

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



DIVISION ONE  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, )  
 ) No. 1 CA-CR 08-0845  
 Appellee, )  
 ) DEPARTMENT D  
 v. )  
 ) MEMORANDUM DECISION  
 JOSE ALEJANDRO ACUNA )  
 ) (Not for Publication -  
 Appellant. ) Rule 111, Rules of the  
 ) Arizona Supreme Court)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2007-005055-001 DT

The Honorable Paul J. McMurdie, Judge

**CONVICTION AND SENTENCE AFFIRMED; REMANDED FOR  
RECALCULATION OF PRESENTENCE INCARCERATION CREDIT**

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Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals Section  
Attorney for Appellee

Maricopa County Public Defender's Office Phoenix  
By Thomas K. Baird, Deputy Public Defender  
Attorneys for Appellant

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G E M M I L L, Judge

¶1 Jose Acuna ("Acuna") appeals from his conviction and sentence for disorderly conduct. Acuna's counsel filed a brief

in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. See *Smith v. Robbins*, 528 U.S. 259 (2000). Acuna was afforded the opportunity to file a supplemental brief *in propria persona* but did not do so. For the following reasons, we affirm the conviction and sentence with the exception that we remand for a new calculation of the presentence incarceration credit due Acuna.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 “We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions.” *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶3 Early in the morning on March 11, 2007, an altercation occurred between Richard M. and Acuna. The specific facts regarding the altercation are disputed. However, it was revealed through testimony at trial that Richard M.’s girlfriend believed Acuna and his friends had recently stolen her sister’s car electronics. Richard M. took his jacket off, in preparation of a fight, and put down his gun, which his girlfriend later picked up. Acuna testified that he later took the gun from the girlfriend’s hand and fired the gun once into the air. More

gunshots were heard and Richard M. and Juan Q. were found to be wounded. Richard M.'s injuries were fatal; Juan Q. was in the hospital for many weeks and later died in a car accident in Mexico.

¶14 A police investigation led to Acuna's arrest on March 12, 2007. Acuna was charged with first degree murder and aggravated assault. On March 21, 2007, Acuna was indicted by a grand jury of second degree murder, a class one dangerous felony, and aggravated assault, a class three dangerous felony.

¶15 In March 2008, after an eleven-day jury trial, the court declared a mistrial because the jury could not reach a verdict. A retrial was held in July 2008, resulting in a jury verdict of not guilty as to second degree murder but guilty of disorderly conduct, a lesser included offense of aggravated assault. The jury also found the offense to be a dangerous offense. Acuna was sentenced to 2.25 year's imprisonment with a presentence incarceration credit of 54 days.

¶16 Acuna timely appealed and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033 (Supp. 2008).

#### **DISCUSSION**

¶17 Having considered defense counsel's brief and examined the record for reversible error, *see Leon*, 104 Ariz. at 300, 451

P.2d at 881, we find no reversible error regarding the conviction or the sentence, with one minor exception: we believe the record is incomplete regarding the calculation of the presentence incarceration credit. We therefore remand for clarification on the presentence incarceration credit prior to Acuna's first trial: specifically, the days of incarceration from the time of arrest to his release on bond in March 2007.<sup>1</sup>

¶8 The evidence presented supports the conviction. As far as the record reveals, Acuna was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure. Because we find no reversible error, we affirm the conviction.

¶9 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Acuna of

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<sup>1</sup> According to the available record on appeal, Acuna was arrested and taken into custody on either March 12, 2007 or March 14, 2007. The record also contains a receipt showing payment of bail on his behalf on March 22, 2007, but we cannot determine whether he was released from custody on March 22 or 23, 2007. Additionally, Acuna was again incarcerated prior to sentencing beginning from the date of the jury verdict, July 28, 2008. The court awarded him 54 days of presentence incarceration credit. He may be entitled to one or two more days of presentence incarceration credit, depending on whether he was initially taken into custody on March 12 or 14, 2007, and on whether he was released from custody on March 22 or 23, 2007. The trial court is requested on remand to recalculate the presentence incarceration credit.

the disposition of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. Acuna has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

**CONCLUSION**

¶10 We affirm the conviction and sentence, with the exception that we remand for clarification and further fact-finding, if necessary, regarding the presentence incarceration credit.

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JOHN C. GEMMILL, Judge

CONCURRING:

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PETER B. SWANN, Presiding Judge

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DIANE M. JOHNSEN, Judge