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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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, *Appellant*,

v.

DOUGLAS RICHARD SMITH, *Appellee*.

No. 1 CA-CR 16-0739
FILED 10-31-2017

Appeal from the Superior Court in Maricopa County
No. CR2011-148340-001 SE
The Honorable Julie A. Lafave, Judge *Pro Tempore*

REVERSED AND REMANDED

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Gerald R. Grant
Counsel for Appellant

Maricopa County Public Defender's Office, Phoenix
By Tennie B. Martin
Counsel for Appellee

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MEMORANDUM DECISION

Presiding Judge Lawrence F. Winthrop delivered the decision of the Court, in which Judge Diane M. Johnsen and Judge Maria Elena Cruz joined.

WINTHROP, Presiding Judge:

¶1 The State appeals the trial court’s order reinstating Douglas Richard Smith (“Smith”) on standard probation after he pleaded guilty to a new felony offense. For the following reasons, we reverse and remand the case to the trial court for further proceedings consistent with this decision.

FACTS AND PROCEDURAL HISTORY

¶2 On September 23, 2011, a grand jury indicted Smith on three counts of sale or transportation of dangerous drugs, a class 2 felony, and two counts of misconduct involving weapons, a class 4 felony. Smith entered a plea agreement, admitting two counts of attempted sale or transportation of dangerous drugs, a class 3 felony; the other counts were dismissed. The trial court sentenced Smith to three and one-half years’ imprisonment and imposed two years’ probation (the “2011 case”).

¶3 On June 8, 2015, the State moved to revoke Smith’s probation related to his 2011 case. In its motion, the State alleged Smith’s probation should be revoked because Smith had committed misdemeanor offenses, failed to report to his probation officers, and failed to pay probation fees. The trial court denied the State’s request to revoke Smith’s probation and reinstated, and extended, Smith’s probation to two years and ninety days.

¶4 The State again moved to revoke Smith’s probation on June 30, 2016. The State alleged Smith’s probation should be revoked because Smith had committed a misdemeanor offense, failed to report to probation, failed to participate in substance abuse treatment programs, used illegal substances, and failed to pay probation fees. The trial court denied the State’s motion, but placed Smith on intensive probation and extended his term of probation to three years and ninety days.

¶5 On July 26, 2016, the State again moved to revoke Smith’s probation, this time alleging Smith committed the crimes of threat-intimidate, a class 1 misdemeanor; assault-touched to injure, a class 3 misdemeanor; escape in the third degree, a class 6 felony; and criminal

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trespass in the second degree, a class 2 misdemeanor. At the time set for the probation violation hearing, Smith informed the court that he had signed a plea agreement concerning the new charges and would plead guilty to escape in the third degree, a class 6 felony. The court deferred acceptance of the plea until sentencing.

¶6 At sentencing, the trial court accepted Smith's guilty plea and found, based on that plea, that Smith was guilty of escape in the third degree, a class 6 felony. Consistent with the sentencing range in the plea agreement, the State requested Smith serve one and one-half years in prison for his class 6 felony conviction. In addition, the State requested Smith's probation for the 2011 case be revoked and the court impose the presumptive prison term because Smith had again violated the terms of his probation. The court sentenced Smith to one and one-half years in prison on the escape conviction, but denied the State's request to revoke Smith's probation. Instead, the court reinstated Smith on standard probation for the 2011 conviction to commence upon completion of the prison term imposed for the escape conviction.

¶7 The State moved to reconsider, requesting the trial court vacate the sentence and re-set the matter for new sentencing.¹ The State argued the sentence the trial court imposed was unlawful because Arizona Revised Statutes ("A.R.S.") section 13-917(B) (2010) required the court to revoke Smith's probation based on his commission of a new felony offense while on intensive probation. The court denied the State's motion, ruling that "in order for revocation to prison to be mandatory, both requirements [of A.R.S. § 13-917(B)] must be independently satisfied." The court further found that the "State's failure to raise the alleged applicability of A.R.S. § 13-917(B) prior to the conclusion of sentencing precludes it from consideration."²

¹ The State filed a motion asking to expand the record in this appeal to include its Motion to Reconsider, which was filed in the 2016 case, CR 2016-135277-001. We grant that motion.

² The State properly alleged Smith's probation should be revoked based on the commission of a new felony offense, even if it did not explicitly reference A.R.S. § 13-917(B). Further, the State raised A.R.S. § 13-917(B) when it moved for reconsideration. Thus, we will not deem the State's failure to explicitly raise A.R.S. § 13-917(B) before sentencing as waiver, and review A.R.S. § 13-917(B)'s application *de novo*. However, even if the State

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¶8 The State timely appealed. We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (2016), 13-4031 (2010), and 13-4032 (2010).

ANALYSIS

¶9 We review questions of statutory interpretation *de novo*, and in doing so attempt to fulfill the legislature’s intent in enacting the statute. *State v. Barnett*, 209 Ariz. 352, 354, ¶ 7 (App. 2004). If the language of the statute is clear and unambiguous, we give full effect to the statute, “without resorting to any rules of statutory construction.” *Id.* (quoting *State v. Johnson*, 171 Ariz. 39, 41 (App. 1992)). However, if the statute’s language is unclear or subject to multiple reasonable interpretations, we will look to “the statute’s context, the language used, the subject matter, the effects and consequences, the historical background, and the purpose and spirit of the law.” *Id.* (quoting *Johnson*, 171 Ariz. at 41).

¶10 On appeal, the State argues the trial court erred in denying its request to revoke Smith’s probation. The State further argues the court erred in finding A.R.S. § 13-917(B) required the revocation petition to allege the commission of a new felony *and* an additional probation violation. We agree.

¶11 Section 13-917(B) provides that:

The court may issue a warrant for the arrest of a person granted intensive probation. *If the person commits an additional offense or violates a condition of probation, the court may revoke intensive probation at any time before the expiration or termination of the period of intensive probation. If a petition to revoke the period of intensive probation is filed and the court finds that the person has committed an additional felony offense or has violated a condition of intensive probation which poses a serious threat or danger to the community, the court shall revoke the period of intensive probation and impose a term of imprisonment as authorized by law. If the court finds that the person has violated any other condition of intensive probation, it shall*

had not raised the issue, under Arizona Rules of Criminal Procedure, Rule 24.2(e)(2), the State may move the court to vacate the judgment of guilt “[a]t any time after the entry of judgment and sentence” if “the conviction was based on an erroneous application of the law.” Thus, the State was not barred from raising the matter after the date of the sentencing hearing or at any other subsequent time.

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modify the conditions of intensive probation as appropriate or shall revoke the period of intensive probation and impose a term of imprisonment as authorized by law.

A.R.S. § 13-917(B) (emphasis added).

¶12 With respect to someone who commits a crime while on intensive probation, the statute contemplates two potential scenarios. In the first, the trial court has discretion whether to revoke the probation if the “person commits an additional offense or violates a condition of probation.” A.R.S. § 13-917(B). However, in the second, the court has no discretion, and must revoke the probation, if “a petition to revoke . . . is filed and the court finds that the person has committed an additional felony offense or has violated a condition of intensive probation which poses a serious threat or danger to the community.” *Id.*

¶13 Nothing in A.R.S. § 13-917(B) requires the petition allege both an additional felony *and* an additional probation violation. To the contrary, A.R.S. § 13-917(B) requires the petition only allege either the commission of an additional felony offense *or* a violation of a condition of the intensive probation which poses a serious threat or danger to the community. *See* A.R.S. § 13-917(B).

¶14 Smith relies on *State v. Botkin* to support his argument that the trial court properly exercised its discretion by reducing his probation from intensive to standard. *State v. Botkin* addressed whether A.R.S. § 13-917(B) “deprives the superior court of authority to transfer the defendant from intensive to supervised probation after a petition to revoke has been filed but before any finding that the defendant committed the additional felony offense has been made.” 221 Ariz. 1, 2, ¶ 2 (2009). In *Botkin*, the court found that to trigger the mandatory revocation of probation in subsection B, the defendant must be on intensive probation and: (1) a petition to revoke the intensive probation must be filed; and (2) the court must find the defendant committed an additional felony offense. *Id.* at 4, ¶ 14. Under *Botkin* the trial court retains authority under A.R.S. § 13-917(A) to transfer the defendant from intensive to supervised probation up until the disposition hearing on the new felony offense. *Id.* at ¶ 15. Thus, *Botkin* contemplates that in some rare circumstances a defendant on intensive probation may commit a new felony offense and be transferred from intensive to supervised probation before the disposition hearing on the new felony offense. *Id.* at 4-5, ¶¶ 19-20. In such a circumstance, the trial court may exercise discretion in transferring the defendant from intensive to supervised probation because

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the court has not yet found the defendant “committed an additional felony offense.”

¶15 Smith contends that rarely contemplated circumstance occurred here. Smith argues that because the court deferred acceptance of his guilty plea until sentencing, the court retained its discretion at the sentencing hearing to place him on supervised probation. Smith’s argument is not supported by the chain of events as documented in the record.

¶16 On August 29, 2016, the trial court held a hearing at which it ascertained the voluntariness of Smith’s acceptance of the plea agreement, but the court deferred accepting Smith’s plea until sentencing. At sentencing, the court first accepted Smith’s plea and found him guilty of the additional felony. After hearing from the parties, the court proceeded to sentence Smith to one and one-half years’ incarceration on the felony escape charge, and then placed Smith on standard probation in connection with his 2011 case, to commence on completion of his prison term.³

¶17 The language of A.R.S. § 13-917(B) is clear, and is not altered by *Botkin*. Under A.R.S. § 13-917(B), the trial court “shall revoke the period of intensive probation and impose a term of imprisonment” if a petition to revoke the probation has been filed “and the court finds that the person has committed an additional felony offense.” A.R.S. § 13-917(B) (emphasis added). Here, the State filed a petition to revoke Smith’s intensive probation based on his commission of a new felony. Although the court deferred acceptance of Smith’s guilty plea until sentencing, the court at that subsequent hearing began by accepting Smith’s plea in the new felony offense, then, based upon that admission, adjudicated him guilty of that charge. At that point, the court lost its discretion to continue or modify Smith’s existing intensive probation on the 2011 case. As such, and consistent with the statutory mandate, the court, although well-intentioned, was required to revoke probation and impose a term of imprisonment.

³ The court observed that if it revoked Smith’s probation on the 2011 charges and imposed the presumptive prison term, Smith would serve more time as a result of his probation violation than for his new felony offense.

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CONCLUSION

¶18 For the above-mentioned reasons, we reverse and remand the case to the trial court for further proceedings consistent with this decision.



AMY M. WOOD • Clerk of the Court
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