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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
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BY: GH

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

STATE OF ARIZONA,)
) 1 CA-CR 08-1120 PRPC
)
 Respondent,) DEPARTMENT C
)
 v.) Maricopa County
) Superior Court
STEPHEN MIRRETTI, JR.,) No. CR 1994-004122
)
)
 Petitioner.)
) **DECISION ORDER**
)
)

Stephen Mirretti, Jr. petitions this court to review the trial court's denial of post-conviction relief. Presiding Judge Patrick Irvine, and Judges Michael J. Brown and Donn Kessler, have considered this petition for review and for the reasons stated, grant review and grant relief.

FACTS AND PROCEDURAL HISTORY

We discuss only those facts necessary to our disposition of this matter. Mirretti pled guilty to fraudulent schemes and artifices, bribery, theft of public money, and conspiracy to obstruct a criminal investigation. The trial judge sentenced Mirretti to concurrent terms of five years imprisonment for bribery, a class four felony; eight years imprisonment for theft of public money, a class three felony; and two years imprisonment for conspiracy to obstruct a criminal investigation, a class five

felony. For fraudulent schemes and artifices, a class two felony, Mirretti was placed on five years probation, "commencing upon release from the Department of Corrections" The judgment suspending sentence reflects that the trial judge wrote that probation would begin "upon release from DOC[,]" and directed that restitution payments of \$300.00 per month commence on the first day of the fourth month "after release from custody."

On February 5, 2000, the Board of Executive Clemency granted parole and Mirretti was released. Mirretti was supervised on parole until his parole expiration date of February 11, 2002. Mirretti also served three months and thirteen days of community supervision, concurrent with his parole. His community supervision ended on May 17, 2000.¹

Consistent with the trial court's order, Mirretti made his first \$300.00 restitution payment on January 30, 2000. He continued making these restitution payments almost regularly for the next six years.

¹ Mirretti committed conspiracy to obstruct a criminal investigation after January 1, 1994, the effective date of Arizona's new "Truth in Sentencing" code. The new code provided in part for the imposition of "community supervision." Community supervision is consecutive to the actual period of imprisonment and equals one-seventh of the time actually served. See Arizona Revised Statutes ("A.R.S.") § 13-603(I)(Supp. 2009). Also, the director of the Department of Corrections may authorize temporary release of any inmate for "purposes preparatory to a return to the community within ninety days of the inmate's release date" See A.R.S. § 31-233(B) (Supp. 2009).

On March 27, 2002, an adult probation officer filed a petition to modify Mirretti's probation. Under "CIRCUMSTANCES SUPPORTING RECOMMENDATION," the officer stated the modification "is being submitted to set the start date of Court-ordered payments" beginning May 1, 2002, and to set the "defendant's probation start date . . . for February 11, 2002," because Mirretti's "absolute date of discharge was February 11, 2002." The record does not reflect whether Mirretti was given notice of the petition. On April 3, 2002, without a hearing, the trial court granted the petition.

On December 18, 2006, Mirretti's probation officer filed a petition to revoke probation. The petition alleged several violations, the earliest of which was alleged to have occurred on March 17, 2006. On September 7, 2007, Mirretti admitted that he violated his probation by failing to report to his probation officer as directed. The trial court revoked probation and sentenced Mirretti to the presumptive term of five years' imprisonment.

Mirretti timely filed his petition for post-conviction relief. Relying on *State v. Ball*, 157 Ariz. 382, 758 P.2d 653 (App. 1988), Mirretti argued that his term of probation began upon his physical release from prison, February 5, 2000, and thus had expired before the revocation. Alternatively, Mirretti argued that his term of probation began on May 17, 2000, the day his

community supervision ended.² In either event, he argued, the trial court's order revoking probation, and the prison sentence imposed, were invalid because his term of probation had already expired. See A.R.S. § 13-901(C)(Supp. 2009);³ *State v. Johnson*, 182 Ariz. 73, 73, 893 P.2d 73, 73 (App. 1995)(holding that a court lacks jurisdiction to revoke probation after term has expired). He also argued that his counsel had been ineffective for failing to raise the issue.

To the extent the trial court's earlier modification of probation served to extend the term of probation, Mirretti argued, the modification was null and void in light of *State v. Korzuch*, 186 Ariz. 190, 193-95, 920 P.2d 312, 315-17 (1996)(holding that an extension of the term of probation is a modification that requires notice and a hearing).

The State filed a response and argued that Mirretti's term of probation did not begin until after his absolute discharge from the Department of Corrections, February 12, 2002. Relying on *State v. Gandara*, 174 Ariz. 105, 847 P.2d 606 (App. 1992), the State argued that Mirretti's prison sentences were not satisfied until his release from prison *and parole supervision*. Mirretti's

² Arizona Revised Statutes section 13-603(K)(Supp. 2009) provides that a person shall begin serving any term of probation "after the person serves the term of community supervision."

³ We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

parole supervision expired on February 11, 2002. Thus, the term of probation began on February 12, 2002, and therefore had not expired prior to the revocation. Consequently, the State concluded, there was no basis for the claim of ineffective assistance of counsel.

The State agreed that if the trial court's earlier modification of probation had extended the term of probation, it was null and void pursuant to *Korzuch*. The State, however, argued that the trial court's action was not a modification, but merely an order setting the start date for the term of probation.

Mirretti replied and argued that *Gandara* was unpersuasive because in that case, the trial judge had ordered the term of probation to commence "after [Gandara's] release from parole supervision." In contrast, Mirretti's term of probation, like the term of probation in the *Ball* decision, was ordered to begin upon release from the Department of Corrections.

Mirretti noted that because the trial court had ordered a term of community supervision, he agreed that his term of probation was "tolled" until community supervision ended on May 17, 2000. Thus, he concluded, his five-year term of probation expired on May 17, 2005, seventeen months prior to the date of the earliest alleged violation.

The trial court denied his petition without explanation.⁴ Mirretti timely petitioned this court for review, and the State has responded.

DISCUSSION

In *Ball*, the trial court ordered a term of probation consecutive to a prison sentence, and further ordered that the term of probation commence "on the first day following the defendant's release." 157 Ariz. at 383, 758 P.2d at 654. On appeal, the defendant argued that the court could not order a term of probation consecutive to a prison sentence, and that the court had failed to sufficiently designate when the term of probation was to begin. *Id.*

The court first concluded that the trial court had authority to impose a term of probation to run consecutively after a prison sentence. *Id.* at 383-84, 758 P.2d at 654-55. As to designating when the term of probation commenced, the court stated "we think it sufficient compliance for the court to state that probation begins when the defendant is released from prison." *Id.* at 384, 758 P.2d at 655. The court found that A.R.S. § 13-901(A), providing that a person placed on probation shall be placed on supervised or unsupervised probation "without delay," meant:

⁴ Mirretti had argued a third claim which the court found colorable, and had set an evidentiary hearing. Mirretti, however, later withdrew this claim.

[T]hat the probation shall begin "without delay" once the preceding sentence has been served and the defendant has been released from prison. That is exactly what the trial judge ordered in this case. Probation begins upon defendant's physical release from prison.

Id. at 385, 758 P.2d at 656.

In *Gandara*, the defendant was convicted of two counts of driving under the influence ("DUI") with a suspended license, and one count of aggravated DUI. 174 Ariz. at 106, 847 P.2d at 607. The court sentenced the defendant to a two-year prison term on one offense, and two three-year terms of probation to be served concurrently with one another but consecutively to the prison term. *Id.* The court also ordered the mandatory six-month prison terms as conditions of probation be served concurrently with the two-year prison term, and concurrently with each other. *Id.* Finally, the court ordered that the probation terms not begin until after the defendant's release from parole supervision. *Id.*

On appeal, one of the issues raised by the defendant was whether the trial court had erred when it ordered that probation not begin until after the defendant's release from parole supervision as opposed to his physical release from prison. The court distinguished *Ball* and noted that the trial court did not commit error when it set the commencement date of probation after the defendant's release from parole supervision:

In *State v. Ball*, 157 Ariz. 382, 758 P.2d 653 (App. 1988), Division One of this court construed "without delay" to mean upon release from prison, which is what the trial court in that case had ordered. We believe that the trial court's order in the instant case is even more precise. A consecutive sentence does not begin until the prior sentence is satisfied. *Mileham v. Arizona Board of Pardons & Paroles*, 110 Ariz. 470, 520 P.2d 840 (1974). "It ameliorates punishment by permitting a convict to serve his sentence outside of prison walls, but parole does not interrupt the sentence." *Id.* at 472, 520 P.2d at 842. Thus, a sentence is not satisfied until the person is released from prison and parole supervision.

Of primary importance is that consecutive sentences not commence after an indefinite prior sentence. See *State v. King*, 166 Ariz. 342, 802 P.2d 1041 (App. 1990). There is always the possibility that appellant will either not qualify for parole or that he will begin parole but for some reason have it revoked, resulting in his imprisonment once again. Therefore, to make certain that the sentence is clear and not indefinite, it must be modified to reflect that probation is to begin only upon appellant's absolute discharge from his prior sentence in CR-31319.

Id. at 107-08, 847 P.2d at 608-09. Contrary to the State's argument, *Gandara* is not more analogous to this case than *Ball*, and it does not stand for the proposition that a consecutive term of probation cannot commence until after parole supervision ends. *Gandara* did not express any disagreement with or disapproval of *Ball*. The court simply held that *Ball* did not preclude the trial

court from ordering a consecutive term of probation to commence after parole supervision ended.

In light of our resolution of this issue, we need not address Mirretti's claim of ineffective assistance of counsel.

CONCLUSION

Because the trial court in this case ordered that the term of probation begin upon Mirretti's release from the Department of Corrections, pursuant to *Ball*, probation was set to commence on February 5, 2000. However, by operation of A.R.S. § 13-603(K), the running of the term of probation was tolled until after Mirretti's community supervision ended on May 17, 2000, and thus the term of probation expired May 17, 2005. Therefore, the trial court lacked jurisdiction to revoke Mirretti's probation and to sentence him to prison on September 7, 2007. We grant review, grant relief, and vacate the trial court's order of September 7, 2007 which revoked probation, and vacate the prison sentence imposed.

/s/

PATRICK IRVINE, PRESIDING JUDGE