

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

FILED BY CLERK

JUN 24 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0464
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
LD HOLMAN,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR201200049

Honorable Delia R. Neal, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Amy Pignatella Cain

Tucson
Attorneys for Appellee

Harriette P. Levitt

Tucson
Attorney for Appellant

HOWARD, Chief Judge.

¶1 LD Holman appeals from the trial court’s revocation of his probation. He argues the court “improperly amended” the state’s petition to revoke his probation “in order to find [him] in violation” of a probationary term. Because the court did not err, we affirm.

¶2 In May 2012, Holman pled guilty to first-degree burglary and was placed on a seven-year term of probation. In September 2012, the state filed a petition to revoke Holman’s probation, alleging he had violated the terms of his probation by committing several criminal offenses and because he had “failed to participate and cooperate in substance abuse counseling, as directed; thereby violating Item #12 of his conditions of probation,” “failed to maintain gainful employment and/or attend school as directed . . . thereby violating Item #14 of his conditions of probation,” and “failed to pay or remain current on his financial obligations to the court; thereby violating Item #15 of his conditions of probation.”

¶3 At the beginning of the contested violation hearing, the trial court granted the state’s motion to dismiss the allegations based on Holman’s alleged criminal offenses. Holman’s probation officer testified Holman had failed to enroll with a substance abuse treatment agency as directed. The probation officer also testified Holman “did not look for employment” and “failed to provide a job search log as directed” and had not paid any of the fines, fees, or financial assessments against him. The officer further stated Holman had not provided him with “any documentation” demonstrating he had been enrolled in school. He acknowledged, however, that Holman had told him in early September that he “was enrolled” in high school and had given him a “business card” from the school

stating Holman had an appointment there in late September—on or about the date Holman had been arrested. The officer did not contact the school.

¶4 During the hearing, the trial court observed there was “a clerical error” in the petition to revoke probation. It noted the allegation related to Holman’s obligation to seek employment instead should read, consistent with Item #14 of Holman’s probation conditions, that Holman “has failed to seek, obtain or maintain gainful employment and/or attend school as directed by the adult probation department, thereby violating . . . his conditions of probation.” The court asked the parties if they had any objection to amending the allegation “to say, ‘seek, obtain or maintain gainful employment’” instead of only “maintain gainful employment.” It further stated that “the evidence shows that [Holman] never had employment. And the petition [to revoke was filed] because he failed to follow the directive to seek employment.” Although Holman agreed the proposed amendment was consistent with the probationary condition, he objected to amending the petition to revoke. The court nonetheless ordered the petition be amended, concluding the amendment was consistent with “the disclosure provided by the State, the testimony that was presented here today, and frankly the language of the rule,” and finding that amending the petition would correct “a clerical error in the language of the petition” and did not constitute “any meaningful variance.”

¶5 At the end of the hearing, the trial court concluded Holman was in violation of probation. It found Holman had failed to participate and cooperate in substance abuse counseling as directed by his probation officer. The court further found Holman had been given “a reasonable directive regarding the necessity of . . . applying for and

obtaining and maintaining gainful employment” and had failed to follow that directive, which was “designed to implement” the terms of his probation. The court also concluded Holman had “failed to apply for, obtain or maintain gainful employment or alternatively attend school” in violation of the terms of his probation and “that [Holman] may have been willing to attend school at some point in the future does not change the fact that he failed to seek employment during the time that he was neither in school nor employed.” The court, however, determined the state had not proved the remaining allegation that Holman had failed to pay required financial obligations because Holman “had no reasonable means” to do so. It revoked Holman’s probation and imposed a five-year prison term.

¶6 On appeal, Holman argues the trial court erred by amending the revocation petition to conform to Item #14 of his terms of his probation. A probation violation hearing is a much more informal proceeding than a criminal trial and does not involve the same technical rules of procedure or evidence. *See generally* Ariz. R. Crim. P. 27.8. Nevertheless, due process requires that a probationer be given written notice of the grounds for probation revocation and an opportunity to be heard. *Gagnon v. Scarpelli*, 411 U.S. 778, 786 (1973); *accord State v. Moreno*, 21 Ariz. App. 462, 463, 520 P.2d 1139, 1140 (1974). A deficiency in a revocation petition, however, does not require reversal where the petition gives adequate notice of the grounds for revocation. *State v. Stotts*, 144 Ariz. 72, 80, 695 P.2d 1110, 1118 (1985); *State v. Williams*, 122 Ariz. 146, 150, 593 P.2d 896, 900 (1979).

¶7 We review a trial court’s decision to amend a charge for an abuse of discretion. *See State v. Sammons*, 156 Ariz. 51, 54, 749 P.2d 1372, 1375 (1988) (noting trial court’s “considerable discretion in resolving” motions to amend). Although the Rules of Criminal Procedure do not expressly provide for amending a petition to revoke, an amendment is not improper where it is purely technical and there is no prejudice to the defendant. *State v. Robledo*, 116 Ariz. 346, 347, 569 P.2d 288, 289 (App. 1977). An amendment is deemed technical when it does not change the nature of the charge or prejudice the defendant. *State v. Bruce*, 125 Ariz. 421, 423, 610 P.2d 55, 57 (1980).

¶8 Holman argues the amendment “broadened the charged violations without prior notice” and that he therefore had no opportunity “to properly defend himself.” He contends he had presented evidence “showing that he had complied with the requirement that he *either* maintain employment *or* enroll in school,” and concludes that, because he “had demonstrated that he complied with the alternative requirement of enrolling in school, he could not be found to have violated his terms of probation” as alleged in the petition to revoke.

¶9 This argument misses the mark. Holman appears to believe the trial court’s amendment to the petition meant that attending school would not be sufficient to comply with the terms of his probation. We disagree. The amended petition and Item #14 both required that Holman seek employment, be employed, or be enrolled in school. The court found Holman had not been enrolled in school for the majority of his probationary term to date and thus violated Item #14 because he also had not sought or obtained employment during the time he was not enrolled in school. It did not, as Holman seems

to suggest, conclude that being enrolled in school could not constitute compliance with Item #14.

¶10 But Holman, albeit tangentially, suggests an alternative argument that the revocation petition was defective because it did not allege that he had failed to seek employment—only that he failed to be employed or enrolled in school—and that the trial court’s amendment therefore was improper. This argument has some facial appeal. Even if Holman was not employed or enrolled in school, he was still compliant with Item #14 if he was seeking employment. Thus, the phrase in the revocation petition alleging that Holman “ha[d] failed to maintain gainful employment and/or attend school,” read in isolation, did not allege a violation of Item #14.

¶11 But we agree with the state that the trial court’s amendment to the petition was merely technical and did not prejudice Holman. *See Stotts*, 144 Ariz. at 80, 695 P.2d at 1118; *Williams*, 122 Ariz. at 150, 593 P.2d at 900; *Robledo*, 116 Ariz. at 347, 569 P.2d at 289. The petition generally stated that Holman had violated Item #14 of his probation. The allegation that Holman had failed to seek employment was necessarily included by that reference. Holman signed the terms and conditions of his probations and thus was aware of Item #14’s requirements. And the court found the state’s pretrial disclosure clearly indicated the state intended to make and prove that allegation. Holman does not suggest the court erred in making that determination. Nor does he suggest that he lacked notice the state would seek to prove that he had not sought employment, or that his defense would have been different had the petition been more precise.

¶12 For the reasons stated, we affirm the trial court's revocation of Holman's probation and the sentence imposed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Michael Miller
MICHAEL MILLER, Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.