FILED BY CLERK
FEB 13 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. CARLOS TAPIA VILLAREAL, Appellant.	)	2 CA-CR 2012-0289 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200800663

Honorable John F. Kelliher, Jr., Judge

AFFIRMED AS MODIFIED

Hamilton Law Office
By Lynn T. Hamilton
Mesa
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Pursuant to a plea agreement, appellant Carlos Villareal was convicted of burglary of a non-residential structure (an automobile), a class four felony, and placed on three years' probation, commencing on February 12, 2010. Following a violation hearing, the trial court found Villareal had violated conditions of probation, revoked probation, and sentenced him to the presumptive prison term of 2.5 years. Villareal

appealed and appointed counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Villareal has filed a supplemental brief.

¶2 Although counsel asserts she has reviewed the entire record and "has found no arguable issues on appeal," she states that in correspondence to her, Villareal requested she challenge the 177-day presentence incarceration credit the trial court gave him when it sentenced him to prison. According to counsel, Villareal maintains "he should have received credit for time while he was in federal custody in 2012 since the federal drug case was the reason for the violation of probation." In his supplemental brief, Villareal makes the same argument, insisting he was entitled to credit on his sentence in this case for time spent in federal custody.

¶3 Villareal was arrested on January 5, 2012, and subsequently was charged with and convicted of a federal drug offense, after border patrol agents found marijuana strapped to his leg as he was leaving Mexico and entering the United States at the Arizona border. It was his possession of marijuana that was the basis for the trial court's finding that he had violated Uniform Condition of Probation Number 7, which prohibited him from possessing or using an illegal drug, the third allegation in the petition to revoke probation. Additionally, the court found Villareal had failed to report to his probation officer on or before January 5, 2012, the date of his arrest on the federal offense, a violation of Condition Number 3, the second allegation in the revocation petition.

¶4 The trial court did not err by not crediting Villareal's sentence in this case with time he apparently spent in custody pursuant to the federal offense after his arrest on

January 5, 2012. Given the record before us, which includes the presentence report and presentencing memoranda prepared both before he was placed on probation in 2010 and before the probation violation sentencing hearing, it appears Villareal's incarceration credit was based on the following: 149 days from his September 4, 2008 arrest for the instant offense and his release on his own recognizance on January 30, 2009; two days, February 12 and 13, 2009, when he apparently presented himself to law enforcement officers in response to a new indictment and outstanding warrant, and then was released on his own recognizance; and twenty-six days between May 17 and June 11, 2012, purportedly the time between his arrest pursuant to a warrant issued after the petition to revoke probation was filed and his sentencing. Villareal apparently believes he is entitled to incarceration credit toward his probation violation sentence, for time he served in connection with federal charges that arose out of his possession of marijuana as he entered the United States on January 5, 2012. We disagree.

¶5 A defendant is entitled to credit for presentence incarceration for any time served "pursuant to an offense until the prisoner is sentenced to imprisonment for such offense." A.R.S. § 13-712(B)[1]; *see also State v. Bridgeforth*, 156 Ariz. 58, 59, 750 P.2d 1, 2 (App. 1986) (defendant entitled to presentence incarceration credit "only . . . for time actually spent in custody pursuant to the offense," not for time spent on unrelated matter), *aff'd as modified*, 156 Ariz. 60, 750 P.2d 3 (1988); *State v. San Miguel*, 132 Ariz. 57, 60–

[1]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see id.*, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

61, 643 P.2d 1027, 1030–31 (App. 1982) (same). Nothing in the record before us establishes that any of the time he served on the federal offense was also pursuant to the instant offense. However, in reviewing the record for fundamental error, as counsel has requested, we have determined Villareal is entitled to an additional two days of presentence incarceration credit. *State v. Ritch*, 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989) (award of incorrect incarceration credit fundamental error).

¶6 After the state filed the petition to revoke probation, the trial court issued a warrant for Villareal's arrest, which was served on him on May 15, 2012, apparently while he was in federal custody. The predisposition memorandum filed by the probation department recommended Villareal be given 177 days' credit based on 151 days served in 2008 and 2009, and the twenty-six days from May 17 through June 11, 2012, the date he was sentenced in connection with the revocation proceeding. But as we stated, Villareal was arrested on May 15, 2012, in connection with the revocation proceeding, not May 17. Consequently, he was entitled to an additional two days of presentence incarceration credit.

¶7 Villareal also contends in his supplemental brief that trial counsel advised him, "in private . . . to not request a mitigation hearing," suggesting counsel had been ineffective in this regard and that there was evidence in mitigation that he could have presented, particularly evidence related to his character. He argues "it is plausible he would have received less than the presumptive" prison term had such evidence been presented. But we do not consider claims of ineffective assistance of counsel on direct appeal. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002). Such claims must be

raised in a petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. *Id.* We note, moreover, that counsel urged the court to sentence Villareal to the minimum period of incarceration, arguing Villareal had taken responsibility for the instant offense "by pleading guilty and being placed on probation" and that he seems to have a "drug problem that got him into trouble," referring to the offense that gave rise to the federal charges. In any event, Villareal has not established any basis for granting relief and disturbing the presumptive prison term the court imposed.

¶8 We have reviewed the record for fundamental error as counsel has requested, and other than the sentencing error, have found none. We therefore affirm the trial court's order revoking Villareal's probation and the judgment of sentence, as modified to reflect Villareal is granted 179 days' credit for presentence incarceration, not 177 days.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge