

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: 10/04/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0828  
)  
Appellee, ) DEPARTMENT A  
)  
v. ) **MEMORANDUM DECISION**  
)  
DANIEL LEE PITZER, ) (Not for Publication -  
) Rule 111, Rules of the  
Appellant. ) Arizona Supreme Court)  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-106092-001

The Honorable Virginia L. Richter, Judge *Pro Tempore*

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
Matthew Binford, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Tennie B. Martin, Deputy Public Defender  
Attorney for Appellant

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**T I M M E R**, Presiding Judge

¶1 Daniel Lee Pitzer appeals the trial court's  
disposition reinstating him on probation after he violated a

condition of probation. Pitzer does not contest he violated probation or contend that the court erred by reinstating him on probation. Rather, he argues the court erred in finding he was no longer eligible for mandatory probation pursuant to Arizona Revised Statutes ("A.R.S.") section 13-901.01(A) (West 2012)<sup>1</sup> because he had refused to participate in drug treatment. For the reasons that follow, we disagree and therefore affirm.

#### **BACKGROUND**

¶12 In July 2009, Pitzer pled guilty to possession of drug paraphernalia, his first drug conviction. The superior court imposed 18 months' probation pursuant to A.R.S. § 13-901.01(A), which requires a disposition of probation for certain first- and second-time drug offenders. *State v. Vaughn*, 217 Ariz. 518, 521, ¶ 15, 176 P.3d 716, 719 (App. 2008). One condition of probation was completion of at least eight hours of drug treatment. The court later convicted Pitzer of another drug offense, which constituted an automatic probation violation. After an evidentiary hearing, the court also found that Pitzer had refused to participate in three drug treatment programs. This finding removed Pitzer from eligibility for mandatory probation under § 13-901.01(A). Regardless, the court reinstated probation for two years. This appeal followed.

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<sup>1</sup> Absent material revisions after the date of an alleged offense, we cite a statute's current version.

## DISCUSSION

¶3 A defendant's eligibility for mandatory probation under A.R.S. § 13-901.01(A) must be revoked if the court finds that "the defendant refused to participate in drug treatment." A.R.S. § 13-901.01(G). Pitzer argues the evidence does not support such a finding, and the trial court therefore erred by finding him ineligible for mandatory probation. We will uphold the court's finding unless "[it] is arbitrary or unsupported by any theory of evidence." *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999).

¶4 Pitzer correctly contends that in order to find a defendant no longer eligible for mandatory probation under § 13-901.01(A), the court must find that the defendant "refused" to participate in drug treatment rather than merely "failed" to do so. A finding of "refusal" includes an element of willfulness; evidence of continued drug use and failure to complete drug treatment are insufficient to support a finding of refusal. *Vaughn*, 217 Ariz. at 523, ¶ 25, 176 P.3d at 721 (holding evidence of drug use and failure to participate in a drug test was not by itself sufficient evidence of refusal to participate in drug treatment).

¶5 Our review of the record reveals sufficient evidence to uphold the court's finding that Pitzer, through his conduct, willfully refused to participate in drug treatment. Pitzer's

probation officer testified she initially referred him to an out-patient program before making a referral to Maverick House, an in-patient drug treatment program. Maverick House subsequently discharged Pitzer for failing to comply with program rules when he was caught associating with a drug user. Pitzer next entered a Salvation Army treatment program, but voluntarily checked himself out of that program. He then returned to Maverick House, where he was discharged for violating a leave-of-absence policy. Pitzer knew he was required to complete a minimum of eight hours of drug treatment as a condition to his probation because he signed a document reflecting review of this and other probation conditions.

¶16 Although, as Pitzer points out, he never verbally refused to participate in drug treatment, his repeated violations of Maverick House's rules and his voluntary discharge from the Salvation Army program, combined with evidence he knew he was required to complete at least eight hours of drug treatment, evidence his refusal by conduct to participate in drug treatment. This case is therefore distinguishable from *Vaughn*, which held a defendant's continued drug use and failure to participate in a drug test did not support a finding the defendant had "refused" treatment. Unlike the defendant in *Vaughn*, Pitzer did not merely fail to comply with certain probation conditions; he willfully took actions directly

negating his participation in drug treatment. See *id.* at 522-23, ¶¶ 23-25, 176 P.3d at 720-21.

¶7 Based on this record, we cannot say the trial court's finding under § 13-901.01(G) was arbitrary or unsupported by the evidence.<sup>2</sup> We therefore affirm.

/s/  
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/  
John C. Gemmill, Judge

/s/  
Margaret H. Downie, Judge

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<sup>2</sup> Pitzer asserts the trial court did not state what burden of proof it employed to make its finding. To the extent Pitzer argues the court committed reversible error by this omission, we disagree. The Arizona Rules of Criminal Procedure do not require the court to state the burden of proof. We presume the court applied the appropriate burden. *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) ("Trial judges 'are presumed to know the law and to apply it in making their decisions.'" (quoting *Walton v. Arizona*, 497 U.S. 639, 653 (1990))). Moreover, because probation violations must be established by a preponderance of the evidence, Ariz. R. Crim. P. 27.8(b)(3), which is the least onerous burden of proof, we fail to discern how Pitzer was prejudiced if the court mistakenly held the State to a higher burden.