

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. 31.24



DIVISION ONE
FILED: 07/12/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0530
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
LARRY D. THEBERG,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2000-017715

The Honorable Christine E. Mulleneaux, Judge Pro Tempore

APPEAL DISMISSED

Thomas C. Horne, Arizona Attorney General Phoenix
And Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
By Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Edith M. Lucero, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Larry D. Theberg ("Defendant") appeals the continuation of his probation after the trial court found he violated the terms of probation by failing to register as a sex

offender. Because we have no jurisdiction over the error urged by Defendant, we dismiss his appeal.

FACTS AND PROCEDURAL HISTORY

¶2 In 1992, Defendant was convicted of aggravated criminal sexual assault in Illinois. He was sentenced to eight years in the Illinois Department of Corrections and ordered to register as a sex offender. Defendant registered in Illinois as a sex offender in 1996, 1998, 1999, and 2000.

¶3 On August 24, 2000, Defendant obtained an Arizona driver's license that listed a Phoenix address.¹ On November 1, a Mesa police detective assisted Defendant when his work truck broke down. During a driver's license check, the detective learned that Defendant had never registered as a sex offender in Arizona.

¶4 In November 2000, Defendant was charged with failure to register as a sex offender, a class 4 felony ("November 2000 charge"). The Information alleged that Defendant had been convicted in another jurisdiction of an offense that would have violated A.R.S. § 13-1405, sexual conduct with a minor, if Defendant's actions had occurred in Arizona, and that Defendant failed to register as a sex offender within ten days of remaining in Maricopa County. Defendant pleaded to the charge

¹ Defendant was employed as a carnival worker. Defendant told the presentence investigator that the Phoenix address was his employer's business address.

and explained it went "over [his] head" that he had to register in Arizona when he "transferred" his driver's license here; he admitted he "should have registered." His sentence was suspended subject to completion of six months imprisonment and a subsequent four-year probation period.

¶15 When released from prison in January 2001, Defendant was placed in a work-furlough program but failed to return. In June a petition to revoke Defendant's probation was filed and a bench warrant issued. Defendant was arrested in February 2003 and pleaded guilty to escape, a class 5 felony. The court then found Defendant "in automatic violation" of probation on the November 2000 charge. The court sentenced him to 2.25 years in prison for the escape, reinstated his probation for the November 2000 charge for 3.5 years beginning upon his release from prison, and ordered lifetime sex offender registration.

¶16 Defendant was released to community supervision in January 2005. He absconded and a warrant for his arrest was issued in March. In June 2006, Defendant was charged in Nevada for failure to change address as a sex offender and sentenced to a term of 12 to 48 months in the Nevada Department of Corrections. He was released November 25, 2008.

¶17 In January 2009, a petition to revoke probation and order for warrant was entered in Arizona. The petition noted that Defendant failed to report within 72 hours of discharge

from prison, that his whereabouts were unknown since November 2008, and that he failed to register as a sex offender; a warrant issued. Defendant was arrested in March 2009 in Nevada. Defendant moved to dismiss the petition to revoke probation, claiming his probationary term was extended without notice and had expired. The court denied the motion.

¶18 After conducting a violation hearing, the court found Defendant violated the terms of probation by failing to inform the probation department of his address after he was released from the Nevada Department of Corrections. The court continued Defendant's probation for 3 years, ending June 23, 2012. Defendant timely appeals the trial court's finding of probation violation ("June 2009 finding").

DISCUSSION

¶19 Defendant urges us to vacate his "original guilty plea and subsequent probation violations," asserting that the trial court lacked subject matter jurisdiction over him because it failed to determine whether the statutory elements of the Illinois conviction sufficiently matched A.R.S. § 13-3821, which required him to register as a sex offender in Arizona.

¶10 "[S]ubject matter jurisdiction cannot be waived, even by a guilty plea, and it may be raised at any time." *State v. Flores*, 218 Ariz. 407, 410, ¶ 6, 188 P.3d 706, 709 (App. 2008). We review questions of subject matter jurisdiction de novo. *Id.*

"No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment" Ariz. Const. art. 2, § 30. See also *State v. Buckley*, 153 Ariz. 91, 93, 734 P.2d 1047, 1049 (App. 1987) ("The filing of an information is required to confer subject matter jurisdiction on the court in rendering a criminal conviction even under a guilty plea."). "An information is a written statement charging the commission of a public offense, signed and presented to the court by the prosecutor." Ariz. R. Crim. P. 13.1(b). It is "a plain, concise statement of the facts sufficiently definite to inform the defendant of the offense charged" that "shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated." Ariz. R. Crim. P. 13.2(a)-(b).

¶11 We disagree with Defendant that there is any question of subject matter jurisdiction in this case. Here, the signed Information was filed November 17, 2000, and it contained sufficient information to inform Defendant of the offense charged. The trial court, therefore, had subject matter jurisdiction over Defendant on the November 2000 charge.

¶12 To the extent that Defendant is challenging his original judgment of conviction, we have no jurisdiction on that issue. See Ariz. R. Crim. P. 31.3 (requiring notice of appeal

to be filed within 20 days after entry of judgment and sentence); *State v. Herrera*, 121 Ariz. 12, 14, 588 P.2d 305, 307 (1978) (requiring an appeal from the judgment of guilt to be "taken with dispatch" and holding that "suspension of the sentence" does not extend the time for filing an appeal). Here, Defendant was sentenced in December 2000. He signed a Right to Appeal form that clearly stated that failure to file a notice of appeal within 20 days waived his right to appeal the judgment and sentence. Defendant filed his notice of appeal in July 2009 -- significantly past the 20-day deadline.

¶13 Similarly we are without jurisdiction in this matter because "[i]n noncapital cases a defendant may not appeal from a judgment or sentence that is entered pursuant to a plea agreement or an admission to a probation violation." A.R.S. § 13-4033(B). Instead, such defendants must seek appellate review by way of post-conviction relief proceedings. See Ariz. R. Crim. P. 32.1 (providing a "Rule 32 of-right proceeding" for probation violation). Here, Defendant's plea agreement notified him that he "waives and gives up the right to appeal." Defendant initialed the box on the plea agreement to indicate he had read and understood that term. The court confirmed that Defendant had read the plea agreement and understood its terms. The Defendant also signed the Right to Appeal form, which specifically stated that he had no right to appeal if he pleaded

guilty or no contest or admitted a probation violation. The court also advised him to file "a petition for postconviction relief within 90 days" if he wanted a review of the court's order.

¶14 Other than his claims relating to subject matter jurisdiction, Defendant does not otherwise challenge the court's June 2009 finding that he violated probation. At that June disposition hearing, counsel for Defendant raised the issue of subject matter jurisdiction because "[w]e don't think that the Illinois law qualifies under the Arizona law," but he also advised Defendant "that's a Rule 32, and I've given [Defendant] the paperwork for that." Defendant, however, did not seek relief under Rule 32.

CONCLUSION

¶15 Because we have no jurisdiction to entertain the issues Defendant urges, we dismiss his appeal.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PATRICIA K. NORRIS, Judge