

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JAIRO ADAIR CONTRERAS, *Appellant*.

Nos. 1 CA-CR 15-0310, 1 CA-CR 15-0320 (Consolidated)
FILED 7-5-16

AMENDED PER ORDER FILED 7-5-16

Appeal from the Superior Court in Maricopa County

Nos. CR2010-007488, CR2009-005164

The Honorable J. Justin McGuire, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Tennie B. Martin
Counsel for Appellant

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding
Judge Peter B. Swann and Judge Lawrence F. Winthrop joined.

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K E S S L E R, Judge:

¶1 Jairo Adair Contreras (“Contreras”) appeals the superior court’s order revoking his probation in two separate cases and sentencing him to prison. Counsel for Contreras filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530 (App. 1999). Finding no arguable issues to raise, counsel requested that this Court search the record for fundamental error. Contreras was given the opportunity to, but did not file a supplemental *pro per* brief.

¶2 In an *Anders* appeal, this Court must review the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005). We will not reverse for fundamental error unless the defendant can show that the error prejudiced him. *Id.* at ¶ 20. For the reasons that follow, we affirm Contreras’ probation revocation and sentences.

FACTUAL AND PROCEDURAL HISTORY¹

¶3 Contreras committed attempted theft of means of transportation in 2008 in CR2009-00168. *See* Ariz. Rev. Stat. (“A.R.S.”) §§ 13-1814(A)(5) (2007), -1001 (2010).² His first probation began when he pled guilty to that offense, a class 4 felony, in 2009 with probation to run for three years, which was then extended to October 28, 2016 when the court reinstated him to probation for a probation violation. Contreras then committed burglary in the second degree, a class 3 felony, later in 2009. *See* A.R.S. § 13-1507 (2010). He pled guilty to that offense, resulting in a second probation for three years to begin April 2010 in CR2009-005164.³ That probationary period was ultimately extended to October 28, 2016 when the court reinstated him to probation for another violation.

¶4 Contreras signed a Uniform Conditions of Supervised Probation form that outlined the details of his probation terms. Term 6

¹ We construe the evidence in the light most favorable to sustaining the judgment of the superior court and resolve all reasonable inferences against the defendant. *State v. Greene*, 192 Ariz. 431, 436, ¶ 12 (1998).

² We cite the current version of applicable statutes unless revisions material to this decision have occurred since the events in question.

³ The first case, CR2009-00168, was transferred to Maricopa County jurisdiction as CR2010-007488 on June 15, 2010.

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required Contreras to report to the Adult Probation Department (“APD”) as directed and comply with written directives of the APD to enforce compliance with the conditions of his probation. Term 21 required Contreras to comply with the special conditions of his probation, which included Intensive Probation Supervision. Term 7 required Contreras to reside at an address approved by the APD and to receive prior approval before changing his address.

¶5 Intensive Probation Officer BR assumed supervision of Contreras’ probation cases in June 2014. She created an Intensive Probation Agreement requiring Contreras to meet with her every Thursday between 1:00 and 3:00 p.m. at her office. On September 30, 2014, an irregular Tuesday meeting, BR created a Behavior Agreement which was signed by Contreras, directing him to reside at New Journey, a sober living community, and report to that address by 5:00 p.m. that day.

¶6 After Contreras’ failure to report to New Journey on September 30, 2014, and his failure to report to BR’s office on the following Thursday, BR filed the fourth and most recent petition to revoke probation against him on October 9, 2014. At the probation violation hearing on March 3, 2015, the State presented evidence against Contreras on four terms of his probation. The court found three terms, terms 6, 21, and 7, proven by a preponderance of the evidence, revoked his probation and sentenced him to concurrent terms of 2.5 and 3.5 years respectively, to run concurrently, in the Department of Corrections.

DISCUSSION

¶7 A court may revoke a defendant’s probation if the State proves a violation of probation by a preponderance of the evidence. *Ariz. R. Crim. P. 27.8(b)(3)*; *State v. Salinas*, 23 Ariz. App. 232, 234 (1975). “We will uphold a trial court’s finding that a probationer has violated probation unless the finding is arbitrary or unsupported by any theory of evidence.” *State v. Thomas*, 196 Ariz. 312, 313, ¶ 3 (App. 1999).

I. There is sufficient evidence to support the revocation of Contreras’ probation.

¶8 To prove that Contreras violated terms 6 and 21, the State presented the Intensive Probation Agreement that required Contreras to meet with BR every Thursday. BR testified that Contreras signed the agreement and that Contreras last met with her on Tuesday, September 30, 2014, but failed to report to her office on the following Thursday, October 9, 2014.

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¶9 The testimony regarding terms 6 and 21 was uncontroverted. Contreras reported to BR according to his Intensive Probation Agreement until September 30, 2014, and then failed to report on and after October 9, 2014. Thus, the court properly found that the failure to report violated both term 6 and the specific agreement made under term 21.

¶10 To prove that Contreras violated term 7, the State presented the Behavior Agreement that required Contreras to reside at New Journey and to report there by 5:00 the evening of September 30, 2014. BR testified that she contacted the director at New Journey the following day on October 1, 2014, and he stated that Contreras did not come in.

¶11 The testimony regarding term 7 was also uncontroverted. At the time of signing the Behavior Agreement, Contreras did not express any issue with reporting by 5:00 that evening. Upon failing to report to New Journey according to the Behavior Agreement, Contreras did not contact BR about residing elsewhere. Thus, the court properly found that Contreras' failure to report to the agreed-upon address, and his failure to receive approval before residing at another address, violated term 7.

II. Contreras' sentences are within statutory guidelines.

¶12 Finding that the mitigating and aggravating factors balanced out, the court sentenced Contreras to the presumptive term in each of his cases, to be served concurrently. For CR2010-007488, a class 4 felony committed in August 2008, the court sentenced Contreras to 2.5 years. The sentence is within the designated range of 1.5 to 3 years under the 2008 version of A.R.S. § 13-702. For CR2009-005164, a class 3 felony committed in November 2009, the court sentenced Contreras to 3.5 years, which is the presumptive sentence under the current version of A.R.S. § 13-702, effective in 2009.

III. Contreras received more presentence credit than he was entitled to; however, the State did not appeal the excess.

¶13 In CR2010-007488, Contreras had been incarcerated seven times for probation violations since November 20, 2009, amounting to 220 days of presentence incarceration credit. In CR2009-005164, Contreras had been incarcerated nine times for probation violations since November 19, 2009, amounting to 234 days of presentence incarceration credit. The two credits increased by twenty days each to 240 and 254 days respectively by the time of Contreras' disposition and sentencing on March 3, 2015. The court stated these amounts during sentencing.

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¶14 The order of confinement and minute entry for CR2010-007488 are consistent with the court's pronouncement and allot 240 days of presentence credit. However, the order of confinement and minute entry for CR2009-005164 allot 354 days of credit, not 254 as stated by the court on March 3, 2015. Thus, Contreras received 100 days more presentence incarceration credit than he was entitled to; however, because the State failed to appeal the sentence, we will not review the excess credit. *See State v. Dawson*, 164 Ariz. 278, 282 (1990).

CONCLUSION

¶15 After careful review of the record, we find no meritorious grounds for reversal of Contreras' probation revocation or modification of the sentences imposed. The evidence supports the revocation, the sentences imposed were within the sentencing limits, and Contreras was represented at all stages of the proceedings below and was given the opportunity to address the court prior to sentencing. Accordingly, we affirm Contreras' probation revocation and sentences.

¶16 Upon the filing of this decision, counsel shall inform Contreras of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Contreras shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.



Ruth A. Willingham · Clerk of the Court
FILED : jt