

STATE V. ABEYTA

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
DEREK ABEYTA
Defendant-Appellant.**

No. 34,705

COURT OF APPEALS OF NEW MEXICO

December 3, 2015

APPEAL FROM THE DISTRICT COURT OF BERNALILLO COUNTY, Angela J. Jewell,
District Judge

COUNSEL

Hector Balderas, Attorney General, Santa Fe, NM, for Appellees

Jorge Alvarado, Chief Public Defender, Santa Fe, NM, Kimberly Chavez Cook,
Assistant Appellate Defender, Santa Fe, NM, for Appellant

JUDGES

MICHAEL E. VIGIL, Chief Judge. WE CONCUR: JAMES J. WECHSLER, Judge,
TIMOTHY L. GARCIA, Judge

AUTHOR: MICHAEL E. VIGIL

MEMORANDUM OPINION

VIGIL, Chief Judge.

{1} Defendant appeals from a district court order revoking his probation. We proposed to affirm. Defendant has responded with a motion to amend the docketing

statement and a memorandum in opposition. For the reasons set forth below, Defendant's motion to amend is hereby **DENIED**.

{2} We affirm the district court order revoking Defendant's probation revocation.

MOTION TO AMEND

{3} 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. See *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.

{4} Here, the motion claims that a police report, which was not entered into the record, referenced a "taser video." Defendant claims that the State should have disclosed the tape, and that his trial counsel was ineffective in failing to demand the tape. Because the video is not part of the record, it is not subject to review on direct appeal. See *State v. Hunter*, 2001-NMCA-078, ¶ 18, 131 N.M. 76, 33 P.3d 296 ("Matters not of record present no issue for review."). To the extent that Defendant's claims may have merit, we believe that they are more properly addressed in a habeas corpus proceeding. See *Duncan v. Kerby*, 1993-NMSC-011, ¶ 4, 115 N.M. 344, 851 P.2d 466.

SUFFICIENCY ISSUE

{5} Defendant continues to challenge the sufficiency of the evidence to support the revocation of his probation. "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 State 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 also *State v. Martinez*, 1989-NMCA-036, ¶ 7, 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).

{6} The district court found that Defendant violated the condition of probation relating to possession/consumption of alcohol and Defendant's obligation to report any arrest within 48 hours. The State presented evidence that at the time of his arrest Defendant

had bloodshot watery eyes, smelled of alcohol, and was in possession of a bottle that the arresting officer believed was alcohol. The district court also found that Defendant did not report his arrest within 48 hours. Defendant is relying on evidence that the police, in his presence, had independently notified his probation officer of Defendant's arrest. However, as we observed in the calendar notice, Defendant's condition of probation imposed a duty on Defendant to personally report the arrest, and there is no exception for any third-party notice. Because Defendant violated the express terms of this probation condition, the district court could reject Defendant's alleged excuse for non-compliance. In addition, Defendant is arguing that the only evidence that he failed to report is hearsay evidence from a report prepared by his probation officer, who did not testify. As Defendant concedes, hearsay evidence is permissible in probation revocation hearings. In addition to the report, there was also in-court testimony that Defendant had in fact been arrested. As such, we conclude that this is sufficient evidence under the above-noted standard of review.

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

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

MICHAEL E. VIGIL, Chief Judge

WE CONCUR:

JAMES J. WECHSLER, Judge

TIMOTHY L. GARCIA, Judge