FILED BY CLERK
APR 11 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

IN RE WYATT H.	2 CA-JV 2011-0120 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. JV6222

Honorable D. Corey Sanders, Judge Pro Tempore

AFFIRMED

Kenneth A. Angle, Graham County Attorney
By Steven Trujillo
Safford
Attorneys for State

Harriette P. Levitt
Tucson
Attorney for Minor

H O W A R D, Chief Judge.

¶1 Wyatt H. appeals from the juvenile court's orders finding he had violated his probation and committing him to the Arizona Department of Juvenile Corrections (ADJC) for a minimum of thirteen months. He contends the court improperly admitted evidence of statements he had made during the course of his sex offender treatment, as well as evidence that he had failed two consecutive polygraph examinations during the course of that treatment. He also maintains he is entitled to presentence incarceration credit for 185 days served in juvenile detention before his commitment to ADJC. For the following reasons, we affirm.

Facts and Procedural Background

¶2 In 2009, Wyatt admitted committing indecent exposure, was adjudicated delinquent, and was placed on juvenile probation for three years with the condition that he attend sex offender treatment. In early 2010, he admitted he had violated his probation by failing to attend one of his counseling sessions, and the juvenile court placed him on Juvenile Intensive Probation Supervision (JIPS) and ordered him to participate in a residential treatment program at the Youth Development Institute (YDI).

¶3 In May 2011, the state filed another petition to revoke Wyatt's probation, in which it alleged he had been released unsuccessfully from YDI because he had failed to progress in treatment, was noncompliant with treatment, and had continued to act out sexually. At a contested probation violation hearing, Wyatt moved to preclude evidence of statements he had made during his YDI counseling sessions, arguing admission of such statements violated A.R.S. § 13-4066 and his Fifth Amendment protection against

self-incrimination. The juvenile court granted the motion in part, ruling that statements Wyatt may have made about his past behavior would be excluded, but permitting the state to introduce his statements about acts that took place during his treatment.

¶4 At the hearing, Wyatt's YDI therapist testified he had been terminated unsuccessfully from the program because he had not made sufficient progress to continue in treatment. She reported his treatment history had been "definitely up and down," with weeks or months of progress followed by a backslide. She emphasized the importance of a client's being "completely truthful about . . . what's going on with them" and "things that they're struggling with" during the course of treatment and stated Wyatt's maintenance polygraph reports had indicated he was "doing things that were manipulative and being deceitful throughout his treatment." She noted Wyatt had continued to struggle with inappropriate behaviors, citing his history of self-harm and deviant masturbatory practices, voyeurism and frottaging involving his peers, and an attempt to expose himself to a staff member. Wyatt also had self-reported that, while he was released on home passes, he had watched his stepfather as he used a public urinal and had watched his father sleeping in the nude. The therapist explained that Wyatt had not disclosed the second incident directly during the course of his therapy; rather, it had taken "a series of discussions and a series of polygraphs for that information to finally

come out" and, even then, the therapist could not confirm that Wyatt had told her "the complete story."[1]

¶5 At the close of the hearing, the juvenile court stated it was "not convinced" Wyatt had been non-compliant with treatment, but found he had violated the terms of his probation by failing to remain in treatment at YDI. The court further found YDI had made a "reasonable decision" to terminate Wyatt's treatment unsuccessfully because he had "fail[ed] to progress in his treatment" and had "continue[d] to act out sexually." Wyatt was committed to ADJC "for a minimum stay of 13 months, not to exceed [his eighteenth] birthday" in December 2013, and ordered to participate in ADJC's "Journey Sex Offender Program."

Discussion

A probation violation "must be established by a preponderance of the evidence," and a court may consider "any reliable evidence not legally privileged, including hearsay." Ariz. R. Crim. P. 27.8(b)(3); *see also In re Maricopa Cnty. Juv. Action No. J-83341-S*, 119 Ariz. 178, 182-83, 580 P.2d 10, 14-15 (App. 1978) (identical text in precursor, Ariz. R. Crim. P. 27.7(b)(3), 210 Ariz. LXIV-LXV (2005), applied to juvenile probation violation hearings). We review a court's revocation of probation for an abuse of discretion. *State v. Thomas*, 196 Ariz. 312, ¶ 3, 996 P.2d 113, 114 (App. 1999).

[1]The therapist testified that Wyatt had failed a subsequent polygraph examination and "didn't make any further disclosures that would indicate that he was ready to be honest about what was going on" or to address his struggles during therapy, despite opportunities to do so.

Similarly, a court has "reasonable discretion in determining the admissibility of evidence" at a probation violation hearing, "and such discretion will not be disturbed on appeal unless it has been clearly abused." *State v. Tulipane*, 122 Ariz. 557, 558, 596 P.2d 695, 696 (1979). We review de novo legal issues raised by a motion to suppress evidence. *State v. Levens*, 214 Ariz. 339, ¶ 7, 152 P.3d 1222, 1224 (App. 2007).

Section 13-4066, A.R.S., and Self-Incrimination

¶6 In relevant part, § 13-4066 provides as follows:

> A. Any statement that is made by a person who undergoes sex offender treatment that is ordered by the court or that is provided by the state department of corrections or the department of juvenile corrections to a person who is convicted of an offense listed in chapter 14 or 35.1 of this title and any evidence that results from that treatment is not admissible against the person in any criminal or juvenile delinquency proceeding unless the person consents, except that the statement or evidence may be used pursuant to rule 404 (b) and (c), Arizona rules of evidence.
>
> B. This section does not apply if there is a reasonable belief that the person has committed a new violation of chapter 14 or 35.1 of this title during the course of the person's treatment. . . .

(footnote omitted).

¶7 Wyatt first argues, as he did below, that his statements about his conduct during community passes were subject to exclusion pursuant to § 13-4066(A). He maintains the juvenile court committed reversible error in accepting the state's avowal that Wyatt's statements were admissible pursuant to § 13-4066(B) based on a reasonable belief that he had committed acts of voyeurism, in violation of § 13-1424. Relying on

Jacobsen v. Lindberg, 225 Ariz. 318, 238 P.3d 129 (App. 2010), *review granted*, Mar. 15, 2011, and *State v. Eccles*, 179 Ariz. 226, 877 P.2d 799 (1994), Wyatt also argues he "was found in violation of his conditions of probation exclusively on evidence offered in violation of his constitutional rights against self-incrimination, as guaranteed by the Fifth Amendment."

¶8 The Fifth Amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The Supreme Court has explained,

> [T]his prohibition not only permits a person to refuse to testify against himself at a criminal trial in which he is a defendant, but also "privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings." In all such proceedings, "a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. . . . Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution."

Minnesota v. Murphy, 465 U.S. 420, 426 (1984), *quoting Lefkowitz v. Turley*, 414 U.S. 70, 77, 78 (1973) (citations omitted; alterations in *Murphy*).

¶9 We agree with the state that neither § 13-4066 nor the Fifth Amendment limits the admissibility of evidence here, because a probation revocation hearing is not a criminal prosecution or a juvenile delinquency proceeding. *See Murphy*, 465 U.S. at 435 n.7 (probation revocation "not a criminal proceeding"; "privilege against compelled self-

incrimination" not available to probationer "on the ground that the information sought can be used in revocation proceedings"); *In re Miguel R.*, 204 Ariz. 328, ¶¶ 28-29, 63 P.3d 1065, 1073 (App. 2003) (juvenile probation revocation hearing not criminal proceeding for purpose of privilege against self-incrimination). As the Supreme Court has explained,

> [A] state may validly insist on answers to even incriminating questions and hence sensibly administer its probation system, as long as it recognizes that the required answers may not be used in a criminal proceeding and thus eliminates the threat of incrimination. Under such circumstances, a probationer's "right to immunity as a result of his compelled testimony would not be at stake . . . ."

Murphy, 465 U.S. at 435 n.7, *quoting Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation*, 392 U.S. 280, 284 (1968); *see also State v. Rivera*, 116 Ariz. 449, 452, 569 P.2d 1347, 1350 (1977) (statements to probation officer about crimes committed during probation admissible in revocation hearing "regardless of whether the probationer has been read his *Miranda* rights prior to such admissions").

¶10 Wyatt's reliance on *Jacobsen* and *Eccles* is unavailing. In *Jacobsen*, a probationer sought special action relief from a trial court's order directing him to answer questions in a polygraph examination administered by a sex offender treatment program, notwithstanding his invocation of his right against self-incrimination, on the ground that "'§ 13-4066(B) provides protection commensurate with the Defendant's Fifth Amendment rights.'" 225 Ariz. 318, ¶¶ 1-2, 5, 238 P.3d at 130-31. Another panel of this court granted relief, holding that § 13-4066 "is not broad enough to provide the immunity

that is required to force a defendant invoking his rights against self-incrimination to speak" because it permits the admission of incriminating statements in a criminal or delinquency proceeding to prove an offense committed during treatment or to prove a defendant's propensity to commit any subsequent crime. *Id.* ¶¶ 9-12. Citing our supreme court's decision in *Eccles*, the court in *Jacobsen* held "a probationer can only be compelled to answer incriminating questions if the probationer is offered use immunity" pursuant to A.R.S. § 13-4066. *Id.* ¶ 10. The court noted the state had "declined to offer Jacobsen immunity" under this general immunity statute. *Id.* ¶ 11.

¶11 In *Eccles*, our supreme court found "constitutionally repugnant" a trial court's admonition to a pleading defendant that, "as a 'critical part of the Sexual Offender Treatment Program,'" he "'must agree to waive any and all rights against [self-incrimination], granted under the United States and/or the State of Arizona constitutions'" by answering truthfully any questions asked by "'the probation officer, counselors, polygraph examiners, or any other agent of the Probation Department's treatment programs'"; that his answers could be used "'to revoke your conditions of probation, or for the filing of new charges, and at trial, on those new charges'"; and that his refusal to adhere to the court's instructions could "'result in a revocation of probation.'" 179 Ariz. at 227, 229, 877 P.2d at 800, 802 (alteration in *Eccles*). Citing *Murphy*, the court held "the state cannot make waiver of the privilege against self-incrimination a condition of probation." *Id.* at 227, 877 P.2d at 800.

¶12 But although requiring a probationer to waive his legitimate Fifth Amendment rights under penalty of revocation is constitutionally impermissible, requiring a probationer to "speak truthfully about matters relevant to his probationary status" is not. *Id.* at 228, 877 P.2d at 801 (probation term "sanitized" to eliminate required waiver of Fifth Amendment right); *see also Murphy*, 465 U.S. at 437 (constitutionally permissible requirement that probationer respond truthfully to probation officer's questions "contained no suggestion that his probation was conditional on his waiving his Fifth Amendment privilege"). Here, conditions of Wyatt's probation required him to "actively participate in sex offender treatment"; to "submit to any program of psychological, psychiatric or physiological assessment . . . including the polygraph, to assist in treatment, planning and case monitoring"; and to "allow any therapist" to disclose information about his progress to the court. Nothing in these terms suggests "his probation was conditional on his waiving his Fifth Amendment privilege." *Murphy*, 465 U.S. at 437.

¶13 Moreover, as the state points out, Wyatt never refused to answer any questions based on his Fifth Amendment right against self-incrimination, as the petitioner in *Jacobsen* had. *See Jacobsen*, 225 Ariz. 318, ¶ 5, 238 P.3d at 131; *see also Eccles*, 179 Ariz. at 228, 877 P.2d at 801 ("[W]e do not hold that defendant may not incriminate himself; to avoid doing so, he must assert the privilege at the appropriate time."). The Supreme Court explained in *Murphy*, "A state may require a probationer to appear and discuss matters that affect his probationary status; such a requirement, without more, does

not give rise to a self-executing privilege." *Murphy*, 465 U.S. at 435. And, even if Wyatt's incriminating statements could be deemed "compelled" by an express or implied assertion that "invocation of the privilege would lead to revocation of probation," the result would be that "the failure to assert the privilege would be excused, and the probationer's answers would be deemed compelled and inadmissible in a criminal prosecution." *Id.* As addressed above, a probation revocation hearing is not a criminal prosecution subject to a defendant's privilege against compelled self-incrimination, *see Murphy*, 465 U.S. at 435 n.7; *Rivera*, 116 Ariz. at 452, 569 P.2d at 1350, and nothing in this record suggests the state sought to introduce Wyatt's statements in any delinquency proceeding based on his admissions.

Admission of Failed Polygraph Examinations

¶14 Wyatt argues the admission of evidence that he failed two polygraph examinations constitutes fundamental, prejudicial error.[2] In *State v. Goodloe*, our supreme court ruled that admission of polygraph evidence is permissible in probation revocation hearings "to corroborate other evidence[,] . . . so long as there is not a delegation of the authority vested in the court." 107 Ariz. 141, 142, 483 P.2d 556, 557 (1971). The juvenile court did not delegate its authority to polygraph examiners here.

[2]Wyatt did not object to evidence of his polygraph examination results during the hearing, and so has forfeited review of this issue for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶15 Indeed, we conclude Wyatt cannot sustain his burden of establishing that the admission of the polygraph evidence in this case, if it had been error at all, was prejudicial. To establish prejudice here, Wyatt must show that a reasonable fact-finder could have reached a different result if the polygraph evidence had been excluded. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 26-27, 115 P.3d 601, 608-09 (2005). Here, the juvenile court expressly declined to find Wyatt had violated his probation because he had been "non[-]compliant" with treatment based on the state's evidence of failed polygraph examinations. Instead, the court ruled Wyatt had violated his probation because he had failed to progress in treatment, as established by conduct he admitted or behavior observed by YDI personnel. Because the court emphasized that its ruling did not rely on evidence that Wyatt had failed polygraph examinations, Wyatt was not prejudiced by the admission of that evidence.

Credit for Time Served

¶16 Wyatt also argues his disposition is illegal because the juvenile court did not award credit for presentence incarceration, pursuant to A.R.S. § 13-712(B), for the time he spent in juvenile detention prior to his disposition. This court previously has ruled that juveniles are not entitled to credit for time spent in pre-disposition custody. *See In re Cochise Cnty. Juv. Action No. JV95000239*, 186 Ariz. 234, 236, 921 P.2d 34, 36 (App. 1996) (impossible to give credit for "time served" on unknown period of confinement, which may not end until minor's eighteenth birthday). Notwithstanding Wyatt's argument on appeal that, unlike the juvenile in *Cochise Cnty. No. JV95000239*,

he has been committed to ADJC for "a known period of time," we find no meaningful distinction between the dispositions at issue.

Disposition

¶17 The juvenile court's probation revocation and disposition orders are affirmed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge