

NOTE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.34



DIVISION ONE
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RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0382
) 1 CA-CR 11-0756
 Appellee,) (Consolidated)
)
 v.) DEPARTMENT A
)
 JIMI TYRESE COLBERT,) **MEMORANDUM DECISION**
)
 Appellant.) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-008361-001

The Honorable Roland J. Steinle III, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Division
Linley Wilson, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

T I M M E R, Presiding Judge

¶1 Jimi Tyrese Colbert appeals the superior court's finding he violated the terms of his probation and its order revoking probation and committing him to a two-year term of imprisonment. For the reasons that follow, we affirm.

BACKGROUND

¶2 In October 2007, the State indicted Colbert with one count of sexual assault and one count of kidnapping. Colbert pled guilty to attempted kidnapping pursuant to a plea agreement, and the court suspended sentence and imposed a three-year term of supervised probation on April 25, 2008. In addition to standard conditions of probation, the court imposed as Term 26: "The defendant shall submit to sex offender assessment. This court shall hear all violations. If [adult probation officer ("APO")] after assessment feels #25 Sex Offender Terms [are] call[ed] for APO shall submit Petition to Modify."

¶3 Colbert attended three assessment sessions at the end of 2008, and the doctor prepared a report on January 22, 2009 recommending two polygraph examinations to complete the assessment: one specific to the offense for which Colbert was on probation and one regarding his sexual history. The APO informed Colbert in October 2009 the polygraphs were necessary, and he first directed Colbert to schedule the exams in March 2010. Thereafter, the APO reminded Colbert eight times to

schedule the polygraph exams, finally confirming on June 3 that the two tests were scheduled for June 7 and June 29. Colbert did not attend either scheduled polygraph, explaining he had been busy with school and that he did not understand the polygraphs were required under the terms of his probation.

¶4 In July 2010, the APO filed a petition to revoke probation for Colbert's failure to submit to this portion of the sex offender assessment. After the petition but before the probation violation hearing, Colbert submitted to the polygraph exams; the resulting report stated Colbert "readily admitted to the underlying offense" regarding the offense-specific exam and was not deceptive during the sexual history exam, in which he denied having any other sexual victims. After hearing testimony from the APO and from Colbert, the superior court found Colbert had violated the terms of his probation by failing to submit to the polygraphs as directed. It explicitly found that Colbert's excuses lacked credibility, that "[h]e made a decision he wasn't going to do it" because "he didn't feel that it was necessary." The court revoked probation and imposed a super-mitigated two-year term of imprisonment with 117 days' presentence incarceration credit.

¶5 Colbert moved to vacate the judgment, arguing, among other things, the condition of probation mandating submission to

the polygraph was unconstitutional, and the court denied the motion. Colbert timely appealed.

DISCUSSION

¶6 Colbert argues the directive to participate in a sexual history polygraph, which could elicit information about uncharged prior or subsequent sex offenses, unconstitutionally required him to waive his Fifth Amendment privilege against self-incrimination as a condition of probation. We review the superior court's order finding a violation and revoking probation for an abuse of discretion. *State v. Moore*, 125 Ariz. 305, 306, 609 P.2d 575, 576 (1980); *State v. LeMatty*, 121 Ariz. 333, 335-36, 590 P.2d 449, 451-52 (1979). We review alleged constitutional violations de novo. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004).

¶7 The State may neither mandate waiver of the Fifth Amendment privilege against self-incrimination as a condition of probation nor revoke probation for a valid exercise of the privilege. *State v. Eccles*, 179 Ariz. 226, 227-28, 877 P.2d 799, 800-01 (1994); *Jacobsen v. Lindberg*, 225 Ariz. 318, 321, ¶ 6, 238 P.3d 129, 132 (App. 2010); see also U.S. Const. amend. V ("No person . . . shall be compelled in any criminal case to be a witness against himself."). The terms of probation may, however, "proscribe false statements and require defendant to respond to questions that could not incriminate him in future

criminal proceedings" so long as this condition would neither prohibit nor penalize legitimate assertion of the privilege. *Eccles*, 179 Ariz. at 228, 877 P.2d at 801. Thus, a condition simply mandating submission to a polygraph exam is not impermissible because it alone does not automatically waive the privilege. *Jacobsen*, 225 Ariz. at 322, ¶ 8, 238 P.3d at 133; see also *State v. Levens*, 214 Ariz. 339, 343, ¶ 17 n.3, 152 P.3d 1222, 1226 n.3 (App. 2007) ("A condition requiring participation in a polygraph exam is not the same as an unconstitutional provision revoking probation for the assertion of the right against self-incrimination.") (citing *Minnesota v. Murphy*, 465 U.S. 420, 434-35 (1984)). Additionally, "a defendant may choose not to exercise his full rights." *Jacobsen*, 225 Ariz. at 322, ¶ 8, 238 P.3d at 133. Without a condition of probation mandating waiver, "defendant is free to claim the privilege and must do so [at the appropriate time] if he desires not to incriminate himself." *Eccles*, 179 Ariz. at 228, 877 P.2d at 801.

¶8 The terms of Colbert's probation did not require him to waive his privilege against self-incrimination. Term 26, which mandated participation in a sex-offender assessment, made no mention of the privilege against self-incrimination. Because it "'contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege,' it did nothing

more than proscribe false statements." *Id.* (quoting *Murphy*, 465 U.S. at 437). Additionally, there is no suggestion in the record that Colbert's probation could have been revoked for a legitimate assertion of the privilege or that the State so threatened. See *Levens*, 214 Ariz. at 343, ¶ 17, 152 P.3d at 1226. Indeed, the State concedes Colbert's silence pursuant to a valid exercise of the privilege would not have been grounds to revoke probation.

¶19 Furthermore, Colbert never asserted the privilege. By the time of the revocation hearing, he had voluntarily submitted to the polygraph exams, and the test results revealed no incriminating information. See *Eccles*, 179 Ariz. at 228, 877 P.2d at 801; *Jacobsen*, 225 Ariz. at 322, ¶ 8, 238 P.3d at 133. Finally, Colbert testified his failure to complete the polygraphs as directed between March and July 2010 was due to scheduling difficulties and a belief they were not necessary; he did not rest his failure to participate on any Fifth Amendment concerns, nor did he seek relief from the court on those grounds. The condition of probation mandating submission to a sexual history polygraph did not unconstitutionally mandate waiver of Colbert's Fifth Amendment privilege, and the court did not err by finding noncompliance with this term and revoking Colbert's probation on that basis.

CONCLUSION

¶10 For the foregoing reasons, we affirm the court's order revoking probation and resulting disposition.

/s/

Ann A. Scott Timmer
Presiding Judge

CONCURRING:

/s/

Patricia K. Norris, Judge

/s/

Donn Kessler, Judge