DIVISION ONE
FILED: 10/29/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0428
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
JAMES ALEXANDER DELAROSA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. S8015CR20080719

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Michael T. O'Toole, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
Attorney for Appellant

T H U M M A, Judge

¶1 Defendant James Alexander Delarosa challenges the revocation of his probation for an aggravated assault

conviction. For the reasons set forth below, the revocation is affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 After being charged with aggravated assault of a peace officer, Delarosa pled guilty to aggravated assault, a Class 6 undesignated felony. On October 27, 2008, Delarosa was placed on supervised probation for three years, with various terms including 300 hours community restitution but no jail time. The court allowed Delarosa's counsel to withdraw as attorney of record in November 2008.

¶3 For many months, Delarosa apparently complied with his probation obligations. In November and December 2010, however, Delarosa twice tested positive for marijuana use and failed to drug test as directed on three other occasions. After Delarosa and his probation officer discussed an "intermediate sanction," his probation officer wrote and Delarosa signed the following letter:

> This officer is considering petitioning the Court to have you serve 15 days in the Mohave County Jail as an Intermediate Sanction.
>
> This officer has reason to believe you have violated your probation and I am considering filing a Petition to Revoke Probation. If a

[1] This court views the evidence in the light most favorable to sustaining the conviction and resolves all reasonable inferences against defendant. *State v. Karr*, 221 Ariz. 319, 320, ¶ 2, 212 P.3d 11, 12 (App. 2008).

> Petition to Revoke Probation is filed, you may be arrested or summoned to appear in Court for these alleged violations of your probation.
>
> However, if you feel the Intermediate Sanction of 15 days in the Mohave County Jail is in your best interest, you may sign below. If you do not oppose this action and your probation will be modified by the court, then the alleged violations will not be brought against you if any future Court action is initiated.
>
> I [Delarosa] do not oppose serving 15 days in the Mohave County Jail as an Intermediate Sanction.

On January 4, 2011, Delarosa's probation officer filed a petition and proposed order with the superior court indicating Delarosa had violated probation by testing positive for marijuana and failing to test; stating a belief that 15 days in jail would be an appropriate intermediate consequence; stating the Mohave County Attorney's Office had no objection to the consequence and noting Delarosa "has signed the attached letter stating that he does not oppose the Intermediate Sanction." Accordingly, the probation officer requested an order that Delarosa be ordered to serve 15 days in jail.

¶4 Consistent with Delarosa's stipulation, on January 11, 2011, Superior Court Judge Rick A. Williams ordered Delarosa to serve 15 days in jail with a self-surrender date of "no later than Friday, January 21, 2011, at 6:00 p.m." Delarosa self-surrendered as required. In an order addressing "a jail kite

[note] from [Delarosa while he was in jail] requesting a copy of his court paperwork," Judge Williams noted he

> represented [Delarosa] when he was originally placed on probation. The court signed the order for intermediate sanction of 15 days jail because it was an uncontested issue stipulated by the defendant. The court will recuse itself if any contested issues arise or if requested to do so by either [Delarosa] or the state.

¶5 After serving the agreed-upon 15 days in jail, Delarosa was released but remained on probation. After being released, Delarosa's compliance with probation was spotty. In February, March, April and June 2011, Delarosa failed to drug test as directed. By July 2011, Delarosa had completed 204 of his 300 hours of community restitution but had "not completed any community restitution since September 30, 2010" and had made no payments required by probation "since December 1, 2010." Delarosa and his probation officer then apparently discussed another "intermediate sanction" and, as a result, his probation officer wrote and Delarosa signed a letter "in which [Delarosa] states he does not oppose serving sixty (60) days in the Mohave County Jail as an Intermediate Sanction."

¶6 On July 12, 2011, Delarosa's probation officer filed a petition and proposed order with the superior court indicating Delarosa had violated probation by failing to test, failing to perform community restitution hours and failing to make required

payments; asking that "probation be modified and [Delarosa] be ordered to serve sixty (60) days in the Mohave County Jail as an Intermediate Sanction with probation to terminate upon his release from custody;" stating the Mohave County Attorney's Office had no objection and noting Delarosa "has signed the attached letter stating that he does not oppose the Intermediate Sanction."

¶7 Consistent with this stipulation, on July 20, 2011, Judge Williams issued an order modifying Delarosa's probation, ordering Delarosa to serve 60 days in jail with a self-surrender date of "no later than August 1, 2011, at 5:00 p.m. with his probation to terminate upon his release from custody." Delarosa, however, failed to report on August 1 as ordered. On August 5, 2011, Delarosa filed a request acknowledging that he failed to comply with the self-surrender date and asking the date be continued for a week. Later that same day, Delarosa's probation officer filed a petition to revoke probation, alleging Delarosa failed to self-surrender on August 1 as ordered. Judge Williams issued a bench warrant for Delarosa's arrest and Delarosa surrendered to the jail on August 18, apparently after learning of the warrant.

¶8 From that point forward, the case was transferred to Superior Court Judge Steven F. Conn. The same day he was taken into custody, Delarosa requested the appointment of an attorney

and an attorney was appointed to represent him. Delarosa was held in custody continuously from August 18 until November 11, 2011. After several hearings and continuances, a contested probation violation hearing was held on October 19, 2011.

¶9 On October 19, 2011, Delarosa filed a motion to dismiss, asking that the petition to revoke probation be dismissed because the order requiring his August 1 self-surrender was signed by Judge Williams, who had an impermissible conflict because he had represented Delarosa in the underlying assault case. Delarosa claimed that conflict meant the self-surrender order was invalid and unenforceable and could not provide the basis for a probation violation claim. After hearing argument, Judge Conn denied the motion to dismiss and, after receiving evidence and argument, found the State had proven by a preponderance of the evidence a violation of Supervised Probation Uniform Condition 15 (requiring Delarosa to "[c]omply with any written directive of the [Adult Probation Department] to enforce compliance with the conditions of probation"). At a disposition held November 8, 2011, Judge Conn reinstated Delarosa on probation, designated the offense a felony, ordered Delarosa to serve an additional three days in jail and terminated his probation upon release from jail. Without objection, at the conclusion of the disposition hearing, Delarosa's counsel was allowed to withdraw as attorney of

record. Delarosa served the three additional days and was released from jail and probation on or about November 11.

¶10 On November 21, 2011, Delarosa's previously-appointed counsel filed a notice of post-conviction relief (PCR) asking that new counsel be appointed in his PCR proceeding challenging the court's "jurisdiction to consider the Petition to Revoke Probation due to the fact that the defendant's former counsel was now the judge presiding over orders that were the legal basis for the petition to revoke." Noting Delarosa's counsel had withdrawn on November 8, and expressing concern about Delarosa's failure to appeal from the disposition, Judge Conn appointed new counsel for Delarosa. In late January 2012, Delarosa's new counsel filed a PCR petition, acknowledging that Delarosa should have filed a notice of appeal from the disposition but improperly failed to do so, and sought to take a delayed appeal from that November 8 disposition. Although the State opposed the petition, following an evidentiary hearing, Judge Conn allowed Delarosa to file a delayed notice of appeal.

¶11 On June 29, 2012, Delarosa filed a timely notice of delayed appeal from Judge Conn's "finding of a violation of probation and disposition related to same, which became final on 11-8-11." This court has jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised

Statutes (A.R.S.) sections 12-120.21(A)(1)(1992), 13-4031 and 13-4033 (2013).[2]

DISCUSSION

I. This Court Lacks Appellate Jurisdiction Over The July 20, 2011 Order.

¶12 Delarosa does not purport to challenge the 15-day intermediate sanction order. Although attempting to challenge the 60-day intermediate sanction order entered July 20, 2011, Delarosa did not file a timely appeal from that order and the time to do so has long since passed. *See, e.g.*, A.R.S. § 13-4033(A)(1) and (3); Ariz. R. Crim. P. 31.3(a). Moreover, Delarosa's delayed appeal from the November 8 disposition order cannot be used to bootstrap an untimely appeal from the July 20, 2011 order. *See State v. Gessner*, 128 Ariz. 487, 488, 626 P.2d 1119, 1120 (App. 1981) (citing cases). "The filing of a timely notice of appeal is essential to the exercise of jurisdiction by this court." *State v. Littleton*, 146 Ariz. 531, 533, 707 P.2d 329, 331 (App. 1985) (citation omitted).

¶13 In the alternative, Delarosa asks this court to accept special action jurisdiction over his challenge to the July 20, 2011 order, raising for the first time on appeal a generalized "due process" argument. In doing so, Delarosa argues that "[a]

[2] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

court may not modify probation in such a way that an additional burden or limitation is imposed on a defendant's liberty without complying with . . . constitutional due process requirements," which he claims included "notice of the allegations," "the right to counsel, and the right to a hearing to confront witnesses and present evidence." Factually and legally, Delarosa's arguments miss the mark.

¶14 Factually, Delarosa had known of his community restitution and payment obligations since October 2008 and presumably knew whether he was complying with those obligations in the first half of 2011. Similarly, Delarosa knew whether he was ordered to submit to drug testing and knew whether he failed to do so in February, March, April and June 2011. And Delarosa had agreed to an intermediate sanction months before the July 20, 2011 order. Delarosa's probation officer gave him notice of the proposed intermediate sanction prior to the July 20, 2011 order and gave him the opportunity to agree to the intermediate sanction or not agree and, instead, participate in a probation revocation proceeding, where he would have the right to counsel and an evidentiary hearing. *See* Ariz. R. Crim. P. 27.7, 27.8. In response, Delarosa signed the letter stating he did not oppose the 60-day intermediate sanction. Delarosa was given notice and, had he not agreed to the intermediate sanction, would have been provided counsel and an evidentiary hearing at any resulting

petition to revoke probation. By agreeing to the intermediate sanction, however, Delarosa did not admit to any probation violation; instead, he agreed to modify his probation by accepting an intermediate sanction in lieu of any admission or finding that he violated probation.

¶15 Legally, Delarosa is wrong in claiming that he has a due process right to counsel and an evidentiary hearing for a modification of probation, as opposed to a petition to revoke probation. *Compare* Ariz. R. Crim. P. 27.3 ("Modification and clarification of conditions and regulations") *with* Ariz. R. Crim. P. 27.2, 27.8 (addressing petition to revoke probation). None of the cases Delarosa cites provide the rights he claims as applied to his case.[3] Instead, Delarosa asks the court to graft onto a probation modification case law addressing rights in a probation revocation proceeding. The court declines that invitation.

[3] *See State v. Korzuch*, 186 Ariz. 190, 195, 920 P.2d 312, 317 (1996) (extending probation term required notice to defendant; "In this case, there was neither notice nor any attempt at notice.") (3-2 decision); *In re Richard M.*, 196 Ariz. 84, 86, 993 P.2d 1048, 1050 (App. 1999) (following *Marie G.* and finding probation violation for juvenile's failure to drug test could only be based on written notice to test) (2-1 decision regarding written notice requirement); *In re Marie G.*, 189 Ariz. 632, 634, 944 P.2d 1246, 1248 (App. 1997) (juvenile case holding notice and opportunity to be heard was required to impose detention for positive drug test); *State v. Benson*, 176 Ariz. 281, 282, 860 P.2d 1334, 1335 (App. 1993) (requiring notice to defendant before undesignated offense may be designated a felony).

¶16 The concurrence suggests there may be a right to counsel for certain types of probation modifications under Ariz. R. Crim. P. 27.3. The concurrence correctly states that no rule expressly provides such a right and the concurrence cites no case holding such a right exists. The rules appear to properly recognize a dichotomy where a modification or clarification of probation does not implicate a right to counsel, while a revocation of probation does invoke such a right. *Compare* Ariz. R. Crim. P. 27.3 ("Modification and clarification of conditions and regulations") *with* Ariz. R. Crim. P. 27.2, 27.8 (addressing petition to revoke probation). Stated differently, under the rules, the issue is whether the action properly is a modification or clarification of probation (which does not implicate a right to counsel) or a revocation of probation (which does). Had Delarosa made a timely challenge with this court, there is a serious question whether the July 20, 2011 order was a proper modification of probation, particularly given that no deferred jail time had been imposed at the October 27, 2008 disposition. *See* Ariz. R. Crim. P. 27.3. Delarosa, however, failed to do so. Accordingly, nothing in this decision should be read to suggest that a defendant has a right to counsel for a modification or clarification of probation properly sought pursuant to Ariz. R. Crim. P. 27.3.

¶17 In short, Delarosa failed to take a timely notice of appeal from the July 20, 2011 order or seek to file a delayed appeal from that order and the time to do so has long since passed. Accordingly, this court lacks appellate jurisdiction over that order. For this same reason, the court declines Delarosa's request to exercise special action jurisdiction over the July 20, 2011 order. *Cf. Silver v. Rose*, 135 Ariz. 339, 342, 661 P.2d 189, 192 (App. 1982) (noting, in dicta, court properly would "decline jurisdiction" if "special action were nothing more than an untimely appeal in disguise"), *disavowed on other grounds* in *Maricopa County Juvenile Action No. JS-4997*, 140 Ariz. 210, 211, 680 P.2d 1271, 1272 (App. 1984); *see also State ex rel. Nelly v. Rodriguez*, 165 Ariz. 74, 76, 796 P.2d 876, 878 (1990) (noting Arizona's strong policy against using special actions as substitutes for appeals). Thus, this court lacks jurisdiction over the July 20, 2011 order.

II. Judge Conn Properly Found Delarosa Violated Probation.

¶18 Delarosa claims Judge Conn's probation violation finding and the resulting disposition cannot stand because the violation finding was premised on the July 20, 2011 order, which was entered in violation of Arizona's Code of Judicial Conduct and therefore is invalid and unenforceable. Delarosa's argument

turns on the proposition that the July 20, 2011 order was void and, therefore, could be disobeyed without consequence.[4]

¶19 Contrary to Delarosa's argument, Arizona recognizes a distinction between an order that is "void" and one that is "voidable."

> A judgment or order is void if the court entering it lacked jurisdiction: (1) over the subject matter, (2) over the person involved, or (3) to render the particular judgment or order entered. [By contrast, a] voidable judgment [or order] is one in which the court has jurisdiction over the subject matter and parties but which is otherwise erroneous and subject to reversal. *A judgment that is voidable is binding and enforceable and has all the ordinary attributes of a valid judgment until it is reversed or vacated*.

State v. Cramer, 192 Ariz. 150, 153, ¶ 16, 962 P.2d 224, 227 (App. 1998) (emphasis added). As applied, the superior court clearly had jurisdiction over Delarosa, over this case and to modify probation terms. *See, e.g.*, *State v. Maldonado*, 223 Ariz. 309, 312, ¶ 19, 223 P.3d 653, 656 (2010); *see also* Ariz. R.

[4] Without elaboration, Delarosa challenges Judge Conn's designating the offense a felony. If Delarosa's challenge is based on his arguments regarding the July 20, 2011 order, that challenge fails as described below. Otherwise, at the time the offense was designated a felony, Delarosa was represented by counsel and had an opportunity to address Judge Conn in open court. Delarosa has provided no independent challenge to the hearing where the offense was designated a felony. *See* A.R.S. § 13-604. Accordingly, the court rejects Delarosa's summary challenge to Judge Conn designating the offense a felony.

Crim. P. 27.3.[5] Accordingly, any conflict by Judge Williams meant that his orders were voidable, not void. *See, e.g.*, *Conkling v. Crosby*, 29 Ariz. 60, 67-68, 239 P.2d 506, 509 (1925) (acts of judge laboring under "disqualification" do not affect jurisdiction and are voidable but not void); *see also Doe ex rel Doe v. Publix Super Markets, Inc.*, 814 So. 2d 1249, 1251 (Fla. Dist. Ct. App. 2002) (similar) (citing cases); *Pierce v. Pierce*, 39 P.3d 791, 800 (Okla. 2001) (similar) (citing cases); *State v. McDonnell*, 176 P.3d 1236, 1244 (Or. 2007) (similar) (citing cases).

¶20 Had Delarosa timely appealed from the July 20, 2011 order, that decision might have been subject to being voided. Delarosa, however, failed to do so and, instead, let the time for an appeal pass. Therefore, Judge Conn correctly concluded at the revocation hearing that the July 20, 2011 order was, at most, "voidable;" had not been voided and, accordingly, was valid and enforceable. *Cramer*, 192 Ariz. at 153, 962 P.2d at 227. As a result, Judge Conn did not err as a legal matter in determining whether Delarosa violated his probation as modified

[5] *State v. Chacon*, 221 Ariz. 523, 212 P.3d 861 (App. 2009), relied upon by Delarosa, is distinguishable. *Chacon* held that the superior court did not have jurisdiction to consider a petition to revoke probation after "the probationary period had expired." 221 Ariz. at 526, ¶ 8, 212 P.3d at 864. In this case, the July 20, 2011 order and the August 5, 2011 petition to revoke were both filed before Delarosa's probation grant expired.

in the July 20, 2011 order. *See id*. at 153-54, ¶ 17, 962 P.2d 227-28 (noting "voidable" order is valid and binding until vacated or voided).

¶21 Factually, Delarosa testified at the revocation hearing and admitted knowing he had to self-surrender by 5:00 p.m. on August 1, 2011 as required by the July 20, 2011 order. Delarosa testified he made a decision not to do so and that his failure to self-surrender was not caused by any impossibility. Judge Conn found Delarosa violated his probation by not surrendering at the designated date and time as required by the July 20, 2011 order. The evidence of record supports that finding, meaning the probation violation finding and resulting disposition was not error. *State v. Thomas*, 196 Ariz. 312, 313, ¶ 2, 996 P.2d 113, 114 (App. 1999).

CONCLUSION

¶22 The revocation of Delarosa's probation and resulting disposition is affirmed.

/S/_____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/_____
MAURICE PORTLEY, Presiding Judge

K E S S L E R, Judge, specially concurring:

¶18 I concur with the majority and in the result in this matter, except on the issue of Delarosa's due process challenge to the "intermediate sanction orders." I agree with the majority that we do not have jurisdiction over that challenge because of his failure to timely appeal from those orders. However, the "intermediate sanction process" used by the State here raises serious due process concerns. I address those concerns because they easily can be avoided in the future simply by ensuring that a probationer has the opportunity to receive advice of counsel, and to have counsel review a suggested stipulated intermediate sanction.

¶19 Essentially, the issue is what due process rights Delarosa had before an "intermediate sanction" could be imposed on him. Regardless of what we call that sanction, it amounts to a modification of his probationary terms, and in this case, resulted in a loss of liberty short of revocation of probation. As such, Delarosa had a due process right to notice of the proposed modification. *See State v. Korzuch*, 186 Ariz. 190, 193-94, 920 P.2d 312, 315-16 (1996). The record shows that Delarosa was given notice of the proposed modification by his probation officer. He was also given the opportunity to agree to the intermediate sanction or to reject it in favor of a revocation proceeding. At such a proceeding, Delarosa would

have had the benefit of counsel, including the right to consult with counsel. *See* Ariz. R. Crim. P. 6.1(a), 6.1(a) cmt., 27.7.

¶20 The question that remains is whether Delarosa had a due process right to counsel at the time of the proposed modification and the corresponding right to a full colloquy before he waived his rights to counsel. None of our criminal rules of procedure expressly provide for the right to counsel at a hearing to consider a court-ordered modification of the terms of probation. However, there is some authority that a defendant at a modification of probation proceeding might have a right to counsel. Although in *Korzuch* there was no notice to the defendant of the proposed modification, the court posited the issue as whether a "modification without any attempted notice to the probationer or his counsel violates the probationer's rights." 186 Ariz. at 192, 920 P.2d at 314. *Korzuch* relied in part on *Nieuwenhuis v. Kelly*, 164 Ariz. 603, 606, 795 P.2d 823, 826 (App. 1990). In *Nieuwenhuis*, we held that the defendant's due process rights at a probation modification hearing were met because he had notice of the hearing, his counsel filed a memorandum on the proposed modification and he and his counsel attended the hearing. *Id.* This would imply that any court-approved modification of probation terms requires a right to counsel unless the defendant waives that right after the appropriate colloquy. *See* Ariz. R. Crim. P. 6.1(c). Anything

short of that would make notice hollow—a probationer facing a court-ordered modification of probation, especially including jail time short of a revocation hearing, would be at the mercy of the probation officer and the court without the assistance of counsel.

¶21 Further support for the right to counsel and a colloquy before waiving counsel for a proposed court-ordered modification can be found in Arizona Rule of Criminal Procedure 27.9. That rule provides for a colloquy informing the probationer of the right to counsel in a revocation proceeding before the court accepts an admission by the probationer that he or she has violated a term of probation. Although Delarosa did not expressly admit to any probation violation at a revocation hearing, his agreement to an interim sanction has all the earmarks of an admission because Delarosa was essentially agreeing to jail time not provided for in his original probation. It is unlikely Delarosa was voluntarily agreeing to jail time absent a probation violation.

¶22 Interim sanctions short of a probation revocation proceeding may have significant efficiencies. They would allow probation officers and the court to deal with what might be minor alleged probation violations without subjecting the probationer to a full-blown revocation hearing. Such a result might be in the probationer's best interests. However, it is

difficult for a probationer to know whether the interim sanction/modification is in his or her self-interest when he has no right to advice of counsel.

¶23 I agree with the majority that we lack jurisdiction over any possible appeal from the sanction orders. Nor do I think we should remedy the lack of any timely appeal by treating the appeal on this issue as a special action. *See State ex rel. Nelly v. Rodriguez*, 165 Ariz. 74, 76, 796 P.2d 876, 878 (1990) (noting Arizona's strong policy against using special actions as substitutes for appeals). However, I think that the superior court and the adult probation departments should be aware that using interim sanctions/modification proceedings without offering the defendant the opportunity to seek advice of counsel, or for a formal waiver of counsel after a colloquy, might violate the probationer's due process rights and, in the appropriate case, require reversal of the interim sanction.

/S/_____
DONN KESSLER, Judge