NOTICE: 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. 31.24

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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. JAY SCOTT MCFADDEN, Appellant.	)	2 CA-CR 2011-0243 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800120

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

Joel Larson, Cochise County Legal Defender
By Richard M. Swartz
Bisbee
Attorneys for Appellant

E S P I N O SA, Judge.

¶1 Jay McFadden appeals from the trial court's August 2011 order revoking his placement on intensive probation and sentencing him to a presumptive prison term of 3.5 years for his 2008 conviction for theft. Counsel has filed a brief citing *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing he has reviewed the record and found no arguable issue to raise on

appeal. He asks this court to search the record for reversible error. In a pro se, supplemental brief, McFadden argues the court erred (1) in admitting hearsay evidence that urine samples he provided on February 17 and May 24, 2011, were positive for the presence of methamphetamine and (2) in concluding the evidence was sufficient to find he had committed an additional felony offense, requiring revocation of his intensive probation and imposition of a prison term. *See* A.R.S. § 13-917(B). For the following reasons, we affirm.

¶2 We view the evidence at a probation violation hearing in the light most favorable to upholding the court's ruling. *See State v. Vaughn*, 217 Ariz. 518, n.2, 176 P.3d 716, 717 n.2 (App. 2008). So viewed, the evidence established that McFadden had been placed on a five-year term of intensive probation in September 2008, after he had pleaded guilty to felony theft. Among other conditions of his probation, McFadden was ordered to refrain from possessing or using "illegal drugs, toxic vapors, or controlled substances." In June 2011, his probation officer, Deborah Syphurs, filed a petition to revoke his probation, alleging he had violated this condition by using methamphetamine on or about February 17 and May 24, 2011.

¶3 With respect to each of those dates, a Cochise County Adult Probation officer testified he had witnessed McFadden submit urine for testing and attach a chain of custody seal to the sample provided; the officer had then placed the sample in a "drop box" for delivery to a drug testing laboratory. The laboratory reported that each of the samples had been positive for the presence of methamphetamine; certified copies of the laboratory's reports, including the affidavits of the laboratory's director, were admitted into evidence. Syphurs also testified that, when she confronted McFadden with the positive urinalysis result for February 17, he admitted he had used methamphetamine.

¶4 On appeal, McFadden argues the trial court erred in admitting hearsay evidence of the urinalysis reports. He contends the evidence was not reliable and its admission violated due process and deprived him of the opportunity to confront and cross-examine lab technicians who had prepared the reports.

¶5 During a probation violation hearing, "[t]he court may receive any reliable evidence . . . including hearsay." Ariz. R. Crim. P. 27.8(b)(3). Although McFadden's counsel objected to admission of the laboratory reports on the ground they were hearsay, she made no argument that the reports were unreliable or that McFadden's confrontation clause rights were violated. Accordingly, because McFadden failed to raise these arguments below, he has forfeited appellate review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). McFadden has failed to establish that any error occurred here, much less fundamental error.

¶6 To the extent McFadden appears to claim his right to confrontation, afforded by amendments VI and XIV of the United States Constitution and article II, § 24 of the Arizona Constitution, was violated by admission of the urinalysis results, we rejected nearly identical arguments in *State v. Carr*, 216 Ariz. 444, ¶¶ 5-6, 9-11, 167 P.3d 131, 133-34 (App. 2007). As we stated in *Carr*, "Our courts have repeatedly found urinalysis reports to be reliable, admissible evidence when there is 'testimony establishing how the sample was taken' and 'nothing to indicate that [the] report [is] inaccurate, or that the . . . testing procedures were generally unreliable.'" *Id.* ¶ 5, *quoting State v. Flores*, 26 Ariz. App. 400, 401, 549 P.2d 180, 181 (1976) (first two alterations in *Carr*). We also explained that, because a probation violation hearing "is not a stage of criminal prosecution," the Sixth Amendment right to confrontation does not apply and, "to the extent probationers have a limited Fourteenth Amendment right to confrontation,

that right is not abridged when the state presents 'reliable hearsay' evidence against the probationer," and good cause exists for not allowing confrontation. *Id.* ¶¶ 10-11, *quoting State v. Brown*, 23 Ariz. App. 225, 231, 532 P.2d 167, 173 (1975).

¶7 According to McFadden, however, the laboratory reports were not "reliable" because there was no evidence that the drop-box in which probation officers had placed his samples "was refrigerated." And McFadden contends—without citation to any authority—that refrigeration "is a requirement for preserving a urine sample for testing."[1] "[I]n the absence of any evidence" of unreliability, a trial court is entitled to give "greater weight to judicial economy" than to a probationer's unsupported objections to the admission of hearsay. *Brown*, 23 Ariz. App. at 231, 532 P.2d at 173. McFadden has presented no evidentiary basis to conclude the urinalysis results were unreliable, either at his hearing or on appeal. The court did not abuse its discretion in admitting the laboratory reports.

¶8 McFadden also argues the evidence was insufficient to support the trial court's finding that he had committed an additional felony offense and its conclusion that it was therefore required to "revoke the period of intensive probation and impose a term of imprisonment" pursuant to § 13-917(B). Citing *State v. Taylor*, 187 Ariz. 567, 931 P.2d 1077 (App. 1996), he contends, "In order for [the] use of drugs to constitute a new crime, the evidence must be more reliable than a urine specimen." *Taylor* does not support this proposition. Indeed, in *Taylor*, the trial court found a probationer had

[1]McFadden also contends "there was no [evidence of a] chain of custody of the two urine samples," but he is mistaken. This evidence was provided through the testimony of the probation officers who had witnessed McFadden producing and sealing the samples and the affidavits of the laboratory's certifying scientist. *See Carr*, 216 Ariz. 444, ¶¶ 4-6, 167 P.3d at 132-33.

committed an additional felony offense based on urinalysis that was positive for the presence of methamphetamine and the probationer's admission to his probation officer—the same evidence that was presented at McFadden's probation violation hearing.[2] *Id*. at 568-70, 931 P.2d at 1078-80. As this court explained in *Taylor*, "The violation was based on the use of methamphetamine, a dangerous drug, see A.R.S. § 13-3401(6)(b)[(xvii)], which is a class 4 felony. A.R.S. §[] 13-3407(A)(1), (B)(1). Accordingly, . . . section 13-917(B) required the trial court to revoke defendant's intensive probation[]." *Id.* at 570, 931 P.2d at 1080.

¶9 A probation violation must be established by a preponderance of the evidence, Rule 27.8(b)(3), and we will uphold a trial court's finding of a violation "unless it is arbitrary or unsupported by any theory of evidence," *State v. Moore*, 125 Ariz. 305, 306, 609 P.2d 575, 576 (1980). Here, the court did not err in finding McFadden had violated his probation and committed a new felony offense by using methamphetamine, and so did not err in revoking his intensive probation.

¶10 The trial court's findings were supported by the evidence, the proceedings were conducted in accordance with the law, and the sentence imposed upon revocation of McFadden's probation was within the range authorized. *See* A.R.S. §§ 13-702(D).[3] In

[2]McFadden discounts Syphurs's testimony about his admissions to her, claiming it is "belied by the fact that [he] denied the allegations to the Court, and proceeded to the violation hearing." But in probation violation hearings, as in other proceedings, "'[t]he finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses.'" *State v. Lewis*, 224 Ariz. 512, ¶ 21, 233 P.3d 625, 629 (App. 2010), *aff'd*, 226 Ariz. 124, 244 P.3d 561 (2011), *quoting State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995).

[3]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because no changes in the statutes are material to the issues in this case, *see*

our examination of the record pursuant to *Anders*, we have found no reversible or fundamental error and no arguable issue warranting further appellate review.

¶11 Accordingly, the trial court's findings of probation violations, its revocation of McFadden's probation, and the sentence imposed are affirmed.

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

CONCURRING:

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

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

id. § 119; 1993 Ariz. Sess. Laws, ch. 255, § 10, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.