



Fourth Court of Appeals
San Antonio, Texas

MEMORANDUM OPINION

No. 04-16-00639-CR

Jonathan Lopez **ARELLANO**,
Appellant

v.

The **STATE** of Texas,
Appellee

From the 437th Judicial District Court, Bexar County, Texas
Trial Court No. 2013CR6229W
Honorable Lori I. Valenzuela, Judge Presiding

Opinion by: Luz Elena D. Chapa, Justice

Sitting: Karen Angelini, Justice
Marialyn Barnard, Justice
Luz Elena D. Chapa, Justice

Delivered and Filed: May 24, 2017

AFFIRMED

Jonathan Lopez Arellano appeals the trial court's revocation of his community supervision. He argues the trial court erred by not finding the State exercised due diligence in attempting to contact or locate him after he failed to report to his supervision officer and there is no evidence the State exercised such due diligence. We affirm the trial court's judgment.

BACKGROUND

In 2013, Arellano pled guilty to the charge of possessing a controlled substance (penalty group 1) in an amount of less than one gram. The trial court rendered a judgment of conviction,

but suspended the imposition of Arellano's sentence and placed him on community supervision for two years. The trial court also imposed terms and conditions for Arellano's community supervision.

In 2014, the State moved to revoke Arellano's community supervision, alleging he violated several conditions of his community supervision. At a hearing on the State's motion, Arellano pled true to the State's allegations. The trial court signed orders amending the conditions of Arellano's community supervision and extended the duration of his community supervision through August 2016.

In 2016, the State again moved to revoke Arellano's community supervision, alleging he violated several conditions of his community supervision. The State alleged, among other violations, that Arellano failed to report to his supervision officer in December 2015 and January 2016. At a hearing on the State's motion, Arellano pled true to the State's failure-to-report allegation. Arellano's counsel informed the trial court that Arellano was homeless, but he had secured housing; obtained a GED; reported to his supervision officer in other months; and complied with the other conditions of his community supervision. Arellano did not argue or offer evidence showing his supervision officer failed to exercise due diligence or request a finding on the issue of due diligence. After the trial court revoked Arellano's community supervision, Arellano filed a timely notice of appeal.

ANALYSIS

We review a trial court's revocation of community supervision for an abuse of discretion. *Simon v. State*, 442 S.W.3d 581, 583 (Tex. App.—San Antonio 2014, no pet.). "Community supervision may be revoked upon a finding that an appellant has violated the terms of his or her community supervision." *Id.* "Generally, one prerequisite to preserve a claim of error for appellate review is that the record must show the complaining party made a timely request, objection, or

motion to the trial court that specifically stated the party's complaint." *Sauls v. State*, 384 S.W.3d 862, 863 (Tex. App.—San Antonio 2012, no pet.) (quotation marks omitted). "An error not preserved in a revocation hearing may be waived." *Id.* And if the defendant fails to request specific findings, the trial court's failure "to make specific findings in the order revoking [community supervision] is not reversible error." *Id.*

In his sole issue, Arellano argues the trial court "erred in failing to make any findings that the [S]tate exercised due diligence in locating Appellant." He also contends the record does not show his supervision officer's effort, if any, to contact him between the time he failed to report and when the State filed its second motion to revoke. Arellano relies on section 24 of article 42.12 of the Texas Code of Criminal Procedure, the "Due Diligence Defense," which provides:

[I]t is an affirmative defense to revocation for an alleged failure to report to a supervision officer as directed or to remain within a specified place that a supervision officer, peace officer, or other officer with the power of arrest under a warrant issued by a judge for that alleged violation failed to contact or attempt to contact the defendant in person at the defendant's last known residence address or last known employment address, as reflected in the files of the department serving the county in which the order of community supervision was entered.

TEX. CODE CRIM. PROC. ANN. art. 42.12, § 24 (West Supp. 2016). Section 24 does not require the trial court to make a *sua sponte* finding about the supervision officer's due diligence. *See id.* Arellano did not request that the trial court make a finding about his supervision officer's alleged lack of due diligence. He therefore failed to preserve his complaint about the lack of a finding for appellate review, and we will not reverse the trial court's judgment on the basis that it failed to *sua sponte* make such a finding. *See Sauls*, 384 S.W.3d at 864.

Furthermore, section 24 provides an officer's failure to exercise due diligence is an "affirmative defense" to a failure-to-report allegation. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 24. Arellano therefore had "the burden of proving that no community supervision officer attempted to contact him in person at his last known address according to the State's records." *See*

Wheat v. State, 165 S.W.3d 802, 806 (Tex. App.—Texarkana 2005, pet. ref'd). As Arellano notes in his brief, there is no evidence¹ showing his supervision officer exercised, or failed to exercise, due diligence. Arellano pled true to the State's allegation that he failed to report to his supervision officer, and he failed to satisfy his burden to establish his supervision officer did not exercise due diligence. Thus, the trial court did not abuse its discretion by revoking Arellano's community supervision. *See id.*; *see also Simon*, 442 S.W.3d at 583.

CONCLUSION

We affirm the trial court's judgment.

Luz Elena D. Chapa, Justice

DO NOT PUBLISH

¹ The clerk's record contains a February 24, 2016 violation report that notes, "The defendant has failed to report since November 24, 2015. On February 9, 2016, the Field Unit attempted a home visit at the given address, but they were told the defendant did not live at that address." The violation report was not admitted into evidence at the revocation hearing.