

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 04/19/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

STATE OF ARIZONA,) 1 CA-CR 10-0393
)
 Appellee,) DEPARTMENT E
)
 v.) MEMORANDUM DECISION
) (Not for Publication -
 ROBIN RIVERA,) Rule 111, Rules of the
) Arizona Supreme Court)
 Appellant.)
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200900049

The Honorable Andrew W. Gould, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Yuma County Public Defender Yuma
By Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

I R V I N E, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969), following the revocation of Robin Rivera's probation. Counsel for Rivera asks this Court to search the record for fundamental error. Rivera was given an opportunity to file a supplemental brief in propria persona, but did not do so. By separate addendum, counsel has informed the Court of issues Rivera wishes the Court to consider. After reviewing the record, we affirm the revocation of Rivera's probation and the resulting sentence.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the trial court's judgment and resolve all reasonable inferences against Rivera. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998). In May 2009, Rivera pled guilty to attempted burglary in the second degree, a class four felony. The trial court suspended Rivera's sentence and placed him on intensive probation. As a condition of probation, Rivera was ordered to serve ninety days in jail. Rivera did not check in to serve his jail time and was not located at his residence. Based on the violation, the State petitioned to revoke Rivera's probation. The trial court issued a bench warrant, and Rivera was subsequently arrested. Once apprehended, Rivera tested positive for methamphetamines.

¶3 The trial court held a probation revocation hearing where it found by a preponderance of the evidence that Rivera

violated some conditions of his probation. The court sentenced Rivera to a presumptive 2.5 year sentence and gave him credit for 134 days of presentence incarceration.

DISCUSSION

¶4 We review Rivera's probation revocation for fundamental error. *See State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). The State must prove by a preponderance of the evidence that a defendant has violated his probation. *State v. Moore*, 125 Ariz. 305, 306, 609 P.2d 575, 576 (1980).

Imposition of presumptive sentence

¶5 Rivera, through counsel, argues "that he should have been sentenced to less than the presumptive term." He argues that a mitigated sentence is appropriate because: (1) he was working at Jack in the Box and at a factory; (2) he made a mistake and "used;" (3) this was his first probation violation; (4) he was only eighteen years old at the time of the revocation proceedings; (5) while in prison, he has obtained his GED; and (6) his trial attorney was deficient because she did not request a mitigation hearing after he was found in violation of his probation terms.

¶6 All of the reasons Rivera provides for an imposition of a mitigated sentence are factual matters to be considered by the trial court. Further, Rivera wrote a letter to the trial court prior to his probation revocation hearing, requesting the

trial court consider certain information prior to sentencing. Rivera noted his behavior was due in part to "dumb choices" and to "that drug." He stated he was young, worked at a factory and at Jack in the Box. Rivera presented the same information to the trial court as he does here. We will not reweigh the evidence to determine its sufficiency. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶7 The State presented sufficient evidence to support the court's finding that Rivera had violated three conditions of his probation when he (1) failed to reside at a residence approved by adult probation and/or obtain approval from adult probation prior to changing the residence; (2) failed to show up to serve his jail sentence; and (3) used methamphetamines. Evidence was presented at the probation revocation hearing that Rivera's drug screening tested positive for methamphetamines. Rivera's probation officer testified that Rivera did not check in for his jail sentence. When the probation officer called Rivera to ask about why he did not surrender for his jail time, Rivera said "he did not want to go back to jail." Additionally, there was testimony presented that Rivera's mother noted Rivera was "on the run" and she had not seen him in days.

¶8 Rivera claims his attorney was "deficient" because she did not request a mitigation hearing after he was found in violation of his probation. To the extent Rivera is asserting a

claim of ineffective assistance of counsel, it must be raised in Rule 32 proceedings. We will not address such claims on direct appeal regardless of their merit. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). We note that although Rivera's attorney did not request a mitigation hearing, she filed a disposition memorandum, requesting a super-mitigated sentence. The memorandum outlined Rivera's young age, employment prior to his probation violation, and the nature of the underlying crime - essentially the elements Rivera asks this Court to consider.

¶9 Counsel for Rivera has advised this Court that after a diligent search of the entire record, he has found no arguable question of law. The record reveals no fundamental error. The probation revocation proceedings complied with Arizona Rule of Criminal Procedure 27, and so far as the record reveals, Rivera was present and represented by counsel at all stages. The State presented sufficient evidence to support the court's finding that Rivera had violated three conditions of his probation. Because Rivera consented to the terms of probation as part of a plea, we cannot conclude that the court's reasoning constituted fundamental error. The court imposed a legal sentence and credited Rivera with the correct amount of presentence incarceration credit.

¶10 Upon the filing of this decision, defense counsel shall inform Rivera of the status of his appeal and of his

future 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, 684 P.2d 154, 156-57 (1984). Rivera shall have thirty days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review. On the Court's own motion, we extend the time for Rivera to file a pro per motion for reconsideration to thirty days from the date of this decision.

CONCLUSION

¶11 For the foregoing reasons, we affirm the revocation of Rivera's probation and the resulting sentence.

/s/

PATRICK IRVINE, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

MAURICE PORTLEY, Judge