NOTICE: THIS DESION 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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

DIVISION ONE
FILED: 03/01/11
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

STATE OF ARIZONA, Appellee, v. LARZ DANE YOUNGREN, Appellant.	)	1 CA-CR 10-0505 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. CR 2000-0396

The Honorable William T. Kiger, Judge

AFFIRMED AS MODIFIED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel, Criminal Appeals Section
and Michael J. Mitchell, Assistant Attorney General
Attorneys for Appellee

C. Kenneth Ray, II, P.C. — Prescott
by C. Kenneth Ray, II
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Larz Dane Youngren ("Defendant") appeals from an order revoking his probation and imposing sentence. He also

challenges the award of presentence incarceration credit. For reasons that follow, we affirm the order but modify it as to presentence incarceration credit.

BACKGROUND

¶2 In June 2000, Defendant was charged with numerous drug offenses and ultimately pled guilty to eight counts. In March 2002, with respect to six of the counts, the court sentenced him to concurrent prison terms of 5, 2.5, 2.5, 1.5, 1.5 and 1 years and awarded him 646 days of presentence incarceration credit on each term. On the remaining two counts for possession of dangerous drugs, the court suspended sentence and ordered that Defendant be placed on intensive probation for seven years upon his release from prison. Defendant verified that he had received a copy of the conditions of probation and that they had been explained to him.

¶3 Defendant was released from prison on September 22, 2004 and was promptly placed on intensive probation. By September 2005, he had been placed on standard supervised probation.

¶4 Christina Healy became his probation officer in September 2009, and on January 14, 2010, she filed a petition to revoke probation, alleging a violation of Condition 1 that Defendant obey all laws. Defendant had been arrested two days

prior and charged with possession and possession for sale of marijuana as well as possession of drug paraphernalia.

¶5 Defendant filed a notice of intent to assert entrapment as a defense to the petition to revoke and a motion in limine. After a hearing, the court concluded that entrapment could not be asserted as a defense in a probation revocation matter. Defendant sought a stay and special action relief from this court and in the Arizona Supreme Court without success.

¶6 At the revocation hearing, Detective McClain testified that he had executed a search warrant on a truck driven by Defendant on January 12, 2010. He said that he recognized Defendant and that he found thirty-six one-ounce baggies of a substance, later proved to be marijuana, with a weight of more than two pounds. After being given *Miranda* warnings, Defendant responded to a question about how long the drugs had been in the truck with, "Not long." McClain also testified that he had had three prior conversations with Defendant but said that he had not contacted his probation officer about Defendant's possible use as an informant.

¶7 Defense counsel offered rebuttal evidence of additional telephone contact between McClain and Defendant. McClain testified that he knew Defendant was on probation and that an officer wishing to use a probationer as an informant had to contact that person's probation officer. Defense counsel

then submitted a written offer of proof related to the entrapment defense. The court read the offer but found by a preponderance of the evidence that Defendant had committed a violation of probation and ordered him taken into custody on April 9, 2010.

¶8 At a predisposition hearing, the chief probation officer testified that it was against policy for probationers to act as confidential informants. Healy also testified that although Prescott Valley police had contacted Defendant in October 2009, Defendant had not in turn notified her of that contact. She added that a condition of probation required Defendant to speak to his probation officer within 72 hours of any law enforcement contact. Defense counsel argued that the court did not have the complete story about the purported violation and asked the court to reinstate Defendant on probation.

¶9 The court found that reinstatement was inappropriate and imposed concurrent five-year terms for the two drug offenses for which Defendant had been on probation and awarded him forty-four days of presentence incarceration credit. Defense counsel objected that because the court had suspended sentence on these two charges in March 2002 but had not simultaneously ordered that Defendant be released from custody on those charges, Defendant effectively had been in custody for those offenses all

the while he was in prison. Thus, Defendant should receive 1,404 days of credit for time served. The court rejected the argument, and Defendant timely appealed. 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

Entrapment Defense

¶10 Defendant first challenges the ruling precluding entrapment as a defense in a probation revocation proceeding. He argues that due process entitles him to "the opportunity to present a complete defense" and to confront and to cross-examine "any witness in support of such defense." Defendant does not dispute, however, that he had notice of the basis for the revocation request, that he was represented by counsel, and that he had an opportunity to confront the State's witnesses and to call his own witnesses.[1] Instead, he contends that he is entitled to assert an affirmative defense of entrapment.

¶11 Whether there was a due process violation presents an issue of law subject to de novo review. *State v. Booker*, 212 Ariz. 502, 504, ¶ 10, 135 P.3d 57, 59 (App. 2006). "The purpose of [a] violation hearing is to determine whether a probationer

[1]Arizona Rule of Criminal Procedure 27.6(a) authorizes the filing of a petition to revoke probation if reasonable cause exists to believe a probationer has violated the conditions of probation.

has in fact violated a probation condition." *State v. Vaughn*, 217 Ariz. 518, 522, ¶ 18, 176 P.3d 716, 720 (App. 2008). At a revocation hearing, "[e]ach party may present evidence and shall have the right to cross examine witnesses," the "court may receive any reliable evidence not legally privileged," and the "violation must be established by a preponderance of the evidence." Ariz. R.Crim. P. 27.8(b)(3). If the court finds a violation, it "shall make specific findings of the facts which establish the violation." Ariz. R.Crim. P. 27.8(b)(4).

¶12 Here, the proceedings complied with the above standards, but in addition, the court ruled that entrapment was not an available defense. By statute, entrapment is "an affirmative defense *to a criminal charge,*" A.R.S. § 13-206(A) (emphasis added), and must be shown "by clear and convincing evidence." A.R.S. § 13-206(B).[2] The State argues that a crime is defined as "a misdemeanor or a felony" in A.R.S. § 13-105(7) (2010) and that a probation violation hearing is not intended to resolve a criminal charge beyond a reasonable doubt but instead

[2]A.R.S. § 13-206(A) states: "It is an affirmative defense to a criminal charge that the person was entrapped. To claim entrapment, the person must admit . . . the substantial elements of the offense charged." Also, one who claims entrapment "has the burden of proving . . . by clear and convincing evidence" that law enforcement officers had the idea of committing the offense and "urged and induced" the defendant to commit the offense and that he "was not predisposed to commit the type of offense charged" before being induced to do so. A.R.S. § 13-206(B).

to determine whether probation is still an appropriate form of rehabilitation and deterrence. We agree.

¶13 At the revocation hearing, Defendant was not presenting a defense to the new, pending criminal charges. Thus, whether entrapment occurred and might be an affirmative defense to those later charges was not the issue. And, as we note below, Defendant later pled guilty to those charges and waived the entrapment defense in doing so.

¶14 Unlike a criminal trial or change of plea proceeding, the focus of the revocation proceeding is to allow the court to determine whether probation remained "an effective means of rehabilitation" in lieu of imprisonment for the *prior* convictions. Our supreme court has acknowledged that probation revocation matters are not the equivalent of criminal proceedings and thus do not implicate the full range of constitutional rights. For example, the court held that the exclusionary rule does not apply in a revocation proceeding which "is not to decide guilt or innocence but to determine, by a preponderance of all reliable evidence, whether a probationer has violated the terms and conditions of his probation . . . [and] whether continued probation is still an effective means of rehabilitation and in the best interest of society." *State v. Alfaro*, 127 Ariz. 578, 579, 623 P.2d 8, 9 (1980). The court cited *Morrisey v. Brewer*, 408 U.S. 471, 480 (1972), for the

proposition that revocation proceedings, unlike a trial, deprive the accused "of the conditional liberty properly dependent on the observance of special restrictions." *Id*.

¶15 Although Defendant cites cases from other states which may suggest that entrapment is a defense, we are not persuaded.[3] Defendant has not shown that other state statutes are identical to ours, and the cases are devoid of a rationale for allowing such a defense in the revocation setting.

¶16 Moreover, the State points out that Defendant's 2010 offenses were disposed of by a plea agreement and guilty plea in September 2010. By entering a guilty plea, Defendant waived all non-jurisdictional defects or defenses to those crimes, including a defense like entrapment. *See U.S. v. Ruiz*, 536 U.S. 622, 628 (2002) (by entering guilty plea, defendant forgoes various constitutional guarantees); *State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993) (valid guilty plea waives all non-jurisdictional defects). Accordingly, when Defendant chose not to assert an entrapment defense in the prosecution of the 2010 offenses and to plead guilty, he waived

[3] *U.S. v. Sutton*, 421 F.2d 1394, 1395 (5th Cir. 1970), summarily affirmed a revocation, noting that an illegal liquor sale had occurred, and adding without explanation that "it did not constitute entrapment." In *People v. Schultz*, 63 Cal.Rptr. 667, 668 (Cal. App. 1967), the probationer raised entrapment for the first time on appeal; the court found no entrapment as a matter of law but said that even if raised below, the trial court had found no entrapment. Neither case considered the type of analysis we adopt based on our statutory scheme.

any claim of entrapment. Therefore, he has not shown any denial of due process in the revocation proceeding, simply because he could not assert a defense he later abandoned. There was no reversible error.

Presentence Incarceration Credit

¶17 Defendant next argues that the superior court erred in failing to award presentence incarceration credit for the time he was imprisoned for the six charges on which he was sentenced in 2002. He asserts that § 13-901(A) (2010) requires that when the court suspends sentence, it must "without delay" place a defendant on probation but that in his case the court improperly delayed in placing him on probation until he had completed his six concurrent prison sentences. He contends that because the court failed to state at sentencing in March 2002 that Defendant was released from custody for these two offenses, he is entitled to 1,404 days of presentence credit.

¶18 Section 13-901(A) states that if one "convicted of an offense is eligible for probation, the court may suspend the imposition or execution of sentence and, if so, shall without delay place the person on intensive probation supervision pursuant to § 13-913 or supervised or unsupervised probation on such terms and conditions as the law requires and the court deems appropriate. . . ." In *State v. Ball*, 157 Ariz. 382, 385, 758 P.2d 653, 656 (App. 1988), we held that when a defendant is

first imprisoned on other charges and is ordered to later be placed on probation, "the words 'without delay' . . . must mean that the probation shall begin 'without delay' once the preceding sentence has been served and the defendant has been released from prison." *See also State v. Gandara*, 174 Ariz. 105, 107, 847 P.2d 606, 608 (App. 1992) (accord).

¶19 Furthermore, § 13-712(B) (2010) provides that "[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment *for such offense* shall be credited against the term of imprisonment otherwise provided for by this chapter."[4] (Emphasis added.) Defendant was not in custody due to his conviction for these two offenses until April 9, 2010, and he was not in custody for these two offenses while he was serving sentences imposed for the other six offenses. He is not entitled to 1,404 days of presentence credit.

¶20 The State concedes, however, that Defendant is entitled to forty-nine rather than forty-four days of such credit. Failure to grant all pre-sentence incarceration credit due constitutes fundamental error, which we can correct by modifying the sentence appropriately. A.R.S. § 13-4037(A)

[4]We cite to the current version of the applicable statute because no revisions material to this decision have since been made.

(2010); *State v. Ritch*, 160 Ariz. 495, 499, 774 P.2d 234, 238 (App. 1989).

CONCLUSION

¶21 We find no due process violation in the trial court's refusal to consider entrapment as a defense to probation revocation. We do, however, correct the sentencing minute entry to reflect that Defendant will receive forty-nine days of presentence incarceration credit.

/s/_____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/_____
DONN KESSLER, Presiding Judge

/s/_____
DIANE M. JOHNSEN, Judge