

STATE V. PEREZ

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STATE OF NEW MEXICO,
Plaintiff-Appellee,
v.
ANTONIO M. PEREZ, JR.,
Defendant-Appellant.

No. A-1-CA-36843

COURT OF APPEALS OF NEW MEXICO

December 28, 2018

APPEAL FROM THE DISTRICT COURT OF DOÑA ANA COUNTY, Fernando R.
Macias, District Judge

COUNSEL

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

Bennett J. Baur, Chief Public Defender, Tania Shahani, Assistant Appellate Defender,
Santa Fe, NM, for Appellant

JUDGES

LINDA M. VANZI, Chief Judge. WE CONCUR: M. MONICA ZAMORA, Judge,
JENNIFER L. ATTREP, Judge

AUTHOR: LINDA M. VANZI

MEMORANDUM OPINION

VANZI, Chief Judge.

{1} Defendant appeals from two orders of the district court revoking his probation in two separate district court cases (D-307-CR-2016-00929 and D-307-CR-2016-01077). This Court issued a notice of proposed disposition in which we proposed to affirm. We

also consolidated Court of Appeals Case No. A-1-CA-36843 with Court of Appeals Case No. A-1-CA-36845, and we instructed that all future filings shall be made in Court of Appeals Case No. A-1-CA-36843. Defendant has filed a memorandum in opposition to our proposed affirmance, which we have duly considered. Unpersuaded, we affirm.

{2} In his docketing statements, Defendant raised two issues—sufficiency of the evidence and ineffective assistance of counsel. [36843/-00929 DS 6; 36845/-01077 DS 6] In this Court’s calendar notice, we proposed to conclude that, based on the testimony provided by Defendant’s probation officer, there was sufficient evidence to establish to a reasonable certainty that Defendant violated his probation by failing to report to the Adult Probation and Parole Office (APPO) for an intake appointment on May 2, 2017, failing to provide a valid address to his probation and parole officer, and absconding from supervision. [CN 2-5] With respect to his ineffective assistance of counsel claim, we stated that it was “unclear on what basis Defendant is claiming that he was denied effective assistance of counsel.” [CN 5] Therefore, we suggested that “Defendant’s ineffective assistance of counsel claim would be more properly brought as a habeas corpus petition.” [CN 5]

Sufficiency of the Evidence

{3} In his memorandum in opposition to our notice of proposed disposition, Defendant does not point out specific errors in fact or law. *See Hennessy v. Duryea*, 1998-NMCA-036, ¶ 24, 124 N.M. 754, 955 P.2d 683 (“Our courts have repeatedly held that, in summary calendar cases, the burden is on the party opposing the proposed disposition to clearly point out errors in fact or law.”). Nevertheless, Defendant maintains that there was insufficient evidence to establish that Defendant willfully violated the conditions of his probation because Defendant “testified that he inadvertently provided an incorrect address, did not have a working phone upon his release from custody, and was never informed that he had to report to the probation office on May 2.” [MIO 5; see generally MIO 4-6] *See In re Bruno R.*, 2003-NMCA-057, ¶ 11, 133 N.M. 566, 66 P.3d 339 (“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.”). Notably, Defendant does not address the district court’s finding that he absconded from supervision.

{4} As discussed in our notice of proposed disposition, there was evidence presented that Defendant was given an appointment card and a verbal reminder by APPO staff to return for his initial appointment on May 2, 2017, and he failed to appear for that appointment. [CN 3] Defendant admitted that he had access to telephones, he knew where the APPO office was located, he did not follow up with APPO after the lengthy delay in getting his case assigned, and he knew he had to change his address. [CN 4] There was also evidence presented that after Defendant was located, and before he could be arrested, he escaped during a pat down. [CN 3]

{5} As Defendant acknowledges, this Court may affirm the revocation if there is sufficient evidence supporting just one violation. [MIO 5-6] *See State v. Leon*, 2013-

NMCA-011, ¶ 37, 292 P.3d 493 (stating that “although [the d]efendant challenges the sufficiency of the evidence supporting each of his probation violations, if there is sufficient evidence to support just one violation, we will find the district court’s order was proper”). For the reasons discussed above and in this Court’s notice of proposed disposition, we conclude that there was sufficient evidence to support a finding that Defendant willfully absconded and violated his probation agreement.

Ineffective Assistance of Counsel

{6} With respect to his claim for ineffective assistance of counsel, Defendant claims that his trial counsel failed to regularly communicate with him, and as a result of poor communication, Defendant “was unaware how his trial counsel intended to challenge the alleged probation violations and was taken off guard when trial counsel asked him to testify on his own behalf.” [MIO 7] Defendant further contends that “[b]ecause trial counsel failed to review the pros and cons of testifying at the hearing, [Defendant] ended up testifying unprepared, and regrets his decision. He believes that if he had exercised his right to remain silent, the result of the proceeding would have been different.” [MIO 7-8]

{7} In considering an ineffective assistance of counsel claim, our review is limited to an evaluation of the facts contained within the record. “If facts necessary to a full determination are not part of the record, an ineffective assistance claim is more properly brought through a habeas corpus petition[.]” *State v. Roybal*, 2002-NMSC-027, ¶ 19, 132 N.M. 657, 54 P.3d 61. Here, the substance of Defendant’s allegations is not a matter of record. Therefore, Defendant’s ineffective assistance of counsel claim would be more properly brought as a habeas corpus petition. *See State v. Grogan*, 2007-NMSC-039, ¶ 9, 142 N.M. 107, 163 P.3d 494 (expressing a preference for habeas corpus proceedings to address ineffective assistance of counsel claims).

{8} Accordingly, we affirm the revocation of Defendant’s probation.

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

LINDA M. VANZI, Chief Judge

WE CONCUR:

M. MONICA ZAMORA, Judge

JENNIFER L. ATTREP, Judge