

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



DIVISION ONE
FILED: 06/21/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) Nos. 1 CA-CR 11-0145
) 1 CA-CR 11-0352
Appellee,) (Consolidated)
)
v.) DEPARTMENT E
)
AMBER FAYE WATSON,) **MEMORANDUM DECISION**
)
Appellant.) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause Nos. CR 2008-156955-001 DT; CR 2008-132659-001 DT

The Honorable Jeffrey Reuter, Commissioner

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals Section/
Capital Litigation Section
and Adriana M. Zick, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 Amber Faye Watson appeals the superior court's disposition imposed for a probation violation. Specifically, Watson argues the superior court erred in finding that she is no longer eligible for mandatory probation pursuant to Arizona Revised Statutes (A.R.S.) section 13-901.01(G) (2010). For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶2 Watson pled guilty to solicitation to possess a narcotic drug and possession of marijuana. She was sentenced to probation on both counts, see A.R.S. § 13-901.01(A), (F) (making probation mandatory for certain first and second drug convictions), and in both cases, as a condition of probation, she was directed to participate in substance abuse counseling, see A.R.S. § 13-901.01(D) (stating that sentencing courts imposing mandatory probation pursuant to the statute "shall require participation in an appropriate drug treatment or education program" as a condition of probation).

¶3 On November 25, 2009, the State petitioned to revoke Watson's probation alleging numerous probation violations, including Watson's failure to participate in substance abuse counseling. On February 18, 2010, Watson admitted violating the term of her probation requiring participation in substance abuse counseling and the other allegations were dismissed. The State

informed the superior court that it was not seeking a "302 finding"¹ at that time and the court continued Watson on probation with a revised expiration date.

¶4 Six months later, Cheryl Begay, Watson's supervising probation officer, instituted proceedings to revoke Watson's probation alleging, among other things, that Watson failed to participate in substance abuse treatment. Based on this allegation, the probation officer requested that the superior court find Watson was no longer eligible for disposition under A.R.S. § 13-901.01.

¶5 The superior court held a violation hearing that was limited in scope to the allegation that Watson failed to participate in substance abuse counseling. At the hearing, Begay testified that she discussed the mandatory substance abuse counseling with Watson at their initial meeting in March 2010. Begay also stated that she and Watson's previous probation officer gave Watson written directives for substance abuse counseling. In April 2010, Watson entered a substance abuse

¹ The shorthand "302 finding" refers to Proposition 302, passed by a voter referendum in November 2002, which permits sentencing courts to "revoke [mandatory] probation [pursuant to A.R.S. § 13-901.01] upon a finding that a probationer refused to participate in drug treatment." *State v. Vaughn*, 217 Ariz. 518, 520 n.3, 176 P.3d 716, 718 n.3 (App. 2008). Prior to the amendment, A.R.S. § 13-901.01 "required that first-time Proposition 200 probation violators be reinstated on probation with additional conditions and incarceration was not an option." *Id.* (internal quotations omitted).

program with Native American Connections (NAC), but she was discharged in June for failure to report to classes, comply with the intake reporting requirements, and respond to their attempts to "re-establish service." Watson informed Begay that she was applying with AHCCCS, but also stated she would pay for the counseling if necessary. Begay provided Watson with several less expensive treatment options, but Watson chose to continue with NAC. Watson failed to meet the deadlines set forth in the directives for commencing a substance abuse program.

¶16 Watson testified that she applied to have AHCCCS cover the cost of her substance abuse counseling with NAC, but her application was denied because she failed to provide a birth certificate and census card demonstrating her Native American lineage. When asked why she was unable to provide the necessary documentation to AHCCCS, Watson testified that the records were located in storage containers in Ganado, Arizona, that there were "rat droppings" in the storage containers that presented a health risk, that it was "hard" to travel to Ganado, and that locating the documents was "a huge hassle." Watson further testified that she was unable to afford the \$3000 out-of-pocket expense for the counseling in the absence of AHCCCS coverage. Finally, when asked about being discharged from NAC, Watson admitted that she failed to attend her scheduled appointment

with the provider but claimed she had no knowledge of NAC's numerous attempts to contact her and establish service.

¶17 Following the presentation of evidence, defense counsel acknowledged that Watson "clear[ly]" violated her probation, but argued that she did not "refuse treatment" to warrant a 302 finding. Specifically, defense counsel argued that Watson's failure to "push [] herself" and "get[] things done as quickly as possible" should not be equated with a refusal of treatment.

¶18 After hearing argument from the parties, the superior court found that the State had proven by a preponderance of the evidence that Watson violated the term of her probation requiring substance abuse counseling. With respect to a 302 finding, the superior court stated:

[A]lthough she did not by her verbiage refuse treatment, I find that by her actions she did refuse treatment. The excuses she gave for not getting the information she needed to get on AHCCCS, I find to not be legally sufficient excuses, and there was no good excuse for being discharged.

And I think through her actions, between being reinstated, which was in February and August, her actions have established that she has refused treatment. So I'm going to find that she's effectively rejected drug treatment as a condition of probation, and that she's no longer eligible for mandatory probation under Proposition 200, and that disposition will proceed pursuant to A.R.S. 13-901.01(f).

¶9 Nonetheless, at the December 15, 2010 disposition hearing, the superior court reinstated Watson on probation, with an October 6, 2011 "expiration date on both cases." This appeal followed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

DISCUSSION

¶10 On appeal, Watson challenges the sufficiency of the evidence supporting the superior court's finding that she refused to participate in drug treatment. She contends that she failed to complete drug treatment as a result of financial hardship, and therefore did not willfully refuse.

¶11 We will uphold a superior court's finding that a probationer has violated probation unless the finding is arbitrary or unsupported by any theory of evidence. *Vaughn*, 217 Ariz. at 521, ¶ 14, 176 P.3d at 719 (internal quotations omitted). "However, an illegal sentence is fundamental error that [this court] must correct."² *Id.* (internal quotations omitted).

² Although probation is technically not a "sentence," *State v. Bouchier*, 159 Ariz. 346, 347, 767 P.2d 233, 234 (App. 1989), we refer to "sentence" here in the more general context of a sanction, see *United States v. Knights*, 534 U.S. 112, 119 (2001) (noting probation is a form of criminal sanction imposed after a determination of guilt).

¶12 "[E]vidence is not insufficient simply because the testimony is conflicting." *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999). "It is for the trial court to resolve such conflicts and to assess the credibility of witnesses in doing so." *Id.* Moreover, when a court's ruling is based on findings of fact after an evidentiary hearing, we accept the court's findings unless they are clearly erroneous. *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993).

¶13 As set forth in A.R.S. § 13-901.01, "unless a person has been convicted of or indicted for a violent crime, upon a first or second conviction of personal possession or use of a controlled substance or drug paraphernalia not involving methamphetamine, the court shall suspend the imposition or execution of sentence and place the person on probation." *Vaughn*, 217 Ariz. at 521, ¶ 15, 176 P.3d at 719 (internal quotations of A.R.S. § 13-901.01 omitted). If the probationer violates a condition of probation, the court may not revoke the probation unless the court finds that the probationer refused to participate in drug treatment. *Vaughn*, 217 Ariz. at 521, ¶ 13, 176 P.3d at 719; see also A.R.S. § 13-901.01(G) ("If the court finds that the defendant refused to participate in drug treatment, the defendant shall no longer be eligible for probation under this section[.]").

¶14 Watson contends that her "failure" to participate in drug treatment should not be deemed a "refusal" to participate for purposes of A.R.S. § 13-901.01(G). She asserts that she was unable to afford drug treatment without AHCCCS coverage and argues she should not be penalized for her inability to pay. She further claims that she could not timely qualify for AHCCCS coverage because obtaining the requisite documents posed a significant health risk, but she maintains that she "acted reasonably in curing the deficiencies in her application."

¶15 A failure to participate in drug treatment does not necessarily constitute a refusal to participate. See *Vaughn*, 217 Ariz. at 523, ¶ 25, 176 P.3d at 721. Watson cites *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), for the proposition that "a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority."

¶16 Applying the reasoning of *Bearden* here, the sentencing court needed to consider the reason Watson failed to participate in treatment. If the sentencing court determined Watson's failure to participate was a willful refusal or failure to make

sufficient efforts, it was authorized to revoke probation pursuant to A.R.S. § 13-901.01(G).

¶17 The evidence presented at the violation hearing supported such a finding. Begay testified that she provided Watson with several less expensive treatment options, but Watson chose to pursue treatment through NAC. Begay also testified that Watson failed to attend her appointment with NAC and did not respond to NAC's repeated attempts to establish services and was discharged as a result. Moreover, Watson's primary argument that she could not timely obtain AHCCCS coverage because the requisite documents were located in storage containers that posed a health risk was undermined by her testimony at the hearing. Although she made a single reference to "disease" the "rat droppings" surrounding the storage containers may carry, when she was specifically asked whether she failed to obtain the documents "because of the rats" she replied "Yeah. Well, not really." Watson then explained that the volume of items contained in the storage containers was substantial and sorting through the containers to find the documents required a significant amount of time.³ Furthermore, Watson failed to offer any evidence to substantiate her claim that the storage containers presented a health risk and we defer to the superior

³ Watson testified that her Mother located the documents the week before the violation hearing.

court's determinations regarding witness credibility and the weight to accord Watson's testimony. See *Thomas*, 196 Ariz. at 313, ¶ 3, 996 P.2d at 114.

¶18 Thus, unlike *Bearden*, this is not a case in which financial hardship necessarily prevented Watson from participating in a drug treatment program. Rather, the evidence supports the superior court's finding that Watson's dilatory conduct prevented her from obtaining the financial resources that would enable her to participate in a drug treatment program and comply with that term of her probation. Therefore, we affirm the superior court's finding that Watson refused to participate in a drug treatment program and is no longer eligible for mandatory probation pursuant to A.R.S. § 13-901.01.

CONCLUSION

¶19 For the foregoing reasons, we affirm.

_____/s/_____
PHILIP HALL, Judge

CONCURRING:

_____/s/_____
MAURICE PORTLEY, Presiding Judge

_____/s/_____
DIANE M. JOHNSEN, Judge