IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 091987

JAMES CARROLL

Appellant

v.

COMMONWEALTH OF VIRGINIA

Appellee

BRIEF FOR THE COMMONWEALTH

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Appellant

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BRIEF FOR THE COMMONWEALTH

James Carroll was convicted of rape in 2007 pursuant to an "Alford" plea of guilty. The plea agreement in the case called for a suspended imposition of sentence and probation. He is now appealing the Court of Appeals' affirmance of the trial court's subsequent 2008 revocation of that probation.

The gist of Carroll's complaints is that the basis for the revocation was his refusal to admit his guilt during a sex-offender treatment program ordered as part of his probation, which allegedly violated his "right" under North Carolina v. Alford, 400 U.S. 25 (1970),[1] to forever profess his innocence, and that the trial court denied his request for "individual" rather than "group" therapy. He also complains that the Court of Appeals found some plea agreement-grounded arguments to have been defaulted.

STATEMENT OF THE CASE AND RELEVANT FACTS

A warrant was issued on February 8, 2007, charging that Carroll had raped his twelve-year-old stepdaughter in 1983. (Rec. App. 1). On June 18, 2007, the Arlington County grand jury indicted Carroll on two charges of rape in violation of §18.2-61 of the Code of Virginia, one allegedly occurring during the period of March 26, 1981 – March 26, 1982 (CR07-715) and the other between March 27, 1982 and March 27, 1984 (CR07-714). (App. 1).

---

[1] "An 'Alford plea' [of guilty] is where a defendant asserts his innocence but admits that sufficient evidence exists which could likely convince a judge or jury to find the defendant guilty." Neighbors v. Commonwealth, 274 Va. 503, 506 n.3, 650 S.E.2d 514, 515 n.3 (2007).

Guilty Plea Proceeding

On September 6, 2007, Carroll pled guilty pursuant to a plea agreement, in which he stated that "I do not admit I committed the crime to which I am pleading guilty." (App. 5). However, by signing the agreement Carroll acknowledged that ***"I understand that by pleading guilty I may receive the same penalties as if I had been convicted of the same crime after a trial by jury or by a judge sitting without a jury"*** (App. 19-20) (emphasis added), and the document had an "integration clause" acknowledging that "there is no agreement in connection with this case except for the agreement described in this document." (App. 20).

By signing the plea agreement, the defendant also conceded that:

> I understand and agree (pursuant to rule 3A:8(c)(1)(C) of the Supreme Court of Virginia) that the judge will not sentence me on my sentencing day, but will continue the case for five (5) years. I further understand that during this five (5) year period, I must:
>
> (1) be of general good behavior;
>
> (2) no contact with victim and her family; and
>
> (3) payment of court costs.
>
> At the end of this period, if I have met all of the conditions, the Commonwealth will ask the Court to vacate the plea of guilty, and to allow a plea of guilty to Assault and

> Battery (Virginia Code Section 18.2-57) with a fine of $750.00.
>
> I understand and agree that I will be on supervised probation for five (5) years from the date of my release. I also understand that it is my responsibility to immediately report to District 10 Virginia Probation and Parole Office…. (App. 20).

Nowhere did the plea agreement state what the conditions of the probation would be, much less that Carroll would be exempt from any particular treatment due to his "Alford plea." (Id.).

During the voir dire concerning his plea, Carroll indicated further that he understood what it meant to enter an "Alford plea," ***including that the legal consequences of such a plea are the same as a guilty plea***. (App. 29). Also:

> THE COURT: Are you entering this plea because – it's my understanding it's a plea of guilty that you want to enter this morning, is that correct?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: Are you pleading guilty because you are, in fact, guilty and no other reason?
>
> THE DEFENDANT: Yes, sir.
>
> [DEFENSE COUNSEL]: Alford plea.
>
> THE COURT: Tell me what an Alford plea is.

* * *

THE DEFENDANT: Well, what the plea is, it says that the prosecutor feels he has enough evidence to convict me even though I don't think I'm guilty of the crime.

THE COURT: And you don't' want to take that chance.

THE DEFENDANT: Correct. (App. 28-29).

After the judge found that Carroll's "plea [had been] made freely and voluntarily with an understanding of its nature and its consequences" (App. 26-31), the prosecutor proffered that the Commonwealth's evidence would have shown that the appellant had been married to the victim's mother during the period March 27, 1982 – March 27, 1984, that the victim had been less than thirteen years old during that time and that Carroll had had sex with his young step-daughter during that period. (App. 31-32).

The circuit court granted the Commonwealth's motion to *nolle prosequi* the rape charge in CR07-715 and then found the appellant guilty on the charge of rape in CR07-714. Pursuant to the plea agreement, the judge suspended the imposition of sentence for five years and ordered Carroll to be of good behavior, to have no contact with the victim and to pay court costs. The court also placed Carroll on supervised probation during that period and ordered that "[t]he

Defendant shall comply with all the rules and requirements set by the Probation Officer." (App. 35).

Post-Trial Motions

On October 9, 2007, the court granted the defense motion that Carroll's case be supervised by the Arlington County Probation Office rather than the Fairfax County office. (App. 45).

Carroll also had moved the court to relieve him from having to undergo treatment as a sex-offender which the probation department had ordered. (App. 41-42). The prosecutor, however, stated, without dispute from the defense, that "there was really no agreement as to what offender treatment [Carroll] was going to receive once he was on probation" (App. 43) and suggested that the probation officer's job should not be "micromanage[d]." (App. 43-44). The judge denied the defense motion, stating, "[I]t's up to the probation officer." (App. 45).

The Court entered its judgment order on September 20, 2007. (App. 35-36). On October 30, 2007, however, the court entered another order stating, *inter alia*, that "any sex offender treatment is to be determined by the Defendant's supervising Probation Officer" (App. 46), instead of Carroll's requested language that "No sex offender treatment be prescribed or required by the Probation

Officer." (App. 58). The record on appeal does not reflect any appeal by Carroll complaining about his plea, his sentence or the court's denial of his motion to be relieved from sex-offender treatment.

Probation

Probation Officer Lynn McCardle set out the history of the defendant's probation in a letter to the sentencing judge, including that:

> On February 26, 2008, Mr. Carroll agreed to and signed the behavioral contract for sex offenders. As a condition of this document, he was required to be evaluated for a sex offender treatment program and comply with any recommended treatment.
>
> * * *
>
> [O]n October 9, 2007, [Carroll] was referred to the Center for Clinical and Forensic Services (CCFS). . . . After reviewing all of the available facts and police reports that pertained in his case, he was immediately placed into group therapy. (App. 50).

On May 7, 2008, Dr. Cynthia Urick, director of the CCFS, sent a letter to Carroll's probation officer informing him, *inter alia,* that:

> When Mr. Carroll began services at CCFS, he denied all accounts of the offense he was convicted of and indicated that he was "set up" by his ex-wife. Efforts to engage him in discussions about the offense did not produce a change in his position. In fact, he became hostile and resistant when asked about specific details. (App. 47).

After Carroll had received "several opportunities to take responsibility for the offense" and having "failed to do so," Dr. Urick had concluded:

> Mr. Carroll has been in treatment for approximately two months and has made no forward progress regarding accepting responsibility for the crime for which he was convicted. Insofar as there is no indication that he will make the needed change, Mr. Carroll is being unsuccessfully discharged from treatment for lack of amenability. (App. 47-48).

Probation Officer's "Violation" Letter

After receiving the above information from Dr. Urick, Probation Officer McCardle wrote the circuit court on May 19, 2008. After outlining the history of Carroll's probation, McCardle requested the judge to issue a bench warrant and convene a revocation hearing because of the defendant's rejection by CCFS for failure to cooperate and his "moderate to high risk to the community." (App. 50-51).

Revocation Hearing

The circuit court conducted a hearing on Carroll's alleged violation on June 13, 2008. Probation Officer Michael Simmons indicated that the conditions of probation agreed to by Carroll included that he follow all recommendations of the probation

department and successfully complete a sex-offender program that had been ordered. (App. 56-57).

Defense counsel argued that Carroll had not breached the conditions of his probation because he, in fact, did attend the therapy classes. Counsel, however, said that Carroll "will not admit to the rape" and claimed that requiring him to do so would be a breach of ¶ 5 of the plea agreement where it was stated that Carroll did not admit to being guilty of the crime. (App. 61-62). The judge, however, responded that "you can't come in and get the benefits of one thing and not accept the benefits that are designed to help you. And that's what he's doing and it's not going to work." (App. 64).

The court found that Carroll had violated probation because "he has performed poorly in sex-offender treatment, shows no sign of acceptance or responsibility for his actions and he was discharged from therapy for non-compliance." (App. 66).

When the judge allowed defense counsel to state why Carroll should not be ordered to jail as a result of the violation, counsel asked the court to consider "individual" rather than "group" therapy because "[i]t's clear that the Court believes that there is a need for some treatment." (App. 66). However, when the judge asked if

Carroll would admit in the context of individual therapy that he needed help, counsel responded, "Well, admitting that you need help, Judge, I would respectfully suggest is something different than to say, I absolutely committed this offense." (App. 66-68).

The judge then asked Carroll if he had anything he wanted to add, to which Carroll responded, *inter alia*:

> I'm a law abiding citizen I have not committed any crimes.
>
> * * *
>
> I tried to tell these people in this group that I'm not after any women, any men, any boys, any girls, any little children or anything. I tried to tell these people. I was in a class with gay people, with other people. And they said that I was like those people. Well, I wasn't because I was not out chasing any men. I have not been with gay people.
>
> This young gentlemen who was talking about turning tricks, I have not done any of these kinds of things.
>
> * * *
>
> And when I went to that group, I did everything I could. When I tried to talk, I was lambasted. I was beat down. They continued to interrogate me about issues that I could not answer. And I've done everything I could. I will continue to do everything I can. I work hard. That's all I do is work. (App. 72-74).

The judge vacated the suspended imposition of sentence on the rape conviction and replaced it with a suspended five-year, sentence. Carroll's request for "individual" rather than "group"

therapy was not granted; the judge instead conditioned Carroll's continued probation on "the special condition that [he] enter into and successfully complete sex-offender treatment as required by [his] probation officer." (App. 74).

The circuit court entered its judgment order on June 17, 2008 (App. 77), and Carroll noted an appeal of the revocation to the Court of Appeals. (App. 79).

Court of Appeals

On December 30, 2008, a judge of the Court of Appeals granted Carroll an appeal on the following issues in Record No. 1860-08-4:

- Whether the trial court erred in finding appellant in violation of probation based solely on appellant's refusal to admit to rape during sex offender therapy given the fact that the Commonwealth agreed to and the court accepted an Alford plea.
- Whether the trial court erred in not considering a reasonable alternative treatment modality (sex offender treatment with an expert forensic psychologist) in lieu of probation revocation coupled with the condition of successfully completing the same program from which appellant was terminated.

(App. 81).

In a published opinion dated September 1, 2009, the Court of Appeals affirmed the revocation of Carroll's probation by a 2-1 vote.

Carroll v. Commonwealth, 54 Va. App. 730, 682 S.E.2d 92 (2009) (App. 86-115).

The majority found no merit to Carroll's claim that he had a right not to admit his guilt as part of sex offender treatment because his Alford plea supposedly contained an implicit promise that he would never be required to admit guilt. The court noted that Alford itself affirmatively states that there is no "material difference" between a guilty plea denying guilt and a plea of *nolo contendere* as both are still guilty pleas, and that Carroll himself acknowledged during the plea colloquy that the consequences of an "Alford plea" are the same as a guilty plea. (App. 29).

The Court of Appeals majority likewise found no merit to Carroll's contention that the trial court erred in declining to allow him to enter into individual rather than group therapy.

The Court found the dissent's claim that sex-offender treatment requiring him to admit his guilt violated the plea agreement and other contentions to be procedurally barred by Rules 5A:12(c) and 5A:18.

Carroll did not seek *en banc* rehearing in the Court of Appeals, and noted an appeal to this Court on September 28, 2009. (App. 116).

APPELLANT'S ASSIGNMENTS OF ERROR

On March 25, 2010, this Court granted Carroll an appeal on the following assignments of error set out in his petition for appeal:

"I. THE COURT OF APPEALS ERRED IN FINDING THAT, AT THE CLOSE OF THE EVIDENCE AT APPELLANT'S REVOCATION HEARING, APPELLANT DID NOT ARGUE THAT THE TRIAL COURT COULD NOT FIND HIM IN VIOLATION OF PROBATION BECAUSE OF THE TERMS OF ANY PLEA AGREEMENT.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT IT COULD NOT CONSIDER THE PLEA AGREEMENT TERMS OF APPELLANT'S *ALFORD* PLEA AS A BASIS FOR REVERSAL OF THE TRIAL COURT'S REVOCATION, BECAUSE APPELLANT DID NOT ASK THE COURT OF APPEALS TO CONSIDER WHETHER THE TRIAL COURT'S DECISION FINDING THAT APPELLANT WAS IN VIOLATION OF HIS PROBATION WAS A BREACH OF THE TERMS OF THE PLEA AGREEMENT BETWEEN APPELLANT AND THE COMMONWEALTH.

III. THE COURT OF APPEALS ERRED, BASED UPON THE FACTS OF THIS CASE, IN AFFIRMING THE COURT'S REVOCATION OF APPELLANT'S PROBATION BECAUSE APPELLANT REFUSED TO ACEPT RESPONSIBILITY IN SEX-OFFENDER TREATMENT BY ADMITTING TO RAPE BASED UPON HIS *ALFORD* PLEA AS A MATTER OF LAW.

IV. THE COURT OF APPEALS ERRED IN HOLDING THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING APPELLANT'S REQUEST TO CONSIDER A REASONABLE ALTERNATIVE TREATMENT MODALITY, SUCH AS INDIVIDUAL SEX-OFFENDER THERAPY, IN LIEU OF PROBATION REVOCATION COUPLED WITH THE CONDITION OF SUCCESSFULLY COMPLETING THE *SAME* PROGRAM FROM WHICH APPELLANT WAS TERMINATED." (EMPHASIS IN ORIGINAL). (App. 118).

QUESTIONS PRESENTED

1. DID THE COURT OF APPEALS ERR IN HOLDING THAT CARROLL FAILED TO RAISE AT TRIAL HIS PLEA AGREEMENT ARGUMENT? (ASS. ERR. I).

2. DID THE COURT OF APPEALS ERR IN HOLDING THAT IT COULD NOT CONSIDER THE PLEA AGREEMENT AS A BASIS FOR REVERSAL OF THE REVOCATION, BECAUSE THIS WAS NOT A QUESTION PRESENTED IN THE PETITION FOR APPEAL? (ASS. ERR. II).

3. DID THE COURT OF APPEALS ERR IN AFFIRMING THE REVOCATION OF PROBATION BECAUSE HE REFUSED TO ACCEPT RESPONSIBILITY IN SEX-OFFENDER TREATMENT BASED UPON HIS ALFORD PLEA AS A MATTER OF LAW? (ASS. ERR. III),

4. DID THE DEFENDANT CARRY HIS BURDEN OF ESTABLISHING THAT THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING HIS REQUEST FOR "INDIVIDUAL" RATHER THAN "GROUP" SEX-OFFENDER THERAPY? (ASS. ERR. IV).

SUMMARY OF THE ARGUMENT

The Supreme Court in Alford did not purport to create a new type of plea; the Court simply held that there is no constitutional bar to one pleading guilty while maintaining his innocence. 400 U.S. at 37-38. See Edwards v. Carpenter, 529 U.S. 446, 448 (2000).

Accordingly, "various Courts of Appeals have deemed an Alford plea the procedural equivalent of a non-Alford guilty plea. *** 'Once accepted by a court, it is the voluntary plea of guilt itself, with its intrinsic admission of each element of the crime, that triggers the

collateral consequences attending that plea. Those consequences may not be avoided by an assertion of innocence.'" Ballard v. Burton, 444 F.3d 391, 396-97 (5th Cir. 2006) (citations omitted).

ARGUMENT

This Court reviews the evidence in the light most favorable to the appellee, granting it all reasonable inferences deducible therefrom. Zimmerman v. Commonwealth, 266 Va. 384, 386, 585 S.E.2d 538, 539 (2003). And, Virginia Code § 8.01-680 mandates that "the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong. . . ."

I & II. NO ERROR IN HOLDING ARGUMENTS BASED ON PLEA AGREEMENT TO BE DEFAULTED

Carroll's Assignments of Error I and II both assert that the Court of Appeals erred in finding arguments grounded on the plea agreement to be procedurally defaulted. However, it simply cannot be denied that none of the questions he presented in his petition for appeal in that Court even mention the term "plea agreement," much less assert that it somehow precluded any condition of Carroll's probation. (Def. CAV Pet. App. at 3-4).

Rule 5A:12(c) restricts the Court of Appeals from considering any question not presented in the petition for appeal, just as this Court's Rule 5:17 mandates that "[o]nly errors assigned in the petition for appeal will be noticed by this Court." See Commonwealth v. Brown, 279 Va. 235, 240, 687 S.E.2d 742, 744 (2010) (analogizing Rule 5A:12(c) to Rule 5:17). In addition, Rule 5A:18, like this Court's Rule 5:25, bars from appeal issues not raised below.

These rules, of course, simply codify the long-stated rule that, "[o]n appeal, though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court." West Alex. Prop. Inc. v. First Virginia Mort. Corp., 221 Va. 134, 138, 267 S.E.2d 149, 151 (1980). The Court of Appeals did not err in finding defaulted any plea agreement-grounded argument which had not been expressly presented to the trial court and/or in the questions presented to it.[2]

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[2] Carroll did not ask the Court of Appeals to consider a plea agreement-based issue in order to "attain the ends of justice," nor did he assign error to that Court's failure to do so. See Rule 5:17(c); Yeatts v. Murray, 249 Va. 285, 290-91, 455 S.E.2d 18,2 1 (1995) (failure of assignment of error to assert issue being argued with "reasonable certainty" precludes its consideration on appeal).

I. Carroll says that he mentioned the term "plea agreement" during argument at the revocation hearing, so the Court of Appeals supposedly erred in finding procedurally barred an argument that requiring him to admit his guilt during sex offender treatment violated that document. (Def. Br. 13-15). The defendant's assertion, however, begs the question.

The Court of Appeals did not find the plea agreement issue defaulted because it was not raised below; the Court held it was not encompassed in a question presented as required by Rule 5A:12(c). (App. 90-94). In its recent decision in Commonwealth v. Brown, this Court analogized Rule 5A:12(c)'s admonition that "[o]nly questions presented in the petition for appeal will be noticed by the Court of Appeals" to Rule 5:17's prohibition that "[o]nly errors assigned in the petition for appeal will be noticed by this Court." This Court held that it was error to hold that the police lacked probable cause to arrest the Brown because that issue was not encompassed by the question presented in Brown's petition for appeal. 279 Va. at 240-41, 687 S.E.2d at 744-45 ("Brown's question presented concerned whether the police had reasonable suspicion to detain Brown, not whether they had probable cause to arrest him.").

Here, none of the questions presented in Carroll's petition for appeal in the Court of Appeals even mentioned the term "plea agreement," much less asserted that requiring him to admit his guilt in the context of sex offender treatment would constitute a breach of that document. (Def. CAV Pet. Appeal at 3-4). The Court of Appeals did not err in refusing to consider an issue not properly raised.

In any event, as the Court of Appeals majority noted, Carroll's plea agreement-based claims really are just a variation of his contention that the sex-offender treatment's requirement that he admit his guilt was precluded by his Alford plea. In other words, if his Alford plea agreement founders, so must his plea agreement claims.

II. Carroll contends that his questions presented in the Court of Appeals did raise a plea agreement-based argument because, in effect, the term "Alford plea comprised the plea agreement and guilty plea. . . ." (Def. Br. at 16). This clearly is not the case.

In Kirby v. Commonwealth, 264 Va. 440, 570 S.E.2d 832 (2002), the appellant's sole assignment of error was:

> The Court of Appeals erred when it held the trial court properly admitted without limitation the testimony of Lisa Kirby, spouse of John Kirby, when the witness was compelled to testify over defendant's objection pursuant

> to § 19.2-271.2 . . . and where the indictment for neither offense mentioned Lisa Kirby specifically as a victim.

Id. at 444, 570 S.E.2d at 834. When Kirby then argued on appeal that the admission of his statements to his wife were inadmissible because they were "'privileged communications'" under § 19.2-271.2, this Court held that "the assignment of error does not properly encompass the argument," id., explaining:

> Here, counsel did not "lay his finger on the error"; under no reasonable reading can the assignment of error possibly direct this Court or opposing counsel to an understanding that the defendant intends to ask reversal on an alleged violation of the statute prohibiting the disclosure of privileged communication between husband and wife. Hence, we will not notice the defendant's argument on the subject. Rule 5:17(c).

Id. at 445, 570 S.E.2d at 834.

The same conclusion should hold here, where Carroll's questions presented in the Court of Appeals neither mentioned the term "plea agreement" or asserted a breach thereof. It is clear that Carroll's claim that an "Alford plea" barred a certain condition of probation failed to "lay his finger on the error" of an alleged breach of the plea agreement. Indeed, the same "Alford plea" – based argument could be raised by a defendant who pled guilty without a plea agreement and was sentenced to probation.

In any event, even assuming *arguendo* that Carroll had properly raised below a claim that revoking his probation due to his failure to successfully complete sex-offender treatment violated the plea agreement, such an argument would be without merit. Paragraph 14 of the Plea Agreement Memorandum that Carroll, his attorney and the prosecutor signed states:

> There is no agreement in connection with this case except for the agreement described in this document. I understand the judge will not enforce any agreement not written down here.

(App. 20). Nowhere did the plea agreement state what type of therapy Carroll could or could not be ordered to enroll in, or that he could not be called upon to admit his guilt in some post-plea situation. (App. 18-22). Indeed, at the post-plea motions hearing on October 9, 2007, the prosecutor stated that "there really was no agreement as to what offender treatment he was going to receive once he was on probation." Defense counsel did not contradict this statement. (App. 43). See also Whittaker v. Commonwealth, 217 Va. 966, 969, 234 S.E.2d 79, 81 (1977) ("[U]nilateral avowal of counsel [as to expected testimony], if unchallenged, . . . constitutes a proper proffer….").

A defendant's unfounded or unilateral belief that something will or will not happen cannot be the basis of a claim that a plea

agreement was breached. United States v. O'Brien, 853 F.2d 522, 526 (7th Cir. 1988). "While the government is obligated to fulfill the promises it made in a plea agreement, defendants are not entitled to have promises read into their plea agreement because they claim that they believed the agreement included such promises." Feliciano v. United States, 914 F.Supp. 776, 780 (D.P. Rico 1996) (citations omitted). In sum, a reviewing court will not bind the government to promises it did not make, United States v. Fentress, 792 F.2d 461, 464-65 (4th Cir. 1986), and, "[w]ithout a promise, there can be no breach." O'Brien, 853 F.2d at 526.

For example, a plea agreement for a specific sentence does not bar an order to also pay restitution because barring restitution was not implicit in the present, and "the prosecution made no promises that were violated in the request for restitution. . . ." United States v. Fentress,792 F.2d 461, 465 (4th Cir. 1986). Similarly, this court has held that the parties' express agreement to a specific sentence does not preclude an additional suspended sentence and probation where a statute in effect at the time of the "contract," i.e., the plea agreement, required such additions to every sentence as a matter of

law. Wright v. Commonwealth, 275 Va. 77, 80-82, 655 S.E.2d 7, 9-10 (2008).

Moreover, the plea agreement in this case included a so-called "integration" or "merger" clause, stating, *inter alia*, that "there is no agreement in connection with this case except for the agreement described in this document." (App. 20). When a plea agreement contains such a clause, a reviewing court "normally . . . should construe the written document within its four corners, 'unfestooned with covenants the parties did not see fit to mention.'" United States v. Castro, 299 F.3d 5, 14 (1st Cir. 2002) (citation omitted). Accordingly, "an integration clause normally prevents a criminal defendant, who has entered into a plea agreement, from asserting that the government made oral promises to him not contained in the plea agreement itself," United States v. Hunt, 205 F.3d 931, 935 (6th Cir. 2000), i.e., he cannot add a new term to the agreement. United States v. Rockwell International, 124 F.3d 1194, 1299-01 (10th Cir. 1997).

In Warren v. State, 579 N.W.2d 678 (Wisc.), cert. denied, 525 U.S. 966 (1998), the defendant argued, like Carroll does here, that both the prosecutor and judge, by accepting the plea agreement,

implicitly promised that he would be allowed to continue to assert his innocence. However, the Supreme Court of Wisconsin rejected his contention, holding:

> Warren's argument is based upon the faulty premise that an Alford plea is a promise that defendant will never have to admit his guilt. Because an Alford plea is not infused with any special promises, the state did not "change its position" when it revoked his probation for failing to admit guilt during probationary treatment.
>
> ***Because the State never promised or assured Warren that he would be able to maintain his innocence for purposes other than the plea itself, we conclude that the State did not breach its Alford plea agreement with Warren when it revoked probation in this case.***

Id. at 711 (Emphasis added). Accord Warren v. Circuit Court, 223 F.3d 454, 459 (7th Cir. 2000), cert denied, 531 U.S. 1168 (2001).

III. REVOCATION NOT BARRED BY ALFORD PLEA

Carroll's complaint does not reflect an omnibus attack on his probation revocation, or even on revocations based on a probationer's refusal to admit to having committed a sexual offense during sex-offender therapy. Carroll's self-limiting complaint about such revocations is instead grounded only on his contention that his "Alford plea" of guilty supposedly precluded the revocation of his

probation based on a refusal to admit guilt. As defense counsel stated at the revocation hearing:

> He's maintained that innocence and that is the whole purpose of the Alford plea, as he explained to the Court, that the evidence is such that I could be found guilty but I still maintain my innocence
>
> * * *
>
> But Your Honor, the gravamen of this whole [alleged probation violation] thing is that these people say that he's in denial.
>
> * * *
>
> ***The whole issue is if he denies it occurred, then he is uncooperative and they are going to put him out***, and that is exactly what they said they were going to do.

(App. 63-69) (emphasis added). His complaint is without merit.

With respect to a judge's revocation authority vis-à-vis a defendant's conditions of probation:

> Code § 19.2-303 allows a trial judge, after conviction, to suspend a sentence in whole or in part, and in addition, to place the defendant on probation "under such conditions as the court shall determine." The statute places wide discretion in the trial court to determine what conditions are to be imposed in each particular case. The Virginia Supreme Court has noted the wide latitude the legislature has afforded trial courts in fashioning rehabilitative programs for defendants. Inherent in the power granted under § 19.2-303…to suspend imposition or execution [of

> sentence,] is the power to place conditions on such suspension.

Nuckoles v. Commonwealth, 12 Va. App. 1083, 1085, 407 S.E.2d 355, 356 (1991)(citations omitted). The "only limitation placed upon the discretion of the trial court in its determination of what conditions are to be imposed is that a condition be 'reasonable.'" Id. at 1086, 407 S.E.2d at 356 (citation omitted).

"It is a central tenet of sex offender treatment to require the offender to admit his or her guilt. * * * This requirement, like any condition of probation, serves the goals of rehabilitation and protection of the state and community interest." Warren v. State, 579 N.W. 2d at 707. See Davis v. Commonwealth, No. 0462-07-2 (March 11, 2008) (UP) (Copy in Addendum) ("We have no concern of the reasonableness of the trial court's ratification of the probation officer's direction to Davis to participate in sexual offender treatment. 'Sex offenders are a serious threat to this Nation.' McKune v. Lile, 536 U.S. 24, 32 (2002) (plurality).* * * 'States thus have a vital interest in rehabilitating convicted sex offenders.' Id. That interest in

rehabilitation fully justified the probation condition imposed upon Davis requiring him to participate in sex offender treatment.")[3]

Second, Carroll's argument is grounded on a misapprehension as to the meaning of North Carolina v. Alford. "In Virginia, [a]n accused may plead not guilty, guilty or *nolo contendere*, Code § 19.2-254. Appellant's right to enter a plea of guilty without an express admission of guilt was firmly established in North Carolina v. Alford," where "[t]he Supreme Court . . . held that 'while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty.'" Smith v. Commonwealth, 27 Va. App. 357, 361-62, 499 S.E.2d 11, 13 (1998) (quoting Alford, 400 U.S. at 37).

An "Alford plea" simply is "a variation of a guilty plea." United States v. Morrow, 914 F.2d 608, 611 (4th Cir. 1990). See State v. Carter, 706 N.E.2d 409 (Ohio App. 1997) (Alford plea is nothing more than a species of guilty plea). "[F]rom the State's perspective [Alford pleas] are no different from other guilty pleas; it would otherwise be

[3]"Although an unpublished opinion has no precedential value, a court…does not err by considering the rationale and adopting it to the extent it is persuasive." Fairfax County School Board v. Rose, 29 Va. App. 32, 39 n.3, 509 S.E.2d 525, 528 n.3 (1999) (en banc) (citation omitted).

unconscionable for a court to sentence an individual to a term of imprisonment. In fact, . . . an Alford plea may generally be used for the same purpose as any other conviction." Silmon v. Travis, 791 N.E.2d 501, 504 (N.Y. App. 2000).

Alford-based arguments similar to Carroll's have been considered by our courts. For example, in Smith v. Commonwealth the Court of Appeals noted that "[t]he sole issue before us on appeal is whether appellant's entry of an Alford plea requires the trial judge to disregard his lack of remorse at sentencing." 27 Va. App., at 360-61, 499 S.E.2d at 12-13. Akin to Carroll's claim here, Smith "contend[ed] it [was] unreasonable to consider his lack of remorse for a murder he denied committing." Id. However, the Court of Appeals quoted with approval that:

> "Once the Alford plea is entered, the court may treat the defendant, for purposes of sentencing, as if he or she were guilty, *** Although an Alford plea allows a defendant to plead guilty amid assertions of innocence, it does not require a court to accept those assertions."

Id. at 362, 499 S.E.2d at 13 (quoting State v. Howry, 896 P.2d 1002, 1004 (Idaho App. 1995)). The Smith Court thus "h[e]ld that a defendant's Alford plea does not require that the trial court disregard his lack of remorse at sentencing." Id. at 363, 499 S.E.2d at 14.

In addition, other jurisdictions have rejected arguments like the one Carroll makes here. For example, in State v. Alston, 534 S.E.2d 666 (N.C. App. 2000), Alston claimed his probation could not have been validly revoked due to his failure to successfully complete a "sex offender treatment program," given that he had entered an Alford plea of guilty, which be contended '"necessarily contemplated' that he would be allowed to maintain factual innocence…." Id. at 668. Holding otherwise, the North Carolina Court of Appeals said:

> [A]n "Alford plea" constitutes "a guilty plea in the same way that a plea of nolo contendre or no contest is a guilty plea. As a consequence, in accepting an "Alford plea" as a concession to [a] defendant, [the trial court accords that defendant] no implications or assurance as to future revocation proceedings. In other words, an "Alford plea" is in no way "infused with any special promises," nor does acceptance thereof constitute "a promise that a defendant will never have to admit his guilt."

Id. at 669-70 (citations omitted) (bracketed words added in original).

Likewise, both state and federal courts rejected Philip Warren's contention that the State had violated his right to due process when, following his entry of an Alford plea of guilty, his probation was later revoked for failing to successfully complete a sex offender treatment program that required him to admit his guilt. In so holding, the Supreme Court of Wisconsin said:

> A defendant's protestations of innocence under an Alford plea extend only to the plea itself.
>
> * * *
>
> Whatever the reason for entering an Alford plea, the fact remains that when a defendant enters such a plea, he becomes a convicted sex offender and is treated no differently than he would be had he gone to trial and been convicted by a jury.
>
> * * *
>
> In sum, we hold that the revocation of Warren's probation for failure to admit his guilt after acceptance of his Alford plea did not violate his right to due process.

Warren v. State, 579 N.W.2d at 707.

Subsequently, the United States Court of Appeals for the Seventh Circuit rejected Warren's federal habeas challenge to his revocation, holding:

> ***Warren believes that the acceptance of an Alford plea is an assurance that a defendant will not have to admit guilt during either conviction or punishment. He is wrong. He can maintain his innocence at the drug store, the grocery store and any other public place he desires. But, when in the private setting of sex offender counseling that is ordered as a condition of probation, and his admission is necessary for rehabilitation, he must admit responsibility for his conduct.*** We do not worry that our ruling will force insincere admissions of guilt from defendants during counseling as there are trained counselors evaluating the admissions and they will be able to differentiate between the sincere and the insincere. Nor do we believe that our ruling forces innocent defendants to confess to crimes they did not commit, as there must be a sufficient indication of the

> defendant's guilt before an Alford plea is accepted. We believe that here, Warren got the bargain to which he agreed.

Warren v. Circuit Court, 223 F.3d at 459 (emphasis added).

As the Supreme Court of Colorado said in upholding the defendant's probation revocation after his Alford plea of guilty:

> The [Court of Appeals] held that the acceptance of an Alford plea does not imply a promise or assurance of anything.
>
> More accurately stated, an Alford plea, if accepted by the court, permits a conviction without requiring an admission of guilt and while permitting a protestation of innocence. There is nothing inherent in an Alford plea that gives the defendant any rights, or promises any limitations, with respect to the punishment imposed after the conviction.
>
> We find this reasoning to be wholly consistent with that expressed by the Supreme Court in Alford. An Alford plea is to be treated as a guilty plea and a sentence may be imposed accordingly. See Alford, 400 U.S. at 37.
>
> ***Hence, we conclude that by accepting the Alford plea, the trial court did not in any way obviate later revocation proceedings for failure to admit guilt in a therapeutic context.***

People v. Birdsong, 958 P.2d 1124, 1130 (Col. 1998).

Carroll relies on an unpublished case from Ohio, State v. Birchler, No. 00AP-31 (Ohio App. 2000) (UP), and a county court decision from New York, People v. Walters, 627 N.Y.S. 2d 289 (N.Y. Co. Ct. 1995). In Birchler, however, the probation revocation was

reversed due to lack of notice to the defendant when he entered his Alford plea. Here, Carroll raised no "lack of notice" due process argument at trial. See Rule 5A:18, Rule 5:25, and has never assigned that issue as error. See Rule 5A:12(c), Rule 5:17(c).

As for Walters, the Supreme Court of Wisconsin declined to follow its lead in its Warren case, explaining that the New York case was "largely inapposite" to the issue involved there – and here – and that it did not "involve a knowing and voluntary plea analysis which distinguishes between direct and collateral consequences of an Alford plea." 579 N.W. 2d at 710. Since Walters was handed down, moreover, a ***higher*** New York court has ruled consistent with the Commonwealth's position in this case. See Silmon v. Travis, supra.

The defendant also relies on Gilfillen v. State, 582 N.E.2d 821 (Ind. 1991), an Indiana case not involving an "Alford plea" where it was held that, "***in a circumstance such as this, where the defendant has not pled guilty but was instead convicted while denying guilt***, trial courts may not insist on an admission of guilt as a

condition of probation or use a continued denial of guilt as the basis for revocation." Id. at 824 (emphasis added).[4]

The defendant also relies on Parson v. Carroll, 272 Va. 560, 636 S.E.2d 452 (2006), a civil case where this Court held that the doctrine of judicial estoppel, or fact preclusion, did not apply to a litigant who had entered an "Alford plea" because he "assumed a position of law, not a position of fact." Id. at 565-66, 636 S.E.2d at 455. The Commonwealth, of course, has never disputed that an "Alford plea" is, "first and foremost, not an admission of factual guilt." See United States v. Nguyen, 465 F.3d 1128, 1130 (9th Cir. 2006) (citing North Carolina v. Alford, 400 U.S. at 36). Indeed, that's the whole point of the "Alford plea." Parson, moreover, did not discuss or hold anything with respect to the effect an "Alford plea" has in a criminal case or that it guarantees a defendant special rights with respect to probation conditions.

Finally, Carroll relies on State v. Case, 213 P.3d 429 (Kan. 2009), but that opinion also is inapposite to this one. There, after Case had entered an "Alford" plea of guilty, the trial court had applied

[4] Indiana law bars acceptance of an "Alford plea." Norris v. State, 896 N.E.2d 1149, 1152 (Ind. 2008).

a statutory sentence enhancement provision to increase his sentence. However, because the statute required a factual predicate that the crime was a "sexually violent" one, and Case's "Alford plea" was not a factual admission of that, the Court held the enhancement failed to comply with Apprendi v. New Jersey, 530 U.S. 466 (2000), which requires that facts supporting a sentence enhancement must be proved beyond a reasonable doubt. Id. at 436-37. The Case court did not hold that one entering an "Alford plea" cannot receive enhanced punishment; just that an "Alford plea" does not by itself supply the factual predicate.

Instead of these inapposite cases, the United States Court of Appeals for the Fifth Circuit held as follows with respect to the post-plea consequences of an "Alford plea":

> [V]arious Courts of Appeals have deemed an Alford plea the procedural equivalent of a non-Alford guilty plea. We likewise view an Alford plea as nothing more than a variation of an ordinary guilty plea. *** "Once accepted by a court, it is the voluntary plea of guilt itself, with its intrinsic admission of each element of the crime, that triggers the collateral consequences attending that plea. Those consequences may not be avoided by an assertion of innocence."

Ballard v. Burton, 444 F.3d at 396-97 (Citations omitted).

Carroll indicated at the time of his plea that he understood that the legal consequences of an Alford plea are the same as a guilty plea. (App. 29). The judge revoked his probation not just because he refused to admit his guilt during therapy, but also because of his overall poor performance during the sex-offender treatment. (App. 66).

Carroll has not made a "clear showing" that the judge abused his discretion in revoking his probation. See Berry, 200 Va. at 497, 106 S.E.2d at 592-93. Indeed, it would seem axiomatic that a judge, as a matter of law, cannot be said to have abused his discretion if he opts for a rational, law-supported choice, even if the appellate court would have chosen differently. See also Anderson v. Bessemer City, 470 U.S. 564, 574 (1985).

IV. "INDIVIDUAL" VERSUS "GROUP" THERAPY

As noted previously, the "only limitation placed upon the discretion of the trial court in its determination of what conditions are to be imposed is that a condition be 'reasonable.'" Nuckoles v. Commonwealth, 12 Va. App. at 1086, 407 S.E.2d at 356. Here, the judge left it to the probation department to determine the particular therapy program in which Carroll would participate. The defendant

was aware of this and did not appeal the judge's decision. Carroll thereafter was enrolled in the group therapy program run by CCFS, from which he ultimately was terminated for failure to cooperate ***and*** because of his hostile behavior.

Carroll asserted in the Court of Appeals that for the judge to "require successful completion of the <u>same</u> sex offender program which previously terminated him as a condition of continued probation…is an abuse of discretion." (Def. CAV Br. 18) (emphasis in original). However, at the revocation hearing, defense counsel did not make that argument, just saying: "I would ask the court to consider individual therapy. It's clear the Court believes that there is a need for treatment. I would ask the Court – many people do not do well in group therapy." (App. 66).

Even then, defense counsel failed to proffer anything to support his request. While counsel said, "Everyone's an individual, Judge, and to that end I would ask the court to consider individual therapy," he conceded there was no one at the hearing who "could really talk about whether group therapy is the proper modality for dealing with Mr. Carroll." (App. 68). However, he just said "an individual therapist ***may*** be in a better position to deal with the issues, if any, that Mr.

Carroll has, rather then a group therapy." (App. 68) (emphasis added).

Counsel said he had spoken with a Dr. Saminov, with whom the court was familiar, who had said that, despite his "heavy load, he's willing to take Mr. Carroll on if the Court would deem it appropriate." However, counsel admitted that Saminov "wanted the Court to be clear that he was not a certified sex therapist."

The prosecutor, for his part, noted that the CCFS letters showed that Carroll had been disruptive and that he "just does not like taking instructions." He also stated that, because Dr. Saminov was not a certified sex therapist, there was nothing to show that individual therapy would help Carroll who, in fact, did need treatment. (App. 68-70). He also pointed out that the judge had made clear at the October 2007 hearing that Carroll was to complete the sex-offender program he was in (App. 71) and, again the defendant did not appeal the judge's denial of his motion to bar sex offender treatment.

Given the sparse argument – and even sparser facts – the defense provided the trial judge in support of its request for "individual" therapy, it cannot possibly be said that Carroll has made

the requisite "clear showing of abuse of discretion" by the trial court, and it was ***his*** burden to do so. See Jackson v. Commonwealth, 255 Va. 625, 640, 499 S.E.2d 538, 547 (1999) (burden on appellant to establish abuse of discretion).[5]

In any event, the judge did not order Carroll to re-enter the same therapy program or, for that matter, specify any type of therapy, group or otherwise; the judge simply ordered that Carroll "enter into and successfully complete sex-offender treatment as required by [his] probation officer." (App. 74). The Court of Appeals did not err in affirming the trial court's failure to order "individual" therapy.

CONCLUSION

This Court should affirm the Court of Appeals' judgment in Record No. 1860-08-4, affirming the revocation of James Carroll's suspended imposition of sentence and probation by the Circuit Court of Arlington County.

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[5] Little of the argument and none of the authority cited by appellant on this issue was proffered to the trial judge. See West Alexandria Prop., 221 Va. at 138, 267 S.E.2d at 151 (argument different from one raised at trial, even if taking the same general position, not considered on appeal).

Respectfully submitted,

COMMONWEALTH OF VIRGINIA,
Appellee herein.

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CERTIFICATE OF COUNSEL

On May 27, 2010, the appellee complied with Rule 5:26 by hand-filing fifteen (15) copies of this Brief For The Commonwealth with this Court, and mailing three (3) copies to appellant's counsel: Clarence F. Stanback, Jr., Esquire, 2408 Muncy Circle, Hyattsville, MD 20785.

_____
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VBN 15689

A D D E N D U M

Davis v. Commonwealth, 08 Vap UNP 0462072 (2008)

UNPUBLISHED
IN THE COURT OF APPEALS OF VIRGINIA
ARGUED AT RICHMOND, VIRGINIA

TERRENCE JANSSEN DAVIS
v.
COMMONWEALTH OF VIRGINIA

Record No. 0462-07-2
Decided: March 11, 2008

Present: Judges Frank, Kelsey and Senior Judge Coleman

FROM THE CIRCUIT COURT OF THE CITY OF RICHMOND, Clarence N. Jenkins, Jr., Judge

Affirmed.

COUNSEL

James L. McLemore, IV, for appellant.

Josephine F. Whalen, Assistant Attorney General II (Robert F. McDonnell, Attorney General, on brief), for appellee.

MEMORANDUM OPINION* BY JUDGE D. ARTHUR KELSEY:

Finding **Terrence Janssen Davis** in violation of the terms of his probation, the trial court revoked a portion of Davis's suspended sentence on convictions for failing to register as a convicted sex offender. On appeal, Davis argues that the trial court abused its discretion by finding he violated a valid condition of probation and by punishing him for refusing to incriminate himself. Disagreeing with both arguments, we affirm.

I.

After being convicted pursuant to a guilty plea of aggravated sexual battery and sodomy, Davis failed in 2005 and 2006 to register as a violent sex offender with the Virginia State Police. Davis pled guilty to three felony indictments alleging violations of Code § 18.2-472.1. His conviction order imposed a total of 15 years' incarceration and suspended all but six months. The trial court placed Davis on supervised probation, ordering him to "comply with all the rules and requirements set by the Probation Officer."

Upon his release, Davis entered intensive supervision in the sex offender unit of the probation office. The probation officer directed Davis to attend a sex offender treatment evaluation. At his first meeting with the counselor, Dr. James O'Quinn, Davis became confrontational and declared he would not comply with the evaluation. Despite his guilty pleas and convictions, Davis insisted he was not guilty of any sexual offenses. At a second meeting with Dr. O'Quinn, Davis again displayed a poor attitude and put forth minimal effort.

When Davis repeated his highly confrontational behavior at a third meeting, Dr. O'Quinn suspended further evaluations until Davis submitted to a polygraph test. Still protesting his innocence, Davis complied. The polygraph examiner reported that Davis was deceptive when questioned about his prior sexual crimes. Dr. O'Quinn agreed to work with Davis on his "denial issues." When two additional meetings proved unproductive, however, Dr. O'Quinn finally concluded that Davis was "untreatable" and terminated any further sessions. Davis

was arrested for his failure to comply with treatment.

The probation officer reported these facts to the trial court and recommended that Davis be found in violation of the terms of his probation. At his probation violation hearing, Davis argued that he was justified in refusing to cooperate for two reasons. First, the probation officer's instruction that Davis enter sexual offender treatment was unreasonable because the conviction order did not require it and the underlying crime did not warrant it. Second, Davis argued that a finding that he violated probation would be tantamount to punishing him for "maintaining his innocence" on the original convictions of aggravated sexual battery and sodomy. Disagreeing with both assertions, the trial court found Davis in violation of the terms of probation and resuspended all but 60 days of his aggregate sentence.

II.

We find no merit in either of Davis's challenges to the trial court's finding that he violated the terms of his supervised probation.

A. *THE REASONABLENESS OF SEX OFFENDER TREATMENT*

The probation officer's authority to order sex offender treatment stemmed from the trial court's order requiring Davis to "comply with all the rules and requirements set by the Probation Officer." *See generally* Code § 19.2-303.3(B) (authorizing trial courts to direct criminal defendants to "abide by any additional requirements of supervision imposed or established by the local community-based probation services agency during the period of probation supervision").[1] Whether defiance of a probation officer's instructions is sufficient cause to revoke a suspended sentence rests within the trial court's "quite broad" discretion, *Peyton v. Commonwealth*, 268 Va. 503, 508, 604 S.E.2d 17, 19 (2004) (citation omitted), and is subject to reversal only upon "a clear showing" of an abuse of that discretion, *Word v. Commonwealth*, 41 Va. App. 496, 506-07, 586 S.E.2d 282, 287 (2003) (citation omitted).

When coupled with a suspended sentence, probation should be viewed as "an act of grace on the part of the Commonwealth to one who has been convicted and sentenced to a term of confinement." *Pierce v. Commonwealth*, 48 Va. App. 660, 667, 633 S.E.2d 755, 758 (2006). "The power of the court to revoke for breach of the terms and conditions of probation should not be restricted beyond the limitations fixed by the statutes." *Rease v. Commonwealth*, 227 Va. 289, 294, 316 S.E.2d 148, 151 (1984). The rehabilitative purpose of probation can be "more readily accomplished when the probationer is under the broad control of the court and the direct supervision of the court's probation officer." *Id.* at 294-95, 316 S.E.2d at 151.

To be sure, probation conditions must be reasonable. *Hartless v. Commonwealth*, 29 Va. App. 172, 175, 510 S.E.2d 738, 739 (1999) (The "only limitation placed upon the discretion of the trial court in its determination of what conditions are to be imposed is that a condition be 'reasonable.'" (quoting *Dyke v. Commonwealth*, 193 Va. 478, 484, 69 S.E.2d 483, 486 (1952))). This reasonableness requirement, however, means only that the conditions take into account the "nature of the offense, the background of the offender and the surrounding circumstances." *Anderson v. Commonwealth*, 25 Va. App. 565, 574, 490 S.E.2d 274, 278 (1997) (quoting *Nuckoles v. Commonwealth*, 12 Va. App. 1083, 1086, 407 S.E.2d 355, 356 (1991)), *aff'd en banc* 26 Va. App. 535, 495 S.E.2d 547, *aff'd*, 256 Va. 580, 507 S.E.2d 339 (1998).

We have no concern over the reasonableness of the trial court's ratification of the probation officer's direction to Davis to participate in sexual offender treatment. "Sex offenders are a serious threat in this Nation." *McKune v. Lile*, 536 U.S. 24, 32 (2002) (plurality). "When convicted sex offenders reenter society, they are much more likely than any other type of offender to be rearrested for a new rape or sexual assault." *Id.* at 33. "States thus have a vital interest in rehabilitating convicted sex offenders." *Id.* That interest in rehabilitation fully justified the probation condition imposed upon Davis requiring him to participate in sex offender treatment. The nature of the offense for which Davis was on probation was his failure to register as a sex offender. His background includes convictions, based upon guilty pleas, of aggravated sexual battery and sodomy. Davis's demonstrated propensity for sexual offenses and his unwillingness to register as a convicted sex offender, the

trial court correctly concluded, made him a prime candidate for sexual offender treatment while he enjoyed his liberty during the period of probationary grace from his 15-year penitentiary sentence.[2]

B. *DAVIS'S CLAIMED RIGHT AGAINST SELF-INCRIMINATION*

We also reject Davis's argument that the trial court's finding that he violated probation somehow offended his right against self-incrimination.

Commenting on the evidence, the trial court noted that Dr. O'Quinn was "not trying to force [Davis] to admit, but was just going to work with him on some of these issues." Despite this effort, the trial court found, Davis continued his pattern of "confrontation" up until the last meeting with Dr. O'Quinn. The evidence before the trial court supports this finding. At every meeting with Dr. O'Quinn, Davis displayed a recalcitrant attitude wholly inappropriate for a productive therapeutic meeting. The issue was not so much his refusal to admit what he had done, but his refusal to cooperatively participate in the program because he believed it unnecessary given his protestations of innocence. This he had not even an arguable right to do.[3]

III.

In sum, the trial court did not abuse its discretion in finding Davis in violation of the terms of his probation. We affirm the trial court's order revoking and resuspending all but 60 days of the remaining sentences imposed upon Davis by the conviction orders.

Affirmed.

FOOTNOTES

[*] Pursuant to Code § 17.1-413, this opinion is not designated for publication.

[1] *Cf. Miller v. Commonwealth*, 25 Va. App. 727, 743-45, 492 S.E.2d 482, 491 (1997) (A probation officer has "supervisory responsibility for [a probationer's] conduct and treatment during the course of his probation" and is "charged by law with defining a probationer's permissible or impermissible conduct.").

[2] In his appellate brief, Davis also argues he should not have been ordered into sex offender treatment because his plea agreement did not mention the subject. *See* Appellant's Br. at 4-5. Whatever the merits of this argument, we will not address it because Davis never raised this point in the trial court and cannot do so for the first time on appeal. *See* Rule 5A:18. "Making one specific argument on an issue does not preserve a separate legal point on the same issue for review." *Edwards v. Commonwealth*, 41 Va. App. 752, 760, 589 S.E.2d 444, 448 (2003) (*en banc), aff'd by unpublished order*, 04 Va. S. Ct. UNP 040019, No. 040019 (Va. Oct. 15, 2004); *see also West Alexandria Prop., Inc. v. First Va. Mortgage & Real Estate Inv. Trust*, 221 Va. 134, 138, 267 S.E.2d 149, 151 (1980) ("On appeal, though taking the same general position as in the trial court, an appellant may not rely on reasons which could have been but were not raised for the benefit of the lower court.").

[3] Given our ruling, we need not address the Commonwealth's argument that the privilege against self-incrimination applies only to statements that might incriminate an individual "in *future* criminal proceedings," *Venable v. Commonwealth*, 48 Va. App. 380, 386, 632 S.E.2d 1, 4 (2006) (emphasis added) (quoting *Minnesota v. Murphy*, 465 U.S. 420, 426 (1984)) — an impossibility here because Davis had already been convicted, based upon guilty pleas, of the underlying offenses. *See Murphy*, 465 U.S. at 425 n.7.