

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

JONATHAN BARRETT EDGAR,
Petitioner.

No. 2 CA-CR 2016-0069-PR
Filed July 13, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County
No. CR056376
The Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Barbara LaWall, Pima County Attorney
By Nicolette Kneup, Deputy County Attorney, Tucson
Counsel for Respondent

Jonathan B. Edgar, Kingman
In Propria Persona

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MEMORANDUM DECISION

Judge Staring authored the decision of the Court, in which Judge Vásquez and Judge Miller concurred.

STARING, Judge:

¶1 Jonathan Edgar seeks review of the trial court's order denying his motion to vacate judgment, which the trial court characterized as a successive, of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that order unless the court clearly abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). Edgar has not met his burden of demonstrating such abuse here.

¶2 Edgar pled guilty in June 1997 to second-degree burglary. The trial court suspended the imposition of sentence and placed him on a five-year term of probation. In May 1998, the state filed a petition to revoke Edgar's probation, asserting inter alia that he had changed his residence without permission and that his current whereabouts were unknown. Edgar was arrested in 2014, after which he admitted absconding from probation. The court revoked his probation and imposed a seven-year prison term. He sought post-conviction relief, raising a sentencing claim.¹ The trial court denied relief, and this court denied relief on review. *State v. Edgar*, No. 2 CA-CR 2015-0047-PR (Ariz. App. July 14, 2015) (mem. decision).

¶3 While his first petition for review was pending, Edgar filed a motion to vacate the judgment, citing Rule 60, Ariz. R. Civ. P., and arguing the trial court lacked jurisdiction to revoke his probation because his probationary period had expired. The court determined Edgar's filing, in effect, was a petition for post-

¹Edgar was represented by counsel in the trial court, but filed his petition for review pro se.

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conviction relief pursuant to Rule 32 and ordered the state to respond. After the state responded and Edgar filed his reply, the court denied relief after oral argument. This petition for review followed the court's denial of Edgar's motion for rehearing.

¶4 On review, Edgar repeats his argument that the trial court did not have jurisdiction to revoke his probation because his probation period had expired.² To the extent Edgar's arguments require us to interpret statutes, our review is de novo. *Fragoso v. Fell*, 210 Ariz. 427, ¶ 7, 111 P.3d 1027, 1030 (App. 2005). Our primary task is to give effect to legislative intent, and the statute's plain language is the best indicator of that intent. *State v. Lee*, 236 Ariz. 377, ¶ 16, 340 P.3d 1085, 1090 (App. 2014). Thus, if the statute's language is unambiguous, "we need not look further to determine the statute's meaning and apply its terms as written" without applying other principles of statutory construction. *Id.* In interpreting court rules, we follow the same approach, applying the rule's unambiguous language as the best indication of the supreme court's intent in promulgating the rule. *State v. Harden*, 228 Ariz. 131, ¶ 6, 263 P.3d 680, 681 (App. 2011).

²Edgar argued below, and the trial court apparently agreed, that this claim is not precluded pursuant to Rule 32.2(a) because Edgar can raise it in the context of ineffective assistance of counsel in his first Rule 32 proceeding or because jurisdictional defects are not subject to waiver and thus can be raised in a second, timely, of-right proceeding like this one. *See generally* Ariz. R. Crim. P. 32.2(a)(3) (precluding waived claims), 32.4(a) (providing for second, of-right post-conviction proceeding); *Stewart v. Smith*, 202 Ariz. 446, ¶ 8, 46 P.3d 1067, 1070 (2002) (certain claims require knowing, voluntary, and intelligent waiver for Rule 32.2(a)(3) to apply); *State v. Martinez*, 226 Ariz. 464, ¶ 9, 250 P.3d 241, 243-44 (App. 2011) (in successive proceeding, pleading defendant entitled to raise claim of ineffective Rule 32 counsel); *State v. Chacon*, 221 Ariz. 523, ¶ 5, 212 P.3d 861, 863-64 (App. 2009) (subject-matter jurisdiction cannot be waived or forfeited). Because Edgar's substantive jurisdictional argument is without merit, we need not determine if either basis would exempt it from preclusion.

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¶5 A trial court lacks jurisdiction to revoke probation if the probationary period has expired. *State v. Chacon*, 221 Ariz. 523, ¶ 6, 212 P.3d 861, 864 (App. 2009). And, to comport with due process, a revocation hearing “must be held within a reasonable time” following the filing of a petition to revoke. *State v. Adler*, 189 Ariz. 280, 282, 942 P.2d 439, 441 (1997). But, unless a court ultimately determines the defendant did not violate the terms of probation, “[t]he running of the period of probation shall cease during the period from the filing of the petition to revoke probation to the termination of revocation of probation proceedings.” A.R.S. § 13-903(D). As noted above, the state filed the petition to revoke Edgar’s probation before his probationary term expired. As such, it was tolled for the intervening years until he was arrested and his probation revoked.

¶6 Edgar argues, however, that § 13-903(D) does not apply to him because the state was required to proceed with the revocation of his probation in absentia pursuant to Rule 27.10, Ariz. R. Crim. P., and therefore the state was not sufficiently “diligent when seeking a remedy.” Rule 27.10 provides: “A proceeding to revoke probation in absentia shall be commenced only after the probationer’s whereabouts are unknown to the probation officer for at least 60 days.” We agree with the trial court that the rule’s language cannot reasonably be read to require the state to proceed with revocation if the probationer’s whereabouts are unknown for sixty days; instead, that plain language permits revocation in the probationer’s absence only if that condition is met.³ And, even if Rule 27.10 did require the

³Edgar’s citation to *State v. Lovell*, 123 Ariz. 467, 600 P.2d 1099 (1979), does not convince us otherwise. The supreme court in that case did not suggest that the state is required to proceed under Rule 27.10, but concluded instead that a court could not revoke probation in a petitioner’s absence without complying with the rule’s requirements, notwithstanding that the defendant “had received actual notice of the revocation hearing and . . . his attorney had received a copy of the petition to revoke.” *Id.* at 469-70, 600 P.2d at 1101-02.

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state to proceed, Edgar has not established that violating that rule would create a jurisdictional defect.

¶7 Edgar cites *State v. Flemming*, 184 Ariz. 110, 907 P.2d 496 (1995), for the proposition that the state's undue delay in pursuing revocation can deprive a court of jurisdiction. In *Flemming*, our supreme court addressed the time limits of former Rule 27.7, Ariz. R. Crim. P., governing the time between "the service of summons or arrest on a warrant in a probation revocation proceeding."⁴ *Flemming*, 184 Ariz. at 115, 907 P.2d at 501. The supreme court noted the rule was intended "to ensure that a probationer's due process rights are not violated by undue delay in probation revocation procedures." *Id.* It further observed that the time limits were not jurisdictional. *Id.*

¶8 Although the court in *Flemming* suggested that delays between the filing of a petition to revoke and the hearing could implicate due process concerns, the case is readily distinguishable because *Flemming* was in jail for the entire duration of the delay.⁵ *Id.* at 112, 115, 907 P.2d at 498, 501; *see also Adler*, 189 Ariz. at 282, 942 P.2d at 441 (due process required revocation hearing to be "held within a reasonable time"). But, even if the delay here constituted a due process violation, by admitting that he had violated the terms of his probation, Edgar has waived all non-jurisdictional defects save those related to the voluntariness of that admission. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993). And Edgar has identified no basis for us to conclude that a delay between the filing of a petition to revoke and revocation would create a jurisdictional defect when the delay between arrest and revocation

⁴Rule 27.7 was renumbered as Rule 27.8 in 2005. 210 Ariz. LXIV.

⁵We reject Edgar's related suggestion that *Flemming* therefore supports the notion that tolling under § 13-903(D) begins only upon his arrest. That interpretation is contrary to the plain language of § 13-903(D), which unambiguously provides that tolling begins when the petition to revoke is filed. *See Chacon*, 221 Ariz. 523, ¶ 6, 212 P.3d at 864.

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does not. *See Flemming*, 184 Ariz. at 115, 907 P.2d at 501; *cf. State v. Carter*, 151 Ariz. 532, 534, 729 P.2d 336, 338 (App. 1986) (speedy trial limitations “not jurisdictional in the sense that their violation deprives a court of the power to act against the defendant”). Moreover, when the delay between the filing of a petition and revocation is unreasonable, a defendant is entitled to relief only if he or she demonstrates resulting prejudice, *see Adler*, 189 Ariz. at 284, 952 P.2d at 443, which Edgar has not attempted to do.

¶9 Edgar also appears to contend the state was required to elect whether his probationary period would toll pursuant to § 13-903(D) or pursuant to § 13-903(C),⁶ which provides the probationary period will toll “during the unauthorized absence of the defendant from the jurisdiction or from any required supervision and shall resume only upon the defendant’s voluntary or involuntary return to the probation service.” He cites no authority supporting this argument, and it is unsupported by the statute’s language. Accordingly, we do not address this contention further. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review).

¶10 Edgar further suggests the state “admitt[ed]” his probation had expired because it continued to charge him “probation fees” while the petition to revoke was pending. Thus, he seems to reason, his probationary period did not “cease” as contemplated by § 13-903(C) or (D). But nothing in § 13-903 suggests the state can control, expressly or implicitly, whether statutory tolling occurs—subsections (C) and (D) unambiguously provide the “running of the period of probation shall cease” in the relevant circumstance. Last, to the extent Edgar suggests the trial court therefore erred in entering a criminal restitution order including accrued probation fees, he stated below that he was not contesting fees, and we therefore do not address that issue on review.

⁶Because § 13-903(D) tolls Edgar’s probationary term, we need not determine whether § 13-903(C) also would apply.

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¶11 For the reasons stated, we grant review but deny relief.