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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0209
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ROBERT ALLEN HOKE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR 1993-091155

The Honorable Sheila A. Madden, Commissioner

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

Robert Allen Hoke Phoenix
Appellant *In Propria Persona*

D O W N I E, Judge

¶1 Robert Allen Hoke ("defendant") appeals from the

superior court's finding of a probation violation and the ensuing disposition. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), counsel for defendant has advised us that he has thoroughly reviewed the record and found no arguable issue of law. Counsel now asks this Court to review the record for fundamental error. See *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a *pro se* supplemental brief, and he has done so. He raises several issues, including: (1) denial of the right to appellate self-representation; (2) ineffective assistance of counsel; (3) lack of subject matter jurisdiction, and (4) insufficiency of the evidence. For the following reasons, we affirm.

FACTS AND PROCEDURAL BACKGROUND

¶12 In September 1994, defendant was sentenced to fourteen years in prison after being convicted of attempted sexual conduct with minors and sexual exploitation of a minor. He also received seven years' probation upon release from prison for charges relating to taking nude photographs of his minor daughter.

¶13 Defendant was released from prison March 14, 2008. On August 26, 2008, defendant used a computer at the Granite Reef Senior Center in Scottsdale to view sexually explicit images and

reply to sexually explicit personal ads on Craigslist.¹ An employee called the police. Officer T.E. arrived. He read defendant's response to the ad and "observed a picture of two naked Butts." Defendant claimed he was searching for a gay roommate in the ads and did not know they would contain sexually explicit images. He said he had no intention of viewing the images and did not plan to follow through with the "sexual talk" in his response. Officer T.E. served defendant a trespass warning and reported the incident to defendant's surveillance officer.

¶4 Defendant was charged with possessing "sexually stimulating and/or sexually oriented material without prior written approval," in violation of term 25-10 of his probation.² On February 11, 2009, defendant waived his right to counsel, and the Public Defender was appointed as advisory counsel.

¶5 On February 18, defendant sought a change of judge pursuant to Arizona Rule of Criminal Procedure ("Rule") 10.2; his request was denied as untimely. Because the time for that filing expired while the Public Defender served as advisory counsel, defendant alleged ineffective assistance of counsel.

¹ Craigslist is an online classified-advertisement service.

² On the State's motion, an allegation that defendant violated term 25-5 by failing to participate in sex offender treatment was dismissed.

The trial court denied a motion to stay the proceedings, but granted a continuance to allow defendant time to prepare a defense. The court denied defendant's challenge to its subject matter jurisdiction.

¶16 At the probation violation hearing on March 17, 2009, the trial court struck defendant's request to subpoena the legislature and deliver "45 200+page letters" alerting it to the fraudulent indictment against defendant. It also denied defendant's objections to alleged defects in the indictment. The court further denied a motion to dismiss claiming no lawyer could provide effective assistance of counsel due to an inherent bias resulting from an attorney's duty, as an officer of the court, to ensure defendant goes to prison.

¶17 After a hearing at which defendant testified, the trial court found he had violated the terms of his probation. At the disposition hearing that immediately followed, the court considered statements from defendant's daughter urging leniency. Defendant was reinstated on probation for seventy-six months, with a modified start date of May 14, 2008. He was also ordered to serve a deferred jail term of two months, with no credit for sixty-one days spent in custody, and subject to modification or deletion upon petition by the probation officer. Defendant was prohibited from accessing a computer without written permission.

DISCUSSION

¶18 We have read and considered the briefs and reviewed the entire record. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the disposition was within the trial court's authority.³ Defendant was afforded a hearing with advisory counsel present, advised of the alleged violations, had an opportunity to present his defense, and the proceedings were recorded.

1. Appellate Self-Representation

¶19 Defendant contends he has a right to represent himself on appeal and argues this Court's July 21, 2009 order denying counsel's motion to withdraw on those grounds was erroneous. We disagree. Defendant has filed a forty-page *pro se* supplemental brief raising all of the issues he deems relevant and has thus availed himself of a procedural opportunity for self-representation in an *Anders* proceeding. See *Anders*, 386 U.S. at 739-40.

³ The trial court had discretion about whether to give defendant credit for time spent in custody. *State v. Snider*, 172 Ariz. 163, 165-66, 185 P.2d 495, 497-98 (App. 1992) (no credit for seventy-two days defendant spent in custody during probation violation proceedings); *State v. Brodie*, 127 Ariz. 150, 151, 618 P.2d 644, 645 (App. 1980) (defendant not entitled to offset presentence jail time against probationary jail time).

2. Ineffective Assistance of Counsel

¶10 “[I]neffective assistance of counsel claims are to be brought in Rule 32 proceedings.” *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). “Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit.” *Id.*

3. Subject Matter Jurisdiction

¶11 Defendant argues the superior court lacked subject matter jurisdiction because the underlying indictment against him was defective, and the criminal statutes upon which it was based were unconstitutional. “Subject matter jurisdiction is never waived and may be raised at any time, including on appeal.” *State v. Buckley*, 153 Ariz. 91, 93, 734 P.2d 1047, 1049 (App. 1987) (citation omitted).

¶12 “Subject matter jurisdiction is the power of a court to hear and determine a controversy.” *State v. Fimbres*, 222 Ariz. 293, 301, ¶ 29, 213 P.3d 1020, 1028 (App. 2009) (internal quotations and citations omitted). Article 6, Section 14(4) of the Arizona Constitution “governs the subject matter jurisdiction of the superior courts in criminal cases” and “declares that superior courts shall have original jurisdiction in ‘[c]riminal cases amounting to felony.’” *State v. Maldonado*, 573 Ariz. Adv. Rep. 8, ¶¶ 20-21 (Jan. 7, 2010) (affirming same

conclusion in *Fimbres*, 222 Ariz. at 301, ¶ 29, 213 P.3d at 1028).

¶13 In a criminal case, "subject matter jurisdiction is established when the indictment is filed." *Fimbres*, 222 Ariz. at 302, ¶ 33, 213 P.3d at 1029 (citation omitted). Any attack on an indictment after filing "is not based on the lack of the court's subject matter jurisdiction," but "on the basis of its insufficiency or on a technical defect of its contents." *Buckley*, 153 Ariz. at 93, 734 P.2d at 1049 (emphasis added). Objections to an indictment must be raised at least twenty days before trial. Ariz. R. Crim. P. 13.5(e), 16.1(b). See also *State v. Anderson*, 210 Ariz. 327, ¶ 16, 111 P.3d 369, 377-78 (2005). The failure to timely object waives the objection absent fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).

¶14 Here, the underlying indictment alleged felonies over which the superior court had original subject matter jurisdiction under the Arizona Constitution. Art. 6, § 14(4). Defendant did not timely challenge the indictment or allege fundamental error during the time for appealing the underlying conviction. The trial court correctly ruled that time expired many years ago. See *State v. Herrera*, 121 Ariz. 12, 14, 588 P.2d 305, 307 (holding that an appeal from the judgment of guilt "be taken with dispatch" from the original date of conviction)

(citations omitted). Similarly, defendant failed to timely attack the constitutionality of the criminal statutes governing the underlying case. He may not do so now. *Id.* (in appeal from probation revocation and resentencing, defendant was procedurally precluded from attacking constitutionality of underlying rape conviction).

4. Insufficiency of Evidence

¶15 Lastly, defendant argues insufficient evidence supports the trial court's decision. We conclude otherwise.

¶16 A probation violation must be established by preponderance of the evidence. Ariz. R. Crim. P. 27.8(b)(3); *State v. Vaughn*, 217 Ariz. 518, 522, ¶ 18, 176 P.3d 716, 720 (App. 2008). We review the trial court's decision for an abuse of discretion. *State v. Lawson*, 19 Ariz. App. 536, 537, 509 P.2d 229, 230 (1973). We will not reverse a finding of a probation violation unless it is arbitrary or unsupported by any theory of the evidence. *State v. Stotts*, 144 Ariz. 72, 79, 695 P.2d 1110, 1117 (1985).

¶17 The State established by a preponderance of the evidence that defendant violated term 25-10 of his probation. In his statement to Officer T.E., defendant demonstrated awareness that "[a] term of his probation is that he not look at Sexual [sic] explicit material." His probation officer testified defendant was never given permission "to access or

possess any sexually stimulating material." Nonetheless, defendant stated: "I went to the personal section of 'Men seeking Men' for the purpose of looking for gay ads that was [sic] seeking roommates While clicking on nearly every ad, I was amazed that there [were] many ads that included nude pictures of themselves [sic] often with erect penis [sic] and showing their ass." Although he denied the images were explicit, defendant admitted "viewing pictures of naked body parts including penises." Two witnesses, Officer T.E. and an employee of the senior center, saw defendant viewing such images. The employee told Officer T.E. he believed defendant was "looking up porn." Further, defendant stated he put "sexually graphic details" in his response to the ad with "graphic explanatives [sic] of a sexual nature." We find no error in the trial court's conclusions, particularly in light of its credibility determinations. See *State v. Gallagher*, 169 Ariz. 202, 203, 818 P.2d 187, 188 (App. 1991) ("[T]he credibility of a witness is for the trier-of-fact, not an appellate court.").

CONCLUSION

¶18 We affirm the finding of a probation violation and the disposition ordered by the superior court. Counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do nothing more than inform

