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



DIVISION ONE
FILED: 03/22/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0477
)
Appellee,) DEPARTMENT D
)
v.) MEMORANDUM DECISION
) (Not for Publication -
WILLIAM H. HALL, III,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR200901151

The Honorable Thomas B. Lindberg, Judge (Deceased)

AFFIRMED

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

Nicole Farnum Phoenix
Attorney for Appellant

G E M M I L L, Judge

¶1 William H. Hall, III appeals the superior court's finding that he violated his probation, its revocation of his probation, and the imposition of a term of imprisonment. Hall's counsel filed a brief in compliance with *Anders v. California*,

386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. Hall was afforded the opportunity to file a supplemental brief *in propria persona*, and he has done so. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001). In October 2010, Hall was convicted of attempted sexual exploitation of a minor under the age of fifteen, a class three felony, and surreptitious photographing, a class five felony. On October 18, 2010, the court suspended the imposition of sentence and imposed supervised probation for a term of ten years. On October 20 and 27, 2010, Hall signed acknowledgments that the terms of his probation had been provided and explained to him and that he understood the terms.

¶13 Uniform Condition #7 of Hall's probation required that he reside in a residence approved by Adult Probation Services ("APD") and receive prior approval of the APD before changing his residence. On March 18, 2011, Hall's probation officer discovered that Hall had changed his place of residence from the

approved residence to an undisclosed location. Hall had not received prior approval to move and did not notify his probation officer of his new location until March 29, 2011.

¶4 Sex Offender Condition #11 of Hall's probation required Hall to refrain from using or possessing computer equipment or accessing the Internet without prior written approval of the APD. If granted prior written approval, Hall was required to abide by the APD Computer Usage Guidelines ("Guidelines"). Guidelines #2 and #13, respectively, required Hall to limit himself to possessing only one computer at the residence and to avoid using certain categories of websites, including, *inter alia*, social networking sites. On October 28, 2010, Hall's probation officer installed monitoring software on Hall's laptop computer. Noting Hall additionally possessed a desktop computer, he directed Hall to dispose of the desktop computer. On March 8, 2011, Hall's probation officer observed that Hall still had the desktop computer, in addition to the monitored laptop computer, in his possession. On or about December 13, 2010, Hall's probation officer discovered that Hall had been utilizing several social networking sites, including Facebook and MySpace, and blocked Hall's access to the sites. Subsequently, Hall continued his attempts to access various social networking sites.

¶5 On March 29, 2011, Hall's probation officer filed with

the superior court a petition to revoke probation. The petition alleged, *inter alia*, that Hall had changed his place of residence without notifying or being approved by APD, possessed more than one computer, and utilized social networking websites in violation of the terms of his probation. The trial court held violation and disposition hearings on May 25 and June 13, 2011, respectively. Hall chose not to testify at the violation hearing, and the only two witnesses during the proceeding were Hall's probation officers. Hall testified at the disposition hearing.

¶16 The trial court found Hall had violated Uniform Condition #7 and Sex Offender Condition #11 (specifically Guidelines #2 and #13). The court revoked his probation and sentenced him to a presumptive term of ten years' imprisonment for the class three felony conviction, to be served concurrently with a presumptive prison term of one and one-half years for the class five felony. The court awarded Hall 263 days of presentence incarceration credit for both felonies. This appeal followed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes sections 12-120.21(A)(1)(2003), 13-4031(2010), and 13-4033(A)(2010).

DISCUSSION

¶17 Having considered defense counsel's brief and Hall's

pro se supplemental brief, and examined the record for reversible error, see *Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. As far as the record reveals, Hall was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure. Additionally, the sentence imposed falls within the range permitted by law.

¶18 In his supplemental brief, Hall argues the trial court erred in finding he violated Guideline #13, a condition of his probation, because Guideline #13 does not explicitly include the phrase "social networking" or list "Facebook" as an example of a prohibited site. Hall asserts that he did not receive written notice that he was prohibited from accessing social networking sites as a condition of his probation, that he was granted oral permission from APD to access such sites, and that therefore his access of such sites was not a willful violation of the probation condition. Citing to Arizona Rule of Criminal Procedure 27.8(c)(2) ("Probation shall not be revoked for violation of a condition or regulation of which the probationer has not received a written copy.") and *State v. Alves*, 174 Ariz. 504, 506, 851 P.2d 129, 131 (App. 1992) ("the violation of a rule which a probationer is not, and could not be expected to be aware of, will not support a revocation of probation" and "[a]

violation must be willful" (citing to *State v. Robinson*, 142 Ariz. 296, 689 P.2d 555 (App. 1984)), Hall argues that the trial court erred in finding that he had violated Guideline #13.

¶9 Except in limited circumstances, "the revocation of probation has always been deemed to lie within the sound discretion of the trial court." *State v. Sanchez*, 19 Ariz.App. 253, 254, 506 P.2d 644, 645 (1973); see also A.R.S. § 13-917(B) (2010) (providing that the trial court may revoke probation at any time before expiration of the probationary period and may impose a term of imprisonment as authorized by law). We will uphold a court's finding of a probation violation unless the finding is arbitrary or unsupported by any theory of the evidence, i.e., for an abuse of discretion. *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999). In addition, "[a] violation must be established by a preponderance of the evidence." Ariz. R. Crim. P. 27.8(b)(3). "The evidence is not insufficient simply because the testimony is conflicting." *Thomas*, 196 Ariz. at 313, ¶ 3, 996 P.2d at 114.

A. Written Notice

¶10 Hall contends that the trial court violated Rule 27.8(c)(2) because it did not have sufficient evidence to conclude that Hall had written notice he was prohibited from accessing social networking sites. Specifically, Hall argues that because the text of Guideline #13 does not explicitly

include "social networking" or list Facebook as an example, he had no written notice of the prohibition.

¶11 As a requirement for being granted permission to use a computer for his web-design business, Hall was required to abide by the Guidelines. On October 20, 2010, and prior to being allowed use of a computer, Hall signed the Guidelines acknowledging that he understood the conditions within. Guideline #13, in its entirety, states: "I will not use an electronic bulletin board system, Internet relay chat channel, DCC chat channel, instant messaging, newsgroup, user group, peer to peer (e.g. Napster, Gnutella, Freenet, etc)."

¶12 During cross examination by Hall's attorney, the APD Surveillance Officer ("S.O.") responsible for monitoring and controlling Hall's Internet use testified that condition #13 prohibits the use of social networking sites:

Q: Can you show me where on [the Guidelines] [Hall] is not allowed to use social networking sites?

S.O.: Yes, No. 13. I will not use any electronic bulletin board system[s] and social networking [is] underneath bulletin board system[s] because [users] can post comments and that's what a bulletin board system is.

Q: The end of paragraph 13 it gives examples of Napster, Gnutella, Freenet. Does not say Facebook, does it?

S.O.: It is so broad. There [are] thousands and thousands.

Q: Everybody knows Facebook. It doesn't say Facebook, does it?

S.O.: This is a little older. It - but it's a category of bulletin board systems which is what all networking systems are.

¶13 Hall did not offer any contrary evidence. The trial court determined that the functionalities listed in Guideline #13, such as electronic bulletin board and chat systems, include social networking sites. With regard to Hall's argument that "Facebook" was not a listed example, the trial court determined that because the list of examples ends with "et cetera," it is not an exclusive list of prohibited sites. Because there is evidence on the record that Guideline #13 includes social networking sites despite not explicitly stating so in the text, we find that the trial court had sufficient evidence to find that Hall had written notice that he was prohibited from accessing social networking sites.

B. Oral Permission

¶14 In his supplemental brief, Hall further claims that on October 27, 2010, while S.O. was installing monitoring software on Hall's laptop computer, Hall "mentioned that he routinely used Facebook as a successful part of his marketing strategy" for his web-design business. Hall claims that S.O. verbally responded "that some websites, like chat rooms, would be blocked, but not Facebook." To support these claims, Hall cites

not to the record, but to an affidavit he prepared and signed on December 7, 2011, for the purpose of including with his appellate supplemental brief. As Hall's affidavit was not part of the record before the trial court, we must disregard the factual allegations contained within it in favor of examining the actual record. ARCAP 11(a)(1) ("The record on appeal to the appellate court shall be the official documents, exhibits, minute entries, and other objects filed with the clerk of the superior court, and a certified transcript or narrative or agreed statement, or if authorized by the appellate court, the electronic recording of the proceeding.").

¶15 At Hall's May 25, 2011 violation hearing, S.O. testified that he "told [Hall] the restrictions, especially [that] he not be allowed to use social networking sites, and that they would be blocked" and that these prohibited sites included MySpace and Facebook. The record offers no evidence contradicting S.O.'s claim that he did not give oral permission to Hall. Because the record offers uncontradicted evidence supporting the trial court's finding, we must find that there is sufficient evidence for the trial court to have concluded that Hall was not granted oral permission to use social networking sites, including Facebook.

C. Willful Violation

¶16 Hall also claims that because he did not know that he

was prohibited from visiting, and indeed thought he was allowed to visit social networking sites, the trial court did not have sufficient evidence to find that he willfully violated Guideline #13. On appeal, Hall claims that his Internet access was blocked on December 13, 2010, "without either verbal or written notice that Hall had violated a condition of his probation by visiting social networking sites." Even if that claim were true, the very act of blocking access to social networking sites should have put Hall on notice that such access was prohibited. Despite the initial block of Facebook and MySpace, S.O. testified that Hall "continued to use different [social networking sites] and [S.O.] continued to block them." Apparently, this pattern continued for some time:

Q: So you were monitoring [Hall] after you told him no social networking, you specifically blocked Facebook and MySpace.

S.O.: Correct.

Q: Then you monitored - then you were watching what he was doing. You saw that he was trying to access other social networks, and then you blocked those sites?

S.O.: Correct.

Q: And then he - was he trying continually to try to get [to] the social networking sites and [you] kept on blocking them?

S.O.: Yes.

¶17 Hall cites to *Alves*, 174 Ariz. at 506, 851 P.2d at

131, and *Robinson*, 142 Ariz. at 297-98, 689 P.2d at 556-57, for the proposition that all violations of probation must be willful. *Alves*, relying on *Robinson*, does state that “[a] violation of probation must be willful,” and explains that a probationer cannot be held in violation of a term which he “is not, and could not be expected to be aware of.” *Alves*, 174 Ariz. at 506, 851 P.2d at 131; see *Robinson*, 142 Ariz. at 297-98, 689 P.2d at 556-57. For the reasons stated above, Hall had written notice and therefore could have been expected to have been aware of the term. Moreover, S.O.’s uncontradicted testimony that Hall repeatedly attempted to access new social networking sites as S.O. blocked the previously accessed sites constitutes sufficient evidence for the trial court to have determined that Hall willfully violated Guideline #13, a condition of his probation.

¶18 For the reasons stated above, we find that the trial court had sufficient evidence and did not abuse its discretion in finding that Hall had written notice of the prohibition on accessing social networking sites, had not received oral permission from APD to access such sites, and therefore willfully violated Guideline #13, a condition of his probation.

¶19 In his supplemental brief, Hall further argues essentially that each of his three violations should be overlooked because they were not his fault. Based on the

evidence in the record, we find these arguments unpersuasive.

¶20 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Hall of the disposition of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. Hall has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶21 We affirm the trial court's finding of a probation violation, its revocation of Hall's probation, and the sentences it imposed for Hall's convictions.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
JON W. THOMPSON, Presiding Judge

_____/s/_____
MAURICE PORTLEY, Judge