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



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 08-0896
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
CHRISTINA JO PEEL,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Mohave County

Cause No. CR 2005-1291

The Honorable Robert R. Moon, Judge

AFFIRMED

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

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Attorneys for Appellant

J O H N S E N, Judge

¶1 Christina Jo Peel appeals the superior court's finding that she violated the terms of her probation and its reinstatement of her probation. We affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On May 22, 2006, after Peel entered a plea agreement admitting to one count of attempted escape, an undesignated offense, the superior court placed Peel on supervised probation for two years.¹ The terms of probation required Peel to complete 250 hours of community service at a minimum rate of 15 hours monthly, pay a probation fee of \$20 per month and reimbursement of \$250 to be paid in monthly \$25 installments. She also was required to inform her probation officer of any law enforcement contact within 72 hours.

¶3 On February 5, 2008, Peel was arrested and then released on suspicion of theft of a credit card. She did not report the arrest to her probation officer within 72 hours as required. Peel's probation officer discovered the arrest on February 14, 2008, after another officer learned of it in a local newspaper. That same day, Peel's probation officer arrested her and filed a petition to revoke probation.

¶4 The petition alleged Peel violated the condition of her probation requiring her to "obey all laws" by "committ[ing] the offense of Theft of a Credit Card per Mohave County Sheriff's Department DR# 07-045005" and the condition requiring her to "[r]eport to the [probation department] within 72 hours

¹ "We view the facts in the light most favorable to sustaining the superior court's findings." *State v. Vaughn*, 217 Ariz. 518, 519 n.2, ¶ 3, 176 P.3d 716, 717 n.2 (App. 2008).

of . . . release from incarceration" by "fail[ing] to report to this officer upon being released [from her arrest] on her own recognizance." On March 5, 2008, Peel's probation officer filed a supplemental petition to revoke probation. The supplemental petition incorporated the allegations of the original petition and alleged Peel violated uniform condition #8 of her probation, which required her to "[r]eport any law enforcement contact to the [probation department] within 72 hours," by "on or about March 1, 2008, . . . fail[ing] to report after being arrested by with [sic] the Kingman Police Department." Additionally, the supplemental petition alleged Peel violated condition #16, requiring payment of restitution, fines and fees, and condition #19, requiring completion of 250 hours' community service at a rate of 15 hours minimum monthly. The court subsequently granted the State's motion to dismiss the original petition.

¶15 At the probation revocation hearing on August 15, 2008, Peel's probation officer testified that when he arrested Peel on February 14, 2008, for failing to report her February 5 arrest, he confronted her about the arrest for credit card theft, and Peel "never did release the information to me." He also testified that when he filed the supplemental petition, Peel was \$293 behind on the monthly \$45 payments required by the terms of her probation, although by the time of the hearing, she had paid in full. Finally, the officer added that as of March

2008, Peel was more than 100 hours behind in her required community service, though she had completed her hours by the time of the hearing.

¶16 Peel, testifying on her own behalf, told the court that shortly after she was placed on probation, she was confined to bed rest for a high-risk pregnancy for six to eight months and then contracted an infection that required her to be quarantined in her home for "a few months." According to Peel, she notified her probation officer of her condition, and he told her to "just stay home, get better."

¶17 Peel also testified she received \$622 monthly in social security, \$255 monthly in food stamps and one of her two children received \$204 in benefits monthly. According to the probation officer, Peel also received some income from an "under-the-table" housecleaning job. Peel told the court that the father of her two children, R.D., lived with her and her children, was not employed and that she supported him. R.D. also testified he and his mother took Peel to the probation department every day for a week beginning "the next day after she got out of jail" and that his mother gave Peel a phone to call her probation officer the night she was released.

¶18 At the hearing's conclusion, the court found Peel had violated the terms of her probation by failing to report the February arrest, failing to make required payments and failing

to complete community service on the schedule ordered by the court. At the disposition hearing on September 30, 2008, the court reinstated her on probation; excluded the period from March 1, 2007 to September 29, 2008 from the probationary period; ordered her to serve 45 days in jail; ordered performance of an additional 100 hours of community service and designated Peel's attempted escape offense as a Class 6 felony.

¶19 Peel timely appealed the court's order. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001) and -4033 (Supp. 2009).

DISCUSSION

A. General Principles.

¶10 Arizona Rule of Criminal Procedure 27.8(c)(2) provides, "Upon a determination that a violation of a condition or regulation of probation occurred, the court may revoke, modify or continue probation." The State must prove a probation violation by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3); *State v. Elmore*, 174 Ariz. 480, 483, 851 P.2d 105, 108 (App. 1992).

¶11 The decision to revoke probation lies within the superior court's discretion. *State v. Sanchez*, 19 Ariz. App. 253, 254, 506 P.2d 644, 645 (1973). We will uphold the superior court's "finding that a probationer has violated probation

unless the finding is arbitrary or unsupported by any theory of evidence." *State v. Vaughn*, 217 Ariz. 518, 521, ¶ 14, 176 P.3d 716, 719 (App. 2008); (quoting *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (1999)). Conflicting testimony alone does not render evidence that the probationer violated probation insufficient. *Thomas*, 196 Ariz. at 313, ¶ 3, 996 P.2d at 114. "It is for the trial court to resolve such conflicts and to assess the credibility of witnesses in doing so." *Id.*

B. Notice of the Alleged Failure to Report Law Enforcement Contact.

¶12 Peel contends that the supplemental petition to revoke probation, which alleged that "on or about March 1, 2008" she failed to report her arrest, violated her right to sufficient notice. She asserts she was surprised at the revocation hearing to learn that the allegation in the petition referred to the February 5 arrest, rather than an arrest on or about March 1.²

¶13 Due process requires a defendant receive written notice of alleged violations before a probation revocation hearing. *State v. Rivera*, 116 Ariz. 449, 452, 569 P.2d 1347, 1350 (1977) (citing *Gagnon v. Scarpelli*, 411 U.S. 778 (1973)). Though a petition to revoke probation does not require the level of specificity of an indictment or information, "the allegations as to a violation should be fully and clearly set forth in the

² The record contains no indication that Peel was arrested on or about March 1, 2008.

petition so that the probationer might be informed, by written notice, as to that which he will be called to defend." *State v. Turnbull*, 114 Ariz. 289, 291, 560 P.2d 807, 809 (App. 1977); see also *State v. Tucker*, 124 Ariz. 120, 122, 602 P.2d 501, 503 (App. 1979) (probationer had sufficient notice when petition did not mention specific condition probationer violated but alleged factual basis on which State relied to prove the violation).

¶14 Here, the original petition to revoke probation included the following allegations:

UNIFORM CONDITION #1: Obey all laws.

VIOLATION 1: On or about February 5, 2008 in the vicinity of [] Kingman the defendant committed the offense of Theft of a Credit Card per Mohave County Sheriff's Department DR# 07-045005.

UNIFORM CONDITION #3: Report to the APD within 72 hours of sentencing, absolute discharge from prison, release from incarceration or residential treatment, and continue to report as directed.

VIOLATION: Whereby on or about February 6, 2008 the defendant failed to report to this officer upon being released on her own recognizance.

¶15 The supplemental petition expressly incorporated the "[a]llegations as listed in the [original] Petition to Revoke Probation dated February 14, 2008" and, among others, added the following allegation: "UNIFORM CONDITION #8: Report any law enforcement contact to the APD within 72 hours. VIOLATION 1:

Whereby on or about March 1, 2008, the defendant failed to report after being arrested by [] the Kingman Police Department."

¶16 At the probation revocation hearing, when the State asked Peel's probation officer about her failure to report the February 5 arrest, Peel unsuccessfully objected; her counsel told the court he thought the allegation of a failure to report her arrest had been dismissed. At the close of the hearing, the court deemed the allegation in the supplemental petition amended to conform to the evidence pursuant to Arizona Rule of Criminal Procedure 13.5 and found "that there's no reasonable possibility that the defendant did not understand that this petition to revoke was alleging her failure to report her arrest in February of 2008, as opposed to some phantom or nonexistent [arrest during the] last three days of February 2008."

¶17 We agree with the superior court that Peel had adequate notice the State intended to prove she violated the terms of her probation by failing to report the February 5 arrest. First, although the original petition ultimately was dismissed, the supplemental petition expressly incorporated the allegations contained in the original, which referenced both Peel's February 5 arrest and her failure to report to her probation officer within 72 hours of her release the following day. Second, at the hearing Peel called R.D. to testify on her

behalf that he "took her down to the probation office the next day after she got out of jail." It is unlikely Peel would have presented this testimony had she been unaware the State intended to prove that she failed to report her February 5 arrest. In sum, the record discloses Peel had adequate written notice of the allegation that she violated the terms of her probation by failing to report her February 5 arrest.

C. Failure to Complete Community Service.

¶18 The supplemental petition alleged Peel violated "Uniform Condition #19: Complete 250 hours of community work service at a minimum rate of 15 hours per month beginning as directed in writing by the APD," by her failure "to complete 15 community work service hours per month as ordered by the court." According to the petition, Peel had 180 hours of community service still to complete as of March 4, 2008. Peel asserts the State presented no evidence the probation department directed her in writing to complete 15 hours of service per month and that the evidence showed she was unable to perform any work during a substantial portion of her probationary period.

¶19 Contrary to Peel's contention, her probation officer testified at her revocation hearing that not one but two directives were written for her to perform community service. In the face of that evidence, Peel did not argue at the hearing that she did not receive a written directive from her probation

officer or that the community service term of her probation never went into effect. Instead, her argument was that at the outset of her probation she could not begin her community service due to her pregnancy and related health issues. She argued that her probation officer permitted her to put off community service due to those health issues; she did not argue, however, that the community-service term of probation never became effective. Given that her probation officer testified that written instructions were issued to her to perform community service, we cannot accept Peel's argument, made for the first time on appeal, that she was not required to commence community service because her probation officer did not direct her in writing to do so.

¶20 The State presented substantial evidence, moreover, that Peel failed to complete the required 250 hours of approved community service at a minimum rate of 15 hours monthly. Peel's probation officer testified that at the time the petition was filed, Peel was behind schedule by more than 100 hours. That evidence was sufficient to support the superior court's finding that Peel violated the community service term of her probation. It is for the superior court to determine witness credibility and resolve conflicting testimony. *State v. Ossana*, 199 Ariz. 459, 461, ¶ 7, 18 P.3d 1258, 1260 (App. 2001); *Thomas*, 196 Ariz. at 313, ¶ 3, 996 P.2d at 114. Therefore, because the superior

court's conclusion was neither arbitrary nor unsupported by any theory of the evidence, we uphold the finding. *See Vaughn*, 217 Ariz. at 521, ¶ 14, 176 P.3d at 719.

D. Failure to Pay Fines and Restitution.

¶21 The supplemental petition also alleged Peel failed to make court-ordered payments. According to the petition, Peel was in arrears in the amount of \$293 as of its filing. Peel argues there was insufficient evidence to support the court's finding she violated the terms of her probation by a willful failure to pay.

¶22 Our review of the record demonstrates the evidence supports the superior court's finding. The written terms of Peel's probation required her to pay a \$20 monthly probation fee and a total of \$250 in reimbursement at a rate of \$25 monthly. The probation officer testified that as of the filing of the supplemental petition, Peel was \$293 in arrears on her payments. After the petition was filed, Peel succeeded in making all of her past due payments. In her testimony, Peel never stated she had been unable to pay her court-ordered fees.

¶23 At the hearing's conclusion, the court found that the State proved Peel failed to make payments as ordered. The judge stated that although the evidence showed Peel's income was "woefully low," she had the ability to pay more than she did "primarily because of the combination of working under the table

for cash and not keeping a record of that to be able to show [her] probation officer how much [she was] making. And also contributing to the support of someone else who was not a legal dependent, mainly [R.D.]."³

¶124 Thus, the evidence supports the superior court's finding. At the time of the supplemental petition, Peel was receiving federal assistance and was making an unknown amount cleaning houses. Therefore, because the superior court's finding was not arbitrary and was supported by the evidence, we uphold it. See *Vaughn*, 217 Ariz. at 521, ¶ 14, 176 P.3d at 719.

E. Exclusion of Time from Probation.

¶125 When the superior court reinstated Peel's probation, it excluded from her probationary period the time from March 1, 2007, the date the court found she first failed to complete community service (one year before filing of the petition to revoke), to September 29, 2008, the day before the disposition hearing.

¶126 Arizona Revised Statutes § 13-903(B) (2001) provides:

If a court determines that the defendant violated a condition of the defendant's probation but reinstates probation, the period between the date of the violation and the date of restoration of probation is not computed as part of the period of probation. If it is determined that the defendant is

³ The court stated it did not give much weight, however, to the fact that Peel supported R.D. because that likely permitted Peel to avoid the expense of day care for her children.

not a violator, there is no interruption of the period.

The superior court has wide discretion in sentencing criminal defendants, and if a sentence is within the statutory limits, we will find an abuse of discretion only if the court displays "arbitrariness, capriciousness, or failure to conduct an adequate investigation into the facts relevant to sentencing." *State v. Stotts*, 144 Ariz. 72, 87, 695 P.2d 1110, 1125 (1985).

Here, the court stated:

It looks like she did roughly - just barely over one-fourth of the community service within almost a full two years.

And I can stop the running of probation from the first violation, which seems probably generous to the defendant. I'm going to just make [it] one year before the petition was filed.

¶27 We have rejected Peel's argument that her monthly community service obligation never commenced because her probation officer never directed her in writing to perform community service. See *supra* ¶¶ 19-20. Additionally, the record supports the court's decision to find by a preponderance of the evidence that Peel first violated her probation in March 2007.

¶28 Peel's probation officer testified that when he filed the supplemental petition in early March 2008, Peel was behind in her community service requirement by more than 100 hours.

The officer also testified that Peel completed her 250 work hours on June 7, 2008, having logged 150 of those hours after the supplemental petition was filed in March 2008. A reasonable inference is that Peel had completed only 100 hours of community service between the commencement of her probation in May 2006 and the filing of the supplemental petition in March 2008. Peel testified that her probation officer permitted her to delay beginning her community service for several months due to health issues, but her testimony on that issue was vague and imprecise at best, and the superior court had the discretion to assess her credibility. See *Thomas*, 196 Ariz. at 313, ¶ 3, 996 P.2d at 114. We conclude the superior court acted within its discretion in finding her in violation of the community service requirement beginning in March 2007, and excluding from her probation the time period after that date. See A.R.S. § 13-903(B); see also *Stotts*, 144 Ariz. at 87, 695 P.2d at 1125.

CONCLUSION

¶29 For the foregoing reasons, we affirm the superior court's reinstatement of Peel's term of probation.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MAURICE PORTLEY, Judge

/s/
DANIEL A. BARKER, Judge