DIVISION ONE
FILED: 05-25-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0413
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
JOSE NAVARETTE, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-126825-001 DT

The Honorable Roland J. Steinle, III, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Michael J. Mitchell, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
by Louise Stark, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Judge

¶1 Jose Navarette ("Appellant") appeals the trial court's finding that he violated Conditions 1 and 20 of his probation

terms, and the court's order revoking his probation. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 After an August 25, 2005 domestic violence altercation, Appellant pled guilty to aggravated assault, a class 3 nondangerous offense. The trial court placed him on probation for five years, with a six-month jail term. As conditions of his probation, Appellant was required to obey all laws ("Condition 1") and "[n]ot remain in or return to the United States illegally if deported or processed through voluntary departure" ("Condition 20"). After sentencing, he was released to federal immigration authorities, and on June 19, 2006, he was "deported, excluded, or removed from the United States."

¶3 On June 4, 2007, Appellant was detained in the United States. After Immigration and Customs Enforcement confirmed his illegal presence in the country, Appellant pled guilty in federal district court to illegal reentry after deportation.

¶4 While Appellant was incarcerated on the federal convictions, his state probation officer filed a petition in superior court to revoke probation. On May 14, 2009, the court

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[1] We review the facts in the light most favorable to sustaining the court's findings and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

held a hearing on the alleged violations at which the State's only witness, Appellant's probation officer, identified Appellant based on booking photos and "his criminalist history." Appellant's counsel objected to the officer's testimony and to the introduction of Appellant's federal plea agreement; however, the trial court overruled the objections and admitted the evidence.

¶5 The trial court found that Appellant violated Conditions 1 and 20 of his probation, revoked his probation, and sentenced him to the presumptive term of three-and-a-half years in prison, to run consecutively to his federal sentence. Appellant filed a timely notice of appeal, and 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) (2003), 13-4031 (2010), and 13-4033(A) (2010).

ANALYSIS

¶6 Appellant argues that the State presented insufficient evidence to support the trial court's finding that Appellant violated Conditions 1 and 20 of his probation. Central to Appellant's argument is the contention that the evidence did not establish that Appellant was the individual who entered the country illegally and committed the federal crime, thus triggering the probation violations. We disagree.

¶7 We review probation revocation decisions for an abuse of discretion, and will uphold a finding of a probation violation "unless the finding is arbitrary or unsupported by any theory of evidence." *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999); *State v. Sanchez*, 19 Ariz. App. 253, 254, 506 P.2d 644, 645 (1973). A probation violation "must be established by a preponderance of the evidence," and the court may consider "any reliable evidence not legally privileged, including hearsay." Ariz. R. Crim. P. 27.8(b)(3); *see Thomas*, 196 Ariz. at 313, ¶ 2, 996 P.2d at 114. "Reliable" evidence "is evidence which is trustworthy and connotes that type of dependency which underlies the generally recognized exceptions to the hearsay rule." *State v. Stotts*, 144 Ariz. 72, 82, 695 P.2d 1110, 1120 (1985).

¶8 At the revocation hearing, Appellant's probation officer identified Appellant, who was sitting in the courtroom, based on a booking photo. Appellant argues the probation officer's identification constituted insufficient evidence of Appellant's identity. The probation officer's in-court identification, however, was not the sole piece of evidence that the State presented to confirm Appellant's identity. Over defense counsel's objection – essentially one of lack of foundation – the court also took "judicial notice" of and admitted Appellant's federal plea agreement. In so doing, the

court held that the Rules of Evidence don't generally apply in probation revocation proceedings, that a reliability standard applied to the evidence and, as a federal court document, the plea agreement was reliable and therefore, admissible. We agree.[2]

¶9 Admission of both the probation officer's testimony and Appellant's federal plea agreement was appropriate under the Arizona Rules of Criminal Procedure. Rule 27.8(b)(3) allows the court to consider any "reliable evidence not legally privileged, including hearsay." *See State v. Belcher*, 111 Ariz. 580, 581, 535 P.2d 1297, 1298 (1975) (probation officer's hearsay allegation was "reliable" and within criminal rule allowing court to consider "reliable" evidence, including hearsay). The federal plea agreement was date-stamped by the clerk of the court and contained enough identifying information about

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[2] Appellant argues that the court improperly took judicial notice of the plea agreement because "[a] court cannot usually take judicial notice of a separate court proceeding in order to establish the necessary facts to find existence of a prior for sentencing purposes." The cases Appellant cites for this proposition are distinguishable from the present case in that they both involved issues of proof of prior convictions as aggravators for sentencing purposes, not a conviction proving a violation of a term of probation. *See State v. Morales*, 215 Ariz. 59, 61, ¶ 6, 157 P.3d 479, 481 (2007); *State v. Terrell*, 156 Ariz. 499, 503, 753 P.2d 189, 193 (App. 1988). Evidentiary rules are relaxed in probation revocation proceedings where the standard of proof is a preponderance of the evidence. The cases Appellant cites required the State to meet their burden "beyond a reasonable doubt." Neither *Terrell* nor *Morales* are controlling in this case.

Appellant to allow the trial court to consider it authentic, and thus reliable.

¶10 Further, the court did not base either the identification of Appellant or its decision to revoke Appellant's probation on a single factor, nor on a similarity of names alone, as Appellant asserts. The federal plea agreement corroborated the probation officer's in-court identification. Specifically, Appellant's statements in the plea agreement corresponded with the 2005 acts giving rise to probation in the first place: "[F]or sentencing purposes, I admit that I was convicted of aggravated assault, a felony, on December 15, 2005, and that I was represented by an attorney. I was sentenced to 6 months in jail, and 5 years probation."

¶11 In summary, testimony of Appellant's probation officer, a copy of Appellant's federal plea agreement containing Appellant's admissions concerning his illegal entry and acknowledging his 2005 conviction, and the trial court's judicial notice of its own records, coupled with the fact that the trial judge was the same judge who accepted Appellant's original plea in this matter, all support the court's findings. We find this to be more than sufficient evidence to establish not only Appellant's identity, but also that he was the individual who committed a federal crime and, in so doing, also

violated the terms of his probation. Appellant presented no evidence to suggest otherwise.

CONCLUSION

¶12 For the foregoing reasons, we affirm the trial court judgment revoking probation.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PATRICIA A. OROZCO, Presiding Judge

_____/S/_____
DANIEL A. BARKER, Judge