DISTRICT COURT OF APPEAL OF FLORIDA

SECOND DISTRICT

ANGEL STEVEN de la ROSA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

No. 2D22-1284

July 28, 2023

Appeal from the Circuit Court for Hillsborough County; Kimberly K. Fernandez and Nick Nazaretian, Judges.

Rosanne Brady, Tampa, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Cerese Crawford Taylor and Michael W. Mervine, Senior Assistant Attorneys General, Tampa, for Appellee.

VILLANTI, Judge.

Angel Steven de la Rosa challenges the revocation of his probation and the resulting amended order of probation. He also challenges the denial of his motion to dismiss the violation affidavit. We affirm the denial of de la Rosa's motion to dismiss and explain our reasons for doing so herein. However, because the State failed to prove that de la Rosa had violated a valid condition of his probation, we reverse the order revoking his probation.

For offenses committed in 2013, de la Rosa entered an open plea to seventy-eight counts of possession of child pornography, violations of section 827.071(5), Florida Statutes (2013), which were reclassified as second-degree felonies pursuant to section 775.0847(2), (3), Florida Statutes (2013). The trial court sentenced de la Rosa to fifteen years' sex offender probation on count one and to five years' sex offender probation on counts two through seventy-eight, concurrent with each other but consecutive to count one for a total of twenty years' probation.

In August 2021, de la Rosa's probation officer (PO) filed an affidavit of violation of probation alleging violations of several conditions of his probation. De la Rosa moved to dismiss the violation affidavit, arguing that the original order of sex offender probation did not include special condition 29, a condition not cited by the PO in the affidavit.[1] The trial court denied the motion, explaining that the applicable provision is special condition 31 (electronic monitoring) and that it is mandatory in de la Rosa's case.

At the revocation hearing, the trial court found that "the State has proven . . . by greater weight of the evidence that there has been a substantial violation of his probation."[2] Specifically, the trial court orally found that de la Rosa had violated condition 9 of his probation three

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[1] The affidavit alleged a violation of special condition "39," which does not exist. The PO evidently intended to cite condition 31 and subsequently filed an amended affidavit correcting the scrivener's error. The PO also alleged several violations of condition 9 (failure to comply with the PO's instructions). It is the interplay between the applicability of special condition 31 and the facts supporting the alleged violations of condition 9 that is at issue in this appeal.

[2] The trial court did not find that the violation was willful.

times by failing to plug in his "RTC device"[3] by 10:00 p.m. on July 16, July 23, and July 24, 2021, as instructed by his PO.

A. Applicability of Special Condition 31

Although de la Rosa's PO asserted that de la Rosa had violated several conditions of his probation, the trial court found only that de la Rosa had violated condition 9. However, the validity of the alleged violation of that condition—failure to plug in the monitoring device by 10:00 p.m. each night as instructed by his PO—depends on whether de la Rosa was subject to mandatory electronic monitoring at the time of the alleged violation. Accordingly, we first examine whether de la Rosa was subject to mandatory electronic monitoring under special condition 31.

On appeal, de la Rosa argues that the original sentencing judge did not impose electronic monitoring in the first place, as evidenced, he asserts, by the fact that the original judge did not check the box for special condition 10 of the Order of Sex Offender Probation,[4] and that special condition 31, which is mandatory under certain circumstances, does not apply. As to special condition 10, de la Rosa is correct; that condition does not apply to him. However, special condition 31 does.

Special condition 31 states, in pertinent part:

> (31) Effective for offenders whose crime was committed on or after September 1, 2005, there is hereby imposed, in addition

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[3] The RTC (Real Time Communication) device serves as the link between the probationer's ankle monitor and a satellite, providing real-time data to the monitoring servicer.

[4] Special condition 10 states, "You will submit to electronic monitoring, follow the rules of electronic monitoring, and pay $___ per month for the cost of the electronic monitoring service."

> to any other provision in this section, mandatory electronic monitoring as a condition of supervision for those who:
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> * Are placed on supervision for a violation of chapter 794, s. 800.04(4), (5), or (6), s. 827.071, or s. 847.0145 and the unlawful sexual activity involved a victim 15 years of age or younger and the offender is 18 years of age or older . . . .

(Emphases added.)[5] Special condition 31 is derived from section 948.30(3), Florida Statutes (2013). Although rephrased, it is essentially identical to the statute.

De la Rosa argues that section 948.30(3) does not apply to him because "[h]is offense was a possession of images charge and did not involve any contact with a victim." As a result, he asserts, the mere fact that a violation of section 827.071 is listed as a qualifying offense in section 948.30(3) does not necessarily mean that a person charged solely with possession of child pornography under section 827.071 is subject to the mandatory electronic monitoring requirement of special condition 31.

De la Rosa's premise is false. First and foremost, section 948.30(3)(a) states that the sexual activity must "involve[] a victim 15 years of age or younger." (emphasis added.) It does not say that the sexual activity must be with the defendant. With respect to de la Rosa's "contact" argument, we first note that section 948.30(3) refers to "sexual activity" but does not define it. This makes sense because section 948.30(3) is not a criminal offense statute; its only purpose is to impose an additional mandatory probationary condition upon probationers who have committed a sex offense under one of the listed statutes.

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[5] The order of revocation of probation erroneously states that de la Rosa admitted to the violation. In addition, although the court orally found that de la Rosa had violated condition 9 on three occasions, the order of revocation states only that he violated condition 9.

Accordingly, section 948.30's reference to "sexual activity"—and whether that activity must include interpersonal contact between the offender and the victim as de la Rosa argues—must be evaluated in the context of the conduct proscribed by the relevant listed statute. In this case, section 827.071 provides that the sexual conduct necessary for completion of the offense includes:

> [A]ctual or simulated sexual intercourse, deviate sexual intercourse, sexual bestiality, masturbation, or sadomasochistic abuse; actual or simulated lewd exhibition of the genitals; actual physical contact with a person's clothed or unclothed genitals, pubic area, buttocks, or, if such person is a female, breast, with the intent to arouse or gratify the sexual desire of either party; or any act or conduct which constitutes sexual battery or simulates that sexual battery is being or will be committed.

§ 827.071(1)(*l*). Thus, the sexual act need not be "actual" at all, but merely "simulated." And even if the conduct involves "actual" sexual activity, the child may perform the act alone (masturbation; lewd exhibition) or with another person (not necessarily the defendant). *Cf. United States v. Dominguez*, 997 F.3d 1121, 1125 (11th Cir. 2021) (observing that 18 U.S.C. § 2427 provides that the phrase "sexual activity . . . includes the production of child pornography [which] can be accomplished without interpersonal physical contact between the offender and the victim" (citing *United States v. Johnson*, 784 F.3d 1070, 1071-73 (7th Cir. 2015))); *United States v. Fugit*, 703 F.3d 248, 255 (4th Cir. 2012) ("The fact that [sexual activity as used in § 2422(b)[6]] need not involve interpersonal physical contact is self–evident.").

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[6] 18 U.S.C. § 2422(b) prohibits the use of the mail or any means of intrastate or foreign commerce to persuade, entice, or coerce a minor "to engage in prostitution or any sexual activity for which any person can be charged with a criminal offense." (Emphasis added.)

Finally, none of the four offenses contained in section 827.071[7] require that the offender engage in sexual activity with the child victim. Thus, the inclusion of a violation of section 827.071 as a qualifying offense in section 948.30(3) cannot mean that the qualifying sexual activity must involve contact between the offender and the child victim. If this were the case, the inclusion of section 827.071 in section 948.30(3) would be meaningless. It is a basic rule of statutory construction that "the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." *State v. Goode*, 830 So. 2d 817, 824 (Fla. 2002).

We conclude that the phrase "sexual activity" as used in section 948.30(3) as it pertains to section 827.071 does not require any interpersonal physical contact between the offender and the child victim. Therefore, the mandatory monitoring requirement of section 948.30(3) (special condition 31) is triggered when a defendant is convicted of an offense under section 827.071 and placed on sex offender probation for that offense. Accordingly, the trial court did not err in holding that special condition 31 applies to de la Rosa's probation.

B. Additional Condition of Probation Imposed by Probation Officer

Having determined that the trial court correctly found that de la Rosa was subject to mandatory electronic monitoring, we turn to de la Rosa's argument that his PO's instruction that he place his RTC device

[7] Use of a child in a sexual performance (§ 827.071(2)), promoting a sexual performance by a child (§ 827.071(3)), possession of child pornography with intent to promote (§ 827.071(4)), and possession of child pornography (§ 827.071(5)).

into the charger at 10:00 p.m. was an additional condition of probation that his PO did not have the authority to impose. De la Rosa is correct.

"A violation that triggers revocation of probation must be willful and substantial, and its willful and substantial nature must be supported by the greater weight of the evidence." *Robinson v. State*, 907 So. 2d 1284, 1286 (Fla. 2d DCA 2005) (citing *Hightower v. State,* 529 So. 2d 726, 727 (Fla. 2d DCA 1988)). Within these constraints, a trial court has "broad discretionary power to revoke probation." *Id.* (citing *Anthony v. State*, 854 So. 2d 744, 747 (Fla. 2d DCA 2003)). Nevertheless—and perhaps to state the obvious—"[p]robation cannot be revoked or its terms modified for violating an invalid condition." *Aviles v. State*, 165 So. 3d 841, 843 (Fla. 1st DCA 2015) (first citing *White v. State*, 619 So. 2d 429, 431 (Fla. 1st DCA 1993); and then citing *Odom v. State*, 15 So. 3d 672, 681 (Fla. 1st DCA 2009)).

Obviously, a probationer in possession of electronic monitoring equipment may fairly be required to maintain that equipment to the extent he or she is reasonably capable of so doing. This includes keeping a device charged. But the imposition of a specific time to plug in the RTC device "essentially imposes a new condition of probation [that] is not a routine supervisory direction and cannot support a finding that the probationer is in violation." *Bell v. State*, 24 So. 3d 712, 713 (Fla. 2d DCA 2009) (quoting *Miller v. State*, 958 So. 2d 981, 984-85 (Fla. 2d DCA 2007)); *cf. Messineo v. State*, 174 So. 3d 1106, 1108 (Fla. 5th DCA 2015) ("[A] probation officer has no authority to impose additional conditions of probation, even if the court has ordered the probationer to follow all instructions the officer may give." (quoting *Bishop v. State*, 21 So. 3d 830, 832 (Fla. 1st DCA 2008))); *Paterson v. State*, 612 So. 2d 692, 694 (Fla. 1st DCA 1993) ("The condition that appellant comply with all

instructions the probation officer may give him is also insufficient to support a violation of probation for failure to follow an instruction by the probation officer . . . when such [instruction] was not ordered by the trial judge.").

"[C]ommunity control [or probation] should not function as a thinly disguised trap whereby the controlee's slightest misstep results in revocation and a substantial prison term at the whim of the controlee's community control [or probation] officer." *Filmore v. State*, 133 So. 3d 1188, 1194 (Fla. 2d DCA 2014). Concomitantly, the seriousness of the underlying offense is not relevant in determining whether a violation has occurred. *See, e.g.*, *id.* at 1195 (holding that "the trial court's comment that 'any time you are on probation for a first-degree felony punishable by life . . . any violation is willful and substantial' " was reversible error in and of itself).

We conclude that the requirement that de la Rosa plug his RTC device into the charger at 10:00 p.m. each night was not a valid condition of probation. Therefore, the trial court abused its discretion by revoking de la Rosa's probation and entering a revised order of probation on this basis. *See Aviles*, 165 So. 3d at 843. Accordingly, we reverse the order revoking de la Rosa's probation and remand with instructions to vacate the newly imposed order of probation and to reinstate the order of probation that was in effect immediately prior to the alleged violations.

Reversed and remanded with instructions.

KHOUZAM and BLACK, JJ., Concur.

Opinion subject to revision prior to official publication.