NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

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| GEORGE T. BRYAN,<br><br>Appellant,<br><br>v.<br><br>STATE OF FLORIDA,<br><br>Appellee. | ) | Case No. 2D19-2331 |

Opinion filed April 8, 2020.

Appeal from the Circuit Court for Hillsborough County; Nick Nazaretian, Judge.

Howard L. Dimmig, II, Public Defender, and Richard Sanders, Assistant Public Defender, Bartow, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Johnny T. Salgado, Assistant Attorney General, Tampa, for Appellee.

SMITH, Judge.

George Bryan appeals the trial court's order revoking his probation for the underlying offense of possession of child pornography based upon his possession of a Penthouse magazine. The trial court found Mr. Bryan in violation of Condition 21, for possessing pornography—the Penthouse magazine—and Condition 9, for being

untruthful to his probation officer about the magazine.[1] Mr. Bryan challenges the trial court's finding that he violated Condition 21. Because we hold the State failed to present competent, substantial evidence to prove the Penthouse magazine was relevant to Mr. Bryan's deviant behavior pattern, we reverse the order revoking probation as it relates to Condition 21 and remand for the trial court to determine whether Mr. Bryan's probation should be revoked and if he should be resentenced based solely on the violation of Condition 9.

On June 3, 2016, Mr. Bryan was charged with ten counts of possession of child pornography (ten or more images) in violation of section 827.071(5), Florida Statutes (2016). Mr. Bryan agreed to plead guilty to the charges in exchange for a lesser sentence of ten years' sex offender probation. The State sent Mr. Bryan a letter memorializing the plea agreement. That letter specifically laid out special conditions of probation to be imposed upon Mr. Bryan's guilty plea and was presented to the sentencing court at sentencing. The special conditions of probation listed in the letter included: "That he shall not view, access, own or possess any obscene, pornographic, or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services *that are relevant to the defendant's deviant behavior pattern*. [F.S. 948.30(1)(g)]." (Emphasis added.)

During his plea colloquy, the sentencing court orally pronounced the conditions of Mr. Bryan's probation, which included: "He shall not view, access, own or possess any obscene, pornographic or sexually stimulating visual or auditory material

[1]The order revoking probation only recites a violation of Condition 9. However, the transcript of the proceeding reflects that the trial court found Mr. Bryan in violation of both Condition 9 and Condition 21.

including telephonic, electronic media, computer programs or computer services *that are relevant to the defendant's deviant behavior pattern*." (Emphasis added.)

Thereafter, on May 18, 2017, the trial court entered the written Order of Sex Offender Probation, which stated a number of special conditions, including:

> 21. Unless otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program, a prohibition on viewing, accessing, owning, or possessing any obscene, pornographic or sexually stimulating visual or auditory material, including telephone, electronic media, computer programs, or computer services *that are relevant to the offender's deviant behavior pattern.*
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> 33. Effective for offenders whose crime was committed on or after October 1, 2014, and who is placed on probation or community control for a violation of chapter 794, s. 800.04, *s. 827.071*, s. 847.0135(5), or s. 847.0145, in addition to all other conditions imposed, *is prohibited from viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or auditory material unless otherwise indicated in the treatment plan provided by a qualified practitioner in the sexual offender treatment program.* Visual or auditory material includes, but is not limited to, telephone, electronic media, computer programs, and computer services.

(Emphasis added).

On March 7, 2019, the State filed an affidavit of violation of probation, alleging Mr. Bryan violated Condition 9 of his probation by failing to promptly and truthfully answer inquiries from his probation officer during a required polygraph examination as to whether he owned or viewed any pornography. The affidavit also alleged Mr. Bryan violated Condition 21, which prohibits the "viewing, accessing, owning, or possessing any obscene, pornographic, or sexually stimulating visual or

auditory material that are "relevant to the offender's deviant behavior pattern." Apparently, the Penthouse magazine was discovered in the trunk of Mr. Bryan's vehicle after the polygraph test.

A hearing on the violations of Conditions 9 and 21 was held on May 21, 2019. The State presented the testimony of Mr. Bryan's probation officer, who testified that he read Condition 21 to Mr. Bryan. He also testified that the Penthouse magazine could be purchased legally by anyone over the age of eighteen and did not contain any images of persons under the age of eighteen. No witnesses were presented by Mr. Bryan, but he argued that Condition 21 was not violated where the Penthouse magazine, which depicted adults, was not relevant to the deviant behavior pattern of the underlying offense of child pornography. The trial court disagreed finding the magazine pornographic and relevant to Mr. Bryan's deviant behavior. Mr. Bryan was sentenced to 144 months' prison for violations of Conditions 21 and 9.

On appeal, Mr. Bryan argues the trial court erred in finding that his possession of the Penthouse magazine violated Condition 21 because the adult magazine was not relevant to his deviant behavior—possession of child pornography—and we agree.

We review the trial court's revocation of Mr. Bryan's probation for an abuse of discretion and ask whether competent, substantial evidence supported the trial court's decision. Bauer v. State, 96 So. 3d 1063, 1066 (Fla. 4th DCA 2012); see also Brown v. State, 117 So. 3d 484, 486 (Fla. 2d DCA 2013) (holding the State failed to present legally sufficient evidence relevant to probationer's deviant behavior where videotapes dealt with young adults and not child pornography, with which the defendant

was previously charged). In order to find Mr. Bryan violated Condition 21 of his probation by possessing pornographic material, the "material at issue [must be] relevant to the 'deviant behavior pattern.' " Kasischke v. State, 991 So. 2d 803, 815 (Fla. 2008). "Whether this relevance requirement can be met will depend upon an examination not only of the pornographic or obscene material but also of the underlying circumstances of the probationer's offenses." Brown, 117 So. 3d at 486 (citing Sellers v. State, 16 So. 3d 225, 227 (Fla. 5th DCA 2009) (explaining the evidence must show a rational relationship between the sexually explicit material and the defendant's deviant behavior pattern)).

The Fifth District in Sellers held that possession of adult pornography does not support a revocation of probation imposed for possession of child pornography in the absence of evidence establishing a rational relationship between the pornography, obscene, or sexually stimulating materials and the probationer's deviant behavior pattern. Sellers, 16 So. 3d at 227. In Sellers, the condition of probation at issue was identical to Condition 21 in this case and prohibited "viewing, owning, or possessing any obscene, pornographic, or sexually stimulating material that is relevant to the offender's deviant behavior pattern unless such possession is part of a treatment plan." Id. The court explained this condition "does not prohibit a probationer from possessing any and all obscene, pornographic, or sexually stimulating materials, only those materials that are relevant to the charges for which he was placed on probation." Id. The Sellers court concluded the trial court's finding of relevancy was not supported by competent, substantial evidence because the record lacked any findings describing the nature of

the material, its content, and how it related or was relevant to the defendant's deviant behavior pattern. Id.

Similarly, here, the trial court made no findings describing the nature of the material in the Penthouse magazine, its content, or how it related or was relevant to Mr. Bryan's deviant behavior pattern. In fact, the only evidence before the trial court was that the pictures in the Penthouse magazine depicted images of adult persons and the magazine could be legally purchased by anyone over the age of eighteen. The record was devoid of any evidence that the material—the Penthouse magazine—was relevant to Mr. Bryan's deviant behavior pattern.

The State argues our court's recent opinion in Quijano v. State, 270 So. 3d 549 (Fla. 2d DCA 2019), applies here because Mr. Bryan's probation also included the mandatory special condition that an individual placed on sex offender probation for a crime that occurred after October 1, 2014, is subject to a statutorily required condition prohibiting the possession of *any* pornographic material. See § 948.30(5), Fla. Stat. (2014). Because the State presented evidence that Mr. Bryan's possession of the Penthouse magazine violates Condition 33—although not included in the violation of probation affidavit and not argued at the hearing—the State contends we should affirm the revocation and remand for the trial court to amend its order to show a violation of Condition 33.

In Quijano, we held the erroneous citation to probation condition 21 prohibiting possession of pornographic material that was relevant to the probationer's deviant behavior pattern, rather than the separate condition generally prohibiting the possessing or viewing of any pornographic material, in the State's affidavit of violation of

probation and in the trial court's order revoking probation was harmless and did not violate the probationer's right to due process. Id. at 552. We acknowledged that "[i]t is, of course, a violation of due process and fundamental error to revoke a defendant's probation based on conduct that was not alleged in the affidavit" but stated that "not every defect in an affidavit of violation amounts to a due process violation." Id. at 551.

However, Quijano is not controlling here in that significant differences exist between the instant case and Quijano. In Quijano, we noted:

> Mr. Quijano had the opportunity to—and indeed did—offer evidence and argument at the revocation hearing to rebut the State's argument that he had violated his sex offender probation. And, *importantly*, *the only argument he made at the hearing (that the magazine did not belong to him) related to a component of the conduct common to both conditions 21 and 33*. He did not come to the violation hearing defending on the basis that the magazine was not related to his deviant behavior. Thus, any error that did occur was harmless because, on these facts, Mr. Quijano had notice of the conduct alleged to violate his probation, his ability to prepare a defense to those charges was not prejudiced, and the State offered sufficient evidence to prove that he was guilty of the conduct alleged.

Id. (emphasis added). Whereas in the instant case, at the commencement of the proceeding on the violation of probation, the State confirmed that it was seeking only to have Mr. Bryan's probation revoked under Conditions 9 and 21, and the trial court agreed to proceed and limit the hearing to evidence that would establish a violation of only those conditions alleged in the affidavit—Conditions 9 and 21. To this end, Mr. Bryan defended the charges by arguing *only* that the Penthouse magazine was not relevant to his deviant behavior, as required by Condition 21, because the magazine depicted images of adults and not children or anyone under the age of eighteen.

Moreover, while it is true that the written Order of Sex Offender Probation includes Condition 33, there is nothing in the record to indicate that Mr. Bryan was aware of the condition: Mr. Bryan's probation officer testified that he read Condition 21 to Mr. Bryan—he did not testify that he read Condition 33 to Mr. Bryan; the plea agreement paperwork only includes a restriction on Mr. Bryan's possession of pornographic material that is "related to his deviant behavior pattern," as did the sentencing court's oral pronouncement at sentencing; and while the written order has a section following the court's signature for Mr. Bryan to "acknowledge receipt of a copy of the order and that the conditions have been explained to [him] and [he] agree[s] to abide by them," as well as a space for the supervising officer to sign below this acknowledgement, neither Mr. Bryan nor the supervising officer signed the order.[2] The reason there was no evidence as to Condition 33 is because the State agreed to limit the violation of probation hearing to Conditions 9 and 21 at the outset of the hearing. Had the State alleged a violation of Condition 33 in the affidavit of violation of probation, Mr. Bryan would have had an opportunity to raise defenses to that allegation—an opportunity he was denied by the State's limitation at the beginning of the hearing to violations of Conditions 9 and 21.

Accordingly, the trial court erred in revoking Mr. Bryan's probation where the State failed to present competent, substantial evidence to prove the Penthouse magazine was relevant to Mr. Bryan's deviant behavior. We reverse the order revoking

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[2]While it was not specifically argued in the briefs that Mr. Bryan did not sign the Order of Sex Offender Probation, that fact is clear on the face of the record before this court and is properly considered in this appeal. See Gordon v. Burke, 429 So. 2d 36, 37 (Fla. 2d DCA 1983) ("It is well settled that an appellate court must make judgments based on the official record before it.").

probation and remand for the trial court to determine whether Mr. Bryan's probation should be revoked and if the same sentence should be imposed based solely on Mr. Bryan's violation of Condition 9. See McPeek v. State, 61 So. 3d 1267 (Fla. 1st DCA 2011) (ordering remand because record did not indicate whether trial court would have revoked probation based only on the defendant's remaining alleged violation).

Reversed and remanded.

SILBERMAN and VILLANTI, JJ., Concur.