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



DIVISION ONE  
FILED: 06/05/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0465  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
PETER JAY NORRIS, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR1996-002147

The Honorable Jeffrey A. Rueter, Judge *Pro Tempore*

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
And Jeffrey L. Sparks, Assistant Attorney General  
Attorneys for Appellee

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By Kathryn L. Petroff, Deputy Public Defender  
Attorneys for Appellant

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**B R O W N**, Judge

¶1 Peter Jay Norris appeals the trial court's order  
revoking his probation and the resulting disposition arising

from his failure to participate in sex offender treatment. For the following reasons, we affirm.

#### **BACKGROUND**

¶2 In 1996, Norris was indicted on ten counts of various offenses related to his alleged conduct with several girls, including sexual abuse, attempted molestation of a child, furnishing obscene materials to minors, and molestation of a child. In January 1998, Norris entered into a plea agreement whereby the State would dismiss the first eight counts of the indictment and Norris would plead no contest to two counts of attempted child molestation (Counts 9 and 10), both class 3 felonies. The agreement also provided that Norris would be placed on lifetime probation for Count 9, but the parties made no agreement as to sentencing for Count 10. At the change of plea hearing, the State provided the factual basis for the plea, explaining that Norris attempted to touch the genitals of two of the victims, both of whom were under the age of fifteen at the time of the offenses. The trial court then accepted the plea agreement.

¶3 The court later sentenced Norris to a presumptive ten-year term of imprisonment on Count 10, explaining that probation was not appropriate "given the collateral conduct which was involved which was not only abusing them sexually, but in addition to that, providing them with drugs, providing them with

alcohol, [and] providing them with obscenity as a means of grooming them for your sexual pleasure and your sexual benefit." As to Count 9, the court placed Norris on lifetime probation, stating "[t]he reason for that is the significant amount of time that you will spend in prison prior to that and, more importantly, for the protection of the community, you will be closely monitored on lifetime probation with very strict rules and orders you will have to comply with." The court then reviewed some of the terms of probation, including the requirement that Norris abide by conditions that apply to sex offenders, which included the requirement to "[a]ttend and actively participate in sex offender treatment and remain in such treatment at the direction of [the] probation officer."

¶4 After Norris completed his prison sentence, he violated his probation by failing to report. In July 2009, the trial court reinstated probation, but with a new term of five years,<sup>1</sup> effective January 27, 2007 with an expiration date of January 27, 2012. The terms of probation still required him to comply with the "sex offender" conditions.

¶5 Norris began a sex offender treatment program at Psychological and Consulting Services ("PCS") in September 2010

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<sup>1</sup> Pursuant to *State v. Peek*, 219 Ariz. 182, 195 P.3d 641 (2008) (holding that relevant law does not allow lifetime probation to be imposed for attempted child molestation occurring between January 1, 1994 and July 20, 1997).

but was discharged in April 2011. In the discharge report, Dr. Garby, a psychologist with PCS, stated that Norris had made "no progress" in several areas, including identifying sexual misbehaviors with adolescent females and developing a relapse prevention plan. Garby stated that Norris had power and control struggles throughout his treatment, was unwilling to discuss his offenses and victims, became defensive during group sessions, minimally participated in homework assignments, acted as though he did not need treatment, and failed to progress in the treatment plan. Based on the discharge report, a petition to revoke Norris's probation was filed for the following violations: (1) failing to participate and cooperate in counseling or assistance as directed by the Adult Probation Department (condition 24); (2) failing to schedule progress assessment tests (condition 25(6)); and (3) unsuccessful discharge from sex offender counseling (condition 25(5)).

¶16 At the violation hearing, the State introduced Garby's discharge report and also called her as a witness. She testified that Norris would not acknowledge his offenses and therefore he would not be able to make progress in the treatment. She explained that Norris made inconsistent statements regarding his recollection of his offenses. Garby also stated her belief that Norris did not want to be at counseling or make progress, but was just biding his time until

he finished treatment in December 2011. She therefore concluded that Norris was not amenable to treatment.

¶17 Norris testified that the inconsistent statements he made to Garby were the result of a misunderstanding and that he was not able to recall the criminal conduct in question because he was intoxicated at the time. He believed he was properly participating in treatment and had accepted his offenses, although he was not sure they occurred in the way Garby had interpreted them. Norris acknowledged that the offenses he pled no contest to were wrong but that he was only in need of "maintenance treatment" because he was not worried about offending again.

¶18 The trial court found that the State proved by a preponderance of the evidence that Norris violated condition 25(5) of his probation by being unsuccessfully discharged from sex offender treatment, but that the State failed to meet its burden for the alleged violations of conditions 24 and 25(6). The court found that even though Norris had admitted on the stand that he was a sexual offender, he had failed to abide by the rules of the treatment, had not made progress, and was not amenable to further treatment. The court revoked Norris's probation and sentenced him to a mitigated term of 7.5 years imprisonment with sixty-eight days of presentence incarceration credit. This timely appeal followed.

## DISCUSSION

¶9 The State must prove a violation of probation by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3); see also *State v. Moore*, 125 Ariz. 305, 306, 609 P.2d 575, 576 (1980). We review the trial court's decision for an abuse of discretion and will uphold a trial court's finding that a probationer has violated probation unless the finding "is arbitrary or unsupported by any theory of evidence." *Moore*, 125 Ariz. at 306, 609 P.2d at 576.

¶10 Norris argues that the trial court's order revoking his probation is "fundamentally unfair" because: (1) it was impossible to comply with the terms of the plea agreement; (2) the State added a "new material term" to the agreement; and (3) Norris had substantially performed his obligations under the plea agreement. We disagree.

¶11 Norris asserts it was impossible to comply with the plea agreement because "anyone entering into a *nolo contendere* plea could not, per force [sic], comply with the sex offender term [to actively participate in sex offender treatment] because actively participating in treatment required acknowledgment of the precise underlying criminal acts in question." Therefore, Norris argues, the trial court acted arbitrarily in finding that Norris willfully violated his probation.

¶12 Although Garby stated that the most important reason for Norris's unsuccessful discharge was his refusal to acknowledge his offenses, she explained that she can treat a patient who does not admit his or her offenses by working on "cognitive distortions about intimacy, relations, sex in general, [and] sexuality." Garby clarified further that progress can only be made in such a situation if the patient is "willing and receptive to the feedback around them," which Norris was not. The court found that Garby discharged Norris for failing to act appropriately in group sessions, having control and power struggles throughout the course of treatment, and for failing to make progress during his treatments. Thus, we reject Norris's contention that he was discharged based only on his failure to admit the "precise underlying criminal acts in question."

¶13 Furthermore, even though the State agreed to a no contest plea based in part on Norris's assertions that he could not remember the charged offenses due to his extreme alcohol consumption, a plea of no contest is treated as the functional equivalent of a guilty plea. See *State v. Anderson*, 147 Ariz. 346, 350, 710 P.2d 456, 460 (1985) ("Like a guilty plea a plea of no contest is an admission of guilt for the purposes of the case." (internal quotations and citation omitted)). Therefore, it was not fundamentally unfair or inconsistent for Garby to ask

Norris to acknowledge his wrongful conduct in connection with the treatment program.

¶14 Norris also asserts that the trial court acted arbitrarily by revoking Norris's probation because Dr. Garby's requirement that Norris admit to the offenses added a "new material term" to the plea agreement. As plea agreements are contractual in nature and may be subject to contract interpretation, *Coy v. Fields*, 200 Ariz. 442, 445, ¶ 9, 27 P.3d 799, 802 (App. 2001), Norris argues that the unilateral addition of this new requirement violated the terms of the original plea agreement.

¶15 Norris fails to recognize, however, that the terms of the plea agreement did not address sex offender treatment. Instead, the agreement provided that Norris would receive "lifetime supervised probation" on Count 9. In that regard, he expressly acknowledged that if he violated any of the written conditions of his probation, it could be terminated, resulting in any sentence permitted by the plea agreement. That the trial court was obligated to reduce Norris's lifetime probation to a term of five years does not mean that the State added a material term to the agreement. Moreover, regardless of the methods Dr. Garby employed in connection with the treatment program, the State did not impose any requirement that Norris admit his guilt.



¶16 Norris also asserts he has "substantially performed" his obligations under the plea agreement by completing his prison sentence on Count 10 and completing four out of the five years of probation required on Count 9. He asserts that because he "has performed all that is required [under the contract], except for slight deficiencies that may easily be cured," he should be entitled to the equitable remedy of reinstatement of his probation under the doctrine of substantial performance.

¶17 Nothing in the plea agreement, however, specifically addresses sex offender treatment. The requirement of active participation was imposed by the trial court as a result of Norris's agreement to be placed on probation. In any event, although plea agreements may be subject to contract interpretation, we are not "obligated to apply a contract analysis to plea agreements because contract law may not provide a sufficient analogy." *Coy*, 200 Ariz. at 445, ¶ 9, 27 P.3d at 802. Assuming that contract principles are relevant here, to determine whether a party has substantially performed its obligations under a contract, we consider the extent of the defect and the degree to which the purpose of the contract is defeated. 15 Williston on Contracts § 44:54 (4th ed.); see also *Am. Cont'l Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 56 n.6, 607 P.2d 372, 375 n.6 (1980) (noting that application of the

doctrine of substantial performance is not appropriate when it would defeat the original intent of the parties).

¶18 The purpose of imprisonment and probation is to promote the rehabilitation of the offender. Ariz. R. Crim. P. 26, Refs & Annos; Ariz. R. Crim. P. 27.1; *State v. Gatlin*, 171 Ariz. 418, 422, 831 P.2d 417, 421 (App. 1992). In her discharge report, Garby stated that Norris's unwillingness to discuss his offenses does "not bode well for future rehabilitation." Garby further stated that Norris's "prognosis for internalizing treatment and making significant progress in treatment [is] significantly poor . . . Norris does not appear [amenable] to treatment at this time." While Norris completed most of the time required under the plea, his failure to actively participate in sex offender treatment has defeated the purpose of the plea agreement, which was rehabilitation. Thus, without deciding whether the doctrine of substantial performance is even relevant in the context of a plea agreement like Norris's, he did not substantially comply with the agreement because he violated his probation.

¶19 Norris also argues that the trial court abused its discretion in accepting Garby's testimony because it was internally inconsistent and conflicted with Norris's testimony. However, it is the trial court's role to "resolve such conflicts and to assess the credibility of witnesses." *State v. Thomas*,

196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999). Moreover, the evidence is not insufficient simply because the witnesses' testimonies conflict. *Id.*

¶20 Norris suggests that there was an ulterior motive behind the discharge based on Garby's statement that she was aware that Norris's probation was about to expire and that it was a factor in deciding to discharge Norris. *See State v. Alves*, 174 Ariz. 504, 506, 851 P.2d 129, 131 (App. 1992) ("An arbitrary termination from a program . . . will not support a revocation of probation."). Garby, however, clarified she was concerned that Norris was just showing up and biding his time until treatment was over and was not interested in the treatment or in making progress. Further, nothing in the record remotely suggests that Garby was biased against Norris or intended to discharge him for the purpose of facilitating revocation of his probation.

¶21 Finally, to the extent that Norris challenges the sufficiency of the evidence supporting a willful violation of probation, we conclude that the State met its burden of proof. *See id.* (recognizing that the trial court must find violation of probation was willful so that probationers are not left at the "whim" of those who administer the programs). Garby's discharge report states that Norris became defensive during group sessions and was unwilling to discuss his offenses and victims. Garby

also testified that Norris would not complete the assignments he was asked to do and was not receptive to feedback. This behavior supports the conclusion that Norris willfully resisted active participation in his treatment, which was a condition of his probation. Thus, the trial court did not abuse its discretion when it determined that the State proved by a preponderance of the evidence that Norris violated term 25(5).

**CONCLUSION**

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

/s/

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

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MARGARET H. DOWNIE, Judge

/s/

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RANDALL M. HOWE, Judge