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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: 02/08/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0235
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BRANDON JASON GONGAWARE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-108579-001DT

The Honorable Frank A. Johnson, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals Section/Capital Litigation Section
And Angela Corinne Kebric, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Brandon Jason Gongaware (Defendant) appeals the trial court's determination that he refused drug counseling in violation of the terms of his probation. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Defendant previously pled guilty to one count of possession or use of marijuana. The trial court suspended his sentence and placed him on probation for twelve months, on the condition that he participate in substance abuse counseling.¹ Defendant's probation officer subsequently filed a petition to revoke probation, alleging in part, that Defendant failed to participate in substance abuse counseling. At the revocation hearing, Defendant's probation officer testified that the reason for Defendant's discharge from counseling was "a total number of absences, progress was no progress, and the recommendation was to restart the program." Defendant testified that during the period of his probation, he missed substance abuse classes due to financial hardship, but that he also spent \$50 to \$60 per month on methamphetamine.

¶3 The trial court found that Defendant refused the drug treatment mandated by the terms of his probation. The trial

¹ The terms of Defendant's probation include other conditions that we do not address.

court reinstated probation and imposed a forty-five day jail sentence as a term of his probation. Defendant timely appealed and we have jurisdiction in accordance with Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1. (2003), 13-4031, and -4033.A. (2010).

DISCUSSION

¶4 On appeal, Defendant challenges the sufficiency of evidence supporting the trial court's decision that his failure to complete drug treatment was willful. That is, Defendant reads A.R.S. § 13-901.01.G. as distinguishing between a failure to participate in drug treatment and a refusal to do so. Defendant argues that because he merely failed to complete drug treatment as a result of financial hardship, and did not willfully refuse, the trial court's decision erroneously denied him the protection of Proposition 200's sentencing provisions. We disagree.

¶5 The State posits that Defendant's appeal is moot. Specifically, the State contends that a reversal by this Court would have no effect because: (1) Defendant was found to have violated other conditions of his probation in addition to refusing to participate in drug treatment; (2) the court-imposed 45-day term of incarceration could not be deferred upon Defendant's early release, and expired in April 2010; and (3) the trial court nevertheless reinstated Defendant's probation after

he served the jail time. Therefore, the State argues that a reversal by this Court would change nothing because a reversal of one probation violation would still leave the others intact; Defendant is not subject to any more incarceration having already served the jail time; and Defendant is already back on probation.

¶16 Indeed, an issue "becomes moot for purposes of appeal where as a result of a change of circumstances before the appellate decision, action by the reviewing court would have no effect on the parties." *Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988). However, "the mootness doctrine is not mandated by the Arizona Constitution, but is solely a discretionary policy of judicial restraint." *Fisher v. Maricopa Cnty. Stadium Dist.*, 185 Ariz. 116, 119, 912 P.2d 1345, 1348 (App. 1995). Thus, even if Defendant's appeal is moot, we may address it.

¶17 Despite the fact that the trial court found multiple violations of Defendant's probation, the primary focus of Defendant's appeal is the "302 finding."² Indeed, the trial court's 302 finding is of particular import because it resulted in Defendant's incarceration. Such incarceration would not have been possible had Defendant prevailed on the merits of his appeal

² A "302 finding" is a specific finding that Defendant refused to participate in drug treatment, made pursuant to A.R.S. § 13-901.01. See Laws 2002, H.C.R. 2013 (2d Reg. Sess.) (Proposition 302).

prior to serving the jail time, leaving him subject only to reinstatement of probation. Thus, what is at stake for Defendant is not the jail time itself, but the legitimacy of his incarceration. See *State v. Sirny*, 160 Ariz. 292, 293, 772 P.2d 1145, 1146 (App. 1989) ("the issue threatens to evade review as a result of the relative brevity of the sentences imposed").

¶18 Though the term of incarceration has expired and Defendant has served the time, the Arizona Supreme Court has recognized Defendant's interest in appealing an erroneous sentence despite having completed it. *State v. Superior Court of Maricopa Cnty.*, 93 Ariz. 351, 355, 380 P.2d 1009, 1011 (1963) ("the law recognizes and protects an individual's interest in his reputation and it would be absurdly inconsistent to dismiss as moot a proceeding initiated to clear one's name of the stigma and infamy of an allegedly erroneous conviction on a criminal charge"). As such, we find that Defendant's appeal of the trial court's 302 finding is not moot, and we now turn to the merits of his argument.

¶19 A probation violation "must be established by a preponderance of the evidence." Ariz. R. Crim. P. 27.8.b.(3). "We will uphold a trial court's finding that a probationer has violated probation unless the finding is arbitrary or unsupported by any theory of evidence." *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3, 996 P.2d 113, 114 (App. 1999). Conflicting testimony does

not, alone, show a lack of sufficient evidence. *Id.* "It is for the trial court to resolve such conflicts and to assess the credibility of witnesses in doing so." *Id.* Moreover, we must recognize a trial court's findings of fact unless they are clearly erroneous. See *Ariz. Bd. of Regents v. Phoenix Newspapers, Inc.*, 167 Ariz. 254, 257, 806 P.2d 348, 351 (1991).

¶10 "Proposition 200, also known as the Drug Medicalization, Prevention, and Control Act of 1996, was a voter initiative and is codified as A.R.S. § 13-901.01." *State v. Vaughn*, 217 Ariz. 518, 521 n.5, ¶ 15, 176 P.3d 716, 719 n.5 (App. 2008). Proposition 200 requires courts to suspend the imposition or execution of sentence for qualifying defendants, place them on probation, and as a condition of probation, "require participation in an appropriate drug treatment or education program." A.R.S. § 13-901.01.D., A. Proposition 302 added that probation may be revoked "if after having a reasonable opportunity to do so the defendant fails or refuses to participate in drug treatment." A.R.S. § 13-901.01.G. Qualifying defendants lose eligibility under the law "[i]f the court finds that the defendant refused to participate in drug treatment." *Id.*

¶11 Defendant argues that his "failure" to participate in drug treatment should not be treated as a "refusal" under A.R.S. § 13-901.01.G. That is, Defendant argues that the law should be

read to distinguish between inadvertent failures and refusals that are willful. Indeed, matters of statutory construction are reviewed de novo. See *Phoenix Newspapers, Inc.*, 167 Ariz. at 257, 806 P.2d at 351. However, we need not decide whether A.R.S. § 13-901.01.G. embraces such a distinction, for the finding that Defendant refused treatment is a factual determination best left to the trial court's discretion.³ See *id.*

¶12 In this case, there is substantial evidence not only to warrant affirming the trial court's finding that Defendant violated this particular condition of his probation, but also that he did so willfully. Defendant testified that he did not participate in drug treatment because he could not afford it. However, Defendant also testified that during the period of his probation he spent \$50 to \$60 per month on methamphetamine. It is clear from the record that Defendant spent money on illegal drugs that he could have spent on the drug treatment that was mandated by the terms of his probation. The trial court

³ Moreover, Defendant's argument fails to account for the language in the first sentence of A.R.S. § 13-901.01.G., which appears to give the trial court discretion in deciding whether to revoke probation upon *either* a failure or a refusal to participate in drug treatment. Thus, even under Defendant's reading of the law, the trial court still would have had the power to revoke probation and impose jail time upon Defendant's failure to participate in drug treatment.

determined that this was a conscious choice on Defendant's part - a choice indicating that Defendant's conduct was willful.⁴

¶13 Defendant's argument which distinguishes between two actions - to refuse and to fail - is a factual determination left to the sound discretion of the trial court and will not be disturbed on appeal absent a clear abuse of that discretion. See *Phoenix Newspapers, Inc.*, 167 Ariz. at 257, 806 P.2d at 351. As a matter of law, it is not the purview of this Court to re-weigh the evidence that was before the trial court, *State v. Tison*, 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), which is entrusted with the duty to distinguish between a criminal defendant's refusal to comply with the terms of probation and a failure to do so.

¶14 Thus, assuming without deciding that A.R.S. § 13-901.01.G. does contemplate disparate consequences for defendants who refuse treatment from those that merely fail to complete it, this would be a factual determination within the province of the trial court - one to which we would afford great deference. Accordingly, the trial court's decisions, finding that Defendant violated his probation, and that he did so willfully, are affirmed.

⁴ This case is distinguishable from *Bearden v. Georgia*, 461 U.S. 660 (1983); the facts of this case support a conclusion that it was not merely financial hardship that prevented Defendant from complying with the terms of his probation, i.e., participating in drug treatment.

CONCLUSION

¶15 For the foregoing reasons, the decision of the trial court imposing jail time is affirmed.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

PATRICIA K. NORRIS, Presiding Judge

/S/

JOHN C. GEMMILL, Judge