IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DAVID ERNEST VAUGHN, *Appellant*.

No. 1 CA-CR 13-0065
FILED 12-19-2013

Appeal from the Superior Court in Yuma County
No. S1400CR200200612
The Honorable Lisa W. Bleich, Judge *Pro Tem*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Terry M. Crist

Counsel for Appellee

Terri L. Capozzi, Yuma

Counsel for Appellant

MEMORANDUM DECISION

Judge Margaret H. Downie delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

D O W N I E, Judge:

¶1 David Ernest Vaughn ("Vaughn") appeals from the revocation of his probation and his sentence to the Arizona Department of Corrections. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Vaughn was charged with five counts of child molestation and seven counts of sexual conduct with a minor in June 2002. The State alleged that the crimes occurred between 1993 and 1997, when the four named victims were each under 15 years of age.

¶3 On August 13, 2002, Vaughn pled guilty to two counts of attempted child molestation, each a class 3 felony and dangerous crime against children that occurred in 1993 (amended count 1) and 1995 (amended count 11). The plea agreement stipulated that Vaughn would receive an aggravated sentence of 13 years in prison on count 1, followed by lifetime probation on count 11 upon his release from prison. On September 10, 2002, the trial court sentenced Vaughn as stipulated. The court advised Vaughn that the terms of probation included a prohibition against using alcohol, as well as drug and alcohol testing. Vaughn did not object or otherwise challenge the plea agreement, the terms of his probation, or his sentence.

¶4 On August 19, 2011, after being released from prison, Vaughn began serving lifetime probation on count 11. He was reminded that one of the terms of probation prohibited him from drinking alcohol. On October 6, 2012, Vaughn's surveillance officer administered a breathalyzer test, and Vaughn tested positive for alcohol.

¶5 The probation officer moved to revoke Vaughn's probation. After a hearing, the trial court found that Vaughn violated his probation by consuming alcohol. Prior to sentencing on January 23, 2013, the court

held a mitigation hearing at which it heard argument regarding the appropriate disposition. The court ruled "that suspension of sentence and a term of probation" was not appropriate, revoked Vaughn's probation, and sentenced him to 10 years in prison on count 11.

¶6 Vaughn timely appealed. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031 and -4033.

DISCUSSION

¶7 Although Vaughn appeals from the revocation of his probation in January 2013, he first argues we must vacate and remand for resentencing as to count 11 because his 2002 sentence to lifetime probation was an illegal sentence. He relies on *State v. Peek*, 219 Ariz. 182, 183-85, ¶¶ 8-10, 20, 195 P.3d 641, 642-43 (2008), wherein our supreme court held that lifetime probation cannot be imposed for "attempted" child molestation offenses committed between January 1, 1994 and July 20, 1997. When Vaughn committed the count 11 offense in 1995, the maximum period of probation for a class 3 felony was 5 years. A.R.S. § 13-902(A)(2); *Peek*, 219 Ariz. at 182-83, ¶¶ 2, 5, 195 P.3d at 641-42.

¶8 The State responds that we lack jurisdiction to review the original sentence because Vaughn failed to timely challenge it through a Rule 32, Arizona Rules of Criminal Procedure, petition and cannot now collaterally attack it more than ten years later.[1] *See* Ariz. R. Crim. P. 32.4(a) (notice in "of-right" Rule 32 proceeding to be filed within 90 days after entry of judgment and sentence). The State further contends that any error in the original sentence for count 11 is harmless because Vaughn's probation term commenced in August 2011, and the revocation occurred well within the five-year probationary term to which Vaughn now claims entitlement.

¶9 We agree with the State. If we were to remand for resentencing, and Vaughn received the five-year probationary term he contends is required under *Peek*, the result would be the same. Vaughn's probation violation in October 2012 and the revocation of his probation in January 2013 both occurred well within that five-year period. As a result,

[1] Because Vaughn entered into a plea agreement, he waived his right to a direct appeal and was restricted to review under Rule 32. Ariz. R. Crim. P. 17.1(e).

Vaughn has demonstrated no prejudice. *See, e.g., State v. Smith*, 219 Ariz. 132, 135-36, ¶¶ 19, 21, 194 P.3d 399, 402-03 (2008) (Appellate courts review unopposed legal errors in sentencing for fundamental error, which requires proof of prejudice.).

¶10 Vaughn also contends the court abused its discretion by revoking his probation and sentencing him to prison "where the only violation involved two instances of alcohol abuse." He contends the court failed to conduct an adequate investigation or to consider alternatives to imprisonment. We conclude otherwise.

¶11 Whether to revoke probation lies within the sound discretion of the trial court. *State v. Edge*, 96 Ariz. 302, 304, 394 P.2d 418, 419 (1964). We review a decision to revoke probation for an abuse of discretion. *State v. Stotts*, 144 Ariz. 72, 86-87, 695 P.2d 1110, 1124-25 (1985). We will not find an abuse of discretion in sentencing unless the trial court's "decision is characterized by arbitrariness, capriciousness, or failure to conduct an adequate investigation into the facts relevant to sentencing." *State v. Blanton*, 173 Ariz. 517, 519, 844 P.2d 1167, 1169 (App. 1992) (citation omitted).

¶12 The record reflects that, prior to sentencing, the court considered a disposition report provided by defense counsel that proposed alternatives to incarceration, as well as a presentence report prepared by the probation officer. At Vaughn's request, the court held a mitigation hearing. Although the prosecutor left the ultimate disposition to the court's discretion, he argued that "just placing [defendant] back on probation without some type of consequences" would be inappropriate and that the presumptive ten-year prison term was appropriate if the court were to sentence Vaughn to prison. Vaughn's probation officer also recommended that probation be revoked and that the court impose the presumptive ten-year prison term.

¶13 Vaughn argues it was overly harsh to sentence him to prison for "two instances of alcohol use" after he was on probation for only 14 months. But while the revocation petition may have been based on only two such violations, it is clear from the record that Vaughn used alcohol previously while on probation. Vaughn's own disposition report notes five other instances, beginning in September 2011, when he "tested positive" for alcohol and was "admonished" or told there would be "serious consequences" if he continued using alcohol. Despite the fact Vaughn was either incarcerated or directed to attend the probation

department's "relapse program" on these occasions, he continued to consume alcohol.

¶14 There was also a direct link between the child molestation offenses and Vaughn's use of alcohol. When he pled guilty to the underlying offenses, Vaughn admitted he was under the influence of alcohol or drugs when he committed the charged offenses. That admission influenced the probation officer's recommendation to revoke probation. As she stated in her report, "defendant's continued behavior is a concern not only because it is a violation of his conditions of probation but also due to the statements made by the defendant when he was interviewed for his presentence report . . . [that] [h]e was under the influence of alcohol or drugs every time." It is clear from the transcript of the sentencing hearing that the trial court was concerned that Vaughn had failed to address his issues with alcohol. Based on the record before us, we find no abuse of discretion.

CONCLUSION

¶15 For the foregoing reasons, we affirm the revocation of Vaughn's probation and his sentence.