

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



DIVISION ONE  
FILED: 7/11/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

**IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE**

STATE OF ARIZONA, ) 1 CA-CR 12-0548  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
HENRY ULLESSIES GONZALEZ, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)

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Appeal from the Superior Court in Navajo County

Cause No. S0900CR20070472

The Honorable John N. Lamb, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General Phoenix  
by Joseph T. Maziarz, Chief Counsel  
Criminal Appeals Section  
and Andrew Reilly, Assistant Attorney General  
Attorneys for Appellee

The Wood Law Office Show Low  
by Ronald D. Wood  
Attorneys for Appellant

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**H O W E**, Judge

¶1 Henry Ullessies Gonzalez ("Gonzalez") appeals the revocation of his probation and the resulting prison sentence. For the following reasons, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 A grand jury indicted Gonzalez in 2007 for transporting 240 pounds of marijuana for sale, a class two felony. Gonzalez pled guilty to attempted transportation of marijuana for sale, a class three felony. In May 2008, the trial court suspended sentence, placed Gonzalez on probation for five years, and ordered him to pay a \$50,000 fine. In June 2008, at Gonzalez's request, the probation department transferred Gonzalez's supervision to Florida.

¶3 In August 2008, Gonzalez's probation officer petitioned to revoke Gonzalez's probation, alleging that Gonzalez was not residing at the approved address, had failed to make payments on his fine, had failed to perform any of the required 200 hours of community service, and had failed to obtain the required substance abuse evaluation. The trial court issued a warrant for his arrest.

¶4 In January 2010, Florida law enforcement arrested Gonzalez on the warrant, but released him after the Navajo County Attorney declined to extradite him from Florida. A second arrest in August 2010 in Florida on the warrant again resulted in his release. Gonzalez failed to contact the Navajo County

Adult Probation Department at any time after he was released on these two occasions to ask about or resolve the pending petition to revoke.

¶15 In March 2012, Florida law enforcement again arrested Gonzalez, and this time he was extradited and transported to Arizona for arraignment on the probation revocation petition. Gonzalez moved to dismiss the petition to revoke, arguing that the more-than-two-year delay in bringing him before the Navajo County Superior Court violated his due process rights. The State responded by outlining the sequence of events—including its failure to extradite Gonzalez twice in 2010 following his arrests on the warrant, and his resultant release from custody—and argued that because of budgetary constraints and Gonzalez's failure to contact probation officials or come to Arizona to face the petition, it had only recently gained custody of Gonzalez. The State also argued that Gonzalez had not articulated any prejudice from the delay. The court found the delay was minimal after the State of Arizona gained custody of Gonzalez, the delay in gaining custody was reasonable, and Gonzalez did not suffer any prejudice from the delay. After the court denied Gonzalez's motion, defense counsel filed a Notice of Additional Record in which he avowed that Gonzalez would have testified that Arizona had failed to extradite him on the petition twice, although each time he had waived extradition,

and that he was prejudiced by the delay because, "if the state had proceeded, it would have learned that Mr. Gonzalez was never implemented on to interstate compact and the problem would have resolved."

¶16 The State then alleged in a supplemental petition to revoke that Gonzalez failed to comply with the term that he report monthly in writing to the Navajo County Adult Probation Department. At the revocation hearing, Gonzalez testified that he did not make any payments on the fine because "at that time" he did not have a job, and "didn't know exactly where to send my money to." In the predisposition report, however, the probation officer reported that Gonzalez said that he lived with his parents, and, in the sixteen months before his extradition, he had earned a monthly income of \$1,400 to \$1,700. Asked why he failed to pay his fines and fees, Gonzalez told the officer, "I just didn't make payments."

¶17 At the disposition hearing, defense counsel argued that the court could not sentence Gonzalez to prison for his failure to make payments on the fine, because the court had not specifically found that Gonzalez had the funds and deliberately failed to use them to make the payments. The court ruled without expressly addressing whether it found that the failure to make payments was deliberate. In determining whether probation was still an appropriate disposition, the court stated that it saw

"a pattern of trying to avoid responsibility . . . I don't think [Gonzalez is] amenable to probation based upon his actions, and I understand probation didn't do anything, but I think it was up to him to get in touch with probation, and he doesn't make that strong of an effort." The court thus sentenced Gonzalez to a mitigated term of two and one-half years in prison.

¶18 Gonzalez timely appeals. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2), 13-4031, and 13-4033(A) (West 2013).<sup>1</sup>

#### DISCUSSION

¶19 Gonzalez argues that the court abused its discretion in denying Gonzalez's Motion to Dismiss Petition to Revoke without hearing any evidence. The record fails to show that Gonzalez requested an evidentiary hearing, however, and shows only that he requested oral argument. Moreover, Gonzalez did not argue at the oral argument that the court abused its discretion in making findings without hearing evidence. Accordingly, we review this claim for fundamental error only. *State v. Henderson*, 210 Ariz. 561, 568, ¶ 22, 115 P.3d 601, 608 (2005). Gonzalez thus bears the burden of establishing error, that the error was fundamental, and that the error prejudiced him. *Id.*

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<sup>1</sup> Absent revisions material to this decision, we cite the current version of applicable statutes.

¶10 Gonzalez has not established that the court committed error, much less fundamental error. Due process entitles a probationer to a hearing on a petition to revoke within a reasonable time. *State v. Adler*, 189 Ariz. 280, 282, 942 P.2d 439, 441 (1997) (citing *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973) and *Morrissey v. Brewer*, 408 U.S. 471, 485 (1972)); see also Ariz. R. Crim. P. 27.7 and 27.8. "The purpose of providing a timely hearing is to hold the proceeding 'while information is fresh and sources are available.'" *Adler*, 189 Ariz. at 282, 942 P.2d at 441. The probationer has the burden to show the necessary prejudice to set aside the revocation on due process grounds. See *Id.* at 284, 942 P.2d 443.

¶11 The court did not violate Gonzalez's due process rights in denying the motion to dismiss without a hearing because the facts were not in dispute. Both Gonzalez and the State were required under Arizona Criminal Procedure Rule 35.1(a) to outline "specific factual grounds" to support the relief they were seeking. The material facts outlined in the briefs and in the record below with respect to the cause of the delay were not in dispute. The delay arose because budgetary constraints twice prevented the State from extraditing Gonzalez from Florida and because Gonzalez failed to contact officials or return to the jurisdiction to answer the petition. The facts before the trial court were uncontested, so the court had no

need or obligation to conduct an evidentiary hearing. *See Mendez v. Robertson*, 202 Ariz. 128, 130-31, ¶¶ 7-10, 42 P.3d 14, 16-17 (App. 2002) (reasoning that absent a requirement in the rules, statutes, or case law for evidentiary hearing, the court did not err in relying on prosecutor's avowal along with all other available information).

¶12 Additionally, Gonzalez has not established that he suffered any prejudice. Gonzalez's only argument below (made after the court had already ruled) was that the petition would have been resolved earlier because it had no merit (because he "was never implemented on to interstate compact"). On appeal, Gonzalez merely speculates that "if the county attorney had moved a bit more expeditiously, contact could have been reestablished with Henry [Gonzalez] only a few months after he was placed on probation and prison might not have been needed in the end." Nothing prevented Gonzalez from arguing these issues at the revocation hearing. Moreover, neither argument shows that the delay had impaired his defense to the petition. Thus, the court's denial of the motion in the absence of an evidentiary hearing was not error, much less fundamental error causing Gonzalez prejudice, as necessary for reversal on fundamental error review.

¶13 Gonzalez also argues that the trial court erred in imposing a prison sentence in part based on a finding that he

had violated the condition of his probation that he make \$600 monthly payments on his \$50,000 fine without determining that he had the financial ability to make the payments. Before revoking probation and imposing a prison sentence for failure to make required payments on fines, a trial court must determine if the probationer willfully and deliberately failed to pay, or if he was unable to pay despite good faith efforts. *State v. Robinson*, 142 Ariz. 296, 297, 689 P.2d 555, 556 (App. 1984); *Bearden v. Georgia*, 461 U.S. 660, 672 (1983).

¶14 Although the trial court did not determine whether Gonzalez willfully or deliberately refused to make his fine payments,<sup>2</sup> the record clearly shows that the trial court would have imposed the same sentence without regard to Gonzalez's failure to pay. See *State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989) (this Court will affirm without remand when the record "clearly shows" that the trial court would have reached the same result). The trial court imposed a mitigated term of 2.5 years imprisonment not because of any failure to pay

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<sup>2</sup> Had the trial court considered the issue, the evidence would have allowed a finding that Gonzalez had simply refused to pay. Although he testified that he did not pay because he did not have a job at the time, he also testified that he "didn't know exactly where to send my money to." The disposition report the trial court reviewed at sentencing noted that Gonzalez said that he lived with his parents, and, in the sixteen months before his extradition, he had earned a monthly income of \$1,400 to \$1,700. Asked why he failed to pay his fines and fees, Gonzalez told the officer, "I just didn't make payments."



but because he did not contact the probation department after his two arrests: "I understand probation didn't do anything, but I think it was up to him to get in touch with probation and he doesn't make that strong of an effort." Thus, no reason exists to remand the matter to the trial court for resentencing.

**CONCLUSION**

¶15 For the foregoing reasons, we affirm the trial court's revocation of Gonzalez's probation and the resultant prison sentence.

\_\_\_\_\_/s/\_\_\_\_\_  
RANDALL M. HOWE, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PETER B. SWANN, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
DIANE M. JOHNSEN, Chief Judge