

STATE V. MONDRAGON

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**STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
FABIAN J. MONDRAGON,
Defendant-Appellant.**

NO. A-1-CA-37359

COURT OF APPEALS OF NEW MEXICO

December 13, 2018

APPEAL FROM THE DISTRICT COURT OF CURRY COUNTY, Drew D. Tatum,
District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Brian Parrish, Assistant Appellate Defender,
Santa Fe, NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: J. MILES HANISEE, Judge, DANIEL J. GALLEGOS, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} Defendant Fabian J. Mondragon has filed a consolidated appeal from three separate orders that revoked his probation in three criminal cases based on the same

conduct. We issued a calendar notice proposing to affirm. Defendant has responded with a memorandum in opposition. We affirm.

Sufficiency

{2} Defendant challenges the sufficiency of the evidence to support the revocations. [MIO 9] “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, ¶ 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).

{3} Here, the district court found that Defendant violated probation number 8, which prohibited selling, owning, or having in his possession firearms. [RP 214 at 65; RP 215 at 54; RP 265 at 44] Defendant arranged for the sale of firearms to an undercover officer. [MIO 2-4] Defendant contacted other individuals to bring the weapons, and he was arrested after they arrived and showed the officer the weapons in Defendant’s presence. [MIO 2-4] This supports revocation based on the selling prohibition. In addition, the district court could have independently based revocation on possession. Defendant claims that he was not in possession of the firearms because he never touched or handled them. [MIO 10] A person is in actual possession of a firearm when, “on the occasion in question, he knows what [the firearm] is, he knows it is on his person or in his presence[,] and he exercises control over it.” UJI 14-130 NMRA. Here, Defendant was knowingly in the presence of the firearms and he exercised control by coordinating with others to bring the weapons to him and the undercover officer. At a minimum, Defendant was in constructive possession. See *State v. Montoya*, 1979-NMCA-044, ¶ 11, 92 N.M. 734, 594 P.2d 1190 (stating that constructive possession includes the power to produce or dispose of an item).

Reconsideration

{4} Defendant continues to claim that the district court erred in denying his motion for reconsideration, which asked for continued probation instead of incarceration. [MIO 13] The district court’s decision not to continue probation was within its discretion. See *State v. Sosa*, 1996-NMSC-057, ¶ 8, 122 N.M. 446, 926 P.2d 299 (explaining that “[i]t is settled law in this jurisdiction that a suspended sentence is a matter of judicial clemency to which a defendant may never claim entitlement.”).

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

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

LINDA M. VANZI, Chief Judge

WE CONCUR:

J. MILES HANISEE, Judge

DANIEL J. GALLEGOS, Judge