

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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 08/02/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

STATE OF ARIZONA,) No. 1 CA-CR 10-1003
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
BILL BURHAN HANES,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Mohave County

Cause No. CR2005-1084

The Honorable Steven F. Conn, Judge

AFFIRMED

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

Jill L. Evans, Mohave County Appellate Defender Kingman
Attorney for Appellant

S W A N N, Judge

¶1 Bill Burhan Hanes ("Defendant") timely appeals the trial court's order reinstating and extending his probation. Pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has

advised us that a thorough search of the record has revealed no arguable question of law, and requests that we review the record for fundamental error. See *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona* but did not do so.

FACTS AND PROCEDURAL HISTORY

¶2 In October 2006, Defendant pleaded guilty to a class 2 felony. The trial court suspended Defendant's sentence, placed him on probation for seven years, and ordered him to pay fees and assessments on an installment plan at \$60 per month.

¶3 On August 13, 2008, a petition to revoke probation alleged that Defendant stopped making his court-ordered payments in February 2008 and stopped reporting to his probation officer in May 2008. After a probation violation hearing, the court found both allegations proved by a preponderance of the evidence. At a December 2, 2008 disposition hearing, the court "focus[ed]" on Defendant's failure to report and acknowledged that his "failure to make payments is not why [he's] here now." The court revoked Defendant's probation and sentenced him to a presumptive five-year prison term on the class 2 felony. Defendant timely appealed and this court reversed the finding that Defendant failed to report, but remanded for a disposition

hearing on the allegation that he failed to pay the court-ordered fees.¹ *State v. Hanes*, 2010 WL 785848 (App. 2010).

¶4 At a December 2, 2010 disposition hearing, the trial court reviewed the evidence presented at the 2008 hearing and again found that Defendant violated probation by failing to pay the fees. The court, however, determined that Defendant "would not have been sentenced to prison" solely for that violation. It therefore reinstated Defendant's probation, extending it until February 2016 to compensate for "the time the petition to revoke has been pending." As a term of reinstatement, the court ordered Defendant to serve jail time but credited him for the days already served in ADOC custody. The court also affirmed all terms and conditions of probation previously imposed, and ordered Defendant to pay attorney's fees of \$100.

DISCUSSION

¶5 We have read and considered the brief submitted by counsel and have reviewed the entire record. *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was present at all critical phases

¹ The requirement to meet with his probation officer was not set out in writing, but payment of the installments was. See Ariz. R. Crim. P. 27.1 ("All conditions and regulations shall be in writing, and a copy of them given to the probationer.").

of the proceedings and represented by counsel. The record reflects no irregularities.

I. EXTENSION OF PROBATION

¶6 We find no fundamental error in the court's extension of Defendant's probation until February 2016.

¶7 The court may revoke probation for a defendant's failure to pay court-ordered fines and assessments. See A.R.S. §§ 13-808(B) (requiring the court to make payment of certain fines, assessments or surcharges a condition of probation), -810(D)(2) (allowing the court to revoke probation for defendant who "wilfully" fails to make court-ordered payments).

¶8 At the 2010 disposition hearing, the court found Defendant violated his terms of probation by failing to make the payments. Because Defendant's seven-year term of probation had not expired or been terminated, the court had authority to toll the running of Defendant's probation. See A.R.S. § 13-903 (describing various methods to calculate periods of probation). Here, the court tolled probation for the "two years and four months" it believed the petition to revoke was "pending" -- presumably the time between August 13, 2008, when the petition to revoke was filed, and December 2, 2010, when Defendant's probation was reinstated. See A.R.S. § 13-903(D) ("The running of the period of probation shall cease during the period from the filing of the petition to revoke probation to the

termination of revocation of probation proceedings"). In fact, the court should have tolled probation from almost six months earlier, when Defendant first failed to make court-ordered payments in February 2008. See A.R.S. § 13-903(B) ("If a court determines that the defendant violated a condition of the defendant's probation but reinstates probation, the period between the date of the violation and the date of restoration of probation is not computed as part of the period of probation."). Defendant, however, is not aggrieved by the court's error because his probation was extended for a shorter period than the statute prescribed. See *State v. Henderson*, 210 Ariz. 561, 568-69, ¶ 26, 115 P.3d 601, 608-09 (2005) (holding defendant has burden to show he was prejudiced by any error under fundamental error analysis). Additionally, we cannot correct this error because the state has not filed a cross-appeal. See *State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990).

II. REIMBURSEMENT OF LEGAL FEES

¶19 The trial court ordered Defendant to pay a portion of his legal fees but did not make specific findings of fact regarding his ability to do so. See Ariz. R. Crim. P. 6.7(d) (requiring a court to order a defendant to offset the costs of legal services if the court finds that a defendant has available financial resources to do so). But "the imposition of the fees without the findings" is not fundamental error because "failing

to make the required findings cannot fairly be characterized as one of those 'rare' circumstances that deprives the defendant of a right essential to his defense or otherwise renders it impossible for him to have had a fair trial." *State v. Moreno-Medrano*, 218 Ariz. 349, 353, ¶¶ 13-14, 185 P.3d 135, 139 (App. 2008).

CONCLUSION

¶10 We affirm Defendant's sentence. Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PATRICIA K. NORRIS, Judge