Opinion Analysis: People v. Liggins (2020) 53 Cal.App.5th 55

Overview

In August 2020, the Court of Appeal decided *People v. Liggins*, a criminal case involving a denial of confrontation rights to a defendant in a probation hearing. In ruling that admitting a hearsay statement — under an exception, but without a showing of unavailability or other good cause — violated the probationer's confrontation right, the opinion departed from the decade-old Court of Appeal precedent established in *People v. Stanphill*, which held that due process rights are necessarily satisfied if hearsay is admitted under an established exception. And the *Stanphill* decision appears to conflict with the standard established by the California Supreme Court for resolving such issues. The California Supreme Court, however, declined to review *Liggins* and resolve the conflict, which may give rise to conflicting applications of due process throughout California courts until a resolution is reached.

Analysis

This issue implicates two conflicting foundational principles

Two foundational principles of hearsay lie at the heart of this issue. One is the principle that hearsay is generally not admissible as evidence, barring an exception.[1] The other is the principle that due process requires allowing a criminal defendant to confront witnesses that testify against them.[2] The intersection of these two principles has often presented challenges. When the adverse testimony in question is hearsay, but the declarant is unavailable to be confronted, what rights should be afforded to the defendant?

The high court has not approached this conflict consistently. The U.S. Supreme Court first valued the hearsay exceptions, using them to excuse the denial of confrontation. In *Ohio v. Roberts*,the court centered its ruling on state hearsay law and the inherent reliability of hearsay. In *Roberts*, adverse testimony from a preliminary hearing was admitted under an Ohio statute after the witness failed to appear at trial.[3] The court held that reliability can be inferred in a case where the evidence falls within a firmly rooted hearsay exception, like the exception for former testimony of an unavailable witness.[4] Because the witness was unavailable, but the questioning at the pretrial hearing was inferentially reliable, admitting the previous testimony did not violate the defendant's right to confrontation.[5]

Yet the U.S. Supreme Court later overturned *Roberts* in *Crawford v. Washington*. Like *Roberts*, *Crawford* dealt with the admission of a pretrial statement after the witness refused to appear at trial.[6] In a unanimous opinion, the court abandoned the *Roberts* reliability analysis, because with "countless" factors to consider, using the supposed inherent reliability of a hearsay exception as the touchstone for the analysis was "so unpredictable that it fails to provide meaningful protection from even core confrontation violations."[7] As a result, the court held that the confrontation right requires cross-examination, and the failure to allow cross-examination was a Sixth Amendment violation.[8] The upshot is that even a statement that otherwise would be admissible under the traditional hearsay exception for former testimony did not justify the denial of confrontation.

A strange departure: *People v. Stanphill*

While *Crawford* was limited to confrontation at trial proceedings, it represents a paradigm shift in how courts view the right to confrontation generally. Furthermore, the right to confront adverse witnesses is not limited to trial proceedings — it also plays a crucial role in probation revocation hearings.[9] Probationers are already on thin ice: a court finding that a probationer violated the terms of their probation could lead to a substantial loss of liberty.[10] And the standard in a probation revocation hearing is far easier for the prosecutor to meet: preponderance, not reasonable doubt.[11] Consequently, the stakes for the potential due process problem of denying confrontation for adverse witnesses are even higher.

Even so, the U.S. Supreme Court and the California Supreme Court have held that there is an appreciable difference between probation revocation hearings and merits trials, and that the meaning of due process varies between the two.[12] Therefore, the confrontation right in revocation hearings is not as absolute as it is in trials, and out-of-court statements may, where appropriate, be used in lieu of live testimony.[13]

California courts therefore use a balancing test, established by the California Supreme Court in *People v. Arreola*, to determine whether admitting prior testimony in probation revocation hearings satisfies due process requirements.[14] This test, while separate from the rule in *Crawford,* is still based on the same general principle that the denial of confrontation requires more than a statement's inherent reliability. Instead, if the prosecutor can show good cause for the declarant's absence, a court must then analyze a variety of factors to determine whether admitting the prior testimony without confrontation would amount to a due process violation:

[T]he showing of good cause that has been made must be considered together with other circumstances relevant to the issue, including the purpose for which the evidence is offered (e.g., as substantive evidence of an alleged probation violation, rather than, for example, simply a reference to the defendant's character); the significance of the particular evidence to a factual determination relevant to a finding of violation of probation; and whether other admissible evidence, including, for example, any admissions made by the probationer, corroborates the former testimony, or *whether, instead, the former testimony constitutes the sole evidence establishing a violation of probation.*[15]

The decision in *Stanphill* did not use that factors approach. Instead, the opinion relied on the *Roberts* standard of reliability as the sole determinant for admission, despite the *Crawford* decision five years prior calling that standard into question. In that case, defendant Stanphill was in jail as part of his probation conditions when he allegedly took part in beating a fellow inmate.[16] The sole evidence tying him to the attack was the victim's statement to an officer made shortly after the attack, but the victim later recanted this statement.[17] Under the *Arreola* rule, the absence of any other evidence to establish Stanphill's probation violation should have required confrontation to put that uncorroborated, recanted statement through the "crucible of cross-examination."[18]

The *Stanphill* opinion distinguished *Arreola* because the victim's statement fell under a recognized hearsay exception for excited utterances.[19] The opinion reasoned that excited utterances were a “special breed of hearsay exception which automatically satisfy a probationer’s due process confrontation/cross-examination rights without the court having to find good cause for the witness’s absence under *Arreola*” because they had inherent reliability and superior trustworthiness that made them better than anything likely to be obtained at trial.[20] It was therefore unnecessary to allow Stanphill to confront the victim.[21]

People v. Liggins **calls** ***Stanphill*** **into question**

The California Supreme Court declined to review *Stanphill*, so that decision went unchallenged for over a decade until *Liggins*. There, Liggins allegedly violated his probation by attacking his girlfriend Precious Roy, who at the scene identified Liggins as her attacker.[22] Her statements were admitted in the revocation hearing as excited utterance exceptions to the hearsay rule, despite Roy later recanting all her accusations.[23] The Court of Appeal refused to follow *Stanphill* because of its reliance on the outdated *Roberts* reliability framework, and found that the *Arreola* test for due process could not be satisfied simply because Roy’s statements were inherently more reliable as excited utterances. [24] Doing so would give an “amorphous, if not entirely subjective concept” dispositive weight in the due process analysis.[25] The court held that the prosecutor failed to show that good cause outweighed the confrontation right, as required by the *Arreola* balancing test.[26]

Possible future issues

The *Liggins* decision creates a new split in authority between two Court of Appeal districts. When such conflicts exist in the intermediate appellate courts, trial courts are free to choose to follow either line of authority.[27] This means that either *Stanphill* or *Liggins* might govern in probation revocation hearings, creating unpredictability for counsel, instability in the law, and inconsistent outcomes for defendants. Only the California Supreme Court can resolve this discrepancy.[28] But the court declined to review the matter on its own motion, and denied a request for depublication by the California District Attorneys Association. This split in authority will therefore raise questions that both lawyers and courts will have to answer when faced with similar situations in the future.

First, are *Stanphill* and *Liggins* sufficiently similar factually? In *Stanphill*, the victim recanted out of fear of retaliation, yet in *Liggins* there was no such motivation. This means that the reliability of the *Stanphill* victim (who not only excitedly identified his attacker, but had been so truthful he feared retaliation for his truthfulness) was so overwhelming that even in the face of the *Arreola* test, the statement was admissible despite a lack of confrontation.

And second, should defendants in probation revocation hearings be afforded the higher level of due process that *Liggins* gives them? After all, if there truly is an appreciable difference between probation revocations hearings and merits trials, then perhaps the *Roberts* approach is sufficient for the less-exacting judicial standards in the probation revocation hearing context. Viewed in that light, perhaps the *Stanphill* courtcorrectly viewed the right to confrontation as part of the due process rights afforded to criminal defendants, but not probationers.

But if a probationer has reduced rights relative to a defendant, where should courts draw the line? Which rights are not encompassed in the meaning of "due process" for probationers? To revoke probation based on recanted hearsay that would not be allowed in a merits trial is to hold that probationers are entitled to less due process compared to first-time defendants. It means that a linchpin principle regarding evidence admission should not be extended to probationers because of their prior guilt. That's a tough argument to sell.

Conclusion

As things currently stand, courts will be faced with a decision to follow either *Stanphill* or *Liggins* when considering admission for hearsay statements in probation revocation hearings. This will likely lead to various inconsistent outcomes and confusion amongst trial court judges. But the First District's opinion is a small but important step towards affording probationers the due process that the U.S. Constitution promises them.

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[1] Evid. Code § 1200; Fed. R. Evid. § 802.

[2] U.S. Const., 6th Amend. ("…to be confronted with the witnesses against him").

[3] *Ohio v. Roberts* (1980) at 59.

[4] *Id.* at 66.

[5] *Id*. at 73.

[6] *Crawford v. Washington (2004)* at 40.

[7] *Id.* at 63.

[8] *Id.* at 61, 68.

[9] The right to confrontation in probation revocation hearings, however, does not also stem from the Sixth Amendment's Confrontation Clause. Rather, it stems from the Fourteenth Amendment's Due Process clause. *Gagnon v. Scarpelli (1973)* at 781; *Morrissey v. Brewer (1972)* at 481–82.

[10] *Morrissey* at 482.

[11] *People v. Rodriguez (1990)* at 441.

[12] *Morrissey* at 489 ("We emphasize there is no thought to equate this second stage of parole revocation to a criminal prosecution in any sense."); *People v. Winson (1981)*at 716.

[13] *Winson* at 716.

[14] *People v. Arreola (1994)* at 1160. The Ninth Circuit Court of Appeals later adopted a similar test based on *Arreola. United States v. Comito (1999)* at 1171.

[15] *Arreola* at 1160 (italics added for emphasis).

[16] *People v. Stanphill (2009)* at 65.

[17] *Id.* at 65, 71.

[18] *Crawford* at 61.

[19] *Id.* at 79.

[20] *Id.* at 81 (italics added for emphasis).

[21] *Ibid.*

[22] *People v. Liggins (2020)* at 60.

[23] *Ibid.*

[24] *Id.* at 69.

[25] *Id.* at 68–69 (citing *Crawford* at 63).

[26] *Liggins* at 69.

[27] *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County (1962)* at 456.

[28] *See In re Shannon's Estate (1965)* at 890 ("Harmonizing conflicting decisions is of course a function of the Supreme Court.").