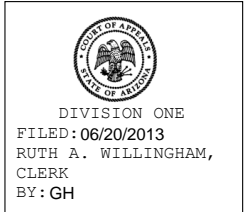


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 12-0511
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
DELBERT WAUNKA,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-117938-001

The Honorable J. Justin McGuire, Commissioner

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Joseph T. Maziarz, Chief Counsel, Criminal Appeals
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

Delbert Wauneka, Appellant Florence

N O R R I S, Judge

¶1 Delbert Wauneka timely appeals from his probation revocation and disposition sentence. After searching the record on appeal and finding no arguable question of law that was not

frivolous, Wauneka's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Wauneka to file a supplemental brief *in propria persona*, and he has done so.¹ We reject the arguments raised in Wauneka's supplemental briefing and, after reviewing the entire record, find no fundamental error. Therefore, we affirm Wauneka's probation revocation and disposition sentence.

FACTS AND PROCEDURAL BACKGROUND²

¶2 On October 13, 2006, Wauneka pled guilty to sexual abuse, a class five felony, attempted sexual assault, a class three felony, and kidnapping, a class two felony (collectively "original convictions"). Pursuant to the plea agreement, the superior court sentenced Wauneka to four years in prison with

¹Wauneka filed a supplemental brief and an "affidavit."

²In a probation revocation hearing, the State must establish by a preponderance of the evidence an individual has violated the terms of his probation. Ariz. R. Crim. P. 27.8(b)(3). We review the superior court's determination that a defendant violated his or her probation for an abuse of discretion. See *State v. LeMatty*, 121 Ariz. 333, 335-36, 590 P.2d 449, 451-52 (1979). Accordingly, this court will not reverse the superior court's factual finding the defendant violated his or her probation unless the finding was "arbitrary and unsupported by any reasonable theory of evidence." *Id.* at 336, 590 P.2d at 452.

544 days of presentence incarceration credit on the kidnapping charge, and suspended imposition of sentence on the sexual abuse and attempted sexual assault charges (collectively "abuse and assault charges") and placed him on lifetime probation with special sex offender conditions on both charges.

¶13 After Wauneka was released from prison in August 2008, he began his terms of probation. In August 2009, the superior court suspended imposition of sentence on the abuse and assault charges and reinstated Wauneka to lifetime probation after he admitted to violating his probation. In July 2010, after Wauneka violated his probation again by pleading guilty in another matter, the court suspended imposition of sentence on the abuse and assault charges and reinstated Wauneka's lifetime probation.

¶14 In June 2012, a probation officer petitioned to revoke Wauneka's probation, alleging he had violated conditions of his probation, including Condition 4 (to reside at an approved residence and obtain approval before changing his residence), and Condition 25.3 (not to "go to or loiter near . . . places primarily used by children under the age of 18" without permission) by going near a shopping mall and an amusement park.

¶15 After Wauneka denied the alleged probation violations, the superior court held a witness violation hearing. At the hearing, Wauneka's probation officer testified he had reviewed

the conditions of probation with Wauneka, and Wauneka had acknowledged he understood the conditions before signing. Wauneka's surveillance officer then testified Wauneka moved from the approved residence without permission, chose to become and remain homeless, and only contacted the surveillance officer after he had moved. The surveillance officer also testified the previous surveillance officer and Wauneka had signed behavior agreements and special sex offender conditions listing examples of "places primarily used by children under the age of 18" that he should not "go to or near," such as malls, parks, playgrounds, and arcades. Another surveillance officer assigned to the Global Positioning System ("GPS") unit who had monitored Wauneka's location testified Wauneka had been "in the parking lot or the property" of the amusement park and near the mall.

¶16 Wauneka also testified at the hearing, and admitted he had slept at an unapproved location before contacting the probation officer, and had been in "the parking lot at the mall."

¶17 At the conclusion of the hearing, the superior court found the State had proven by a preponderance of the evidence Wauneka had violated Condition 4 and 25.3 of his probation. The superior court suspended imposition of sentence on the abuse and assault charges, reinstated Wauneka's lifetime probation, and

imposed a 60-day term in jail as a condition of his probation on the assault charge.

DISCUSSION

I. Issues Raised in Supplemental Briefing

¶18 In his supplemental briefing, Wauneka raises various constitutional and other challenges to his original convictions. He argues during his arrest for those offenses, the police failed to read his *Miranda* rights, illegally searched his property, used physical coercion, and violated his right against self-incrimination. He also raises claims of involuntary plea, ineffective assistance of counsel, prosecutorial misconduct, and speedy trial violations. He further argues the superior court violated the victim's rights and improperly denied his motions to dismiss counsel and withdraw his plea, and his sentence on the kidnapping charge should be "2-to-2.5 years." None of these issues are properly before us because Wauneka cannot challenge his original convictions and sentence entered pursuant to his guilty plea in a direct appeal. A.R.S. § 13-4033(B) (2010) (noncapital defendant has no right to appeal "a judgment or sentence that is entered pursuant to a plea agreement"); Ariz. R. Crim. P. 17.1(e) (noncapital defendant waives right to direct appeal and may seek review only by post-conviction proceedings under Rule 32), Ariz. R. Crim. P. 32.1 (pleading defendant has right to file post-conviction relief); *cf. State v. Regenold*,

226 Ariz. 378, 379, ¶ 8, 249 P.3d 337, 338 (2011) (pleading defendant can appeal sentence imposed as consequence of contested probation violation and not "pursuant to a plea agreement"). Therefore, the only issue before us is the reinstatement of Wauneka's lifetime probation in the 2012 probation violation hearing.³

¶19 Wauneka next argues that by not crediting him for the "time [he had] served under the original sentence," the superior court violated his Fifth Amendment right against double jeopardy. We disagree. The time Wauneka served in prison on the kidnapping charge cannot be used as presentence incarceration credit, and this time cannot be used to reduce his lifetime probation. A.R.S. § 13-712(B) (2010) (presentence incarceration credit means "time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment," which "shall be credited against the term of imprisonment"); *Pickett v. Boykin*, 118 Ariz. 261, 262, 576 P.2d 120, 121 (1978) ("Probation is not a sentence but rather a feature of the suspension of imposition of sentence."); *cf.* A.R.S. § 13-903(F) (2010) (presentence incarceration credit available for sentence of imprisonment imposed upon revocation of probation).

³For this reason, we also deny Wauneka's motion to supplement the record in this appeal with documents and other items that pre-date his original convictions.

II. Fundamental Error Review

¶10 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. The probation revocation proceedings complied with the Arizona Rules of Criminal Procedures. Wauneka was represented by counsel at all stages of the proceedings. The State presented sufficient evidence to support the court's findings that Wauneka had violated the conditions of his probation. Wauneka was given the opportunity to speak at the disposition hearing, and the court acted within its discretion to reinstate Wauneka's probation with additional conditions. Ariz. R. Crim. P. 27.8(c)(2); A.R.S. § 13-902(E) (Supp. 2012) (lifetime probation available for completed or attempted sexual offenses); A.R.S. § 13-901(F) (Supp. 2012) (court may impose jail time as condition of probation).

CONCLUSION

¶11 For the foregoing reasons, we decline to order briefing and affirm Wauneka's probation violation and disposition sentence.

¶12 After the filing of this decision, defense counsel's obligations pertaining to Wauneka's representation in this appeal have ended. Defense counsel need do no more than inform Wauneka of the outcome of this appeal and his future options, unless, upon review, counsel finds an issue appropriate for

submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

¶13 Wauneka has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Wauneka 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

_____/s/_____
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

_____/s/_____
ANDREW W. GOULD, Judge

_____/s/_____
RANDALL M. HOWE, Judge