

**STATE V. OSBY**

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**STATE OF NEW MEXICO,**  
**Plaintiff-Appellee,**  
v.  
**WILLIE DEAN OSBY,**  
**Defendant-Appellant.**

NO. 29,571

COURT OF APPEALS OF NEW MEXICO

September 14, 2009

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, Stephen K. Quinn,  
District Judge

**COUNSEL**

Gary K. King, Attorney General, Santa Fe, NM, for Appellee

Hugh W. Dangler, Chief Public Defender, Karl Erich Martell, Assistant Appellate  
Defender, Santa Fe, NM, for Appellant

**JUDGES**

MICHAEL E. VIGIL, Judge. WE CONCUR: MICHAEL D. BUSTAMANTE, Judge, LINDA  
M. VANZI, Judge

**AUTHOR:** MICHAEL E. VIGIL

**MEMORANDUM OPINION**

**VIGIL, Judge.**

Defendant appeals from the district court order revoking his probation, arguing that there was insufficient evidence to find that he violated his probation. [DS 3; MIO 2-3] Defendant raises this issue pursuant to *State v. Franklin*, 78 N.M. 127, 129, 428 P.2d

982, 984 (1967), and *State v. Boyer*, 103 N.M. 655, 658-60, 712 P.2d 1, 4-6 (Ct. App. 1985). [Id.] We issued a calendar notice proposing to summarily affirm. Defendant filed a timely response and a motion to amend the docketing statement, which we have duly considered. Because we remain unpersuaded by Defendant's assertions of error, we deny the motion to amend and affirm the district court's order.

## **DISCUSSION**

### **Sufficiency**

In a probation revocation proceeding, the State bears the burden of establishing a violation with reasonable certainty. *State v. Sanchez*, 2001-NMCA-060, ¶ 13, 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 believe that the defendant violated the terms of probation. *Id.* "The proof of a violation of a condition of probation need not be established beyond a reasonable doubt." *State v. Martinez*, 108 N.M. 604, 606, 775 P.2d 1321, 1323 (Ct. App. 1989). On appeal, we review the district court's decision to revoke probation for an abuse of discretion. *Id.* To establish an abuse of discretion, it must appear that the district court acted unfairly, arbitrarily, or in manifest error. *Id.*

Defendant was accused of violating probation by consuming alcohol and not obeying the laws of the State of New Mexico. [DS 2] Our calendar notice proposed to hold that the State presented sufficient evidence to support the district court's finding that Defendant violated conditions of his probation based on the testimony of a police officer and a probation officer. The police officer testified that he stopped Defendant's vehicle for speeding on March 20, 2009, and found that Defendant did not have a valid driver's license and that he smelled of alcohol. [RP 109; DS 2-3; MIO 1-2] The police officer charged Defendant with driving while intoxicated and driving without a license. [DS 3; MIO 1-2] The probation officer testified that consuming alcohol and violating state laws were conditions of Defendant's probation. [Id.]

Defendant does not contest our understanding of the evidence. We remain persuaded that the State presented sufficient evidence to support the district court's finding that Defendant violated conditions of his probation. We therefore affirm the district court's order revoking Defendant's probation.

### **Motion to Amend**

Defendant seeks to raise an additional issue that he was not given proper good time credit for time served on his parole revocation. [MIO 3-4] Defendant raises this issue pursuant to *Franklin and Boyer*. [Id. 4] A motion to amend the docketing statement may only be granted if it is timely, and if the issues are viable. See *State v. Moore*, 109 N.M. 119, 128-30, 782 P.2d 91, 100-102 (Ct. App. 1989), *overruled on other grounds by State v. Salgado*, 112 N.M. 537, 817 P.2d 730 (Ct. App. 1991). Defendant concedes that the issue of good time credit was not raised below. [Id.] He does not persuade us that fundamental error occurred. [Id.] Thus, we conclude that the new issue is not

viable. Accordingly, we deny Defendant's motion to amend the docketing statement. Defendant must pursue this issue, if at all, in a habeas corpus proceeding. See *State v. Telles*, 1999-NMCA-013, ¶ 25, 126 N.M. 593, 973 P.2d 845; *State v. Martinez*, 1996-NMCA-109, ¶ 25, 122 N.M. 476, 927 P.2d 31 (stating that "[t]his Court has expressed its preference for habeas corpus proceedings over remand when the record on appeal does not establish a prima facie case").

## **CONCLUSION**

For these reasons, we affirm.

**IT IS SO ORDERED.**

**MICHAEL E. VIGIL, Judge**

**WE CONCUR:**

**MICHAEL D. BUSTAMANTE, Judge**

**LINDA M. VANZI, Judge**