

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CALVIN LAMONT SMITH,
Appellant.

No. 2 CA-CR 2013-0237
Filed December 13, 2013

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Cochise County

No. S0200CR201200347

The Honorable Karl D. Elledge, Judge

AFFIRMED

COUNSEL

Joel Larson, Cochise County Legal Defender
By Bethany Graham, Assistant Legal Defender, Bisbee
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Kelly authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

K E L L Y, Presiding Judge:

¶1 Calvin Smith appeals from the trial court's April 2013 orders revoking his probation and sentencing him to ninety-three days in jail, with credit for time served. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating she has reviewed the record but found no "arguable issues to assert" on appeal and asks us to "review the record for any reversible error." Smith has not filed a supplemental brief. We affirm.

¶2 On appeal, we view the evidence in the light most favorable to upholding the trial court's findings that Smith had violated conditions of probation as alleged in four of the five allegations in the petition to revoke. *See State v. Vaughn*, 217 Ariz. 518, n.2, 176 P.3d 716, 717 n.2 (App. 2008). So viewed, the evidence established the following: Pursuant to a 2012 plea agreement, Smith was convicted of assault, a class one misdemeanor. *See* A.R.S. § 13-1203(A)(1), (B). In July 2012, the court suspended the imposition of sentence and placed him on supervised probation for a period of two years. In February 2013, the probation department filed a petition to revoke probation, alleging Smith had violated multiple conditions of his probation. After a contested violation hearing, the court found a preponderance of the evidence established Smith had violated his probation terms by failing to maintain a crime-free lifestyle (committing burglary and criminal damage), leaving his residence without the permission of his probation officer, and associating with a known felon without first obtaining written

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approval of the probation department.¹ See A.R.S. §§ 13-1506, 13-1602.

¶3 A probation violation must be established by a preponderance of the evidence, Ariz. R. Crim. P. 27.8(b)(3), and we will uphold a trial court's finding of a violation "unless it is arbitrary or unsupported by any theory of evidence." *State v. Moore*, 125 Ariz. 305, 306, 609 P.2d 575, 576 (1980). The evidence presented at the violation hearing established police officers had apprehended Smith and Victor Smith² while they were fleeing from a reported burglary in progress in the laundry room of an apartment complex; metal shavings found on and in Smith's shoes were consistent with shavings found on the floor in front of a damaged vending machine in the laundry room; and a drill and drill bits were found in a backpack either Smith or Victor had been carrying as they fled from the scene. Smith told officers he had "met up" with Victor right before the officers had arrived.

¶4 The trial court acted within its discretion by revoking Smith's probation and sentencing him to time served in jail. See Ariz. R. Crim. P. 27.8(c)(2) (upon determination that violation of condition of probation occurred, court may "revoke, modify or continue probation [and i]f probation is revoked, the court shall pronounce sentence"). And, the sentence imposed upon the

¹The trial court conducted a joint violation hearing on petitions to revoke probation in this case, CR201200347, and another case, CR201100610. Although both petitions were based on the same conduct from February 2013, the conditions of Smith's probation were not the same in both matters. Most notably, Smith was not prohibited from leaving his residence without the permission of the probation department in CR201200347, while he was prohibited from doing so under the conditions of his intensive probation in CR201100610.

²According to the predisposition memorandum prepared by the probation department, Victor Smith was Smith's codefendant in CR201200347.

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revocation of Smith's probation was within the range authorized by law. *See* A.R.S. § 13-707(A).

¶5 In reviewing the record pursuant to *Anders*, however, it appears that, having combined the revocation proceedings in two cases, the trial court relied in this matter on Smith's having left his residence without permission, a condition of his intensive probation in CR201100610, but not a condition of probation in CR201200347, the only case before us in this appeal. Accordingly, to the extent the court relied on Smith's violation of that condition as a ground for revoking probation in CR201200347, that reliance was improper. *See* Ariz. R. Crim. P. 27.8(c)(2) (probation shall not be revoked for violation of condition of which probationer has not received a written copy).

¶6 However, it is clear the result here would have been the same, even had the trial court not considered Smith's violation of that condition of probation. The remaining three violations (committing burglary, criminal damage, and associating with an individual who has a criminal record or is engaged in criminal behavior) were far more serious in nature than the one the court mistakenly relied on, and justified the revocation of probation and sentence imposed. *See State v. Ojeda*, 159 Ariz. 560, 561-62, 769 P.2d 1006, 1007-08 (1989) (if judge relies on improper factors when imposing sentence or revoking probation, appellate court "should affirm without remand only where the record clearly shows the trial court would have reached the same result even without consideration of the improper factors"). Accordingly, although the court erred, this error was neither fundamental nor reversible.

¶7 In accordance with our obligation under *Anders*, we have reviewed the record for fundamental, reversible error, and have found none. We thus affirm the trial court's findings of probation violations, its revocation of Smith's probation, and the sentence imposed.