DIVISION ONE
FILED: 12/08/09
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0797
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
FRANK PATRICK TUCCIO,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-105983-001 DT

The Honorable Jaime B. Holguin, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Frank Patrick Tuccio (Defendant) appeals the revocation of his probation and the sentence imposed.

¶2 Defendant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this court that after a search of the entire appellate record, he found no arguable question of law that was not frivolous. Despite counsel's brief, Defendant requested counsel raise the following issues on appeal: (1) suppression of evidence[1]; (2) sufficiency of the evidence; (3) inability of Defendant to call a witness; (4) the trial court's decision not to mitigate Defendant's sentence; and, (5) the court's decision to impose a five-year sentence, despite an earlier "promise" of a shorter sentence. Defendant was afforded an opportunity to file a supplemental brief in propria persona, but he did not do so.

¶3 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). 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

[1] Defendant does not specifically identify what evidence was suppressed. However, a review of the record, including Defendant's petition for post-conviction relief, indicates Defendant is most likely referring to the alleged disclosure violations which occurred at trial.

(2002), 13-4031, and -4033.A.1 (Supp. 2008).[2] Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶4 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996).

¶5 Pursuant to a plea agreement, on November 8, 2005, Defendant pled guilty to the charge of possession of a dangerous drug for sale in an amount below the statutory threshold. The agreement did not provide for a specific sentence term. However, Defendant and the State agreed, in part, that if the court sentenced Defendant to probation he would serve at least six months in jail, receive "white collar"[3] terms of probation, and if sentenced to the Department of Corrections that Defendant's term would not exceed the statutory presumptive term of five years.

---

[2] We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

[3] White collar terms required Defendant to: (1) obtain written permission before incurring financial obligations or opening new banking accounts; (2) submit accounting records as directed; (3) release banking and financial information as requested; (4) submit copies of financial documents, including tax returns and household income; (5) refrain from gambling; (6) obtain written permission prior to using computer equipment or accessing the internet; (7) make restitution payments; and, (8) notify employers of current convictions.

¶6 On January 13, 2006, the trial court sentenced Defendant to intensive, supervised probation for a period of five years. The court further ordered that he be incarcerated for six months, pay restitution, and serve 360 hours of community service. Defendant's terms of probation included several requirements, including: (1) to report to the Adult Probation Department (APD) within 72 hours of release from residential treatment; and (2) to submit to weekly drug and alcohol testing as required by the APD.

¶7 On July 27, 2006, and again on August 18, 2006, Defendant violated his terms of probation for failure to complete mandatory drug testing. In both instances, Defendant's probation officer requested Defendant be required to submit to more frequent drug testing. The trial court approved these requests.

¶8 On September 25, 2006, after Defendant tested positive for methamphetamine on August 30, 2006, September 5, 2006, and September 14, 2006, Defendant's probation officer recommended Defendant be placed in an inpatient-treatment program. On October 26, 2006, Defendant's probation officer filed a petition to revoke his probation. After a disposition hearing on October 27, 2006, Defendant's probation was reinstated. Defendant was ordered to enroll in the Salvation Army Adult Rehabilitation Center (ARC) beginning on October 30, 2006. On November 14,

2006, Defendant's probation was reduced from level I to level V due to his inpatient status.

¶9 Defendant was directed to remain in the ARC program unless he received prior approval from the intensive probation team to withdraw. He was also directed to report the dates, times, and locations of all meetings he attended to his probation officer. Defendant acknowledged he understood the terms of his probation and that it was his responsibility to comply with the court's orders.

¶10 On March 13, 2007, Defendant was prematurely terminated from the ARC program. After his termination from the program, Defendant did not make contact with his probation officer within 72 hours of his withdrawal, as required by the terms of his probation. Defendant contacted his probation officer on March 20, 2007. On March 21, 2007, Defendant's probation officer signed a petition to revoke his probation.[4] On March 28, 2007, the court held a revocation arraignment at which Defendant denied violating the terms of his probation. The court scheduled a non-witness violation hearing for April 18, 2007. This hearing was continued to May 8, 2007.

[4] Defendant's probation officer testified at the hearing that the petition to revoke probation was filed on March 21, 2007. The signature on the petition is dated March 21, 2007. However, the record reflects that the petition was not filed until August 9, 2007. There is no explanation for the length of time between the signing of the petition and its filing.

¶11 Despite the revocation petition, Defendant was still required to attend mandatory drug testing. However, on April 12, 2007, Defendant's probation officer signed a Notification of Drug Use/Testing Violation indicating Defendant's missed testing on March 29, 2007, as further justification for revoking Defendant's probation.[5]

¶12 The violation hearing began on May 8, 2007, and continued on May 30, 2007. At the hearing, the State alleged five violations of the terms of Defendant's probation.[6]

¶13 The first allegation was due to Defendant's failure to report as directed. It was further alleged that by failing to report, Defendant absconded and violated curfew. Defendant's probation officer testified that Defendant failed to timely report his departure from the ARC inpatient-treatment program. Defendant's probation officer testified that Defendant was released from the ARC on March 13, 2007. He also testified that the APD ordered Defendant to report if he was discharged from the ARC. Defendant's probation officer testified that Defendant failed to report to the APD until March 21, 2007, one week later than required.

---

[5] The supplemental petition was also filed on August 9, 2007; again there is no explanation in the record for the delayed filing of the supplemental petition.

[6] The alleged violations included: failing to submit to drug testing; failing to report to the APD as directed; absconding; failing to participate in the ARC program; and violating curfew.

¶14 The State also alleged that Defendant's early termination from the ARC constituted a violation of the terms of Defendant's probation. Defendant's probation officer testified that Defendant was prematurely terminated from the ARC for failing to follow rules regarding outside contact. Defendant's probation officer based his testimony on a report obtained from a surveillance officer. However, the State failed to disclose this report to Defendant prior to the hearing.

¶15 Defendant moved to strike the probation officer's testimony regarding Defendant's premature termination because the State failed to disclose the surveillance officer's report. Defendant also requested the dismissal of the case based on the disclosure violation. The court did not dismiss the case; however, it did strike all testimony based on the surveillance officer's report. As a further sanction, the court dismissed the probation violations related to Defendant's early termination from the ARC.

¶16 Finally, the State alleged that Defendant failed to complete required drug testing. Defendant's probation officer testified that Defendant failed to submit to mandatory drug testing on March 29 and April 4, 2007. In addition to the probation officer's testimony, the State introduced a letter from a Treatment Assessment Screening Center (TASC) laboratory supervisor stating that the Defendant did not submit to drug

testing on March 29 and April 4, 2007. However, Defendant testified at the hearing that he had completed drug testing and produced receipts from TASC.

¶17 At the conclusion of the hearings, the court found Defendant violated the terms of his probation by failing to report to the APD as directed and for not completing mandatory drug testing. The court sentenced Defendant to the presumptive term of five years with the Arizona Department of Corrections. Defendant received 196 days presentence incarceration credit.[7]

DISCUSSION

Evidence Suppression/Disclosure Violation

¶18 Defendant argues that evidence was unconstitutionally suppressed by the State. Defendant raised the same argument in his petition for post-conviction relief (PCR) but he described the issue as a disclosure violation. In his PCR, Defendant based his argument on the State's failure to disclose the surveillance officer's report, which explained Defendant's premature termination from the ARC. Although Defendant identifies this argument as an unconstitutional suppression of evidence, we believe he is contesting the State's failure to

[7] We note that in reviewing the record, the trial court miscalculated Defendant's presentence incarceration credit. Defendant was entitled to 194 days of credit. Because this error favors the Defendant and the State has not filed a cross-appeal, this error will not be corrected. *See State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990).

disclose the surveillance officer's report. Therefore, we treat this issue as a failure to properly disclose evidence.

¶19 Defendant argues that the State's failure to disclose this evidence should have resulted in the dismissal of his entire case. This court will not reverse the judgment of the trial court for disclosure violations unless the Defendant can demonstrate an abuse of discretion and that the abuse prejudiced the Defendant. *State v. Nordstrom*, 200 Ariz. 229, 251 ¶ 71, 25 P.3d 717, 739 (2001). Arizona Rule of Criminal Procedure 15.1 requires the State to disclose reports prepared by law enforcement relating to alleged offenses. Ariz. R. Crim. P. 15.1.b(3). Defense counsel may remedy a failure by the State to disclose evidence by motioning the court to compel disclosure and apply appropriate sanctions. Ariz. R. Crim. P. 15.7.a. The court has discretion under the Rules to apply sanctions including, but not limited to: (1) excluding the evidence; (2) dismissing the case; and, (3) holding a party in contempt. *Id.* The court may also impose any other sanctions it deems appropriate. *Id.* A trial court is not required to dismiss a case for disclosure violations and before dismissing a case with prejudice, a court should consider whether a less stringent sanction would be more appropriate. *See State v. Meza*, 203 Ariz. 50, 58, ¶ 37, 50 P.3d 407, 415 (App. 2002).

¶20 In this case, Defendant fails to allege or substantiate any prejudice he may have suffered as a result of the trial court's decision. The State violated Rule 15.1 when it failed to timely disclose a document containing the rationale for Defendant's early dismissal from the ARC. However, the court struck testimony and dismissed allegations of probation violations based on this evidence. The court was not obligated to dismiss the entire case as the State presented sufficient evidence to support the remaining charges. *Id.* We find no reversible error.

Sufficiency of Evidence

¶21 Defendant alleges that there was insufficient evidence to support the revocation of his probation. This court will not disturb the fact finder's decision if there is sufficient evidence to support its verdict. *See State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). Probation violations must be established by a preponderance of the evidence. Ariz. R. Crim. P. 27.8.b(3).

¶22 Defendant's terms of probation included a requirement to complete drug testing as ordered by the APD. At the hearing, Defendant's probation officer testified that Defendant failed to comply with this requirement. The State also introduced a letter from a TASC supervisor stating that Defendant did not complete drug testing on March 29, 2007 and April 4, 2007.

¶23 Defendant was also required to keep the APD aware of his status at the ARC. Defendant's probation officer testified that Defendant failed to report to the APD following his release from the ARC as ordered. Because the State presented sufficient evidence to that Defendant violated the terms of his probation, we affirm the trial court's decision.

Inability to Call a Witness

¶24 Defendant alleges that he was unable to call a witness on his behalf. Defendant made a similar argument in his PCR, citing an inability to subpoena a TASC clerk familiar with his drug testing. A defendant is entitled to compel the testimony of witnesses under the Sixth Amendment when their testimony is material and in favor the defendant. *State v. Rosas-Hernandez*, 202 Ariz. 212, 216, ¶ 10, 42 P.3d 1177, 1181 (App. 2002). When there is nothing in the record to demonstrate that the defendant made any effort to find or subpoena a witness there is no Sixth Amendment violation. *State v. Espinosa*, 101 Ariz. 474, 476, 421 P.2d 322, 324 (1966).

¶25 In this case, nothing in the record suggests that witness testimony would have been material or in favor of Defendant. Additionally, nothing in the record suggests Defendant made an attempt to locate the alleged witness. Moreover, there is no evidence that Defendant was denied his ability to compel witness testimony by subpoena. Accordingly,

we find that Defendant was not denied his right to summon witnesses in his defense.

Mitigating Factors and Length of Sentence

¶26 Defendant alleges the trial court erred by failing to give a mitigated sentence, and by proscribing a sentence of five years. The trial court may consider "[any] other factor that the court deems appropriate to the ends of justice" when deciding to impose a mitigated sentence. A.R.S. § 13-702.D.5 (2005). Absent an abuse of discretion, we will not reverse a trial court's decision to apply a presumptive sentence. *State v. Calderon*, 171 Ariz. 12, 13-14, 827 P.2d 473, 474-75 (App. 1991). Nothing in the record before us indicates the trial court abused its discretion in sentencing Defendant to a presumptive term.

¶27 Finally, Defendant argues that the trial court failed to follow through with its earlier statement, that it would impose a sentence of less than five years. We presume the accuracy of the record presented on appeal. *State v. Diaz*, 221 Ariz. 209, ___, ¶ 15, 211 P.3d 1193, 1198 (App. 2009). Reversal is only proper if error is demonstrated; on appeal, Defendants have the burden to present a record containing reversible error. *Id*. at ___, ¶ 6, 211 P.3d at 1195-96.

¶28 Here, the trial court's alleged "promise" is not found in the record and the court's remarks are not contained in a

transcript. Because we presume the accuracy of the record on appeal, we find no error in the trial court's sentencing.

CONCLUSION

¶29 We have read and considered counsel's brief, carefully searched the entire record for reversible error and found none. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the Court's revocation of Defendant's probation. Defendant was present and represented by counsel at all critical stages of the proceedings. Defendant was allowed to present evidence and to call witnesses on his behalf. At sentencing, Defendant and his counsel were given an opportunity to speak and the court imposed a legal sentence.

¶30 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant shall have thirty days from the date of this decision to proceed, if he so desires,

with an in propria persona motion for reconsideration[8] or petition for review.

¶31 For the foregoing reasons, Defendant's revocation of probation and sentence are affirmed.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

MICHAEL J. BROWN, Judge

/S/

PATRICIA K. NORRIS, Judge

[8] Pursuant to Arizona Rule of Criminal Procedure 31.18.b, Defendant or his counsel have fifteen days to file a Motion for Reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days.