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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RUSSELL H. ALMON, Appellant.	)	2 CA-CR 2011-0165 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR98000409

Honorable James L. Conlogue, Judge

AFFIRMED

Joel A. Larson, Cochise County Legal Defender
By Joel A. Larson
Bisbee
Attorney for Appellant

K E L L Y, Judge.

¶1 Russell Almon was placed on lifetime probation in 1999 following a plea of no contest to a charge of child molestation. In 2010, the state filed a petition to revoke his probation, asserting Almon had violated A.R.S. § 13-2310(A), fraudulent scheme and artifice, by providing the probation office with falsified records indicating he had completed required community service hours that he had not completed. The petition

also asserted Almon had not been at home when his probation schedule required him to be. After a violation hearing, the trial court found Almon had violated his probation, revoked his probation, and sentenced him to a five-year prison term.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), in which he avows he has reviewed the record but has found no arguable issue to raise and requests that we search the record for reversible error. Almon has filed a supplemental brief, asserting that, "[b]ased upon the evidence presented in the present . . . direct review/appeal" he has established his actual innocence because no jury could have found beyond a reasonable doubt that he had violated § 13-2310. We affirm.

¶3 Viewed in the light most favorable to sustaining the trial court's findings, we find there was sufficient evidence Almon violated the terms of his probation. *See State v. Vaughn*, 217 Ariz. 518, n.2, 176 P.3d 716, 717 n.2 (App. 2008). The evidence shows Almon was required to work a certain number of hours of community service each month as a condition of his probation and had submitted a log form indicating he had worked twenty hours in January 2010, despite having not worked any hours that month.[1] *See* § 13-2310(A). Additionally, the evidence established Almon was required to follow a weekly schedule listing each time he would be away from his home and, although he had permission to be away from his home from 8:00 a.m. to 5:00 p.m. on March 3, 2010, he was not at home at 7:45 p.m.

[1]The trial court determined the state had not proven a similar claim based on a December 2009 log form.

¶4 Almon's argument in his supplemental brief is difficult to parse. To the extent he suggests the evidence was insufficient to support the trial court's finding that he violated § 13-2310, he essentially asks us to reweigh the evidence, which we will not do. *State v. Lee*, 189 Ariz. 590, 603, 944 P.2d 1204, 1217 (1997). Although Almon testified he had submitted the false report inadvertently, the court was free to reject that testimony. *See State v. Ossana*, 199 Ariz. 459, ¶¶ 7, 8, 18 P.3d 1258, 1260 (App. 2001) (trial court determines credibility of witnesses). And Almon's claim that he intended to work those hours at a later time and had not been able to do so due to illness does not change the fact that he knowingly submitted false information to his probation officer in order to maintain an appearance of compliance with the terms of his probation.

¶5 Additionally, Almon claims he is "actually innocent" because the evidence did not support a conviction beyond a reasonable doubt, and the trial court erred in applying a preponderance of the evidence standard. But the law is clear that, when alleging a person has violated his or her probation, the state need prove those allegations only by a preponderance of the evidence, not beyond a reasonable doubt.[2] Ariz. R. Crim. P. 27.8(b)(3); *State v. Russell*, 226 Ariz. 416, ¶¶ 10-12, 249 P.3d 1116, 1118 (App. 2011) (preponderance standard applies to probation revocation based on alleged felony).

¶6 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and, having found none, we affirm the trial court's

[2]Accordingly, Almon's reliance on *Schlup v. Delo* is misplaced; that case discusses the application of the reasonable doubt standard to a claim of actual innocence of a felony conviction, not a probation violation. 513 U.S. 298, 327-28 (1995).

determination that Almon violated the terms of his probation, its revocation of his probation, and the sentence imposed.[3]

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

[3]The sentence imposed was consistent with the presumptive term described in Almon's plea agreement for a non-dangerous, non-repetitive class two felony. *See* 1993 Ariz. Sess. Laws, ch. 255, § 10 (former § 13-701(C) provided five-year presumptive term for class two felony). But it is inconsistent with the statutory scheme in effect at the time of Almon's offense, which provided for a presumptive prison sentence of seventeen years for child molestation. *See* 1997 Ariz. Sess. Laws, ch. 179, § 1 (former § 13-604.01(C) required seventeen-year presumptive prison term); 1993 Ariz. Sess. Laws, ch. 255, § 29 (violation of former § 13-1410 punishable pursuant to § 13-604.01). But, because any error inures to Almon's benefit and the state has not filed a cross appeal, we do not address this issue further. *See State v. Kinslow*, 165 Ariz. 503, 507, 799 P.2d 844, 848 (1990) (absent cross appeal, appellate court lacks jurisdiction to correct sentencing error benefitting defendant).