

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  
FILED: 05-27-2010  
PHILIP G. URRY, CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, )  
 ) No. 1 CA-CR 09-0367  
 Appellee, )  
 ) DEPARTMENT D  
 v. )  
 ) **MEMORANDUM DECISION**  
 DEXTON HENRY SANDERS, )  
 ) (Not for Publication -  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. CR2007-106622-001 DT

The Honorable James R. Morrow, Judge Pro Tem

**AFFIRMED**

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

Maricopa County Public Defender's Office Phoenix  
By Terry J. Adams, Deputy Public Defender  
Attorneys for Appellant

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G E M M I L L, Judge

¶1 Dexton Henry Sanders appeals from the court's finding of a probation violation and the related disposition. Sanders' 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). Sanders was afforded the opportunity to file a supplemental brief *in propria persona* but did not do so. For the following reasons, we affirm.

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

¶12 On February 8, 2007, Sanders was indicted on one count of aggravated assault, a class 6 felony and a domestic violence offense; one count of possession or use of marijuana, a class 6 felony; and one count of assault, a class 1 misdemeanor and a domestic violence offense. On April 25, 2007, Sanders entered into a plea agreement wherein he agreed to plead guilty to one count of aggravated assault, a class 6 undesignated felony and domestic violence offense. The court accepted the plea. On May 22, 2007, the court entered a guilty judgment against Sanders and suspended the imposition of sentence, placing Sanders on probation for a term of 18 months. The other charges against Sanders were dismissed.

¶13 Approximately 17 months later, on October 28, 2008, Sanders' probation officer, Joi Alecia, initiated a petition to the court, recommending Sanders' probation be extended another 18 months. Alecia recommended Sanders' probation be extended so

that Sanders could complete a mental health evaluation and a domestic violence counseling program. The evaluation and counseling program were both conditions of Sanders' probation. The petition stated that Sanders was also delinquent on probation fines and fees. Alecia stated in the petition that she would submit a petition to the court for an early termination of Sanders' probation once he completed the evaluation and counseling program. Both Sanders and Alecia signed the petition. On November 5, 2008, the court, without conducting a hearing, ordered Sander's probation be modified according to Alecia's recommendation. The petition and order were filed on November 26, 2008.

¶4 In February 2009, Sanders was assigned to a new probation officer, Glenn Thomas. In March 2009, Thomas signed a petition to revoke Sanders' probation, alleging that Sanders violated various terms of his probation. The court conducted a violation hearing on April 28, 2009. At the hearing, Thomas testified that a urine sample provided by Sanders on February 23, 2009, had tested positive for marijuana. As a result, the court found that Sanders violated the terms of his probation and the court extended Sanders' probation to three years, starting from May 22, 2007. The court excluded the time between the February 23, 2009 violation and the April 28, 2009 hearing, resulting in a probation expiration date of July 25, 2010.

¶15 Sanders timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).

#### DISCUSSION

¶16 Sanders' counsel advised this court that after a search of the record, he found no arguable grounds for reversal. Upon reviewing the record, we issued an order pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988), directing the parties to file supplemental briefs to address the following three issues relating to the November 2008 order: (1) could Sanders' term of probation be modified or enlarged without a hearing, consistent with *State v. Korzuch*, 186 Ariz. 190, 193-95, 920 P.2d 312, 315-17 (1996), and due process; (2) did Sanders validly waive, forfeit, or otherwise give up his right to a hearing by signing the petition or otherwise; and (3) are these issues appropriately before the court in this appeal and do the answers to these questions affect the outcome of this appeal. Because we conclude that this court does not have jurisdiction to consider any issue regarding the propriety of the November 2008 order, we need only address the third issue.

¶17 A defendant may appeal a final judgment of conviction or an order after judgment affecting his substantial rights. A.R.S. § 13-4033(A)(1), (3). Modification of the terms of probation affects the defendant's substantial rights and the

defendant, therefore, has a right of direct appeal. See *State v. Jimenez*, 188 Ariz. 342, 345, 935 P.2d 920, 923 (App. 1996) (denying defendant's motion to modify probation terms does not give defendant right of appeal, but order modifying probation does give defendant right of direct appeal). But a defendant must appeal within 20 days of the judgment or order modifying his probation. Ariz. R. Crim. P. 31.3. When sentencing is suspended, the time for filing an appeal is not extended. See *State v. Osborn*, 107 Ariz. 295, 295-96, 486 P.2d 777, 777-78 (1971). Filing a timely notice of appeal is "essential to the exercise of jurisdiction by this court" over the issue. *State v. Berry*, 133 Ariz. 264, 266, 650 P.2d 1246, 1248 (App. 1982) (citation omitted); see also *State v. Hughes*, 22 Ariz. App. 19, 21, 522 P.2d 780, 782 (1974) (noting defendant must appeal within appropriate time period, not at some later time when probation is revoked).

¶18 Here, by order dated and signed on November 5, 2008, the court modified Sanders' probation by extending the probation period an additional 18 months. The order was filed on November 26, 2008. Pursuant to § 13-4033(A) and Arizona Rule of Criminal Procedure 31.3(a), the deadline for filing of a direct appeal from this order has expired.

¶19 On May 14, 2009, Sanders filed a notice of appeal "from the finding of a probation violation and disposition

hearing entered in the Superior Court of Maricopa County on April 28, 2009." This appeal was timely as to the April 28, 2009 violation finding and resulting disposition but it does not confer upon this court the jurisdiction to address the November 2008 order.

¶10 Sanders argues that A.R.S. § 13-4034 allows for an appeal from an illegal sentence.<sup>1</sup> He submits that the "reinstatement of probation is illegal" because his probation should have expired by the time he violated his probation. Sanders, however, did not appeal from the November 2008 order that modified his probation and, as we previously discussed, this court does not have jurisdiction to address that order.

¶11 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 none. The sentence imposed falls within the range permitted by law, and the evidence presented supports the conviction. As far as the record reveals, Sanders 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.

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<sup>1</sup> Section 13-4034 is not a statute authorizing appeals and conferring jurisdiction on this court. We assume Sanders' was referring to A.R.S. § 13-4033(A)(4), which states that "[a]n appeal may be taken by the defendant . . . from . . . [a] sentence on the grounds that it is illegal or excessive."

¶12 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 Sanders of 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. Sanders 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**

¶13 For the foregoing reasons, Sanders' finding of a probation violation and disposition are affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
JON W. THOMPSON, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICK IRVINE, Judge