD [Community Detention] supervision are only permitted to leave the home for court-ordered or DJS-approved activities." djs.maryland.gov (last visited August 4, 2017).

to pay restitution to his theft victim in the amount of $649.99, to be paid in two installments by October 17, 2016.[3]

Gaynette Reed, U.R.'s case management specialist, reported to the court that as of October 7, 2016, U.R. had been only "semi-compliant" with supervision and had not paid the court-ordered restitution. In addition, U.R.'s family members had reported to Ms. Reed that he was not following the rules of the home and was staying out past curfew. As a result, Ms. Reed requested that U.R. be placed on electronic monitoring and in the Evening Reporting Center program.[4]

On October 25, 2016, after U.R. failed to appear in court on October 17 and 18, 2016 for a check on his academic progress, the juvenile court ordered that U.R. be placed on electronic monitoring and in the Evening Reporting Center program, pending a review hearing on November 21, 2016. The court noted that a "willful failure to abide [by the rules and requirements of the Evening Reporting Center] will result in an immediate removal" from community detention "to the care and custody of the Department of Juvenile Services in an appropriate facility."

[3] The written order of the court entering judgment in favor of the victim stated, however, that "execution of the judgment is hereby stayed pending payment through the Department of Juvenile Services, at the rate of $150.00 per month until paid[,] payable on the first day of each month." The discrepancy is not explained in the record.

[4] Evening Reporting Centers are "alternative to detention" programs, "to which assigned youth report daily for in-person supervision as well as programmed activities." djs.maryland.gov (last visited August 4, 2017).

In an October 31, 2016 "violation memo," Glendale Becton, U.R.'s community detention officer, reported that U.R. had violated the community detention/electronic monitoring program by leaving his residence at approximately 4:00 p.m. on October 28, 2016 and failing to be present for a 9:15 p.m. home visit that evening.[5] In addition, U.R.'s mother reported to Mr. Becton that the child at times jumped out the window of his room, resulting in unauthorized absences. The electronic monitoring system showed several "unauthorized leave alerts" on October 29 and 30, 2016.

Mr. Becton advised the court that U.R.'s behavior put him "in direct violation of the program[,] and progress while on the program has been unsatisfactory." The juvenile court issued a writ of attachment, and on October 31, 2016, while being transported from court after a hearing on his violation of the electronic monitoring system, U.R. tried to run away from the transportation officers.

On November 1, 2016, the juvenile court issued a show cause order due to U.R.'s violation of conditions of the probation order. The show cause order detailed the State's allegations that U.R. had failed to: attend school regularly; abide by the rules of the home; report to DJS representatives; complete restitution; and remain within the geographical limitations of his release. The court ordered that U.R. be detained, pending a violation of probation hearing on November 21, 2016.

[5] Some reports state that the visit occurred at 9:45 p.m.

At the violation of probation hearing, Kenny Hooks, Gaynette Reed's supervisor, testified that he was aware of the conditions of U.R.'s probation.[6] When the Assistant State's Attorney asked Mr. Hooks whether U.R. had violated the conditions of his probation, U.R.'s attorney objected on the ground that the testimony of Ms. Reed's supervisor, who had no personal knowledge of U.R.'s case, denied U.R. his due process right of confronting the person who alleged that he violated his probation. The court overruled counsel's objection, but granted U.R.'s counsel a continuing objection.

Mr. Hooks went on to identify State's exhibit 1, a November 16, 2016 memorandum authored by Ms. Reed, which detailed U.R.'s alleged probation violations. The memorandum indicated that U.R. was not home for a 9:45 p.m. home visit on October 28, 2016, rendering him in violation of the home electronic monitoring system. In addition, while being transported to the Cheltenham Youth Facility for that violation, U.R. attempted to run away. Prior to being detained, U.R. had "major issues with compliance," including failure to abide by curfew rules, failure to follow rules of the home, failure to have face-to-face and phone contact with Ms. Reed, and failure to attend school regularly. Finally, according to the memorandum, he had not paid the court-ordered restitution to the victim.

When the State offered exhibit 1 into evidence, U.R.'s attorney again objected on the basis that the report had been created by Ms. Reed, and counsel had been given no opportunity to cross-examine her as to the allegations made in the report, thereby denying U.R. his right to confront his accuser. The court admitted the exhibit over objection. Cross-

[6] Ms. Reed did not appear at the violation of probation hearing.

examination by U.R.'s attorney made it clear that Mr. Hooks had not personally observed U.R.'s alleged probation violations, nor had he personally questioned U.R.

When the State requested that the court find U.R. in violation of his probation, defense counsel argued that the State had failed to prove by a preponderance of evidence any of the claims in the "unconstitutionally vague" show cause order. According to U.R.'s counsel, the State had not, for example, shown how many days U.R. had missed school, what rules of the home he had violated, or how many times he failed to contact his DJS representative. Moreover, defense counsel asserted that the State had failed to prove that the non-payment of restitution was a willful act by U.R.

The juvenile court found U.R. to be in violation of probation and detained him, pending disposition. At a December 7, 2016 disposition hearing, despite the State's recommendation for commitment to a more restrictive Level B non-community residential facility, the juvenile court committed U.R. to a Level C community residential treatment group home for three years.[7]

DISCUSSION

A. <u>First question presented</u>.

U.R. argues that the juvenile court violated his right to confront his accuser by improperly admitting into evidence State's exhibit 1 at his violation of probation hearing.

[7] A Level C facility is defined by the court's disposition order as "Foster, Group Home or other community based residential treatment (Safe Passages Day Treatment Program—with graduated sanctions, to include electronic monitoring and/or detention upon review.)"

The memorandum, and Mr. Hooks's testimony about it, U.R. concludes, did not satisfy an exception to the rule against the admission of hearsay, and should not have been admitted.

The State, while pointing out that hearsay evidence is admissible in juvenile violation of probation hearings, even if it would be barred by the Confrontation Clause at a criminal trial, nonetheless concedes that the juvenile court failed to make the requisite findings that the memorandum was reliable and that good cause existed to permit its admission to prove the probation violation. As such, the State agrees with U.R. that the juvenile court's order of violation of probation should be vacated and the matter remanded for a new hearing.

As the Court of Appeals explained in *State v. Fuller*, 308 Md. 547 (1987), "[t]he Due Process Clause of the Fourteenth Amendment to the United States Constitution imposes procedural and substantive limits on the revocation of the conditional liberty created by probation. If the State seeks to revoke probation, procedural due process entitles the probationer to a fair adjudicative procedure for determining the basis for the revocation of probation." *Id.* at 552 (internal citations omitted). A respondent in a probation revocation hearing is entitled to the right of confrontation of the witnesses against him, as in a criminal proceeding. *Id.* at 549.

In probation revocation proceedings, however, the formal rules of evidence do not apply. *Id.* at 553 (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 789 (1973)). "[R]easonably reliable hearsay" may be admitted during a probation revocation hearing. *Id.*

When, as here, there is a confrontation issue, the juvenile court must test the hearsay evidence

> against the formal rules of evidence to determine whether it fits any of the firmly rooted exceptions to the hearsay rule. If so, it will be admitted. If not, the court may admit it upon finding that it is reasonably reliable *and* . . . that there is good cause for its admission. [G]ood cause need not reach the high standard governing the admissibility of hearsay evidence at criminal trials. In determining whether there is good cause to admit hearsay in a probation revocation hearing, it is obvious that the most important factor is the reliability of the proffered hearsay evidence and whenever the proffered hearsay evidence has substantial guarantees of trustworthiness the hearsay is admissible without the need to establish any additional good cause.

Blanks v. State, 228 Md. App. 335, 353-54 (2016) (internal citations and quotation marks omitted; emphasis in original). If admitting hearsay evidence that does not fit into an exception to the hearsay rule, however, the trial court must, on the record, make a specific finding of good cause. *Fuller*, 308 Md. at 553.

There is no question in this matter that the report authored by Ms. Reed, who did not testify at U.R.'s revocation of probation hearing, comprised hearsay, and it did not fall into any exception to the rule precluding the admission of hearsay evidence. *See* Maryland Rules 5-801(c) (defining hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted"), 5-802 (subject to certain exceptions, hearsay is not admissible), and 5-803 (recognized exceptions to the rule against the admission of hearsay into evidence when the declarant is not necessarily unavailable). Because the record does not contain a finding by the juvenile court of the reliability of Ms. Reed's report and good cause for denying U.R.'s right to confront his accuser, the court committed error by admitting the hearsay evidence at the violation of probation proceeding. *Fuller*, 308 Md. at 554. And, because the juvenile court considered the hearsay evidence in concluding that U.R. violated the conditions of

his probation, we cannot say that the error was harmless. *Id*. Accordingly, a new violation of probation hearing is required.

B. Second question presented.

In deciding whether there was nonetheless sufficient evidence for the juvenile court to find that U.R. violated the conditions of his probation, we treat State's exhibit 1 as if it were properly admitted into evidence at his violation of probation hearing. Assuming the admissibility of Ms. Reed's report, it is apparent that U.R. did violate the terms of his probation.

There appears to be no dispute that U.R. did not pay the court-ordered restitution to the victim of his crimes by the deadline imposed by the court (or at all), which, standing alone, is sufficient evidence of a violation of a condition of his probation as imposed by the juvenile court. And, although U.R. argues that the State failed to show that he acted willfully in failing to pay restitution, as the State points out, it is U.R.'s burden to prove that the violation was not willful, a burden he did not meet. *See Bailey v. State*, 327 Md. 689, 695 (1992) (quoting *Humphrey v. State*, 290 Md. 164, 167-68 (1981))("Initially, the State carries the burden of proving the probation violation, and must do so by a preponderance of the evidence. . . . If the State meets this burden, the burden of persuasion shifts to the probationer, and 'ordinarily probation may not be revoked if the *probationer proves* that his failure to comply was not willful but rather resulted from factors beyond his control and through no fault of his own.'") (emphasis added in *Bailey*, internal citation omitted).

In addition, although U.R. argues that he could not have violated the terms of the "community detention" program in October 2016 because that detention was set to expire on August 26, 2016, he fails to recognize the juvenile court's superseding order of home electronic monitoring detention imposed on October 25, 2016, pending the review hearing on November 21, 2016. Ms. Reed's November 16, 2016 memorandum made clear that U.R. violated the terms of the court-ordered electronic monitoring system when he was not home on the evening of October 28, 2016 for an unannounced home visit and when his absence from the home triggered "unauthorized leave alerts" on October 29 and 30, 2016, which put him "in direct violation of the program."

Finally, although U.R. argues that the evidence pertaining to the allegation that he was not regularly attending school was "overly vague or confusing," an addendum to Ms. Reed's October 7, 2016 memorandum to the court, which is contained in the record, detailed that he had been absent from school 16 of 32 days between August 23, 2016 and October 7, 2016. Obviously, a documented absence rate of 50% constitutes a sufficient showing of a failure to attend school regularly.

VIOLATION OF PROBATION ORDER DATED DECEMBER 7, 2016 VACATED; CASE REMANDED TO THE CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY, SITTING AS A JUVENILE COURT, FOR A NEW VIOLATION OF PROBATION HEARING; COSTS TO BE PAID BY PRINCE GEORGE'S COUNTY.