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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: 08/31/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0003
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JESUS O. ROJO,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. No. CR 2001-000135

The Honorable Frank Johnson, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Jesus O. Rojo appeals the superior court's revocation of his probation and imposition of a prison sentence for attempted sexual conduct with a minor, a class 3 felony pursuant to A.R.S. §§ 13-1001(C)(2) and 13-1405, and a dangerous crime against children in the second degree.

¶2 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Rojo has advised us that she has searched the record on appeal and finds no arguable question of law that is not frivolous. See *Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Rojo was given the opportunity to file a supplemental brief *in propria persona*, but did not do so. Counsel now asks this court to search the record for fundamental error. We have done so, and find none. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 In April 2001, Rojo pled guilty to one count of attempted child molestation and one count of attempted sexual conduct with a minor, both class 3 felonies and dangerous crimes against children in the second degree. On the attempted child molestation count, which is not at issue in this appeal, the superior court sentenced Rojo to a mitigated term of 7.5 years of imprisonment. On the attempted sexual conduct with a minor

count, the court suspended the imposition of sentence and placed Rojo on lifetime probation, consecutive to his imprisonment.

¶14 In June 2008, and again in July 2009, the court found that Rojo was in violation of his probation, and reinstated probation with additional conditions. The conditions of Rojo's probation included: "Participate and cooperate in any program of counseling or assistance as directed by the APD [Adult Probation Department] and/or court" ("Condition 10"), and "At the discretion of the APD, attend, actively participate, and remain in sex offender treatment" ("Condition 25.5").

¶15 In September 2009, Rojo's probation officer advised the court about issues with Rojo's participation in counseling. The court held a status conference, at which Rojo advised the court that he wished to terminate his probation. The court affirmed probation and explained that Rojo was required to complete counseling and treatment as ordered before termination would be considered.

¶16 In November 2009, Rojo's probation officer petitioned the court to revoke Rojo's probation based on violations of, *inter alia*, Conditions 10 and 25.5. A revocation arraignment was held and Rojo entered a denial. A witness violation hearing was then held.

¶17 At the violation hearing, Rojo's probation officer testified that Rojo had not attended counseling since his

probation was last reinstated in July 2009. According to the probation officer, Rojo had been discharged from counseling because "he would not admit to committing an offense." After the September 2009 status conference, the probation officer returned Rojo to counseling at Mountain Valley Counseling. But in late October, Mountain Valley once again discharged Rojo because he continued to deny that he had committed an offense. The probation officer testified that Rojo had attended every available treatment facility and "[n]o one will take him" because he will attend sessions but "won't participate."

¶18 Rojo cross-examined the probation officer, but declined to call witnesses or testify on his own behalf. At the conclusion of the hearing, the court found that the State had proved by a preponderance of the evidence that Rojo had failed to participate in treatment as required by Conditions 10 and 25.5. The court explained that "just having a warm body just sitting in a chair participating in treatment is different than actively participating," and noted that it was within the treatment providers' discretion to find that Rojo was not actively participating and to discharge him from their programs.

¶19 The matter proceeded to a disposition hearing, at which the court revoked Rojo's probation and ordered him

imprisoned for ten years, the presumptive term for the offense.¹
He was given credit for 198 days of presentence incarceration.

¶10 Rojo timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033.

DISCUSSION

¶11 The record reveals no fundamental error. The probation revocation proceedings complied with Ariz. R. Crim. P. 27, and Rojo was present and represented by counsel at all stages. The State presented sufficient evidence to support the court's finding that Rojo refused to actively participate in counseling, and thereby violated Conditions 10 and 25.5 of his probation. In view of the fact that Rojo consented to the terms of probation as part of a plea, we cannot conclude that the court's reasoning constituted fundamental error.

¶12 Rojo was given the opportunity to speak at the disposition hearing, and the court imposed a legal sentence and credited Rojo with the correct amount of presentence incarceration credit.

¹ The statutory sentencing range for a class 3 felony and dangerous crime against children in the second degree has remained unchanged since the relevant time -- for a defendant who (like Rojo) has no predicate felony convictions, the minimum term is 5 years, the presumptive term is 10 years, and the maximum term is 15 years. A.R.S. § 13-705(J) (2010) (previously A.R.S. § 13-604.01).

CONCLUSION

¶13 We have reviewed the record for fundamental error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm the superior court's finding of probation violations, and its revocation of probation and imposition of sentence. Defense counsel's obligations pertaining to this appeal have come to an end. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform her client of the status of this appeal and his future options. *Id.* Rojo has 30 days from the date of this decision to file a petition for review *in propria persona*. Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, he has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/

PETER B. SWANN, Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Presiding Judge

/s/

DONN KESSLER, Judge