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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

IKEMEFULA CHARLES IBEABUCHI, *Appellant*.

No. 1 CA-CR 16-0542
FILED 11-21-2017

Appeal from the Superior Court in Maricopa County
No. CR 1999-095310
The Honorable John R. Doody, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Elizabeth B. N. Garcia
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Mikel Steinfeld
Counsel for Appellant

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MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

H O W E, Judge:

¶1 Ikemefula Ibeabuchi appeals the reinstatement of his probation with the inclusion of intensive probation terms. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In July 2002, Ibeabuchi was convicted of an offense in Nevada and was sentenced to prison on that matter. Additionally, in Arizona in February 2003, Ibeabuchi pled guilty to attempted sexual assault, a class 3 felony, and to sexual abuse, a class 5 felony. In May 2003, the trial court sentenced Ibeabuchi to two years' imprisonment on the sexual abuse count and lifetime probation on the attempted sexual assault count. Ibeabuchi signed the Uniform Conditions of Probation and acknowledged in court that all sex-offender terms would be imposed. Ibeabuchi was released from the Nevada State Prison in February 2014, and he was then transferred to Immigration and Customs Enforcement ("ICE"). He was released from ICE's custody on November 2015, after the Nigerian government declined to issue Ibeabuchi travel documents to return to Nigeria.

¶3 That same month, Ibeabuchi reported to Maricopa Adult Probation Department ("APD") and reviewed his probation terms. Although Ibeabuchi verbally stated that he would comply with his probation conditions, he refused to sign the Review and Acknowledgment of his conditions. APD transferred Ibeabuchi to another team where he again refused to sign any probation documents. Despite not signing the probation directives, Ibeabuchi attended all scheduled appointments with probation and registered as a sex offender with the sheriff's department as required.

¶4 In January 2016, Ibeabuchi's probation officer requested a status conference to "address [Ibeabuchi]'s refusal to sign probation documents, specifically the Review and Acknowledgment of the terms of his probation grant." The court granted the request and set a status

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conference for February 2016. The court initially assigned Ibeabuchi a public defender, but he hired a private defense counsel who filed a notice of appearance on Ibeabuchi's behalf two days before the conference.

¶5 At the status conference, defense counsel explained that Ibeabuchi had retained him to prepare a delayed Arizona Rule of Criminal Procedure 32 petition. Defense counsel stated that he understood Ibeabuchi's signing of the probation terms and conditions would not waive his Rule 32 challenge. Defense counsel also stated that he had discussed the matter with Ibeabuchi and had advised him to sign the conditions. Defense counsel asked the court to advise Ibeabuchi that his signing would not jeopardize his ability to file a Rule 32 petition, and the court granted the request. Afterwards, Ibeabuchi signed the Special Conditions of Probation, which included sex-offender terms.

¶6 On March 24, 2016, the probation officer gave Ibeabuchi a written directive that he schedule an intake appointment with psychological and consulting services for sex-offender treatment by March 29, 2016. After his meeting with the probation officer, Ibeabuchi drove directly to defense counsel's office and showed defense counsel the directive. After speaking with defense counsel, Ibeabuchi still had five days to comply with the directive, but he failed to schedule an intake appointment. On April 5, 2016, the State petitioned to revoke Ibeabuchi's probation for violating Term 25 of his probation because he "failed to attend, actively participate and remain in sex offender treatment" and "failed to schedule an intake appointment . . . by March 29, 2016." Ibeabuchi denied the alleged probation violation, and the court held a probation violation hearing in June 2016.

¶7 At the hearing, the probation officer testified that in November 2015, she had reviewed with Ibeabuchi his probation terms and conditions that he signed in 2003. Specifically, she reviewed Term 25 with Ibeabuchi, which required him to comply with sex-offender conditions and to actively participate in and remain in sex-offender treatment. She further testified that on March 24, 2016, she gave the written directive to Ibeabuchi and told him that he needed to schedule an intake appointment for sex-offender treatment. She stated that although Ibeabuchi refused to sign the directive, he was aware of the directive and did not indicate that he did not understand it. Ibeabuchi informed the probation officer that he was going to take the directive to defense counsel and review it with him. Ibeabuchi requested that the probation officer go through defense counsel for everything related to his probation. The probation officer declined, however, because she believed that she did not need to talk to defense

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counsel about Ibeabuchi's probation terms. The probation officer stated that Ibeabuchi did not tell her that he was not going to comply with the directive because she declined to speak with defense counsel. The probation officer further testified that the directive listed various fees and discounted rates for the required treatment. The probation officer stated that APD would have helped Ibeabuchi pay for treatment if needed, and the first payment would have been due at his first appointment and not when he scheduled the intake appointment. The probation officer testified that Ibeabuchi never scheduled an intake appointment.

¶8 During Ibeabuchi's testimony, he acknowledged that he had received the written directive on March 24, 2016, and had refused to sign it. He stated that he did not sign the directive and refused to comply with it because he thought that: (1) he would have to pay money for treatment the same day that he scheduled his intake appointment and (2) the probation officer had violated his right to counsel. Ibeabuchi also testified that he told the probation officer that he would not be able to afford the treatment fees. Ibeabuchi stated that after receiving the directive, he drove from the probation officer's office directly to defense counsel. Ibeabuchi admitted that he never scheduled an intake appointment after meeting with defense counsel.

¶9 The court found by a preponderance of the evidence that Ibeabuchi had violated Term 25 of his probation. The court further found that Ibeabuchi had refused to comply with the written directive, and whether he believed he could afford the treatment fees did not affect whether he was able to schedule the intake appointment as directed. At the disposition hearing, the court reinstated Ibeabuchi's probation but also included intensive probation terms. Ibeabuchi timely appealed.

DISCUSSION

¶10 Ibeabuchi argues that the court violated his right to counsel in finding that he violated his probation by consulting with his attorney before complying with probation's directive. He also argues that the court violated his due process rights by finding that he violated his probation by failing to comply with a directive when he believed the directive would require payment that he could not afford. The State must prove a probation violation by a preponderance of the evidence. *Ariz. R. Crim. P. 27.8(b)(3); State v. Elmore*, 174 Ariz. 480, 483 (App. 1992). We will uphold the trial court's "finding that a probationer has violated probation unless the finding is arbitrary or unsupported by any theory of evidence." *State v. Vaughn*, 217 Ariz. 518, 521 ¶ 14 (App. 2008). The decision to revoke probation is within

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the trial court's discretion upon a finding that a violation of a probation condition has occurred. *See State v. Sanchez*, 19 Ariz. App. 253, 254 (1973). We view the evidence in the light most favorable to sustaining the court's finding. *State v. Tatlow*, 231 Ariz. 34, 39–40 ¶ 15 (App. 2012). We review constitutional issues de novo. *State v. Coleman*, 241 Ariz. 190, 192 ¶ 6 (App. 2016). Because Ibeabuchi's right to counsel was not violated and his probation violation was unrelated to his inability to pay, the trial court acted appropriately.

1. Right to Counsel

¶11 Ibeabuchi contends that the court violated his right to counsel in finding that he violated his probation by consulting with his attorney about his probation terms. A criminal defendant has the right to counsel under both the Arizona and United States Constitutions. U.S. Const. amend. VI; Ariz. Const. art. II, § 24; *State v. Ruiz*, 236 Ariz. 317, 325 ¶ 30 (App. 2014). This right extends to all critical stages of the criminal process. *State v. Gunches*, 240 Ariz. 198, 202 ¶ 10 (2016). While this Court would normally review the relevant factors to determine if Ibeabuchi's situation constituted a critical stage, we need not do so because the trial court did not find a probation violation based on Ibeabuchi's request to meet with counsel, but rather on Ibeabuchi's failure to schedule an intake appointment. The record clearly shows that Ibeabuchi reviewed and signed his probation terms. After meeting with his probation officer, he met with defense counsel and discussed the directive with counsel and had five days remaining to schedule an intake appointment. His constitutional argument consequently fails. Because the evidence that Ibeabuchi never scheduled an intake appointment was uncontroverted—Ibeabuchi admitted that he had refused to schedule the appointment—the trial court did not abuse its discretion by finding that Ibeabuchi had violated his probation terms.

2. Failure to Comply with Probation Directive

¶12 Relying on *State v. Robinson*, 142 Ariz. 296 (App. 1984), Ibeabuchi contends that the trial court effectively revoked his probation because of his inability to pay for the sex-offender treatment. A trial court may not revoke a probationer's probation "solely on the grounds that he failed to complete payments on the fine and restitution, without regard to his ability to pay." *Id.* at 297; *see also State v. Davis*, 159 Ariz. 562, 563 (1989) (finding that *Robinson* also applies to probationers who are unable to pay probation fees). To do so would amount to a deprivation of the probationer's "conditional freedom in violation of the fundamental fairness

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required by the Fourteenth Amendment.” *Robinson*, 142 Ariz. at 298. *Robinson* is inapplicable here because the court did not add intensive probation terms for Ibeabuchi’s failure or inability to pay. Rather, the court did so because of Ibeabuchi’s failure to comply with the directive to schedule an intake appointment. This failure violated Term 25 of his probation conditions.

¶13 Ibeabuchi counters that he did not schedule an intake appointment because he erroneously believed that he needed to pay a fee and his probation officer never told him that no fee was required. He argues that the probation officer, after hearing from Ibeabuchi that he could not afford the treatment fees, should have explained that APD would help him pay the treatment fees if he could not. He also contends that the probation officer should have clarified that a fee was not required for the intake appointment. He asserts that the probation officer “communicated to [him] that he would be punished no matter what he did.” As such, he argues that his probation was effectively revoked based on his inability to pay. This argument is not persuasive.

¶14 The record shows that the probation officer gave Ibeabuchi the written directive and explained to him orally that he needed to schedule an intake appointment. The probation officer was available for any questions, and Ibeabuchi did not indicate that he did not understand the directive. The record shows that fees related to treatment were listed on the directive, but there was no testimony or other evidence of any fee related to scheduling an intake appointment listed on the directive. Moreover, the probation officer never told Ibeabuchi that he would be required to pay an intake fee. Ibeabuchi also met with defense counsel immediately after receiving the directive, and he still chose not to schedule the intake appointment. Last, the record does not support the assertion that the probation officer told Ibeabuchi that he would be punished no matter what he did. Thus, Ibeabuchi’s probation was reinstated with intensive probation terms for his failure to schedule an intake appointment and not for his inability to pay treatment fees.

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CONCLUSION

¶15 For the foregoing reasons, we affirm.



AMY M. WOOD • Clerk of the Court
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