IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

RICKY LYNN LYLES, JR., **Appellant,**	)	**NOT FOR PUBLICATION**
-vs.-	)	**No. RE-2016-259**
THE STATE OF OKLAHOMA, **Appellee.**	)	

SUMMARY OPINION

LEWIS, JUDGE:

In the District Court of Washita County, Case No. CF-2010-96, Ricky Lynn Lyles, Jr., Appellant, while represented by counsel, entered a plea of guilty to Larceny of a Motorized Vehicle in violation of 21 O.S.Supp.2002, § 1720. On July 19, 2011, the Honorable Christopher S. Kelly, Associate District Judge, sentenced Appellant to three (3) years imprisonment, with all but the first ninety (90) days thereof suspended on written conditions of probation.

On May 14, 2014, the State filed a Motion to Revoke Suspended Sentence. Through reference to a Violation Report attached to that Motion, the State alleged Appellant violated his probation by not reporting to his probation officer and not providing address information and thereby causing his whereabouts to be unknown. On the filing of this Motion, a warrant immediately issued for his arrest. In March of 2016, Appellant was arrested on the warrant. An evidentiary hearing on the merits of the Motion followed, concluding with a March 24, 2016, order by the Honorable Christopher S. Kelly, Associate District Judge, finding Appellant had violated his probation and revoking a 300-day portion of the suspension order.

Appellant now appeals the final order of revocation, and he raises the following propositions of error:

1. The trial court abused its discretion in revoking Mr. Lyles' suspended sentence on the basis of incompetent and inadmissible evidence in violation of his rights to due process and confrontation under the 14 Amendment, under art. 2, § 7, of the Oklahoma Constitution, and under 22 O.S. § 991b.

2. If this Court finds that Mr. Lyles was not revoked solely on the basis of inadmissible hearsay, Mr. Lyles was denied due process of law by the trial court's failure to make a written statement of the evidence relied upon in revoking the suspended sentence.

Having thoroughly considered these propositions of error and the entire record before this Court, including the original record, transcript, and briefs of the parties, the Court finds no error warranting reversal or modification.

I. Factual Background

The sole witness presented to prove the alleged probation violation was an officer for the Department of Corrections Probation and Parole Division (DOC). This officer confirmed that she was "records custodian regarding progress reports and for other probation officers" and that this included "reports when an offender is supervised by interstate compact." (Tr. 5.) The officer further testified that she was familiar with Appellant's case, had reviewed his probation supervision records, and the records revealed Appellant's probation was supervised through an interstate compact with the State of Texas. (Tr. 5-6.) According to these records, for the first two years of his probation Appellant had done well, but in 2013, "he just stopped reporting and did not give new contact information." (Tr. 7.) Despite multiple attempts, the Texas probation office was unable to locate Appellant and classified him as an absconder from supervision. (Tr. 7.) DOC therefore filed its Violation Report requesting revocation. (Tr. 7.) On cross-examination, the witness admitted that but for the Violation Report, she would not know anything about Appellant's case. (Tr. 8.)

On the State resting its case, Appellant argued *Hampton v. State*, 2009 OK CR 4, 203 P.3d 179, prohibited revocation on this evidence alone. Although agreeing the DOC officer's testimony was properly admitted as trustworthy hearsay under *Hampton*, Appellant argued the State's evidence as a whole remained insufficient to revoke because it consisted entirely of hearsay evidence. (Tr. 12-13.) "[R]evocation cannot be based entirely upon hearsay evidence." *Hampton*, ¶ 21, 203 P.3d at 186. Judge Kelly overruled Appellant's objection, found that Appellant had violated the conditions of probation, and partially revoked the order suspending execution of sentence.

II. Legal Analysis

In Proposition I, Appellant renews the sufficiency of the evidence complaint that he raised in the District Court. Additionally under Proposition I, Appellant argues the DOC report should not have been considered admissible hearsay under 12 O.S.2011, § 2803(8)(a), as that provision specifically excludes from the public records exception to the hearsay rule "investigative reports by police and other law enforcement personnel." We find Appellant is foreclosed from raising this admissibility issue, as he conceded before the trial court that this DOC report was admissible hearsay under *Hampton*. "When one objection is made at trial, this Court will not address a different objection on appeal." *Armstrong v. State*, 1991 OK CR 34, ¶ 23, 811 P.2d 593, 599. *See also Wood v. State*, 1998 OK CR 19, ¶ 37, 959 P.2d 1, 11 (finding that defendant "has waived appellate review of a claim that the [DNA lab] reports were improperly admitted under the business records exception to the hearsay rule" where "[h]is objection at trial was based on chain of custody and the necessity of the technicians who performed the test to testify").

As Appellant conceded admissibility before the trial court, we therefore address only the question of whether the State's evidence was sufficient to satisfy *Hampton*. In doing so, we first examine what lies behind *Hampton*'s prohibition against revocations based entirely on hearsay. In *Hampton*, the Court was concerned about a probationer's limited right to confront the witnesses against him in revocation proceedings.[1] With regard to hearsay, we concluded the probationer's right to confront such witnesses "will generally be satisfied when a trial court determines that proffered hearsay bears substantial guarantees of trustworthiness or otherwise has sufficient indicia of reliability." *Hampton*, ¶ 18, 203 P.3d at 185. We further concluded "an out-of-court statement will presumptively satisfy the confrontation rights of a probationer when that statement is one that would normally be admissible under an established exception to the rules against hearsay." *Id.*, ¶ 20, 203 P.3d at 186.

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[1] In *Hampton*, the probationer's first proposition on appeal asserted, "The District Court revoked Appellant's suspended sentence based on hearsay evidence, thereby depriving Appellant of his right of confrontation." *Hampton*, ¶ 3, 203 P.3d at 181. In addressing that proposition, we recognized that our State's revocation statute "requires the State, among other things, to present 'competent evidence justifying the revocation of the suspended sentence,'" and that it further provided that a defendant "shall have the right . . . to be confronted by the witnesses against the defendant.'" *Id.*, ¶ 11, 203 P.3d at 182-83 (ellipse added) *citing* 22 O.S.Supp.2003, § 991b. We also recognized the U.S. Supreme Court decisions of *Morrissey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656 (1973), wherein the Supreme Court set out minimum due process standards for terminating probation or parole, and which standards included "'the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation).'" *Hampton*, ¶ 12, 203 P.3d at 183.

Following *Morrissey* and *Scarpelli*'s recognition of only a limited right of confrontation and cross-examination, we concluded the confrontation right granted under Section 991b was no greater than that identified by those two Supreme Court decisions. *Hampton*, ¶ 13, 203 P.3d at 183. Having determined the scope of a probationer's right of confrontation in revocation proceedings, we then addressed how that right was to be protected "when the State has found it necessary to proffer an out-of-court statement" in a revocation. *Id.*, ¶ 15, 203 at 184. In that regard, "We decline[d] . . . to construe the phrase 'competent evidence' as used in Section 991b to prohibit the admission of hearsay in revocation proceedings once confrontation issues, if any, are addressed." *Id.*, ¶ 21 n.20, 203 at 187 n.20.

By their nature, some things are typically proved through historical records that are technically hearsay.[2] An example are historical records used in proof of a negative, such as a failure to pay, a failure to obtain a license, or as in Appellant's case, a failure to report.[3] In such cases, courts must frequently rely on the business or public records exceptions of the hearsay rule for proof of the nonoccurrence or nonexistence of a matter as revealed by regularly kept records described under those hearsay exceptions. 12 O.S.2011, § 2803(7), (10). In explaining this necessity with regard to the business records exception, Professor Whinery observed:

> The need for the exception is great to avoid undue burden on both the business entities involved in litigation and the court system. Requiring all of the persons involved in the creation of a business record to appear and testify would disrupt business, prolong the trial of lawsuits and expose the trier of fact to the less reliable memory of the persons creating the records than the records

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[2] *E.g.*, 12 O.S.2011, § 2803(11), (12) (provisions that create exceptions to the rule against hearsay for "statements of births, marriages, divorces, deaths, legitimacy, ancestry, relationship by blood or marriage or other similar facts of personal or family history contained in a regularly kept record of a religious organization" or similar statements of fact of family history "contained in family Bibles, genealogy, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts or tombstones, or the like").

[3] *E.g.*, *Tinney v. State*, 1985 OK CR 165, ¶ 11, 712 P.2d 65, 67 (in prosecution for Grand Larceny of a television from a department store, "admission of a 'log sheet' under the business records exception to the hearsay rule" was upheld on store manager's testimony that "log sheet purported to show when a television set was received by the department store and when it was subsequently sold," and thereby revealed that department store's television that was seen in defendant's possession had not been sold); *Lambert v. State*, 1960 OK CR 49, ¶¶ 7-8, 353 P.2d 150, 152-53 (in the prosecution for sale of an alcoholic beverage without a license, Alcoholic Beverage Control (ABC) Board agent's testimony that defendant did not have a license to sell intoxicating liquor—testimony given without providing information as to how agent knew defendant did not have a license other than agent saying, in response to a question about his knowledge of the ABC Board's records, that he knew about his own territory—was sufficient to make a prima facie case that defendant did not have a license); *Tripp v. State*, 94 Okl.Cr. 231, 232, 237 P.2d 171, 173 (1951) (upholding embezzlement conviction of Justice of the Peace who received $35.00 on behalf of the county that by statute was to be paid by quarterly report to the county but "records of the county treasurer for the months of July, August and September 1946 showed no receipts from any Justice of the Peace" or "[a]t no time subsequent to the proceeding as late as January 1947 does any such deposit as the $35 sum herein involved appear to have been made in the county treasurer's office").

> themselves. The guarantee of reliability is found in employee responsibility to produce accurate records, regularity and continuity in the keeping of the records, the systematic review of records for accuracy and reliance upon the records in the business community.

3 Leo H. Whinery, *Oklahoma Evidence, Commentary on the Law of Evidence* § 30.19 (2d ed. 2000).

Under the business records exception, "the testimony of the custodian or other qualified witness" is required. 12 O.S.2011, § 2803(6). If the State utilizes the testimony of such a witness to prove a probationer's failure to pay or failure to report, then we find, at least for the limited purposes of *Hampton*, that the State has presented more than mere hearsay. This is because, in the context of a violation for failure to pay or failure to report, "the custodian or other qualified witness" *is* an individual having firsthand knowledge of record information evidencing this type of violation. By making that individual available to the probationer for cross-examination and confrontation, whereby a probationer can question whether the proffered records were kept and maintained in a manner required for their admissibility or whether they instead indicate a lack of trustworthiness, the probationer's right to confront the witnesses against him is satisfied for purposes of *Hampton*.

Again we emphasize our decision here is not about the admissibility of these particular DOC records on Appellant's reporting history and whether they met the business or public records exceptions for hearsay. Because Appellant did not challenge whether that proffered record testimony qualified as a hearsay exception, we do not address the admissibility issue, as that issue was conceded. We instead limit our holding to finding that the presentation of a witness as the "custodian or other qualified witness" over business or public records satisfies

Hampton's need for more than pure hearsay in probation revocations alleging failure to pay or failure to report.

In Proposition II, Appellant claims error in the District Court's failure to make a written statement of the evidence relied on in revoking his suspended sentence. In *Tate v. State*, 2013 OK CR 18, ¶ 30, 313 P.3d 274, 283, the defendant argued error occurred in her termination from Mental Health Court "when the trial court failed to adequately state on the record the reasons for the termination." Because the defendant did not raise this claim before the trial court, we found appellate review was waived for all but plain error. *Id.*

In addressing that claim, this Court acknowledged the "require[ment] that a defendant be 'sufficiently apprised of the grounds upon which his sentence is revoked.'" *Id.*, ¶ 33, 313 P.3d at 283. *Tate* recognized, however, that this requirement could be met by means other than through the preferred procedure of a verbal pronouncement on the record of the grounds for revocation that is followed by a formal written order. *Tate* observed that absent this preferred procedure, a probationer remained capable of being adequately apprised of the grounds for revocation or termination by reviewing other portions of the revocation record, such as the hearing transcript and the notations made by the trial court. *Id.*, ¶¶ 33-36, ¶ 313 P.3d at 283-84.

In Appellant's case, we find the record sufficiently apprises Appellant of the grounds for his revocation. This is because the only probation violation the State alleged was Appellant's failure to report and keep current his contact information, and the only evidence offered to support that allegation was testimony that the DOC records did not show Appellant had reported and provided address information since 2012. Proposition II therefore does not reveal reversible error has occurred under the facts in this revocation.

DECISION

The final order of March 24, 2016, partially revoking the suspension order in Washita County District Court Case No. CF-2010-96, is **AFFIRMED**. Pursuant to Rule 3.15, *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2016), **MANDATE IS ORDERED ISSUED** on the filing of this decision.

AN APPEAL FROM THE DISTRICT COURT OF WASHITA COUNTY
THE HONORABLE CHRISTOPHER S. KELLY, ASSOCIATE DISTRICT JUDGE

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OPINION BY: LEWIS, J.
SMITH, P.J.: Concurs
LUMPKIN, V.P.J.: Concurs in Result
JOHNSON, J.: Concurs
HUDSON, J.: Concurs

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