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



DIVISION ONE
FILED: 05/24/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0259
)
) DEPARTMENT B
Appellee,)
) **MEMORANDUM DECISION**
v.) (Not for Publication -
) Rule 111, Rules of the
WAYNE OLIVER HALL,) Arizona Supreme Court)
)
Appellant.)
)
)
)

Appeal from the Superior Court in Mohave County

Cause No. S8015CR20071492

The Honorable Lee Frank Jantzen, Judge

REVERSED

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

Mohave County Appellate Defender's Office Kingman
By Jill L. Evans, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Defendant, Wayne Oliver Hall, appeals from the trial court's modification of the November 2009 terms and conditions of his probation to require his compliance with sex offender special terms and conditions. He argues that the modification was an abuse of the trial court's discretion. For reasons set forth more fully below, we agree and vacate the trial court's order.

FACTS AND PROCEDURAL HISTORY¹

¶2 In October 2007, the State charged Defendant with two counts of sexual conduct with his daughter, a child under the age of eighteen, each a Class 2 felony. Following a four-day trial that resulted in a deadlocked jury, the State offered, and Defendant accepted, an *Alford*² plea to one count of child abuse, a Class 2 felony, for having "intentionally caused or permitted the child to be placed in a situation where the person or health of the child was endangered." The stipulated plea agreement contains the following provision:

(2) The defendant will receive a sentence of: **PROBATION, LENGTH IN THE COURT'S DISCRETION**; consistent with the following additional terms: **UP TO SIX MONTHS JAIL; THE DEFENDANT MUST NO[T] HAVE CONTACT WITH**

¹ "We view the evidence in the light most favorable to sustaining [defendant's] convictions and resolve all reasonable inferences against [defendant]." *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005) (citation omitted).

² *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

FEMALES UNDER THE AGE OF 18 YEARS OLD UNLESS IN THE PRESENCE OF ANOTHER ADULT; ALL OTHER TERMS AT THE JUDGE'S DISCRETION. [Defendant] not having to register [as a] sex offender.

¶13 At the change of plea hearing in September 2009, defense counsel specifically clarified with the trial court that "no allegation of sexual motivation" was being alleged with respect to the offense to which defendant was pleading. Counsel also specified that it was "the intent of the parties that there is no [sex offender] registration requirement," which was why there was the provision requiring "no contact with females under [the] age of 18." The State confirmed that it was "not requiring [Defendant] to register as a sex offender." The trial court found a factual basis for the plea and accepted and entered the plea.

¶14 The trial court sentenced Defendant to five years' probation and six months' in jail. Pursuant to the Uniform Conditions of Probation, the trial court specifically ordered Defendant to, among other things: "Not have any contact with the victim(s) whatsoever," (Term 18); "Participate and cooperate in any counseling or assistance as directed by the [Probation Department]," (Term 24); and "[H]ave no contact with any female under the age of 18 unless in the presence of another adult," (Term 26). The Uniform Conditions of Supervised Probation also included the general condition that Defendant "[c]omply with any

written directive of the [Probation Department] to enforce compliance with the conditions of probation," (Term #15).

¶15 On October 27, 2010, Defendant's probation officer filed a Petition to Modify probation. In it, the probation officer noted that "the Pre-Sentence Investigation" report indicated that "the offense was sexually motivated, the victim was 10 years at the onset of the molestation and the sexual abuse continued approximately 6 years." Given the "nature of the offense and the prolonged period of time" during which the offense occurred, the probation officer believed that "Sex Offender Special Conditions of probation should be implemented in order to adequately supervise [D]efendant on probation and to assist in ensuring safety to the community."

¶16 The request for modification was prompted by Defendant's refusal to sign an implementation form presented to him by his probation officer before conferring with counsel. Pursuant to Term #15, the implementation form directed defendant to:

Not initiate, establish or maintain contact with any male or female child under the age of 18, or attempt to do sex offender (sic) without the written approval of your probation officer. Sign and abide by the probation department's definition of "no contact."

Not knowingly date or socialize with any person who has male or female children under

the age of 18 without prior written approval of your probation officer.

¶17 In response, Defendant filed a *pro per* "motion to vacate," to which he attached a copy of the implementation form and asked the court to vacate the additional terms imposed by the form. In his motion, Defendant pointed out that the terms of the implementation form were in "direct opposition" to Term #26 of his terms and conditions of probation, which required only that he have no contact with any females under the age of eighteen without the presence of another adult. He also emphasized that there was never any indication in any of the prior court proceedings that he was a danger to any male under the age of eighteen.

¶18 On November 3, 2010, Defendant's probation officer filed a Petition to Revoke Probation, citing Defendant's violation of "Uniform Condition # 15" for his failure to "comply with any written directive of the [Probation Department] to enforce compliance with the conditions of his probation." Specifically, the petition alleged that on November 1, 2010, Defendant was in his home with his minor son with no supervision, "in violation of a written directive dated October 15, 2010 to not have contact with any male or female child under the age of eighteen (18) years."

¶9 On April 8, 2011, the trial court held a contested revocation of probation hearing at which it also addressed Defendant's motion to vacate Term #15 and the probation officer's motion to modify the terms of probation. The parties stipulated that Defendant had refused to sign the October written directive without first speaking to his attorney and that Defendant had unsupervised contact with his fifteen-year-old son in his home.

¶10 The trial court found that the written directive went beyond the scope of the negotiated terms of probation, and therefore found that Defendant had not violated his probation and denied the petition to revoke. However, because the court also found that Defendant's "attitude" about the written directives and "the probation department's attempts to figure out what's going on in this case" exhibited "a kind of defiance," the court granted the motion to modify the terms of probation to add the sex offender special terms and conditions of probation. The court made an exception to the usual sex offender terms, permitting Defendant to have contact with his minor son.³ Furthermore, the trial court specifically stated

³ Although the court stated that it was not imposing "an additional term that [Defendant] not have contact with male children under the age of 18," the implementation form for the new terms and conditions that Defendant signed following the revocation hearing contains the prohibition against "contact

that, in accordance with the sex offender terms, Defendant was required to register as a sex offender.⁴

¶11 Defendant timely appealed. 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.3 (2010).

DISCUSSION

Appellate Jurisdiction

¶12 The parties agree, and we concur, that we have jurisdiction to review Defendant's arguments on direct appeal. Defendants who plead guilty are not entitled to direct appellate review. A.R.S. § 13-4033.B; Ariz. R. Crim. P. 17.1.e. However, a defendant has a right to a direct appeal from a post-judgment change or modification in the terms and conditions of probation that affects his substantial rights. A.R.S. § 13-4033.A.3; see also *State v. Regenold*, 226 Ariz. 378, 379-80, ¶¶ 9-10, 249 P.3d 337, 338-39 (2011) (defendant who gives up right of appeal by pleading guilty does not waive right to direct appeal from later contested rulings in the case). Here, Defendant contested the addition of the sex offender terms of probation and the

with any male or female child under the age of 18 (except for your own children)."

⁴ The court denied Defendant's request to stay implementation of the new sex offender terms pending the resolution of this appeal.

modification clearly affected his substantial rights. Defendant is therefore entitled to challenge the addition and modification on direct appeal. See A.R.S. § 13-4033.A.3.

Modification of Terms of Probation

¶13 We review a trial court's decision to modify or revoke probation for an abuse of discretion. See *Green v. Superior Court*, 132 Ariz. 468, 470-71, 647 P.2d 166, 168-69 (1982). "An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *State v. Sandoval*, 175 Ariz. 343, 347, 857 P.2d 395, 399 (App. 1993) (quoting *Quigley v. City Court of Tucson*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App. 1982)).

¶14 The trial court retains the authority to modify or clarify any condition or regulation of probation at any time prior to absolute discharge upon appropriate notice. Ariz. R. Crim. P. 27.3. The court is also given wide discretion to revoke or modify the terms of probation "for any reasonable reason." *Burton v. Superior Court*, 27 Ariz. App. 797, 800, 558 P.2d 992, 995 (1977). In addition, the court retains the power to modify probation for reasons that would not warrant revocation of probation. *Green*, 132 Ariz. at 470, 647 P.2d at 168.

¶15 However, "[a] reasonable basis must exist in order for the judge to either modify or revoke the terms of probation."

Burton, 27 Ariz. App. at 800, 558 P.2d at 995. This is because when a trial court decides to place a defendant on probation based on specified terms and conditions, "those terms and conditions are fixed pending an event which constitutes a reasonable basis to change them." *Id.*

¶16 The record in this case contains no evidence of any event that constitutes a "reasonable basis" for modifying the terms of Defendant's probation by adding sex offender special terms and conditions, including sex offender registration. The trial court therefore abused its discretion in granting the petition to modify without justification.

¶17 The original terms of probation only prohibited Defendant from unsupervised contact with *female* children under the age of eighteen. Therefore, as the trial court correctly held, Defendant's unsupervised contact with his minor son was not a violation of the original terms of probation. Moreover, the trial court acknowledged that the underlying facts of Defendant's case did not indicate any issues with regard to *male* children.

¶18 At the revocation hearing, the State conceded that it had "no proof . . . whatsoever" of any inappropriate behavior by Defendant with his son. Instead, the State could only point to the probation officer's "best investigative skills," which led her to "believe that Defendant and his son were taking a nap

in the same bed *and whatever that leads to.*" (Emphasis added.) According to the State, the trial court therefore "ha[d] the right to assume the worst," which was "that [Defendant] now maybe [sic] molesting his son," and impose the additional sex offender terms of probation. The State argued that, on the basis of the probation officer's beliefs, the officer and the court had the authority to prohibit Defendant from having any contact "with any child whatsoever."

¶19 Although the trial court found that the written directive went beyond the scope of the negotiated terms of probation and therefore found that Defendant had not violated his probation, the court appears to have found justification for modifying Defendant's probation because of Defendant's "attitude," which the court characterized as "a kind of defiance" of the probation officer's directives regarding Defendant's son and male minors. This was error. There was nothing in the record that Defendant violated the terms of his probation or otherwise did anything that could constitute a "reasonable basis" for modifying the terms of his probation. The probation officer thus lacked the authority to impose the additional onus of the directive or any other sex offender special condition. Accordingly, Defendant's refusal to comply with the officer's directives cannot be grounds to modify his probation.

¶120 In support of the addition of special sex offender terms, the probation officer's request for modification cites the fact that the "Pre-Sentence Investigation" indicates that the underlying offenses in this case were "sexually motivated." But this is not new information or a new event that supports modification. The fact that Defendant's offenses were sexually motivated was well known to the State and the trial court at the time the terms of the plea agreement were negotiated and accepted, when the terms of probation were imposed. In fact, at the change of plea hearing, the judge who presided over the trial specifically remarked that he would otherwise have considered imposing sex offender registration. Therefore, had the trial court believed that the terms of the plea agreement were unacceptable or inadequate to properly supervise defendant and protect the public, the court was free to either reject the plea agreement altogether or reject any specific provision therein. Ariz. R. Crim. P. 17.4(d) and (e). However, having accepted the plea agreement and its stipulations in their entirety, the court had no authority to thereafter modify the conditions of probation without evidence giving rise to a reasonable basis for doing so. *Burton*, 27 Ariz. App. at 800, 558 P.2d at 995.

¶121 On appeal the State concedes that the trial court exceeded its authority when it ordered sex offender registration

despite the plea agreement's specific agreement that it was not required. The State suggests, however, that we should uphold the trial court's imposition of the other provisions of the sex offender special conditions. We decline to do so. Because we find no reasonable basis in the record for any modification, the addition of any of the sex offender special conditions was unwarranted. *Id.*

CONCLUSION

¶22 For the foregoing reasons, we vacate the trial court's order modifying the terms and conditions of Defendant's probation to add the sex offender special conditions of probation.

/S/

PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/

JON W. THOMPSON, Judge

/S/

DIANE M. JOHNSEN, Judge