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

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



DIVISION ONE  
FILED: 09/14/2010  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

STATE OF ARIZONA, ) 1 CA-CR 09-0677  
)  
Appellee, ) DEPARTMENT A  
)  
v. ) **MEMORANDUM DECISION**  
)  
JOEY NUNCIATA DELSORDI, )  
) (Not for Publication -  
Appellant. ) Rule 111, Rules of the  
) Arizona Supreme Court)  
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Appeal from the Superior Court in Maricopa County

Cause No. CR2005-110459-001 SE

The Honorable Christine E. Mulleneaux, Judge *Pro Tempore*

**VACATED**

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Terry Goddard, Arizona Attorney General Phoenix  
by Kent E. Cattani, Chief Counsel,  
Criminal Appeals/Capital Litigation Section  
Sarah E. Heckathorne, Assistant Attorney General  
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Attorneys for Appellant

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**B A R K E R**, Judge

¶1 Joey Nunciata Delsordi appeals from her probation violation finding and disposition. Delsordi's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this court that after searching the entire record on appeal, she finds no arguable ground for reversal. Delsordi, however, requested that counsel raise as issues an alleged insufficiency of evidence and violation of due process based on lack of notice for failure to adhere to Arizona Rules of Criminal Procedure 27.1 and 27.3 (requiring probation terms to be in writing). We granted Delsordi leave to file a supplemental brief *in propria persona* on or before July 6, 2010, but she did not do so.

¶2 After reviewing the record, we determined that the filing of briefs would benefit the court as to the following issue: Whether written directives by Delsordi's probation officer were required to find probation violations of terms 3 and 9 in light of *State v. Robinson*, 177 Ariz. 543, 869 P.2d 1196 (1994).

¶3 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010). We are required to search the record for

reversible error. Because we find such error, we vacate the court's order and subsequent disposition.

***Facts and Procedural Background***<sup>1</sup>

¶4 In July 2005, Delsordi was charged with possession or use of dangerous drugs, a class four felony (count 1); and possession or use of marijuana, a class six felony (count 2). Delsordi knowingly, intelligently, and voluntarily waived her right to a jury trial and accepted the State's plea offer. She plead guilty to possession of drug paraphernalia, a class six undesignated felony (amended count 1). Her sentence was suspended, and she was placed on probation. At sentencing on July 18, 2005, the court placed Delsordi on two years of supervised probation and ordered a \$750 fine. The plea agreement's conditions required Delsordi to submit to drug and alcohol testing and report to the Adult Probation Department ("APD").

¶5 On June 22, 2006, Delsordi's probation officer filed a petition to revoke probation for warrant or summons. The petition alleged that Delsordi violated several terms of her probation, including failure to report and failure to submit to

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<sup>1</sup> We view the facts in the light most favorable to sustaining the court's judgment and resolve all inferences against Delsordi. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998); *State v. Moore*, 183 Ariz. 183, 186, 901 P.2d 1213, 1216 (App. 1995).

drug testing. On December 19, 2006, Delsordi admitted to violating a probation condition, and the court reinstated her two years of probation commencing on May 6, 2006. On October 25, 2007, Delsordi's probation officer filed another petition to revoke probation and warrantless arrest alleging numerous violations of probation again including failure to report and failure to submit to drug testing.

¶16 On October 1, 2008, Delsordi was found to be in automatic violation of probation based on a determination of guilt in a new case. The court reinstated her probation for eight months beginning on November 26, 2008. Upon reinstatement, Delsordi received and signed a pre-printed form entitled Uniform Conditions of Supervised Probation. The conditions included term 3, stating that Delsordi must "[r]eport to the APD within 72 hours . . . and continue to report as directed," and term 9 ordering her to "[s]ubmit to drug and alcohol testing as directed by the APD and/or court."

¶17 On June 6, 2009, and June 15, 2009, Delsordi's probation officer filed two more petitions alleging violations of nine conditions of probation including failure to report (term 3) and failure to submit to drug testing (term 9). As to term 3, the June 15 petition stated:

The defendant has absconded. The defendant failed to report on: a) 01-21-09, b) 02-18-09, c) 03-11-09, and d) 03-20-09, as

directed. Last date reported: 01-29-09. Attempts to locate included: phone call to defendant, field visit to residence, reviewed booking records, and certified letter. Prior PTR had similar violation.

As to term 9, the June 15 petition stated:

The defendant failed to submit to drug/alcohol testing as directed by the APD on a) 12-10-08, b) 01-29-09, c) 01-30-09, d) 02-03-09, e) 02-13-09, f) 02-19-09, g) 02-23-09, h) 03-04-09, i) 03-10-09, j) 03-19-09, k) 03-23-09, l) 04-02-09, m) 04-07-09, n) 04-13-09, o) 04-23-09, p) 04-28-09, and q) 05-07-09.

¶18 A witness violation hearing was held on August 20, 2009. The State dismissed the alleged violations of terms 1, 7, 8, 11, and 16. Delsordi's probation officer testified that she spoke with Delsordi and orally directed her to report on March 20, 2009, but Delsordi did not meet with her probation officer. She also testified that Delsordi was directed to submit a urinalysis on January 29, 2009 and comply with the TASC Colors program, but Delsordi failed to do so. Delsordi protested that neither term was in writing, and therefore she could not be found in violation of probation based on violation of either term. On the record before us, when Delsordi had been notified of her appointment dates in writing, she had appeared.

¶19 After the State rested, Delsordi moved to dismiss the term 9 violation. The court denied this motion. The court found Delsordi in violation of term 3(D), failure to report to

APD on March 20, 2009, and term 9(B), failure to submit to drug and alcohol testing on January 29, 2009, and the court dismissed the remaining allegations in the petition. Delsordi was given an opportunity to speak during disposition. The court left the matter as an undesignated felony and reinstated Delsordi on probation with a revised expiration date of February 14, 2010. Delsordi was present or represented by counsel throughout the proceedings.

### ***Discussion***

¶10 Delsordi contends that her rights as a probationer under Arizona Rules of Criminal Procedure 27.1 and 27.3 were violated for failure to receive written notice of probation terms 3 (ordering her to report to her probation officer as directed) and 9 (ordering her to participate in drug and alcohol testing). Under Rule 27.1, “[a]ll conditions and regulations” of probation “shall be in writing, and a copy of them given to the probationer.” Ariz. R. Crim. P. 27.1. Rule 27.3 states that “[a] written copy of any modification or clarification shall be given to the probationer.” Ariz. R. Crim. P. 27.3. Finally, Rule 27.8(c)(2) forbids revoking probation<sup>2</sup> “for

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<sup>2</sup> On its face Rule 27.8(c)(2) applies only to probation revocation. Ariz. R. Crim. P. 27.8(c)(2). In *Robinson*, however, our supreme court held that Rule 27.8(c)(2) (then numbered 27.7(c)(2)) applies with equal force to all probation revocation proceedings regardless of the disposition made upon finding violation. 177 Ariz. at 544 n.3, 869 P.3d at 1197 n.3.

violation of a condition or regulation of which the probationer has not received a written copy." Ariz. R. Crim. P. 27.8(c)(2).

¶11 In *Robinson*, our supreme court reversed a probation violation finding based on failure to participate in a particular drug counseling program when the terms of probation stated that probationer must participate in a drug counseling program but did not specify which one. 177 Ariz. at 543-44, 546, 869 P.2d at 1196-97, 1199. The court held that Rule 27.8(c)(2) "precludes a probation violation finding based on failure to comply with an oral order," reasoning that "if an order is important enough to warrant a revocation petition, the order first must be reduced to writing and given to probationer . . . ." *Id.* at 546, 869 P.2d at 1199. A written order containing a mere "boilerplate general directive" is generally not specific enough to satisfy the written notice requirement. *Id.* at 545, 869 P.2d at 1198.

¶12 Here, Delsordi was found to be in violation of probation for failure to comply with term 9(B) because she did not appear for drug testing by the end of January 29, 2009. But term 9 only mandated that Delsordi undergo a drug testing program; no writing was given to Delsordi notifying her to report to TASC or to submit to testing by a certain date. This scenario mirrors that in *Robinson*, in which the probationer was told in writing to undergo drug counseling, but was not told

which program was mandated. 177 Ariz. at 544-45, 869 P.2d at 1197-98. As *Robinson* is from our supreme court, the State concedes that we are bound to follow it, and that it is dispositive at this level. Therefore, the violation of probation for failure to comply with term 9(B) must be vacated.

¶13 The superior court also found that Delsordi had violated term 3(D) by not appearing for an orally scheduled appointment on March 20, 2009. Term 3 of Delsordi's probation conditions mandated that she "[r]eport to the APD within 72 hours . . . and continue to report as directed." Delsordi's probation officer testified that she and Delsordi had agreed to meet every third Wednesday, but the State did not provide any written evidence of this schedule. Further, March 20 was the third Friday of the month, not the third Wednesday. Although Delsordi's probation officer testified that she spoke on the phone with Delsordi on March 19 and told Delsordi to see her on March 20, again the State did not provide evidence that this term was reduced to writing.

¶14 While this condition does not precisely mirror the circumstances in *Robinson*, *Robinson's* principle that probation terms must be in writing to find a probation violation based on failure to comply with those terms is nevertheless applicable. Term 3 of Delsordi's terms of probation – a directive on a pre-printed form telling her to "continue to report as directed" –

is a "boilerplate general directive" similar to the term in *Robinson*. Understandably, the State uses general terms when initially outlining probation conditions. But once Delsordi and her probation officer agreed to a regular schedule of meetings, that schedule should have – and easily could have – been reduced to writing. *Cf. id.* at 545, 869 P.2d at 1198 ("[W]ritten notice is not an onerous requirement. . . . [I]f the probation officer had wanted to initiate probation revocation proceedings for the probationer's failure to comply with his directive, he could have simply written out his order and given it to the probationer. Then, if the probationer further refused to participate . . . , the probationer could be subject to probation revocation.").

¶15 Moreover, the superior court only found Delsordi in violation of term 3 by failing to appear on March 20, which was not one of her regularly scheduled meetings. She was given oral notice of the meeting only one day before the appointment date. Her failure to appear for this short-notice appointment then became a basis for finding a probation violation. Notably, on the record before us, Delsordi appeared for the appointments for which she had received written notice. Scenarios such as this

would seem to be the reason why advance written notice is mandated.<sup>3</sup>

¶16 We emphasize that, as noted in *Robinson*, failing to put terms in writing does not render them invalid. *Id.* at 545 n.4, 869 P.2d at 1198 n.4. Probation officers may continue to schedule and amend meeting times verbally. But if revocation of probation is sought, prior written notice is required. *Id.*

**Conclusion**

¶17 For the reasons set forth above, the court's determination that Delsordi violated her probation is vacated.

/s/

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DANIEL A. BARKER, Judge

CONCURRING:

/s/

\_\_\_\_\_  
PATRICIA A. OROZCO, Presiding Judge

/s/

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LAWRENCE F. WINTHROP, Judge

<sup>3</sup> Although here Delsordi does not claim that she failed to receive oral notice, under *Robinson*, notice must still be in writing even if the probationer admits to receiving the verbal communication. 177 Ariz. at 545, 869 P.2d at 1198. While a compelling argument may be made that violation would be appropriate if there is no prejudice created by the lack of a written (rather than oral) directive, this view is contrary to the holding in *Robinson*. *Id.* ("Although . . . some of the purposes of requiring written notice are met when a probationer admits he was aware of an oral condition, . . . we think it is nevertheless wise to insist on written notice as a basis for revocation.").