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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



DIVISION ONE
FILED: 1/8/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 12-0180
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
RENE JOSEPH CARBAJAL,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2001-016679

The Honorable Jeffrey A. Rueter, Judge Pro Tem

AFFIRMED

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

James J. Haas, Maricopa County Public Defender Phoenix
By Paul J. Prato, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Rene Joseph Carbajal appeals his March 14, 2012 probation revocation and the resulting four-year prison sentence. Carbajal was serving probation in connection with his 2002 sexual assault and kidnapping convictions. Because we find no error in the trial court's revocation of probation, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In 2002, Carbajal was convicted by a jury of kidnapping and sexual assault, both class 2 felonies. On June 20, 2002, Carbajal was sentenced to seven years' imprisonment for the kidnapping conviction, followed by seven years' probation on the sexual assault conviction. Carbajal served his prison sentence and was subsequently released. His probation period commenced on April 8, 2008.

¶3 Over the next four years, three of Carbajal's surveillance officers filed probation violation reports, each alleging separate infractions. First, on March 23, 2010, Carbajal was accused of failing to submit to mandated polygraph testing and to sex offender treatment. The court found that Carbajal had violated the terms of his probation, but at the disposition hearing his probation was reinstated under the

original terms.¹

¶14 A second probation violation report was filed on July 21, 2011. Carbajal again was accused of failing to comply with sex offender treatment requirements. Shortly after Carbajal denied the accusation and a hearing date was set, the State withdrew its petition seeking probation revocation.

¶15 At issue in this appeal is Carbajal's third instance of alleged probation violations. The probation officer alleged that Carbajal "provided false information to (his) polygrapher" and failed to "actively participate and cooperate in sex offender counseling or assistance," both of which would violate Term 11 of Carbajal's probation conditions. The report also alleged a Term 21 violation for failing to abide by the special conditions of a sex offender plus a Term 21.6 violation for not complying with sex offender treatment.

¶16 The facts surrounding the Term 11 allegation revolve around a meeting with polygrapher Marty Oeirich. On February 1, 2012, Carbajal reported for a polygraph test at Clinical Polygraph Services. Carbajal revealed to Oeirich that he

¹ The court had previously corrected an error in the original 2002 sentencing minute entry. The 2002 sentencing for kidnapping and sexual assault was erroneously recorded because sexual assault, under Arizona law, was not eligible for probation. See Ariz. Rev. Stat. § 13-1406(B) (2010). The trial court corrected the record to clarify that Carbajal's seven year prison term satisfied his sexual assault conviction and he was placed on probation for the kidnapping conviction.

currently had an appeal pending in the "Court of Appeals." Oeirich then explained he was forbidden from conducting the test because an ongoing appeal is grounds for immediate termination of polygraph services. Soon after, Oeirich contacted Carbajal's probation officer, Claudia Betancourt, to explain the circumstances leading to his termination of polygraph services. Betancourt investigated the supposed appeal to determine the truth of Carbajal's claim.

¶17 Carbajal's explanation of his supposed appeal was unconvincing. Upon request, Carbajal provided Betancourt with only one document. Betancourt identified a case number from the document and determined it was associated with the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit then verified that, while Carbajal had indeed filed an appeal, it had denied review in January 2011.

¶18 At a March 14, 2012 probation violation hearing, Carbajal continued to insist he had an active appeal in the "District of Columbia." He claimed he had no verifying court documents because the "government sealed it." Carbajal did not persuasively explain his basis for believing the appeal was still active.

¶19 To assess the Term 11 and Term 21.6 allegations that Carbajal failed to actively participate in counseling and treatment, the court also received testimony regarding

Carbajal's past failures in receiving treatment. Carbajal's surveillance officer testified that, on at least two occasions, Carbajal appeared for polygraph tests but exercised his Fifth Amendment right in refusing to answer questions. Carbajal had also refused to actively participate in directed sex offender treatment and even failed to appear at previous polygraph appointments. The trial court found Carbajal's actions violated probation Terms 11 and 21.6, revoked his probation, and ultimately sentenced him to a mitigated term of four years in prison. Carbajal timely appeals the March, 14 2012 probation revocation.

DISCUSSION

¶10 Carbajal contends the court's ruling was not supported by sufficient evidence. He further claims (1) he acted properly at the February 1 polygraph meeting, (2) his past probation non-compliance is irrelevant, and (3) the State failed to provide sufficient evidence that he knew his appeal claim would cease polygraph testing. On this record, we find no abuse of discretion.

¶11 In Arizona, a probation violation must be established by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3). Determining whether to revoke probation is a matter largely within the sound discretion of the trial court, but we review for abuse of discretion, capriciousness, or arbitrariness

on the part of the trial court. *State v. Sanchez*, 19 Ariz. App. 253, 254, 506 P.2d 644, 645 (1973). A trial court's finding that a probationer has violated probation will be upheld "unless the finding is arbitrary or unsupported by any theory of evidence." *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999) (citation omitted).

¶12 The trial court had sufficient evidence to find that Carbajal violated both Term 11 and Term 21.6 of his probation. Term 11 mandated Carbajal "(s)uccessfully complete any program of assistance, counseling or therapy as directed by the probation department." Similarly, Term 21.6 required Carbajal, a sex offender, to "(s)ubmit to any program of psychological or physiological assessment at the direction of probation officer, including . . . the polygraph, to assist in treatment, planning and case monitoring." During the disposition hearing, the court heard testimony regarding Carbajal's dishonesty during polygraph testing and his past non-compliance with mandatory treatment. Relying on this testimony, the court revoked Carbajal's probation.

¶13 Carbajal argues he absolutely complied with the February 1 polygraph meeting. Carbajal explains he showed up for his appointment, was willing to pay the polygraph service fee, and the polygrapher was at fault for not issuing the test. Carbajal, though, downplays his statement to the polygrapher

that he had an appeal pending. This revelation is significant as it was the basis for Oeirich's termination of Carbajal's polygraph testing.

¶14 At the violation hearing, Carbajal's testimony offered little rationale for the court to accept that he truly believed in an active appeal. At no time did Carbajal offer anything beyond an expired case number. Carbajal even admitted he possessed nothing to prove he had a case pending as of February, 2012. Nevertheless, Carbajal's counsel stressed Carbajal is not educated in the law and, thus, could have actually believed his appeal was pending. Resolution of this issue requires a determination of Carbajal's credibility and the trial court is in the best position to assess credibility. The evidence in the record is sufficient to support the trial court's rejection of Carbajal's argument.

¶15 Carbajal next argues that his past unwillingness to comply with probation, and specifically polygraph testing, is irrelevant to the revocation at issue. The trial court overruled Carbajal's objection to this evidence, stating that the testimony was relevant to whether he "knowingly provided false information to avoid taking the polygraph." We review evidentiary rulings for abuse of discretion. *State v. Davolt*, 207 Ariz. 191, 208, ¶ 60, 84 P.3d 456, 473 (2004) (citation omitted). We discern no abuse of discretion in the trial

court's determination in this regard.

¶16 Carbajal further contends that the evidence was insufficient to support revocation of his probation. He specifically argues that the trial court lacked direct evidence that he knew or had reason to know the polygrapher would terminate testing based on a pending appeal. This Court, though, may uphold a trial court decision based solely on circumstantial evidence. See *State v. Stotts*, 144 Ariz. 72, 80, 695 P.2d 1110, 1118 (1985) (“[W]e hold the trial court’s finding, based upon circumstantial evidence alone, [was] not arbitrary and unsupported by any theory of the evidence.”); see also *State v. Nash*, 143 Ariz. 392, 404, 694 P.2d 222, 234 (1985) (citations omitted) (noting that even “[c]riminal convictions may rest solely on circumstantial proof”). We conclude that the record includes sufficient circumstantial evidence to support the court’s finding that Carbajal violated the terms of his probation by providing false information to the polygrapher regarding the existence of an appeal.

CONCLUSION

¶17 Because the evidence in the record supports the trial court’s revocation of probation and imposition of sentence, we

affirm.²

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
MARGARET H. DOWNIE, Judge

_____/s/_____
LAWRENCE F. WINTHROP, Chief Judge

² Because Carbajal's appeal focuses on the revocation of probation and does not challenge the sentence itself, we do not address any issue regarding the sentence.