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NOV 20 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. STEVE PENNINGTON, Appellant.	)	2 CA-CR 2012-0070 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000872

Honorable Wallace R. Hoggatt, Judge

AFFIRMED AS MODIFIED

Harriette P. Levitt — Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 Pursuant to a plea agreement, Steve Pennington pleaded no contest to failing to renew his identification and attempted weapons misconduct. The trial court suspended sentence and placed Pennington on a three-year term of probation. Two months later, the state petitioned to revoke Pennington's probation, alleging multiple violations of conditions of his probation. After a hearing on the matter, the court found

Pennington in violation of his probation and revoked it, sentencing him to consecutive, presumptive terms of imprisonment totaling 2.5 years.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating she has reviewed the record and has found "no arguable issues on appeal" and asking us to "search the entire record for error." In a pro se supplemental brief, Pennington argues (1) the record "is lacking the [required] transcripts," (2) appellate counsel was not competent and was "prejudice[d] against [him]," (3) "the government defaulted on its contractual requirements of the plea agreement," rendering it "null and void"; (4) his "presentence confinement credit" was miscalculated; (5) "both lawyers and the trial court" were prejudiced against him, requiring "reversal of the original conviction"; and (6) trial counsel was "incompetent," prejudiced against him, and had a conflict of interest.

¶3 First, this court already has considered and reconsidered Pennington's motion regarding transcripts, denying his requests both times. Next, any challenge to Pennington's convictions should have been raised in a timely proceeding pursuant to Rule 32, Ariz. R. Crim. P., and cannot be raised here. *See State v. Herrera*, 121 Ariz. 12, 14, 588 P.2d 305, 307 (1978). Likewise, Pennington's apparent claims of ineffective assistance of counsel cannot be raised on appeal, but must be raised in a Rule 32 proceeding. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

¶4 To the extent Pennington argues there was insufficient evidence to support violation of his probation, by asserting the state had failed to prove its allegation that he possessed "deadly weapons," his "motive," or his "intent," we disagree. Viewed in the

light most favorable to sustaining the trial court's decision to revoke Pennington's probation, *see State v. Fontes*, 195 Ariz. 229, ¶ 2, 986 P.2d 897, 898 (App. 1998), the evidence presented at the violation hearing established, inter alia, that as a condition of his probation Pennington was not to possess any deadly weapons or ammunition, but that he had ammunition, a sword, "a fixed blade hunting knife," and a pocket knife in his residence. And, although he was required to obtain permission to change his residence, he moved without permission from his probation officer. In view of that evidence, we cannot say the court's decision was arbitrary or unsupported, and we therefore affirm it. *See State v. Moore*, 125 Ariz. 305, 306, 609 P.2d 575, 576 (1980). We also conclude the terms of imprisonment imposed were within the statutory limits. *See* A.R.S. §§ 13-702; 13-1001(C)(4); 13-3102(A)(4), (L); 13-3821(J); 13-3824(B).

¶5 We agree with Pennington, however, that the trial court miscalculated the number of days of presentence incarceration credit to which he is entitled. Pennington did not object on this basis below. Although failure to raise an issue in the trial court normally forfeits appellate review for all but fundamental, prejudicial error, *see State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005), a limited exception exists for "alleged errors that did not become apparent until the trial court pronounced sentence." *State v. Vermuele*, 226 Ariz. 399, ¶ 14, 249 P.3d 1099, 1103 (App. 2011). The issue is therefore properly before this court despite Pennington's failure to raise it below. Accordingly, we review for an abuse of discretion. *Id.* ¶ 15.

¶6 The 391 days with which the trial court credited Pennington were apparently taken from the presentence report, which counted forty days between January

19, 2012, and March 2, 2012. As Pennington points out, that period included forty-three days of incarceration. Pennington also argues "the court found for 400 days on [November 18, 2011]," suggesting he should be entitled to additional credit. But Pennington does not cite anything in the record specifically to support his contention, *see* Ariz. R. Crim. P. 31.13(c)(1)(vi), and our review of the record has uncovered no such finding by the court. Thus, pursuant to A.R.S. § 13-4037(B), we modify the court's sentence to include presentence incarceration credit of 394 days rather than the 391 days originally ordered.

¶7 In our examination of the record, we have found no other fundamental, reversible error, *see Anders*, 386 U.S. 738, and no arguable issue warranting further appellate review, *see State v. Thompson*, 229 Ariz. 43, ¶ 6, 270 P.3d 870, 873 (App. 2012). Therefore the revocation of Pennington's probation and his sentences are affirmed as modified.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.