

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

FILED BY CLERK

AUG 15 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0103-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ERIC SHAUN NECOECHEA,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20051998

Honorable Michael O. Miller, Judge

REVIEW GRANTED; RELIEF GRANTED AND REMANDED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

Law Office of Ronald Zack
By Ronald Zack

Tucson
Attorney for Petitioner

ESPINOSA, Judge.

¶1 Petitioner Eric Necochea pled guilty in 2006 to attempted sexual assault and attempted armed robbery. The trial court sentenced him to a partially aggravated, 4.5-year sentence on the attempted sexual-assault count, to be followed by a five-year

term of probation on the attempted armed robbery count, including the requirement that he register as a sex offender upon his release from prison. Necoechea sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., arguing, inter alia, that the court erred by requiring him to comply with sex offender conditions while on probation for attempted armed robbery. He also alleged that attorney Stephanie Meade, who represented him in the 2010 proceedings related to another matter and the probation revocation proceedings, was ineffective. We review a trial court's order dismissing a petition for post-conviction relief without an evidentiary hearing for an abuse of discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006). "An abuse of discretion includes an error of law." *See State v. Rubiano*, 214 Ariz. 184, ¶ 5, 150 P.3d 271, 272 (App. 2007).

¶2 In the 2006 plea agreement, the paragraph requiring Necoechea to comply with the special conditions of the sex offender treatment program if placed on probation was crossed out and initialed by the prosecutor, defense counsel, and Necoechea. At sentencing, defense counsel stated, "I thought that there was something in the original Plea Agreement that required sex offender conditions and that we stated at the time of the plea that because it's a robbery count that sex offender conditions would not be required or not appropriate." The state agreed that, although Necoechea would be required to register as a sex offender pursuant to the sexual offense for which he received a prison sentence, he would not be required to abide by sex offender conditions on probation. The trial court approved those terms.¹

¹Judge Ted Borek presided over the 2006 proceedings, while Judge Michael Miller presided over the 2012 Rule 32 proceedings. In addition, it is apparently undisputed that Necoechea did, in fact, register as a sex offender.

¶3 After serving his sentence for attempted sexual assault, Necoechea was released and placed on probation in March 2009. In February 2011, he pled guilty to new charges, which the trial court found constituted a violation of his probation from the 2006 plea agreement. In March 2011, the court sentenced Necoechea to incarceration for the new charges, and reinstated intensive probation on the 2006 attempted armed robbery conviction, to begin upon his release from the 2011 sentences. When Necoechea asked the court to confirm that he would not be required to comply with sex offender conditions once he was released on probation, the court stated, “I’m glad you raised that, because no, it actually will include that you need to comply with the sex offender conditions.”

¶4 Necoechea then filed the underlying petition for post-conviction relief arguing, inter alia, that the trial court’s requirement that he abide by sex offender terms on probation violated his right to due process and the separation of powers, as well as denied him the benefit of his plea bargain, and that Meade was ineffective by failing to pursue these claims. In its February 2012 under-advisement ruling, the court noted that, because Necoechea had waived the right to the preparation of an addendum to the 2006 presentence report, he had “arguably waived the right to object to sex offender conditions in this case.” Acknowledging, however, that “the written record does not clearly state the reasons for imposing sex offender conditions,” in what it characterized as “an exercise of caution,” the court permitted Necoechea to withdraw his waiver to the right to an addendum report, which he did. In its February 2012 ruling, therefore, the court granted in part and denied in part Necoechea’s petition for post-conviction relief. After the addendum report was prepared, the court subsequently conducted a hearing in April 2012, at which it ordered Necoechea to remain under the previously imposed terms and

conditions of probation for the 2006 attempted armed robbery conviction, and imposed the additional terms of intensive probation and “Sex Offender Caseload.”²

¶5 On review, Necoechea argues the trial court abused its discretion by requiring him to abide by sex offender conditions on probation and concluding Meade was not ineffective. We review de novo questions of statutory interpretation. *State v. Mangum*, 214 Ariz. 165, ¶ 6, 150 P.3d 252, 254 (App. 2007); *State v. Kuntz*, 209 Ariz. 276, ¶ 5, 100 P.3d 26, 28 (App. 2004) (“Whether the trial court properly applied [A.R.S.] § 13-2821(A) is a question of law that we review de novo.”). Pursuant to § 13-3821(A), persons convicted of certain enumerated offenses, including attempted sexual assault, are required to register as sex offenders in Arizona. In this case, however, Necoechea had already served his sentence for attempted sexual assault when the court modified his terms of probation on the attempted armed robbery offense. Although Rule 27.8(c)(2), Ariz. R. Crim. P., permits the court to “revoke, modify or continue probation” upon a determination that a probation violation has occurred, nothing in § 13-3821 gave the court the discretion to impose sex offender conditions when it modified Necoechea’s term of probation. The offense of attempted armed robbery, *see* A.R.S. § 13-1904, does not trigger sex offender registration, and violation of probation for that offense would not permit the court to modify probation by imposing the sex offender conditions permitted for an offense falling under § 13-3821.³ *Cf. State v. Espinoza*, 229 Ariz. 421, ¶ 29, 276

²In May 2012, Necoechea filed a subsequent notice of post-conviction relief, presumably to raise a claim of ineffective assistance of Rule 32 counsel. The trial court appointed a new attorney to represent him on that claim, which is not before us on review.

³Additionally, the trial court made no finding that Necoechea was sexually motivated to commit the attempted armed robbery. *See* A.R.S. §§ 13-118, 13-3821(C).

P.3d 55, 62 (App. 2012) (offense of criminal damage not predicate offense for requiring sex offender registration).

¶6 The trial court, therefore, abused its discretion by requiring that Necochea comply with the special terms of sex offender registration while on probation for attempted armed robbery. By extension, the court also abused its discretion by denying post-conviction relief. We therefore grant the petition for review, grant relief, and remand the case with directions to resentence Necochea without requiring compliance with the special terms of sex offender probation, although leaving in place the requirement that he register as a sexual offender for life.⁴

/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

⁴In light of our ruling, we do not reach Necochea's other claims, including his claim that Meade was ineffective.