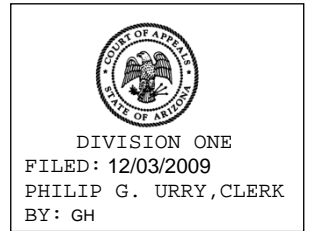


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE
CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.34

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CR 09-0395
)
Appellee,) DEPARTMENT S
)
v.) **MEMORANDUM DECISION**
)
PATRICIA LEANN ALLEN,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-105895-001 DT

The Honorable Frank A. Johnson, Jr., Judge *Pro Tempore*

DISPOSITION AFFIRMED AS MODIFIED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
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Attorneys for Appellee

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By Thomas Baird, Deputy Public Defender
Attorneys for Appellant

T I M M E R, Chief Judge

¶1 Patricia Leann Allen appeals the trial court's disposition imposed for a probation violation, pursuant to Arizona Revised Statutes ("A.R.S.") section 13-901.01(G) (Supp. 2009). Allen argues the court erred in finding she was no longer eligible for mandatory probation under the statute and in imposing a deferred six-month sentence. The State concedes error, and we agree.

¶2 In April 2007, Allen pled guilty to possession or use of marijuana, a class 6 undesignated felony and first offense. The court suspended imposition of sentence and placed Allen on probation for two years pursuant to A.R.S. § 13-901.01 (or "Proposition 200"). Allen agreed to several conditions of probation, including, Term 3 reporting to the Adult Probation Department as directed, and Term 24 participating and cooperating in any counseling or assistance as directed by the Adult Probation Department.

¶3 In January 2009, Allen's probation officer petitioned to revoke her probation. Allen admitted to violating Term 3 and the court conducted a hearing regarding the Term 24 violation. Allen testified she did not complete the treatment because she could not afford to make the requisite payment. She stated she "did whatever needed to be done to try to get a job," but had difficulty

securing employment because of her probationary status. Allen also explained her financial difficulties to her probation officer.

¶4 The court found "that the State has met [its] burden here in proving under Term 24 that [Allen was] not able to complete the counseling because [Allen was] deficient in making the payment for purposes of enrolling in treatment." The court did not, however, find that Allen's non-payment was willful. It further found that Allen has "refused drug treatment." The court stated that Allen was no longer eligible for mandatory probation under Proposition 200 sentencing guidelines and ordered deferred incarceration in the county jail for six months, beginning December 6, 2009.¹ The court continued Allen's probation with a revised expiration date of May 29, 2010.

¶5 An illegal sentence is fundamental error. *O'Connor v. Hyatt ex rel. Maricopa*, 207 Ariz. 409, 411, ¶ 3, 87 P.3d 97, 99 (App. 2004). First and second-time drug offenders under Proposition 200 must be sentenced to probation. *State v. Vaughn*, 217 Ariz. 518, 521, ¶ 15, 176

¹ The court stated that Allen would partake in the ALPHA program while incarcerated. ALPHA is an in-custody drug and alcohol treatment program. It noted that "ALPHA can be deleted if in compliance" and "the chances of [Allen] doing that program are very slim if [Allen] continue[s] to do well on probation."

P.3d 716, 719 (App. 2008). The court may only impose jail time under A.R.S. § 13-901.01(G) “[i]f the court finds that the defendant refused to participate in drug treatment.” The State admits “there is insufficient evidence to support a finding that [Allen] refused to participate in drug treatment.” Further, a failure to participate in treatment does not constitute a refusal to participate. *Vaughn*, 217 Ariz. at 523, ¶ 25, 176 P.3d at 721. The Court in *Bearden v. Georgia*, 461 U.S. 660, 672 (1983), held that

a sentencing court must inquire into the reasons for the failure to pay. If the probationer willfully refused to pay or failed to make sufficient bona fide efforts legally to acquire the resources to pay, the court may revoke probation and sentence the defendant to imprisonment within the authorized range of its sentencing authority.

We agree that the evidence fails to demonstrate Allen refused to participate in treatment. Rather, the evidence shows that, despite her efforts, Allen was unable to make the requisite payment in order to participate in the treatment program. Indeed, the trial court found that Allen’s failure to pay was not willful. *State v. Alves*, 174 Ariz. 504, 506, 851 P.2d 129, 131 (App. 1992) (“A violation of probation must be willful.”).

¶6 For the foregoing reasons, we affirm the trial court’s judgment that Allen committed a probation

violation, but we vacate the imposition of deferred jail time. We also reinstate the mandatory probation sentencing scheme under A.R.S. § 13-901.01.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Lawrence F. Winthrop, Judge

/s/
Daniel A. Barker, Judge