STATE V. BEGAYE

STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DARYL BEGAYE,
Defendant-Appellant.

No. A-1-CA-36209

COURT OF APPEALS OF NEW MEXICO

December 11, 2017

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY, John A. Dean, Jr., District Judge

COUNSEL

Hector H. Balderas, Attorney General, Santa Fe, NM, for Appellee

Bennett J. Baur, Chief Public Defender, Kimberly Chavez Cook, Assistant Appellate Defender, Santa Fe, NM, Appellant

JUDGES

J. MILES HANISEE, Judge. WE CONCUR: JONATHAN B. SUTIN, Judge, JULIE J. VARGAS, Judge

AUTHOR: J. MILES HANISEE

MEMORANDUM OPINION

HANISEE, Judge.

{1} Defendant appeals from the district court's order revoking his probation, committing him to the New Mexico Department of Corrections, and continuing unsupervised probation. This Court issued a notice of proposed disposition in which we

proposed to affirm. Defendant has filed a memorandum in opposition, which we have duly considered. Unpersuaded, we affirm.

{2} Defendant's two challenges on appeal are (1) whether the State sufficiently proved that he violated the conditions of his probation, and (2) whether the sentence imposed as a result of his probation revocation was arbitrary and capricious. [DS 6]

{3} In our calendar notice, we recognized that in a probation revocation proceeding, the State bears the burden of establishing a violation with reasonable certainty. [CN 2] *State v. Sanchez*, 2001-NMCA-060, ¶ 11, 130 N.M. 602, 28 P.3d 1143. To satisfy this burden, the State is required to introduce proof which would incline "a reasonable and impartial mind to the belief that a defendant has violated the terms of probation." *State v. Martinez*, 1989-NMCA-036, ¶ 4, 108 N.M. 604, 775 P.2d 1321. On appeal, this Court reviews the decision to revoke probation for an abuse of discretion. *See id.* ¶ 5. "To establish an abuse of discretion, it must appear the trial court acted unfairly or arbitrarily, or committed manifest error." *Id.*

{4} In our calendar notice, we first observed that the docketing statement provided us with scant details with regard to the evidence and testimony presented at the adjudicatory hearing. [CN 2-3] However, we suggested that our review of the tape log from the adjudicatory hearing revealed that the testimony offered by Farmington Police Officer Domenici was sufficient to establish a violation of probation by Defendant for alcohol consumption. [CN 3-4] Specifically, Officer Domenici testified that Defendant was located in a vehicle with his brother, along with an open bottle of vodka and a case of beer, and Defendant exhibited signs of intoxication. [CN 3-4] We also noted that the tape log indicated that Defendant's probation officer testified that Defendant failed to report for a scheduled meeting. [CN 4] Based on this information, as well as the fact that the docketing statement specifically stated that Defendant admitted to the violations [*see* DS 5], we proposed to conclude that the district court not abuse its discretion in finding that Defendant violated two standard conditions of probation. [CN 4]

{5} In response to this Court's notice of proposed disposition, Defendant argues that the evidence was insufficient to establish that the violations were willful. [MIO 6] *See In re Bruno R.*, 2003-NMCA-057, ¶ 13, 133 N.M. 566, 66 P.3d 339 (stating that "if violation of probation is not willful, but resulted from factors beyond a probationer's control, probation may not be revoked"). We acknowledge that willful conduct is a requisite. However, as we have previously stated, "[o]nce the state offers proof of a breach of a material condition of probation, the defendant must come forward with evidence [to show that his non-compliance] was not willful." *State v. Parsons*, 1986-NMCA-027, ¶ 25, 104 N.M. 123, 717 P.2d 99. "[I]f [the d]efendant fails to carry his burden, then the trial court is within its discretion in revoking [the defendant's probation]." *Martinez*, 1989-NMCA-036 ¶ 8.

{6} In the present case, with respect to the missed appointment, Defendant contends that his confusion about when he was supposed to report—stemming from the death of his boss and his mom during the surrounding time frame, and from a purported

rescheduling of the meeting by his probation officer—made his failure to report non-willful. [MIO 7-8] We need not, however, reach the merits of this argument. That is, because Defendant has not renewed his challenge to the sufficiency of the evidence-or the willfulness-of the violation for consuming alcohol, but instead argues in his memorandum in opposition that the district court had the discretion to refuse to revoke his probation on the basis of such a minor infraction [*see* MIO 8], we are not convinced that we were incorrect in our notice of proposed disposition. Consequently, because a reasonable and impartial mind would be inclined to believe-based on Officer Domenici's testimony and Defendant's admission-that Defendant consumed alcohol in violation of his terms of probation, we affirm the district court's revocation of Defendant's probation on that basis. *See State v. Leon*, 2013-NMCA-011, ¶ 37, 292 P.3d 493 (stating that "although [the d]efendant challenges the sufficiency of the evidence supporting each of his probation violations, if there is sufficient evidence to support just one violation, we will find the district court's order was proper"); *see also State v. Green*, 2015-NMCA-007, ¶ 21 n.3, 341 P.3d 10 (declining to reach the issue of whether sufficient evidence supported revocation of the defendant's probation on the remaining alleged grounds where the Court found sufficient evidence of a violation on one ground).

{7} With respect to his second appellate issue, Defendant continues to argue that the district court abused its discretion by imposing a one-year habitual offender enhancement under these "extreme and unusual" circumstances. [MIO 9] Defendant's specific argument is grounded in his contention that the surrounding circumstances, including the deaths of his boss and his mother in short succession, militate against the district court's imposition of the sentence enhancement. As we noted in our calendar notice, however, the district court's order indicates that the one-year sentence was levied as enforcement of Defendant's repeat offender plea agreement. [CN 5; *see* RP 55 ("In the event that . . . [D]efendant . . . in any way violates any of the conditions of any probation or parole to which he may be or become subject after entry of this agreement, the State will file the felony enhancement against [D]efendant[.]") (Emphasis added.) As such, we remain unconvinced that the district court abused its discretion when it imposed a mandatory one-year sentence, *see* NMSA 1978, § 31-18-1(A) (2003) (mandating a one-year enhancement of a habitual offender's basic sentence when the offender has one prior felony conviction), pursuant to the repeat offender plea agreement entered into and signed by Defendant [RP 54-57].

{8} Accordingly, we affirm.

{9} IT IS SO ORDERED.

J. MILES HANISEE, Judge

WE CONCUR:

JONATHAN B. SUTIN, Judge

JULIE J. VARGAS, Judge