

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROBERT ALLEN BROWN,
Appellant.

No. 2 CA-CR 2019-0302
Filed October 2, 2020

Appeal from the Superior Court in Cochise County
No. S0200CR201900111
The Honorable James L. Conlogue, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
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Counsel for Appellee

Cochise County Office of the Legal Advocate
By Xochitl Orozco, Legal Advocate, Bisbee
Counsel for Appellant

OPINION

Presiding Judge Staring authored the opinion of the Court, in which
Chief Judge Vásquez and Judge Brearcliffe concurred.

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STARRING, Presiding Judge:

¶1 Robert Brown challenges the revocation of his probation after a contested hearing, as well as his sentence of imprisonment for possession of a dangerous drug imposed after the revocation. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the record in the light most favorable to upholding the trial court's decision. *See State v. Rowe*, 116 Ariz. 283, 284 (1977); *State v. Wideman*, 165 Ariz. 364, 369 (App. 1990). In January 2019, Brown pled guilty to one count of possession of a dangerous drug. The court suspended his term of imprisonment and imposed four years of intensive probation, which included the condition that Brown "not possess or use illegal drugs or controlled substances and . . . submit to drug and alcohol testing." In September 2019, the state petitioned the court to revoke Brown's probation, alleging he had violated this condition.

¶3 At the revocation hearing, the state presented evidence that, on August 20 and September 19, 2019, Brown had provided urine samples that tested positive for methamphetamine. Specifically, a surveillance officer described collecting the samples, and a probation officer explained matters related to the test results and chain of custody. During the officers' testimony, Brown repeatedly objected, initially claiming that the chain-of-custody forms constituted unreliable hearsay and potentially lacked required information. Brown also claimed the urinalysis results were hearsay, lacked proper foundation on chain of custody, and were unreliable, due in part to "the method with which they were taken, pursuant to some . . . issues raised pursuant to the [Arizona Code of Judicial Administration]."

¶4 The trial court admitted Brown's urinalysis results and found he had violated the conditions of his probation. And, although Brown claimed "A.R.S. § 13-917 should not mandate revocation pursuant to due process, separation of powers, and cruel and unusual punishment grounds," the court, having concluded it had "no discretion" to do otherwise, revoked Brown's probation and sentenced him to 2.5 years' imprisonment. *See generally* § 13-917(B) (finding of probationer's additional felony offense mandates revocation and "term of imprisonment as authorized by law"). This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(3), (4), (B). *See State v. Regenold*, 226 Ariz. 378, ¶¶ 8,

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12 (2011) (§ 13-4033(B) does not bar pleading defendant from appealing sentence entered after contested revocation hearing).

Admissibility of Urinalysis Evidence

¶5 Brown first contends the trial court erred in admitting his urinalysis results. We review a court's admission of evidence in a probation revocation hearing for an abuse of discretion. *See State v. Tulipane*, 122 Ariz. 557, 558 (1979).

¶6 Rule 27.8(b)(3), Ariz. R. Crim. P., allows the trial court in a revocation hearing to "receive any reliable evidence, including hearsay, that is not legally privileged." Under this rule, evidence is considered "reliable" when it is trustworthy, dependable to the extent of "the generally recognized exceptions to the hearsay rule," and proven to be consistent in providing satisfactory results. *State v. Stotts*, 144 Ariz. 72, 82 (1985). "Our courts have repeatedly found urinalysis reports to be reliable, admissible evidence when there is 'testimony establishing how the sample was taken' and 'nothing to indicate that [the] report [is] inaccurate, or that the hospital testing procedures were generally unreliable.'" *State v. Carr*, 216 Ariz. 444, ¶ 5 (App. 2007) (alterations in original) (quoting *State v. Flores*, 26 Ariz. App. 400, 401 (1976)); *see also Tulipane*, 122 Ariz. at 559; *State v. Rivera*, 116 Ariz. 449, 451 (1977); *State v. Snider*, 172 Ariz. 163, 164 (App. 1992); *State v. Brown*, 23 Ariz. App. 225, 231, *aff'd*, 112 Ariz. 29 (1975).

¶7 Here, Brown argues his urinalysis results were unreliable, and thus, the trial court erred in admitting them. He draws our attention to § 6-110 of the Arizona Code of Judicial Administration (ACJA), which governs and provides procedures for "offender alcohol and drug testing conducted by . . . probation departments and contracted laboratories." § 6-110(B). Brown alleges that several ACJA violations related to his drug tests rendered the results unreliable. Specifically, he claims: the chain-of-custody form for the second sample lacked the courier's identification information and no alternate chain-of-custody form for the courier was provided, *see* § 6-110(G)(3)(g); there were no transportation logs from the courier, *see* § 6-110(G)(11); the samples were improperly held outside of "secure locked storage," *see* § 6-110(G)(10); and the surveillance officer, instead of Brown, put the labels on the samples, violating § 6-110(E)(8) and (G)(10). Finally, Brown asserts the ACJA's mandate that "all specimens be immediately discarded if there has been a breach of protocol or procedure," § 6-110(D)(2)(c), should have prevented his urinalyses from being used in this case.

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¶8 The state counters that it sufficiently demonstrated the reliability of Brown’s urinalysis results. It points to testimony indicating that the surveillance officer personally transported the samples before placing them in a sealed envelope and giving them to a courier, that the samples were verifiable by consistent identification numbers, that the samples were monitored the entire time they were stored, and that the officer applied the sample labels “in Brown’s presence immediately after [each] specimen was collected.” Lastly, the state argues any noncompliance with the ACJA’s drug-testing procedures does not render the test results inadmissible.

¶9 Foremost, we agree the ACJA does not determine the admissibility of probationer drug tests. Part Six of the ACJA was promulgated pursuant to our supreme court’s “*administrative* supervision over all the courts of the state,” Ariz. Const. art. VI, § 3 (emphasis added); see § 6-110(B), and is intended to “provide minimum standards for offender alcohol and drug testing practices.” § 6-110(C). While § 6-110(D)(2)(c) directs a *probation department* to discard a urinalysis sample if these minimum standards are breached, the ACJA does not purport to govern the admissibility of samples that have not been discarded. Further, the ACJA does not supersede the trial court’s discretion and authority regarding the admissibility of evidence in revocation hearings. See Ariz. R. Crim. P. 27.8(b)(3); see also *In re Jonah T.*, 196 Ariz. 204, ¶ 21 (App. 1999) (“[W]e find no authority that would allow an administrative order to govern, or conflict with, the rules of admissibility of otherwise reliable evidence . . .”).

¶10 Here, the trial court relied on evidence sufficient to establish the reliability of Brown’s urinalyses. At the hearing, the surveillance officer first described the general procedures he follows for collecting urine samples and then confirmed he followed those procedures when collecting both of Brown’s samples. These procedures included: observing the probationer rinse his hands and then provide the urine sample; placing a seal on the sample container in front of the probationer¹ and having the probationer confirm that the seal number matches the chain-of-custody number; having the probationer sign the chain-of-custody form; sealing the

¹ACJA § 6-110(E)(8) and (G)(10) require the probationer undergoing drug testing to affix a seal to the sample container. However, the surveillance officer explained that he generally places the seal because in the past he had “worn urine when a defendant got upset.”

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sample in a bag; and transporting the sample to the courier, placing it in an envelope, and having it sent to the lab.

¶11 The state presented the chain-of-custody forms for Brown's samples, which included his name, date of birth, the case and chain-of-custody numbers, the time of sample collection, and both Brown's and the officer's signatures. And, the probation officer confirmed that the chain-of-custody numbers on the forms matched the numbers on the results and verified that Brown's information was also on the results. Moreover, the surveillance officer stated that although he did not continuously store the samples in a secured locker, they were nonetheless monitored constantly. He also explained that identifying numbers are used to ensure case documentation corresponds with particular samples. Finally, both officers confirmed they followed the probation department's policy with regard to Brown's samples.

¶12 Although ACJA violations may, under certain circumstances, affect the reliability of urinalyses, the state's evidence nonetheless supported the trial court's ruling on admission in this case. That is, the state explained how Brown's samples were collected, and despite the specific violations Brown alleges, the court was justified in finding the evidence reliable. *See Carr*, 216 Ariz. 444, ¶ 5. Thus, the court did not abuse its discretion in admitting the urinalysis evidence.

Constitutionality of A.R.S. § 13-917

¶13 Brown next contends A.R.S. § 13-917(B) unconstitutionally mandates a term of imprisonment upon a trial court's finding, by a preponderance of the evidence, that an intensive probationer has committed an additional felony. We review a statute's constitutionality *de novo*. *State v. Arevalo*, ___ Ariz. ___, ¶ 9, 470 P.3d 644, 647 (2020).² To prevail, the challenging party must overcome a strong presumption of constitutionality. *Id.*

²The parties dispute whether Brown properly preserved this issue for appeal. However, the prerequisite to both harmless and fundamental error is that error indeed occurred. *State v. Soliz*, 223 Ariz. 116, ¶¶ 10-12 (2009). Here, we conclude § 13-917(B) is constitutional and, thus, no error occurred. *See State v. Lowery*, 230 Ariz. 536, ¶ 11 (App. 2012) (applying fundamental-error standard to constitutional challenge of statute). Therefore, the parties' dispute as to the standard of review need not be addressed.

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¶14 Section 13-917(B) establishes consequences for a violation of intensive probation. Specifically, it mandates that if “the court finds that the [probationer] has committed an additional felony offense . . . [it] shall revoke the period of intensive probation and impose a term of imprisonment as authorized by law.” *Id.* For the purposes of this subsection, the “term of imprisonment as authorized by law” is the term authorized for the original, underlying offense. *See State v. Russell*, 226 Ariz. 416, ¶¶ 11-12 (App. 2011) (trial court properly sentenced defendant for underlying assault after he violated intensive probation by committing a felony drug offense).

¶15 Brown asserts § 13-917(B)’s sentencing mandate violated his “rights to a jury trial and due process as guaranteed by the Fifth and Sixth Amendments of the United States Constitution.” *See generally Apprendi v. New Jersey*, 530 U.S. 466, 476-77 (2000) (Due Process Clause and Sixth Amendment require a jury determination of guilt for each element of each charged offense); *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542-43 (1989) (right to jury trial attaches when defendant faces maximum prison term greater than six months). He primarily relies on *United States v. Haymond*, a recent Supreme Court case invalidating a federal statute that required the imposition of an additional prison term upon a finding, by a preponderance of the evidence, that an offender on supervised release committed one of its enumerated offenses. ___ U.S. ___, 139 S. Ct. 2369, 2378-79, 2386 (2019). In short, Brown claims, as in *Haymond*, § 13-917(B) unconstitutionally imposes punishment without a required jury finding. *See* 139 S. Ct. at 2386 (Breyer, J., concurring).

¶16 In response, the state emphasizes that a revocation hearing is not a stage of a criminal prosecution, but rather is only intended to determine if the probationer violated his conditions, thus requiring fewer procedural safeguards for the accused. The state further argues *Haymond* is distinguishable—that is, § 13-917(B) does not render punishment for a new offense, and instead punishes a defendant for failing to abide by court-imposed conditions. The state further distinguishes § 13-917(B) from 18 U.S.C. § 3583(k), the statutory subsection invalidated in *Haymond*, claiming it “does not present any of the . . . factors that, in combination, render § 3583(k) unconstitutional.”³ *United States v. Doka*, 955 F.3d 290, 298 (2d Cir. 2020) (discussing § 3583(e)(3)).

³The state also asserts Brown must demonstrate that § 13-917(B) is unconstitutional “beyond a reasonable doubt.” However, in *Gallardo v. State*, our supreme court disapproved this standard. 236 Ariz. 84, ¶ 8 (2014).

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¶17 We conclude § 13-917(B) is constitutional, even in light of *Haymond*.⁴ The provision addressed there, § 3583(k), requires a minimum sentence of five years in prison for a defendant on supervised release who commits one of its enumerated offenses – without regard to the sentence required for the original crime. *See Haymond*, 139 S. Ct. at 2386 (Breyer, J., concurring). Given this, the Court concluded that provision resembled a punishment for a new offense, implicating the right to a jury finding, rather than punishment for the initial offense. *Id.*

¶18 Section 13-917(B), on the other hand, does not mandate a particular sentence based on the subsequent commission of an additional enumerated felony. Instead, it is triggered by any “additional felony offense” and requires the probationer to be sentenced to a term of imprisonment determined by his *original* offense. *See Russell*, 226 Ariz. 416, ¶¶ 11-12. Accordingly, when the trial court found Brown had committed an additional felony while on intensive probation, *see* A.R.S. §§ 13-3401(6)(c)(xxxviii), 13-3407(A)(1), (B)(1), it sentenced him to the presumptive term of imprisonment for his original offense committed in June 2018.

¶19 Thus, § 13-917(B) neither mandates punishment for a new offense nor unconstitutionally deprives a defendant of the right to trial by jury. Rather, it revokes an offender’s privilege of probation and imposes a prison sentence for his original offense. *See State v. Douglas*, 87 Ariz. 182, 186 (1960) (probation is a “matter of grace and not of right”). These consequences are solely “part of the penalty for the initial offense” to which Brown pled guilty. *Johnson v. United States*, 529 U.S. 694, 700 (2000) (addressing revocation of supervised release); *see also United States v. J.W.T.*,

Nonetheless, the challenging party still bears the burden of overcoming the presumption of a statute’s constitutionality. *Arevalo*, ___ Ariz. ___, ¶ 9, 470 P.3d at 647.

⁴We view Justice Breyer’s concurrence as controlling among the Court’s plurality. *See State v. Medina*, 232 Ariz. 391, ¶ 57 (2013) (“If no opinion garners the support of a majority, the ‘position taken by those Members who concurred in the judgments on the narrowest grounds’ is regarded as the holding of the Court.” (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977))); *see also Haymond*, 139 S. Ct. at 2386 (Alito, J., dissenting) (holding is set out in Justice Breyer’s opinion); *Doka*, 955 F.3d at 296 (“In *Haymond*, Justice Breyer’s opinion concurring in the judgment represents the narrowest ground supporting the judgment, and therefore provides the controlling rule.”).

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368 F.3d 994, 995-96 (8th Cir. 2004) (“*Johnson* involved penalties imposed after revocation of supervised release, as opposed to revocation of probation, but we see no basis to treat these situations differently.”). As such, Brown has failed to show § 13-917(B) is unconstitutional.

Disposition

¶20 For the foregoing reasons, we affirm the trial court’s revocation of Brown’s probation and the sentence imposed.