

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

KEYSHON BROWN, *Appellant*.

No. 1 CA-CR 18-0878
1 CA-CR 18-0906
(Consolidated)

FILED 7-30-2019

Appeal from the Superior Court in Maricopa County
No. CR2015-128587-002
No. CR2016-115375-001
The Honorable John R. Doody, Judge *Pro Tempore*

AFFIRMED AS MODIFIED

COUNSEL

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

Maricopa County Public Defender's Office, Phoenix
By Mark E. Dwyer
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Paul J. McMurdie delivered the decision of the Court, in which Chief Judge Peter B. Swann and Judge Samuel A. Thumma joined.

M c M U R D I E, Judge:

¶1 Keyshon Brown appeals the revocation of his probation and the resulting sentences. Brown’s counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), certifying that, after a diligent search of the record, he found no arguable question of law that was not frivolous. Brown was allowed to file a supplemental brief but did not do so. Counsel asks this court to search the record for arguable issues. *See Penson v. Ohio*, 488 U.S. 75 (1988); *State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (App. 1999). After reviewing the record, we affirm the revocation of Brown’s probation and the resulting sentences as modified.

FACTS AND PROCEDURAL BACKGROUND

¶2 In September 2016, Brown pled guilty to one count of aggravated robbery, a class 3 felony, (the “2015 offense”) and one count of aggravated assault, a class 4 felony (the “2016 offense”). For each count, the court suspended the imposition of his sentences and placed Brown on probation for three years to begin upon his physical release from prison and to be served concurrently with each other. The charges stemmed from two separate indictments.

¶3 As relevant here, the written terms of Brown’s probation included that Brown would: (1) provide the probation department with access to his residence, live in a residence approved by the probation department, and receive approval from the probation department before changing his residence; (2) participate in and cooperate with any counseling or assistance program determined by the probation department; and (3) not possess or use illegal drugs or controlled substances and would submit to drug and alcohol testing.

¶4 In June 2017, two petitions to revoke Brown’s probation were filed, and Brown admitted to violating one condition of probation for each petition. For the 2015 offense, the court suspended the imposition of

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sentence and continued Brown on intensive probation for five years with a condition of probation that he serve 30 days in jail. For the 2016 offense, the court suspended the imposition of sentence and continued Brown on intensive probation for four years, running concurrently with Brown's probation on the 2015 offense.

¶5 In April 2018, the State again filed two petitions to revoke Brown's probation alleging Brown violated several conditions of probation. Brown denied the alleged probation violations, and the court scheduled a violation hearing. At the violation hearing, the State sought to prove Brown violated the three conditions of his probation described above and presented testimony from Brown's probation officer. At the close of the State's case, Brown moved for a judgment of acquittal. The court denied the motion. Brown did not present evidence, and the superior court found that the State proved Brown violated the three conditions of probation.

¶6 Brown waived his right to a separate disposition hearing and report, and the superior court directly proceeded to disposition. *See* Ariz. R. Crim. P. 27.8(d). For the 2015 offense, the court revoked Brown's probation and sentenced him to three years' imprisonment with 94 days' presentence incarceration credit. For the 2016 offense, the court revoked Brown's probation and sentenced him to two years' imprisonment, with 65 days' presentence incarceration credit, to be served concurrently with his sentence for the 2015 offense. Brown appealed¹ and the cases were consolidated.

DISCUSSION

¶7 We have read and considered counsel's brief and have reviewed the record for any arguable issues. *See Leon*, 104 Ariz. at 300. Aside from an error in the presentence incarceration credit awarded to Brown discussed below, we find none.

¶8 The State proved by a preponderance of the evidence that Brown violated at least one condition of his probation. *See* Ariz. R. Crim. P. 27.8(b)(3). As a condition of probation, Brown was required to submit to drug and alcohol testing. The petition to revoke Brown's probation alleged he did not submit to drug testing as ordered on several occasions, including four dates in January and February 2018. The State submitted Brown's drug

¹ The superior court granted Brown leave to file a delayed notice of appeal pursuant to Arizona Rule of Criminal Procedure 32.1(f).

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testing record, which showed Brown missed six required tests, including four in January and February 2018. Brown's probation officer also testified she reviewed the record with Brown and that he acknowledged he missed six drug tests. Therefore, sufficient evidence supports the court's finding that Brown violated the condition of probation requiring him to submit to drug and alcohol testing.

¶9 Brown was present and represented by counsel at all stages of the proceedings against him. The record reflects the superior court afforded Brown all of his constitutional and statutory rights, and the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The court held appropriate hearings, the evidence presented at the violation hearing and summarized above was sufficient to support the disposition, and Brown's sentences fall within the range prescribed by law. Brown is, however, entitled to three additional days of presentence incarceration credit for the 2015 offense, and one additional day of credit for the 2016 offense.

¶10 Brown was taken into custody on June 20, 2017, after the first petition to revoke probation was filed. The court entered its disposition order for that probation violation charge on July 12, 2017. As a condition of probation for the 2015 offense, Brown was required to serve 30 days in jail, to run from July 12, 2017 to August 11, 2017. Brown was not required to serve time in jail for the 2016 offense, and both reinstatements of probation were to be served concurrently. Thus, for this period, Brown is entitled to 53 days' presentence incarceration credit for the 2015 offense. He is entitled to 22 days' presentence incarceration credit for the 2016 offense.

¶11 Brown was subsequently taken back into custody on April 26, 2018, after the second set of petitions to revoke were filed. Brown remained in custody until the date of disposition, May 22, 2018. Brown is entitled to an additional 26 days' presentence incarceration credit for this period. A probation violation report also shows Brown was in custody for a probation violation in Mohave County from April 8, 2018 to April 25, 2018, and he is therefore also entitled to another 18 days' presentence incarceration credit. In sum, Brown is entitled to 97 days' presentence incarceration credit for

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the 2015 offense and 66 days' credit for the 2016 offense, and his sentences are modified accordingly.²

CONCLUSION

¶12 The revocation of Brown's probation is affirmed, and his sentence is modified to include 97 days' presentence incarceration credit for the 2015 offense and 66 days' credit for the 2016 offense. After the filing of this decision, defense counsel's obligations pertaining to Brown's representation in this appeal will end after informing Brown of the outcome of this appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984).



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² Brown is not entitled to presentence incarceration credit for time he spent in custody before he was placed on probation after he entered the plea agreement. The same day he was placed on probation initially, Brown was also sentenced to one year of imprisonment on an additional criminal charge, with 326 days' presentence incarceration credit. Because the court ordered Brown's probation to begin upon his physical release from prison, Brown is not entitled to presentence incarceration credit toward the 2015 or 2016 offenses. *See State v. Cuen*, 158 Ariz. 86, 88 (App. 1988) (when consecutive sentences are imposed, presentence incarceration credit only applies to one offense).