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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 06/26/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0468
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
PATRICK WILLIAM MCMICHAEL,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR1997-003340

The Honorable Jeffrey A. Rueter, Judge Pro Tem

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Appellant Patrick William McMichael (Defendant) appeals the trial court's finding that he violated his probation. The

sole issue on appeal is whether the court's finding that Defendant willfully violated his probation was supported by a preponderance of the evidence. Finding no error, we affirm.

FACTUAL and PROCEDURAL HISTORY

¶2 In June 1997, Defendant pleaded guilty to attempted sexual abuse and attempted molestation of a child, both class 3 felonies. Defendant was sentenced to lifetime probation on both counts.

¶3 As part of his probation, Defendant agreed to abide by sex offender restrictions. Two requirements under the sex offender restrictions are at issue here. Defendant was to "not initiate, establish or maintain contact with any male or female child under the age of 18, or attempt to do so, without the prior written approval of the probation officer." Also Defendant was required to "[a]ttend, and *actively participate* in sex offender treatment and remain in such treatment at the direction of [his] probation officer." (Emphasis added.) Defendant was also required to report to a probation officer and give truthful answers to all inquiries posed by the officer.

¶4 Beginning in October 2009, Defendant was assigned to Probation Officer Jones. In addition to monthly meetings with Jones, Defendant met with Surveillance Officer Kenner on a monthly basis. At the probation violation hearing, Jones testified that she gave Defendant the terms of his probation

during their initial meeting in October 2009. At that time, Defendant was instructed to read over and sign the terms to ensure he understood the restrictions and requirements for probation. When Defendant received the terms in October 2009, it was at least the second time that he read and signed the terms, including his initial receipt of them in 1997.

¶15 Jones testified that Defendant admitted to increased contact with minors. She specified that Defendant told her this often took place on buses where Defendant had conversations and physical contact with minors. She also testified that this happened on numerous occasions over a period of months, indicating that Defendant admitted to "monthly" contact with minors. Specifically, Jones testified that Defendant admitted to contact occurring in December 2010, twice in March of 2011, in April 2011, and in May 2011. Defendant also admitted to Kenner that there were other contacts that were not reported and that he "was having dreams and fantasies of having sex with minors."

¶16 Defendant's admissions concerned Jones because, in her opinion, while some contact with minors is normal and unavoidable, the type and frequency of Defendant's contacts and his physical proximity to the minors during those contacts could have been avoided. Jones opined that Defendant's "behaviors were becoming very high risk to the community." In March 2011, Jones

warned Defendant not to have verbal or physical contact minors and to avoid excessive contact with minors while riding buses.

¶17 Jones and Kenner also testified that in April 2011, Defendant filled out a form in which he admitted unnecessary contact with minors. The form was written and signed by Defendant. Therein, Defendant stated: "I get on buses that have a lot of minors, when I knew that I should either wait for another bus or ride my bike, putting the want and need to get where I'm going over probation rules."

¶18 During this same period of time, in April 2011, Defendant was discharged from sex offender treatment. Jones testified that Defendant was discharged for "[h]igh risk behaviors, and the Defendant failed to redirect those behaviors by seeking assistance from his support system, or addressing these issues with the treatment provider or with the help that he was offered."

¶19 At the hearing, Defendant argued that he did not get on buses with the purpose of having contact with minors and that he attended all treatment sessions until he was involuntarily discharged. However, he did not dispute that on multiple occasions he got on buses knowing that minors were on board and subsequently had contact with them. Defendant also admitted that he did not report all contacts.

¶10 The trial court found the State proved that Defendant willfully violated the terms of his probation. The court reinstated Defendant's lifetime probation and sentenced him to an additional three-months' incarceration as a condition of probation. Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 (2010), and 13-4033.A.1 (2010).

DISCUSSION

¶11 For the trial court to find a probation violation, the State must prove by a preponderance of the evidence that Defendant knew of the probation terms, was given the terms in writing and willfully violated the terms. Ariz. R. Crim P.27.8.b; *State v. Alves*, 174 Ariz. 504, 506, 851 P.2d 129, 131 (App. 1992). We will uphold a trial court's finding that probation terms have been violated "unless the finding is arbitrary or unsupported by any theory of evidence," i.e., unless the court abuses its discretion. *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999). In addition, because the trial court is in the best position to determine the credibility of witnesses, we will not reweigh the evidence and we defer to the court's factual findings if they are supported by any theory of evidence. *Id.*

¶12 In this case, the State alleged Defendant violated the terms of his probation by failing to: (1) avoid contact with minors; and (2) actively participate in sex offender treatment. The trial court found the State proved both allegations by a preponderance of evidence.

Contact with Minors

¶13 Under the terms of his probation, Defendant was forbidden from initiating, establishing, or maintaining contact with minors. At the hearing, the State presented evidence that Defendant was aware of the terms of his probation but was nevertheless having contact with minors. Specifically, during the March 8, 2011 meeting, Jones warned Defendant not to have verbal or physical contact with minors and to avoid excessive contact with minors while riding buses. Defendant ignored that instruction, however, and continued to have verbal and physical contact with minors while riding buses, admitting that he got on buses with minors knowing that to do so was against "probation rules." Defendant also admitted to having verbal and physical contact with minors during an April 12, 2011 meeting with Jones, just one month after she reviewed with Defendant the probation restriction that he avoid contact with minors.

¶14 The court found Defendant violated this term of probation because his contact with minors was "beyond [the] incidental contact that's necessary just to basically function in

society." The court also found that "the contact was avoidable" but Defendant placed himself in situations where "he [was] around minors excessively."

¶15 Based on our review of the record, we cannot say the court abused its discretion. Defendant was aware of his probation terms. His probation officer warned him to avoid contact with minors while riding buses, yet he disregarded that warning and continued to have contact with minors. Accordingly, there was sufficient evidence for the court to determine that Defendant knowingly violated this probation term.

Failure to Participate in Sex Offender Treatment

¶16 Defendant admits that he was discharged from the sex offender treatment program. He contends, however, that merely failing to complete the treatment is not a willful act that can lead to a probation violation. Defendant argues that "[s]ince the decision for [Defendant] to be discharged was not his own, he cannot be found in violation."

¶17 We have previously upheld a probation violation for failing to complete a third-party treatment. See *State v. Elmore*, 174 Ariz. 480, 851 P.2d 105 (App. 1992). In *Elmore*, this court recognized that failing to complete a required treatment or rehabilitation program was sufficient evidence of probation violation, even where the probationer was involuntarily discharged from the program. *Id.* at 483, 851 P.2d at 108. We

reasoned that when a defendant is "adequately notified" of what is required to complete the treatment program, a subsequent failure to follow the requirements of the program constitutes a probation violation. *Id.* at 483-84, 851 P.2d at 108-109.

¶18 In this case, while the court found that Defendant did attend and participate in sex offender treatment, it also found that Defendant was "discharged from the program due to his high risk behaviors and his inability to utilize the tools that he had been given in his treatment to properly . . . curtail the high risk behavior." The court thus concluded that Defendant failed to "actively participate" in treatment, as required by the terms of his probation.

¶19 Accordingly, we find the reasoning and holding in *Elmore* to be applicable to this case. Defendant knew he was required to attend and "actively participate" in treatment. However, his engagement in high risk behavior and failure to apply the tools he learned in treatment led to his discharge from the treatment program. He thus failed to "actively participate" and "remain in such treatment at the direction of [his] probation officer." Therefore, trial court did not err in finding Defendant violated this term of probation.

CONCLUSION

¶20 We find there was sufficient evidence for the trial court to determine that Defendant violated the terms of his probation. We therefore affirm the trial court's ruling.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

JON W. THOMPSON, Judge

/S/

DIANE M. JOHNSEN, Judge