

STATE V. WHEELER

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
CHRISTOPHER WHEELER,
Defendant-Appellant.**

Docket No. A-1-CA-37528
COURT OF APPEALS OF NEW MEXICO
May 10, 2019

APPEAL FROM THE DISTRICT COURT OF SANTA FE COUNTY, Mary L. Marlowe,
District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, John Charles Bennett, Assistant Appellate Defender, Santa Fe, NM for Appellant.

JUDGES

LINDA M. VANZI, Judge. WE CONCUR: J. MILES HANISEE, Judge, BRIANA H. ZAMORA, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Judge.

{1} Defendant appeals from a district court order finding a probation violation, retaining Defendant's conditional discharge, but giving him an unsatisfactory discharge from probation. We issued a calendar notice proposing to affirm. Defendant has responded with a motion to amend the docketing statement and a memorandum in opposition. We hereby deny the motion to amend and affirm the district court. **Motion to Amend**

{2} Defendant has filed a motion to amend the docketing statement to add a new issue. In cases assigned to the summary calendar, this Court will grant a motion to amend the docketing statement to include additional issues if the motion (1) is timely; (2) states all facts material to a consideration of the new issues sought to be raised; (3) explains how the issues were properly preserved or why they may be raised for the first time on appeal; (4) demonstrates just cause by explaining why the issues were not originally raised in the docketing statement; and (5) complies in other respects with the appellate rules. *State v. Rael*, 1983-NMCA-081, ¶ 15, 100 N.M. 193, 668 P.2d 309. This Court will deny motions to amend that raise issues that are not viable, even if they allege fundamental or jurisdictional error. See *State v. Moore*, 1989-NMCA-073, ¶ 42, 109 N.M. 119, 782 P.2d 91, *overruled on other grounds by State v. Salgado*, 1991-NMCA-044, 112 N.M. 537, 817 P.2d 730.

{3} Here, Defendant seeks to add the issue of whether the evidence was sufficient to support the finding of probation violation. [MIO 3] “In a probation revocation proceeding, the State bears the burden of establishing a probation violation with a reasonable certainty.” See *State v. Leon*, 2013-NMCA-011, ¶ 36, 292 P.3d 493. “To establish a violation of a probation agreement, the obligation is on the [s]tate to prove willful conduct on the part of the probationer so as to satisfy the applicable burden of proof.” *In Re Bruno R.*, 2003-NMCA-057, ¶ 11, 133 N.M. 566, 66 P.3d 339; see *State v. Martinez*, 1989-NMCA-036, ¶ 8, 108 N.M. 604, 775 P.2d 1321 (explaining that probation should not be revoked where the violation is not willful, in that it resulted from factors beyond a probationer’s control).

{4} The district court found that Defendant violated state law, in contravention of condition 1 in his probation agreement. [RP 45, 69] At the hearing, the arresting officer testified that he was dispatched to J.C. Penney in reference to shoplifting. [MIO 4] When he arrived he saw Defendant handcuffed and sitting on a sidewalk next to mall security officers. [MIO 4] The officer further testified that he arrested Defendant after speaking to three eye-witnesses at the scene. [DS 3]

{5} Referring us to a United States Supreme Court case and a federal circuit court case, Defendant argues that his mere arrest was insufficient to establish the violation. [MIO 7] However, neither of those cases involved a probation violation, let alone testimony from an arresting officer that provided the context of the incident. As noted, the applicable inquiry here is whether the State showed to a reasonable certainty that the violation occurred. Cf. *State v. DeBorde*, 1996-NMCA-042, ¶ 13, 121 N.M. 601, 915 P.2d 906 (noting the state’s strong interest in being able to return a probationer to imprisonment without the burden of a new adversary criminal trial). Given this burden of proof, we conclude that a fact-finder could find that Defendant violated the probation condition that he obey the law.

Issue in Docketing Statement

{6} Defendant does not raise any new arguments on this issue. We therefore rely on the analysis set forth in the calendar notice. See *State v. Mondragon*, 1988-NMCA-027,

¶ 10, 107 N.M. 421, 759 P.2d 1003 (stating that “[a] party responding to a summary calendar notice must come forward and specifically point out errors of law and fact[,]” and the repetition of earlier arguments does not fulfill this requirement).

{7} For the reasons set forth above, we affirm.

{8} **IT IS SO ORDERED.**

LINDA M. VANZI, Judge

WE CONCUR:

J. MILES HANISEE, Judge

BRIANA H. ZAMORA, Judge