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. 31.34

DIVISION ONE
FILED: 12/15/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	No. 1 CA-CR 11-0032
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION**
SERGIO AMARO PEREZ, Appellant.	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-113981-002 DT

The Honorable Susanna C. Pineda, Judge

AFFIRMED AS MODIFIED

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

Bruce F. Peterson, Legal Advocate — Phoenix
By Consuelo M. Ohanesian, Deputy Legal Advocate
Attorneys for Appellant

T I M M E R, Presiding Judge

¶1 Sergio Perez appeals from his convictions and resulting sentences after a jury found him guilty on eight counts of kidnapping, three counts of aggravated assault, and one count of theft of means of transportation. Perez's counsel filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000), *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), advising this court that after a search of the entire record on appeal, she found no arguable grounds for reversal. This court granted Perez an opportunity to file a supplemental brief in propria persona, but he failed to do so.

¶2 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 whether the trial court's denial of Perez's motion to change counsel without additional factual inquiry constituted error that deprived Perez of his Sixth Amendment right to counsel. *See State v. Torres*, 208 Ariz. 340, 343, ¶ 9, 93 P.3d 1056, 1059 (2004). Both parties complied with this order.

¶3 For the following reasons, we affirm Perez's convictions but modify his sentences on counts one and five through nine to reflect 686 days' presentence incarceration credit.

DISCUSSION

I. Motion to change counsel

¶4 The Sixth Amendment guarantees a criminal defendant the assistance of counsel. U.S. Const. amend. VI; *see also* Ariz. Const. art. II, § 24; Ariz. Rev. Stat. ("A.R.S. § 13-114(2) (2010)[1]; Ariz. R. Crim. P. 6.1. Although an indigent defendant is entitled to competent counsel, that defendant is not entitled to "counsel of choice, or to a meaningful relationship with his or her attorney." *Torres*, 208 Ariz. at 342, ¶ 6, 93 P.3d at 1058 (quoting *State v. Moody*, 192 Ariz 505, 507, ¶ 11, 968 P.2d 578, 580 (1998)).

¶5 A defendant's Sixth Amendment right to counsel is violated when there is "a complete breakdown in communication or an irreconcilable conflict between a defendant and his appointed counsel." *Torres*, 208 Ariz. at 342, ¶ 6, 93 P.3d at 1058. Accordingly, a trial court has a duty to inquire into the basis of the defendant's request to substitute counsel, but "the nature of the inquiry will depend upon the nature of the defendant's request." *Id.* at 343, ¶ 8, 93 P.3d at 1059. The court is only required to conduct an evidentiary hearing on a motion to change counsel if the defendant raises a colorable claim that an irreconcilable conflict exists. *See id.* at ¶ 9.

[1] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

A colorable claim exists when the defendant's allegations "go beyond personality conflicts or disagreements with counsel over . . . strategy" and "allege facts sufficient to support a belief that an irreconcilable conflict exists warranting the appointment of new counsel in order to avoid the clear prospect of an unfair trial." *State v. Cromwell*, 211 Ariz. 181, 187, ¶ 30, 119 P.3d 448, 454 (2005).

¶6 When a conflict is irreconcilable, a court must consider other factors in deciding whether to appoint new counsel. *State v. Henry*, 189 Ariz. 542, 546-47, 944 P.2d 57, 61-62 (1997). In that case, the court must also consider:

> . . . whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.

State v. LaGrand, 152 Ariz. 483, 486-87, 733 P.2d 1066, 1069-70 (1987). We review a trial court's decision to deny a request for new counsel for an abuse of discretion. *Cromwell*, 211 Ariz. at 186, ¶ 27, 119 P.3d at 453.

¶7 On October 1, 2009, Perez submitted a pro per "Motion for Ineffective Assistant [sic] of Counsel," asking the court to appoint new counsel. The motion bore a stamp reflecting delivery to inmate legal services on October 2, but the motion was not filed until November 4. Perez attached an affidavit to

the motion avowing that his counsel, Gregory J. Navazo, (1) had not "responded to his repeated requests for information" about the sufficiency, admissibility, and nature of the State's evidence; (2) had not sufficiently explained matters to Perez to permit him to make informed decisions regarding his case; (3) had not adequately prepared a defense after eight months; and (4) had refused to investigate or handle an "erroneous" immigration hold that had been placed on Perez.

¶8 On October 5, Perez filed a single-page pro per motion to change counsel on a pre-printed form that did not include specific or factual allegations concerning his attorney's representation.

¶9 On October 13, the trial court held a status conference with seven defendants, including Perez. After setting the date for the next status conference and addressing other pretrial issues, the trial judge turned to Perez's motion to change counsel:

> THE COURT: . . . Number 2, I have a motion to change counsel. Why do you need to change counsel, sir?
>
> THE DEFENDANT: I don't agree with the fact this [sic] he hasn't come to visit me.
>
> THE COURT: Well, that's not a sufficient reason to change your lawyer.
>
> THE DEFENDANT: I don't have – he's never told me anything about my case. He's only come to see me one or two times.

> THE COURT: Okay. Based upon the record, the Court will deny the pro per motion to change counsel.

Thereafter, Navazo informed the court that although he disagreed with Perez's characterization of his conduct, Perez had filed a complaint against him with the state bar. The court countered that Navazo may file a motion to withdraw, but the mere fact that a bar complaint had been filed is insufficient to sustain a motion to change counsel. The court subsequently entered an order on October 16 denying Perez's motion.

¶10 Nothing in the record indicates the court considered this motion for ineffective assistance of counsel separately from the motion to change counsel. When a trial court does not explicitly rule on a motion, we consider the motion denied upon entry of final judgment. *State v. Hill*, 174 Ariz. 313, 323, 848 P.2d 1375, 1385 (1993).

¶11 Perez did not allege a colorable claim of irreconcilable conflict with his counsel in either motion, and therefore the trial court did not have a duty to conduct further factual inquiry. Taking Perez's two motions together, as well as his verbal response to the court's inquiry at the status conference, Perez made only three specific and factual allegations regarding Navazo's representation: (1) Navazo had only met with Perez "one or two times," (2) Navazo had not

provided Perez with grand jury transcripts or discovery documents upon request, and (3) Navazo did not attempt to investigate an immigration hold that had been placed on Perez. The other allegations (e.g., failure to explain the nature and admissibility of evidence; failure to properly investigate and prepare a defense etc.) are not sufficiently specific or factually based to mandate further inquiry.

¶12 Although Perez's allegations may demonstrate that a conflict existed, they do not amount to a colorable claim of irreconcilable conflict such that the court erred by not conducting an evidentiary hearing on the motion. Cases in which irreconcilable conflict have been found have included those in which the defendant and attorney were "'almost at blows' and were 'antagonistic towards each other.'" *Moody*, 192 Ariz. at 508, ¶ 16, 968 P.2d at 581. Perez, in contrast, claims simply that Navazo was not attentive enough. Such a claim is not one describing irreconcilable conflict. *See State v. Dann*, 220 Ariz. 351, 360, ¶ 22, 207 P.3d 604, 613 (2009) (finding that a "perceived failure to provide prompt, diligent assistance of counsel" was not tantamount to irreconcilable conflict); *see also State v. Djef*, 191 Ariz. 583, 591-92, ¶ 24, 959 P.2d 1274, 1282-83 (1998) (stating that allegations of "lack of communication" and "dissatisfaction with counsel" alone do not warrant a hearing to determine counsel's competence).

¶13 When we consider Perez's allegations, taken together with the remaining *LaGrand* factors, we cannot conclude the trial court abused its discretion in denying Perez's motions. The record demonstrates that Navazo was competent and attentive to Perez's case. Prior to the court's denial of Perez's motion, Navazo had filed a notice of defenses, discovery requests, a motion to extend the Rule 12.9 deadline, and a motion to preclude the statements of co-defendants. The record also demonstrates that Navazo remained attentive to Perez's case even after the motion to change counsel. He subsequently filed a request to remove transcripts of the grand jury proceeding, a motion to disqualify the Maricopa County Attorney's Office, a request for a hearing on lack of adequate medical treatment for Perez in prison, and a motion in limine to exclude evidence. The trial court, while denying Perez's motion at the October 13 status conference, stated that its decision was "based upon the record." The record, both prior to and after the status conference, reflects that Navazo diligently represented Perez, and no indication existed that Navazo and Perez had experienced a complete communication breakdown or irreconcilable conflict. Accordingly, we find the trial court did not abuse its discretion by neglecting to make further factual inquiry into the allegations or in denying the motion.

II. Presentence incarceration credit

¶14 In reviewing the record, we find that the trial court failed to grant sufficient presentence incarceration credit to Perez. Section 13-712(B), A.R.S., (2010), provides that "[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment . . . shall be credited against the term of imprisonment . . . ." Custody commences "when a defendant is booked into a detention facility," but does not include the date of imposition of sentence. *State v. Carnegie*, 174 Ariz. 452, 453-54, 850 P.2d 690, 691-92 (App. 1993); *State v. Hamilton*, 153 Ariz. 244, 245-46, 735 P.2d 854, 855-56 (App. 1987).

¶15 The trial court granted Perez 685 days' presentence incarceration credit for the sentences imposed for convictions on counts one and five through nine, but we concluded Perez was entitled to 686 days' presentence incarceration credit. Perez was arrested on February 24, 2009 and was sentenced on January 11, 2011, which is exactly 686 days of incarceration, not including the sentencing date. The trial court committed fundamental error by crediting him with only 685 days' presentence incarceration credit. *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989) ("The trial court's failure to grant appellant full credit for presentence incarceration clearly constituted fundamental error.").

Pursuant to A.R.S. § 13-4037 (2010), we modify Perez's sentences imposed on convictions for counts one and five through nine to reflect 686 days' presentence incarceration credit.

CONCLUSION

¶16 After the filing of this decision, counsel's obligations pertaining to Perez's representation in this appeal have ended. Counsel need do no more than inform Perez 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). Perez shall have thirty days from the date of this decision to proceed, if he desires, with an in propria persona motion for reconsideration or petition for review.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
Patrick Irvine, Judge

/s/
Daniel A. Barker, Judge