IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JASON SCOTT LAWLER,
Appellant.

No. 2 CA-CR 2021-0057
Filed August 1, 2022

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Graham County
No. CR202000251
The Honorable Michael D. Peterson, Judge

AFFIRMED IN PART; DISMISSED IN PART

COUNSEL

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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Vice Chief Judge Staring concurred.

B R E A R C L I F F E, Judge:

¶1 Jason Lawler appeals from his sentencing following a contested probation violation hearing. Lawler contends that, because his understanding of the plea agreement underlying his probation was fundamentally different from the state's, he did not "knowingly and intelligently enter into the plea agreement." He also asserts that the state "breached the plea agreement" and violated his right to due process. For the following reasons, we affirm in part and dismiss in part.

Factual and Procedural Background

¶2 On appeal of a conviction and sentence, "[w]e view the facts in the light most favorable to upholding the [defendant's] convictions and sentences." *State v. Morgan*, 248 Ariz. 322, ¶ 2 (App. 2020). And, on appeal of a contested probation violation, "[w]e view the facts in the light most favorable to sustaining the [trial court's] findings." *State v. Vaughn*, 217 Ariz. 518, n.2 (App. 2008). The facts here are largely undisputed. In February 2021, Lawler pleaded guilty to one count of misconduct involving weapons and one count of possession of a dangerous drug. The parties agreed that, as to the weapons misconduct count, Lawler would be placed on intensive probation and, as a term of his probation, he would "attend and complete an intensive outpatient program" for drug treatment. Regarding the possession of a dangerous drug count, no agreement was made as to prison or probation other than that Lawler "shall agree to waive time and delay sentencing until after he has enrolled in an intensive outpatient program." The agreement stated that if Lawler successfully completed the drug treatment program on his first attempt, he would be placed on probation for the count of possession of a dangerous drug, to be served concurrently with the term he was serving for weapons misconduct. If Lawler failed to do so, however, the agreement stated he would be sentenced to a term of 3.75 years in the Arizona Department of Corrections for that count. All other terms not stipulated to for both counts were "left to the discretion of the Court."

¶3 At a change of plea hearing, after reviewing the terms of the agreement with Lawler, the trial court accepted his plea. Lawler said he did not understand the terms to be any different than as the court had stated them and confirmed he was not threatened to plead guilty, nor did anyone make promises to him beyond those in the agreement. He also affirmed that his plea was voluntary and of his own free will. Lawler was released from custody following the change of plea hearing and was instructed to report to probation and the drug treatment program, SEABHS, for his intake.

¶4 On March 2, 2021, the state filed a petition to revoke Lawler's probation for: failing to report to probation within twenty-four hours of sentencing; reporting late for his intake with SEABHS because, he stated, he had been with probation, but he had not checked in with probation that day; and leaving a meeting at SEABHS early to report to probation, which he then did not do. A week later, the state filed another petition to revoke his probation, claiming Lawler had violated his probation by: not reporting for his probation intake as of March 8, when he was required to do so on February 26; failing to attend his group meeting at SEABHS on March 2; and being removed from the treatment group at SEABHS on March 3 for lack of attendance.

¶5 Following a contested probation violation hearing, the trial court revoked Lawler's probation and sentenced him to a three-year term of imprisonment for each count to be served consecutively. This appeal followed. For the reasons explained below, we have jurisdiction as to part of this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4033(A).

Analysis

Jurisdiction

¶6 The state argues in its answering brief that Lawler cannot bring this appeal because it goes to "the validity of the plea agreement itself" and "Lawler expressly waived the right to challenge the agreement on direct appeal." In his reply brief, Lawler asserts that, because he "challenged his probation violation[s] rather than admit to them, he retains his right to appeal and this court can properly hear his claims." This is a court of limited jurisdiction, and we only have jurisdiction as specifically conferred by statute. *State v. Eby*, 226 Ariz. 179, ¶ 3 (App. 2011). "[W]e have an independent duty to determine our jurisdiction to consider an appeal." *State v. Kalauli*, 243 Ariz. 521, ¶ 4 (App. 2018).

¶7 While we generally have jurisdiction "in all actions and proceedings originating in or permitted by law to be appealed from the superior court," § 12-120.21(A)(1), defendants in noncapital cases cannot "appeal from a judgment or sentence that is entered pursuant to a plea agreement or an admission to a probation violation," § 13-4033(B). In those cases, defendants must seek relief by filing a petition for post-conviction relief pursuant to Rule 33, Ariz. R. Crim. P. *State v. Regenold*, 226 Ariz. 378, ¶¶ 5-6 (2011). However, if a defendant contests the allegation of a probation violation and is ultimately found to have violated probation after a hearing, he retains his right to direct appeal as to the finding of the violation and the sentence. *Id.* ¶¶ 7-8, 10. This is because the defendant is not considered to have been sentenced "pursuant to [the] plea agreement," such that § 13-4033 would apply. *Id.* ¶ 8 (quoting § 13-4033(B)). Therefore, Rule 33 does not control, and the defendant may "combine the finding of a violation and the sentence imposed following a finding of a probation violation in one appeal." *Id.* ¶¶ 10-11.

¶8 Here, Lawler contested the probation violations alleged regarding the unsuccessful outpatient treatment program. However, while this would normally mean he retained his right to appeal, the issues raised in such an appeal cannot "effectively challenge the plea agreement" itself. *Fisher v. Kaufman*, 201 Ariz. 500, ¶ 5 (App. 2001) (quoting *State v. Delgarito*, 189 Ariz. 58, 59 (App. 1997)); *see Hoffman v. Chandler*, 231 Ariz. 362, ¶ 12 (2013) (since *Regenold* opinion in 1992, "appellate courts have routinely dismissed appeals of post-judgment orders that challenged plea agreement terms"). Two of Lawler's claims on appeal do just that. He argues that, because his understanding of essential terms of the plea agreement was fundamentally different from the state's, he did not "knowingly and intelligently enter into the plea agreement." Specifically, he asserts that he believed that "pursuant to the terms of his agreement, he was supposed to be allowed to do his outpatient treatment via video," and that "if he was sentenced to prison . . . he would be sentenced to concurrent terms, not consecutive." Lawler argues that there must be a "determination as to whether the plea agreement was entered into knowingly and intelligently" on remand to the trial court. Because Lawler is challenging the plea agreement itself, he must do so pursuant to Rule 33. Therefore, as to Lawler's first two claims on appeal, we dismiss them for lack of jurisdiction.

Breach of Plea Agreement

¶9 Lawler also argues that the "state breached the plea agreement and violated [his] right to due process when it failed to provide the intensive outpatient program via video that was promised in order to

induce appellant to plead guilty." Because this is not a direct challenge to the plea agreement, but rather a defense to the allegation of a violation, we have jurisdiction to address this claim. *See Fisher*, 201 Ariz. 500, ¶ 5. But, for a breach of a plea agreement to be raised on appeal, it must first have been presented to the trial court. *See State v. Georgeoff*, 163 Ariz. 434, 437 (1990) (breach of plea agreement cannot be raised for first time on appeal). Lawler did not raise this argument below at his violation of probation hearing or at sentencing. He had the opportunity at each hearing to raise the argument that the state breached the plea agreement, but he did not do so. A breach of a plea agreement is not a fundamental error, and it cannot be raised for the first time on appeal. *Georgeoff*, 163 Ariz. at 436-37.[1] Therefore, because an alleged breach of a plea agreement must be initially raised in the trial court, and this alleged breach was not, we do not address this claim now on appeal.

Disposition

¶10 For the foregoing reasons, we dismiss in part and otherwise affirm the ruling of the trial court.

[1]Lawler did not, in any event, claim or argue fundamental error on appeal.