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



DIVISION ONE
FILED: 03/09/2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 08-1099
)
Appellee,) DEPARTMENT D
)
v.) MEMORANDUM DECISION
)
BILL BURHAN HANES,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Mohave County

Cause No. CR 2005-1084

The Honorable Steven F. Conn, Judge

VACATED AND REMANDED

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J O H N S E N, Judge

¶1 Bill Burhan Hanes appeals the superior court's finding that he violated the conditions of his probation and its revocation of his probation. For the following reasons, we reverse and remand.

FACTS AND PROCEDURAL HISTORY

¶2 On October 23, 2006, after Hanes entered into a plea agreement admitting to one count of fraudulent schemes and artifices, a Class 2 felony, the superior court placed Hanes on supervised probation for seven years, including one year of incarceration in the county jail. The terms of his probation required Hanes to report to the probation department within 72 hours of his release from incarceration and to continue to report as directed by his probation officer. He also was required to pay a \$50 monthly probation services fee and \$200 in reimbursement for attorney's fees at the rate of \$10 monthly.

¶3 On August 13, 2008, Hanes's probation officer filed a petition to revoke probation, alleging Hanes failed to report as directed to the Adult Probation Department from May through August of 2008, failed to obtain prior approval before changing his residence and failed to make court-ordered payments after February 2008. At a hearing, the probation officer testified that in May 2008 he orally instructed Hanes to report to the probation office the following day. Hanes did not report the following day or at any time thereafter. During the next

several months, the officer made unsuccessful attempts to contact Hanes by phone and at Hanes's residence. According to the probation officer, Hanes had a "standing agreement" to report every month.

¶14 Hanes also testified, admitting he did not report to his probation officer from May through August 2008 even though he acknowledged the officer told him to report every two months. Hanes explained he did not report because his father had a stroke and he took his father to doctor's appointments.

¶15 The probation officer also testified that Hanes failed to make his monthly court-ordered payments after February 2008. Hanes was employed by a construction company, working 25 to 30 hours per week. Hanes testified, however, that his wages were garnished for child-support payments in the amount of approximately \$1000 per month.

¶16 At the hearing's conclusion, the court found Hanes in violation of his probation for failing to report as ordered by his probation officer and failing to make monthly court-ordered payments. The court found the State had not proven, however, that Hanes had changed residences. The court revoked Hanes's probation and sentenced him to a presumptive term of five years' imprisonment, with credit for 449 days served.

¶17 Hanes timely appealed. 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

¶18 Hanes argues the court erred in finding him in violation of his probation in the absence of evidence of any written directives ordering him to report to his probation officer and insufficient evidence that his failure to make monthly payments was willful.

¶19 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). 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) (quotation omitted). The decision to revoke probation lies within the superior court's discretion upon a finding that a violation of a condition or regulation of probation occurred. See *State v. Sanchez*, 19 Ariz. App. 253, 254, 506 P.2d 644, 645 (1973).

A. Failure to Report "as Directed."

¶10 Hanes first argues there was insufficient evidence for the court to find he violated the condition requiring him to

report as directed to the probation department because there was no evidence his probation officer ordered him to report in writing. "Probation shall not be revoked for violation of a condition or regulation of which the probationer has not received a written copy." Ariz. R. Crim. P. 27.8(c)(2); see also *State v. Jones*, 163 Ariz. 498, 499, 788 P.2d 1249, 1250 (App. 1990).

¶11 In *State v. Robinson*, 177 Ariz. 543, 543, 869 P.2d 1196, 1196 (1994), a written condition of the defendant's probation required him to "[p]articipate and cooperate in and successfully complete any program of assistance, counseling or therapy, whether outpatient or residential, as directed by the probation officer." Pursuant to this condition, the defendant's probation officer orally directed him to participate in a specific counseling program. *Id.* at 544, 869 P.2d at 1197. The defendant did not comply and the probation officer filed a petition to revoke probation. *Id.* At the revocation hearing the defendant admitted he knew of the requirement to complete the specific counseling program and that he declined to do so. *Id.* Nevertheless, our supreme court held the superior court erred in finding a probation violation based on the defendant's failure to comply with the oral order, notwithstanding that the oral order was issued pursuant to a written "boilerplate general directive." *Id.* at 545-46, 869 P.2d at 1198-99. The court

explained that the written general directive that the defendant participate in a program as directed by his probation officer did not constitute the requisite written notice because it did not specifically tell the defendant what he must do, nor did it give the superior court or appellate courts guidance as to what he was supposed to do. *Id.* at 544, 896 P.2d at 1197. Instead, it was the oral directive to complete a specific program that the defendant was alleged to have violated. *Id.* at 545, 869 P.2d at 1198.

¶12 The circumstances here are directly analogous to those in *Robinson*. The written conditions of Hanes's probation contained the boilerplate general directive that he "[r]eport to the APD within 72 (or ___) hours of sentencing, absolute discharge from prison, release from incarceration or residential treatment, and continue to report as directed." According to the testimony, Hanes's probation officer orally directed him to report one day in May 2008 and Hanes had a "standing agreement" to report either every month, according to the officer, or every two months, according to Hanes. The State presented no evidence that the probation officer delivered to Hanes any written instructions to report. Additionally, the general written directive did not satisfy the notice rule because it did not tell Hanes specifically when he must report; though the petition to revoke quoted the written general directive, Hanes was

alleged to have violated his probation by failing to report as orally directed by his probation officer. Accordingly, we set aside the finding that Hanes violated his probation for failure to report to his probation officer.

B. Failure to Pay Court-Ordered Fees.

¶13 The superior court may not revoke probation and sentence a defendant to imprisonment solely on grounds of nonpayment without inquiring into the defendant's ability to pay. *Bearden v. Georgia*, 461 U.S. 660, 672 (1983); *State v. Davis*, 159 Ariz. 562, 563, 769 P.2d 1008, 1009 (1989). Hanes argues there was insufficient evidence on which the court to find his failure to pay court-ordered fees was willful.

¶14 Sufficient evidence supported the superior court's finding that Hanes violated the condition of his probation requiring him to pay probation fees and reimbursement. The probation officer testified Hanes stopped making the payments after February 2008 and the State introduced exhibits supporting the officer's statements. With respect to ability to pay, Hanes testified that his child-support payments caused him financial difficulty; he did not, however, testify he was unable to make the probation payments. At the revocation hearing's conclusion, the superior court acknowledged that the evidence showed Hanes had approximately \$175 left over from his paycheck after child

support was deducted but stated, "I don't know anything else about his financial obligations."

¶15 The court could not have revoked Hanes' probation solely due to his failure to make payments without further inquiry into his ability to pay. *Davis*, 159 Ariz. at 563, 769 P.2d at 1009; *State v. Wilson*, 150 Ariz. 602, 605, 724 P.2d 1271, 1274 (App. 1986). The court, however, did not base its revocation of probation solely on Hanes's failure to pay. In fact, the court told Hanes at the disposition hearing, "I am focusing on the failure to report because the failure to make payments is not why you are here now."¹

¶16 When we set aside at least one finding of a probation violation, the revocation and disposition also must be set aside and the case remanded for a new disposition hearing unless the record clearly shows the superior court would have made the same disposition without the violation set aside on appeal. *State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989). The court's statements at the disposition hearing in this case do not support the conclusion that it would have made the same

¹ Because the court did not revoke Hanes's probation solely for his failure to make the payments and because we set aside the court's finding that Hanes violated his probation for failing to report to his probation officer, we need not reach the issue of whether the court sufficiently inquired into his ability to pay.

disposition had it not found Hanes in violation for failure to report.

CONCLUSION

¶17 For the foregoing reasons, we vacate the order of revocation and disposition and remand for proceedings consistent with this decision. See *Ojeda*, 159 Ariz. at 562, 769 P.2d at 1008.

/s/ _____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/ _____
PATRICIA A. OROZCO, Presiding Judge

THOMPSON, Judge, dissenting.

¶18 Rule 27.8, Arizona Rule of Criminal Procedure, prescribes a violation "hearing to determine whether a probationer has violated a written condition or regulation of probation" The "writing" requirement serves to assure that a probationer is aware of any special obligations beyond the "general" obligations of probation. *State v Acosta*, 25 Ariz. App. 44, 45, 540 P.2d 1263, 1264 (1975). The comment to Rule 27.1 notes that "the usual practice in the superior courts . . . is for the court to impose a few conditions such as to obey the rules or regulations imposed by the probation officer," and that the Rule "retains this general procedure." Thus special

conditions requiring a prescribed treatment regimen must be in writing to support revocation. *State v Heasley*, 23 Ariz. App. 345, 533 P.2d 556 (1975)(alcohol treatment); *State v Robinson*, 177 Ariz. 543, 869 P.2d 1196 (1994) (counseling). By contrast, the reporting requirement that Hanes violated is of the general nature of "rules or regulations" referenced in the Rule comment and in *Acosta*. Hanes knew he was supposed to report at least once every two months but did not report for four months. He violated the written condition that he report as directed and I would affirm revocation of his probation.

/s/
JON W. THOMPSON, Judge