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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 09/20/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

STATE OF ARIZONA, ) 1 CA-CR 11-0473  
)  
Appellee, ) DEPARTMENT B (AUGUST)  
)  
v. ) MEMORANDUM DECISION  
)  
VICTOR PEREZ CANO, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)  
)  
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200900193

The Honorable Maria Elena Cruz, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Division  
And Barbara A. Bailey, Assistant Attorney General  
Attorneys for Appellee

The Law Offices of Kelly A. Smith Yuma  
By Kelly A. Smith  
Attorney for Appellant

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S W A N N, Judge

¶1 Victor Perez Cano appeals the superior court's revocation of his probation and imposition of a prison sentence. Cano contends that the superior court erred by revoking his probation, because it improperly relied on information protected by federal confidentiality laws and improperly took judicial notice of its own minute entry terminating Cano from its Drug Court program. Cano also contends that the superior court erred by failing to recuse itself from the revocation proceedings. For the following reasons, we affirm.

*FACTS AND PROCEDURAL HISTORY*

¶2 Cano pled guilty to criminal damage and was placed on supervised probation for three years. The conditions of Cano's probation required him to submit to drug and alcohol testing as directed by the probation department or the court ("Condition 9"), participate and cooperate in any counseling or assistance program directed by the probation department or the court ("Condition 10"), and abide by the special conditions of the Yuma County Drug Court ("Condition 25"). The special conditions of the Drug Court required him to comply with the orders of his treatment provider; allow his treatment provider to disclose information concerning his attendance and progress to the probation department and the court; and "[c]omply with all the requirements of each of the Drug Court phases."

¶13 In April 2011, Cano submitted a urine sample to a testing facility and the sample tested positive for methamphetamine. The next month, the court held a Drug Court status hearing at which Cano was represented by counsel and assisted by an interpreter. At the status hearing, the judge stated that she had previously spoken to Cano about his positive test result. The judge also stated that Cano had other "violations" for which he had been sanctioned, but did not specifically describe those violations and sanctions. When asked whether he had anything he would like to say, Cano stated: "I want the program to come to an end, for you to terminate me. That is all I have to say." The court terminated Cano from the Drug Court program and ordered the probation department to file a petition to revoke Cano's probation by the next day.

¶14 Pursuant to the court's order, the probation department filed a petition to revoke Cano's probation based on violations of Conditions 10 and 25, as evidenced by Cano's termination from the Drug Court program "after program rules violations." The matter proceeded to a revocation hearing before the same judge who had presided over the Drug Court proceeding. The court took judicial notice of its order terminating Cano from the Drug Court program, and Cano's probation officer testified. The state produced no additional evidence of why Cano was terminated from the Drug Court program

or how the state obtained the information that led to the termination.

¶15 Based on the termination order and the testimony introduced at the revocation hearing, the court found that Cano violated Condition 10 when he failed to participate and cooperate in the Drug Court program, and violated Condition 25 when he failed to successfully complete the program. The court revoked Cano's probation and imposed a one-year prison sentence. Cano appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A), 13-4031 and 13-4033.

#### *DISCUSSION*

##### *I. THE COURT DID NOT ERR BY REVOKING CANO'S PROBATION.*

¶16 Cano contends that the superior court erred by revoking his probation because the revocation was based on information that is confidential pursuant to federal law and because the court could not take judicial notice of its own order. Cano also contends that the evidence was insufficient to support the revocation. Cano's contentions are unsupported by the record and the law.

##### A. The Record Does Not Support Cano's Claim that the Revocation of His Probation Was Based on Confidential Information.

¶17 Federal law provides for the confidentiality of all information in records maintained in connection with programs

that are both (1) related to a patient's substance abuse treatment or rehabilitation and (2) directly or indirectly assisted by the federal government. 42 U.S.C. § 290dd-2(a); 42 C.F.R. §§ 2.11-2.12. Except as authorized by valid consent or a court order, such records may not be used to investigate the patient. 42 U.S.C. § 290dd-2(b), (c); 42 C.F.R. § 2.12(d). Nor may the records be disclosed to agencies which made participation in the program a condition of the disposition of a criminal proceeding or release from custody, absent the patient's written and signed consent. 42 C.F.R. § 2.35(a).

¶18 There is nothing in the record to indicate that Cano consented to any investigation or disclosure of records from his drug treatment program. But there is also nothing in the record to support Cano's claim that his treatment program received federal assistance. Cano was terminated from the Drug Court program after he submitted a urine sample that tested positive for methamphetamine and personally requested termination from the program after the court spoke to him about that test result.<sup>1</sup> The conditions of Cano's probation permitted the probation department and the court to order Cano to submit to drug testing

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<sup>1</sup> Cano's claim that he and his counsel were unaware of the reasons for his termination from the Drug Court program is groundless. He appeared with counsel at the Drug Court proceedings. Further, even if the Drug Court proceedings were sealed or confidential, we are aware of no authority that prevented Cano from obtaining copies of records from his own case.

independent of any federally assisted program. We will not assume without evidence that Cano submitted to the drug test as part of a federally assisted treatment program subject to federal confidentiality laws. Moreover, even if the program did qualify under the statute, there is nothing in the record to indicate that the state obtained information from the program or its affiliated facilities.

B. The Court Properly Took Judicial Notice of Its Order Terminating Cano from the Drug Court Program.

¶9 Cano next contends that the superior court erred when it took judicial notice of its own order terminating him from the Drug Court program. He contends that the court's order "was part of a sealed drug treatment record that was not readily accessible" and was subject to federal confidentiality laws.

¶10 We find no error. As discussed above, there is no evidence to support Cano's claim that the federal confidentiality laws apply. We reject the notion that even under federal confidentiality laws, a trial judge must ignore the content of his or her own orders -- such a holding would defy logic and render the courts toothless to perform their function. Further, there is nothing in the record to support Cano's claim that the order was otherwise sealed. If Cano believed the order was sealed, he had a duty to see that any document or other information necessary to support that claim

was included in the record. See *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995). He did not do so. And indeed, it appears that the order is readily accessible in the superior court file. The state noted as much in its motion to supplement the appellate record with the order, and there is nothing in the record to indicate the state had to petition the superior court to unseal the order before obtaining a copy. Again, a court may take judicial notice of its own records. *State v. Gross*, 201 Ariz. 41, 45, ¶ 13, 31 P.3d 815, 819 (App. 2001).

C. The Revocation of Cano's Probation Was Supported by Sufficient Evidence.

¶11 Cano next contends that there was insufficient evidence to support the court's finding that he violated the conditions of his probation. The state must prove that a defendant violated a condition of probation by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3); *State v. Tulipane*, 122 Ariz. 557, 558, 596 P.2d 695, 696 (1979). "It is enough for the trial court to have a 'reason to believe' that the individual is 'violating the conditions of his probation or engaging in criminal practices[.]'" *State v. Smith*, 112 Ariz. 416, 419, 542 P.2d 1115, 1118 (1975) (citation omitted). We will not reverse the superior court's determination that a defendant violated a condition of probation unless the court's

finding is arbitrary and unsupported by any theory of the evidence. *State v. Stotts*, 144 Ariz. 72, 79, 695 P.2d 1110, 1117 (1985). We view the evidence in the light most favorable to sustaining the court's finding. *State v. Vaughn*, 217 Ariz. 518, 519 n.2, ¶ 3, 176 P.3d 716, 717 n.2 (App. 2008).

¶12 Here, the state presented sufficient evidence to support the court's finding that Cano violated the conditions of his probation. Cano tested positive for methamphetamine while on probation and asked that the court terminate him from the Drug Court program, which the court did. The court could reasonably have found that this evidence showed Cano willfully violated Conditions 10 and 25 of his probation.

¶13 Cano argues, however, that there was no evidence the state provided him a Spanish-language version of the terms and conditions of his probation. The state provided Cano the written terms and conditions of his probation in English, a probation officer explained those terms and conditions to Cano with the assistance of a Spanish-speaking probation department employee, and Cano signed those conditions and initialed each term and condition that applied to him. Nothing more was required. See Ariz. R. Crim. P. 27.8(c)(2) (probationer must receive written copy of terms and conditions of probation).



II. THE JUDGE DID NOT ERR BY FAILING TO RECUSE HERSELF FROM THE REVOCATION PROCEEDINGS.

¶14 Cano finally contends that the superior court judge should have recused herself from the revocation proceedings because she had personal knowledge of the proceedings in the Drug Court and the reasons why Cano was terminated from the Drug Court program. Cano further implies, but does not directly argue, that the judge was biased or prejudiced.

¶15 Cano did not raise this issue below. We therefore review for fundamental error. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991). We find no error, fundamental or otherwise. The reasons that the court terminated Cano from the Drug Court program and the evidence to support those reasons were available for use in subsequent proceedings, and the judge was not privy to any information not known by Cano and his counsel.

¶16 Further, allegations of judicial bias or prejudice must be specific and the supporting facts "concrete." *State v. Ellison*, 213 Ariz. 116, 128, ¶ 37, 140 P.3d 899, 911 (2006) (citation omitted). Cano makes no specific allegations of bias or prejudice. The mere fact that the same judge who terminated Cano from the Drug Court program later revoked his probation based on that earlier termination is of no matter. "[O]pinions formed by the judge on the basis of facts introduced or events

occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *State v. Ramsey*, 211 Ariz. 529, 541, ¶ 38, 124 P.3d 756, 768 (App. 2005) (alteration in original) (citation omitted). "[J]udicial rulings alone almost never constitute a valid basis for a bias or partiality motion,' . . . without showing '[ ]either an extrajudicial source of bias [ ]or any deep-seated favoritism[.]'" *Ellison*, 213 Ariz. at 129, ¶ 40, 140 P.3d at 912 (first alteration added) (citations omitted). Cano does not even hint that the judge held any "deep-seated favoritism or antagonism." The judge's failure to recuse herself was not error.

CONCLUSION

¶17 Because we find no error, we affirm the superior court's order revoking Cano's probation and imposing a prison sentence.

/s/

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PETER B. SWANN, Judge

CONCURRING:

/s/

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JON W. THOMPSON, Presiding Judge

/s/

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SAMUEL A. THUMMA, Judge