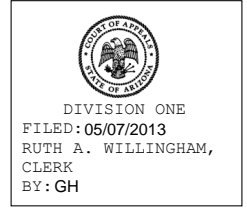


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Sup. Ct. 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) 1 CA-CR 11-0461
) 1 CA-CR 11-0472
 Appellee,) (Consolidated)
)
) DEPARTMENT D
 v.)
)
) **MEMORANDUM DECISION**
 RICHARD JAMES ARVIZO,) (Not for Publication-
) Rule 111, Rules of the
 Appellant.) Arizona Supreme Court)
)
)
)

Appeal from the Superior Court of Maricopa County

Cause Nos. CR2007-031246-001
CR2010-007644-001

The Honorable Joseph Kreamer, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Division Chief Counsel
and Joseph T. Maziarz, Section Chief Counsel
Criminal Appeals Section
and Andrew Reilly, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Presiding Judge

¶1 Richard James Arvizo (defendant) appeals the trial court's grant of 237 days of presentence incarceration credit for his conviction in CR2010-007644-001. Defendant argues that the trial court erred in failing to give him credit for an additional 140 days that he spent in custody pursuant to a probation violation matter. For the reasons that follow, we affirm defendant's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 In October 2007, defendant entered a convenience store and attempted to steal beer. In the process, defendant threw a case of beer at the store clerk's head. Defendant was arrested and pled guilty to aggravated assault in CR2007-031246-001. The trial court suspended the imposition of sentencing and placed defendant on three years of probation. As a condition of his probation, the court ordered defendant to serve six months in jail.

¶3 After his release from jail in 2008, defendant committed the acts that led to his criminal conviction in CR2010-007644-001. On December 12, 2008, defendant approached the victims in a parking lot and displayed a knife. Defendant claimed to be a member of the East Side Chandler street gang and threatened to kill the victims. While defendant was walking away from the victims, a truck approached and three men assaulted him. Police brought defendant to a hospital for

treatment of his injuries. Defendant absconded from the hospital before police could book him.

¶4 The state filed a petition to revoke defendant's probation in CR2007-031246-001 in December 2008. The petition alleged that defendant violated his probation on December 12, 2008 by committing aggravated assault, threatening and intimidating, disorderly conduct, and criminal damage. The petition also alleged that defendant failed to pay probation service fees and failed to complete community service hours under the terms of his probation. The court issued a bench warrant. Defendant was arrested on October 27, 2009. On March 2, 2010, defendant admitted to violating his probation for failing to complete community service hours. The trial court suspended the imposition of sentencing, continued defendant on probation, and imposed a thirty day term in jail as a condition of his probation. The trial court dismissed the remaining allegations.

¶5 Meanwhile, on January 22, 2009, prior to defendant's arrest, the Chandler City Attorney's Office filed a complaint alleging that on December 12, 2008, defendant committed the crime of threatening or intimidating, a class 1 misdemeanor. On March 15, 2010, the Chandler City Attorney's Office voluntarily dismissed this misdemeanor charge.

¶6 The Maricopa County Attorney's Office obtained an indictment on October 21, 2010 charging defendant with five counts: aggravated assault, a class 3 dangerous felony (count 1); disorderly conduct, a class 6 dangerous felony (count 2); assisting a criminal street gang, a class 3 felony (count 3); criminal damage, a class 2 misdemeanor (count 4); and escape in the second degree, a class 5 felony (count 5). A bench warrant issued, and police booked defendant at a detention center on October 23, 2010. Prior to trial, the trial court granted the state's motion to dismiss count 4.

¶7 At trial, the jury convicted defendant of the remaining counts. The jury further found aggravating factors for counts 1, 2, and 3. Based on these convictions, the trial court found defendant in violation of his probation in CR2007-031246-001 and sentenced him to 3.5 years in prison, with 651 days of presentence incarceration credit. In CR2010-007644-001, the court sentenced defendant to concurrent prison terms of 10 years on count 1, 4.5 years on count 2, 8.3 years on count 3, and 1 year on count 5. Defendant received credit for 237 days of presentence incarceration for time spent in custody between October 23, 2010 and his sentencing on June 17, 2011. Defendant timely appealed. We have jurisdiction pursuant to Arizona Constitution Article 6, Section 9 and Arizona Revised Statutes

(A.R.S.) sections 12-120.21(A) (2003), 13-4031 (2010) and 13-4033 (2010).

DISCUSSION

¶8 The sole issue on appeal is whether the trial court should have granted defendant additional credit for spending 140 days in custody between his arrest on October 27, 2009 and the dismissal of the misdemeanor complaint on March 15, 2010. Because defendant failed to object at sentencing, we review for fundamental error only. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail under the fundamental error analysis, defendant must show that a fundamental error exists and that it causes him prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607. We review issues involving statutory construction, including the grant of presentence incarceration credit, de novo. *State v. Bomar*, 199 Ariz. 472, 475, ¶ 5, 19 P.3d 613, 616 (App. 2001).

¶9 Defendant argues that the trial court should have awarded him 140 days of additional presentence incarceration credit because the misdemeanor complaint and the later felony indictment "arose out of the same set of circumstances."¹

¹ The misdemeanor complaint alleged that defendant committed the crime of threatening or intimidating on December 12, 2008 of victims S.P. and C.P. The felony indictment alleged five counts based on defendant's conduct on that same day. However, only two victims were named in the indictment, neither of which was S.P. or C.P.

Defendant asserts that the misdemeanor complaint and the felony indictment contain an overlapping offense, and that he deserves credit for custody between October 27, 2009 and March 15, 2010 because "both the warrant from the probation violation petition had issued and the Chandler misdemeanor complaint had been filed" when custody began. To this end, defendant cites *State v. Brooks*, in which we held that a defendant arrested on new charges and a petition to revoke probation is entitled to presentence incarceration from the time of arrest to the time of sentencing for both matters. *State v. Brooks*, 191 Ariz. 155, 156-57, 953 P.2d 547, 548-49 (App. 1997).

¶10 We find defendant's reliance on our holding in *Brooks* to be misplaced. The new charges against defendant in *Brooks* "formed the sole basis for revoking his probation." *Id.* at 156, 953 P.2d at 548 (emphasis added). Here, the petition to revoke defendant's probation was based not only on his conduct on December 12, 2008, but also on various other violations of his probation terms. In fact, defendant ultimately resolved the probation violation matter and was released from custody by admitting to failing to complete his community service hours. Thus, unlike in *Brooks*, it cannot be said here that defendant's custody on the probation violation matter was dependent on the new charges against him.

¶11 Instead, we agree with the state's argument that *State v. San Miguel* is apposite. In *San Miguel*, we explained that presentence incarceration credit is appropriate only when the confinement "is due to or arises out of the offense against which credit is claimed." *State v. San Miguel*, 132 Ariz. 57, 60, 643 P.2d 1027, 1030 (App. 1982) (citation omitted). We held that incarceration pursuant to a petition to revoke probation is separate and distinct from incarceration pursuant to the charges underlying that petition. *Id.* at 60-61, 643 P.2d at 1030-31. Based on the record before us, we find no indication that defendant's custody beginning on October 27, 2009 was due to the charges later brought against him in the felony indictment.

¶12 Defendant is correct that a trial court's failure to grant full credit for presentence incarceration constitutes fundamental error. See *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). However, we find no error in the trial court's calculation here. Presentence incarceration credit is offense-specific, and compensates a defendant for time in custody "pursuant to an offense" until sentencing "for such offense." A.R.S. § 13-712(B) (2009). The record before us indicates that defendant's incarceration from October 27, 2009 until March 15, 2010 was based solely on the petition to revoke

probation.² The petition alleged several probation violations distinct from those brought in the later felony indictment.

¶13 The fact that the Chandler City Attorney filed a misdemeanor complaint against defendant prior to his first incarceration is not decisive. The mere filing of a complaint does not, as defendant contends, mean that any subsequent custody is pursuant to that complaint. A defendant cannot rely on speculation from a silent record to support a claim of error. *State v. Ethington*, 121 Ariz. 572, 574, 592 P.2d 768, 770 (1979) (citations omitted). Defendant is unable to indicate evidence in the record that his arrest on October 27, 2009 was pursuant to anything other than the petition to revoke probation as required by statute. Therefore, defendant fails to meet his burden of establishing fundamental error.

CONCLUSION

¶14 For the foregoing reasons, we affirm the convictions

² The executed bench warrant and the release questionnaire explicitly reference "probation violation" as the basis for arrest and incarceration. There is no mention of the misdemeanor complaint in these documents.

and sentences.

/s/

JON W. THOMPSON, Presiding Judge

CONCURRING:

/s/

DONN KESSLER, Judge

/s/

LAWRENCE F. WINTHROP, Judge