IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MARCO ERNESTO ACOSTA-GARCIA,
Appellant.

No. 2 CA-CR 2012-0480
Filed December 2, 2013

Appeal from the Superior Court in Pima County
No. CR20094518001
The Honorable Paul E. Tang, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Lori J. Lefferts, Pima County Public Defender
By Frank P. Leto, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Chief Judge Howard and Presiding Judge Vásquez concurred.

M I L L E R, Judge:

¶1 Following a jury trial, appellant Marco Acosta-Garcia was convicted of robbery, and the trial court (J. Acuña) imposed a "slightly aggravated," five-year prison term. This court affirmed the conviction, but vacated the sentence, remanding for resentencing because the court had wrongfully considered Acosta-Garcia's lack of remorse as an aggravating factor. *State v. Acosta-Garcia*, No. 2 CA-CR 2010-0342 (memorandum decision filed July 12, 2011).

¶2 On remand for resentencing, the original sentencing judge (J. Acuña) had retired and a new judge (J. Tang) considered aggravating and mitigating circumstances and imposed the same five-year term of imprisonment. In so doing, Judge Tang stated,

> I think I have to balance those factors and try to figure out what Judge Acuña would have done under the circumstances. Even if he considered the factors that you didn't have remorse improperly and if he didn't include that, I would think he would have imposed a five-year term anyway. So I'm going to go ahead and reimpose the five-year term originally imposed by Judge Acuña.

Acosta-Garcia did not object.

¶3 Counsel has filed a brief citing *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating he has reviewed the record and "is unable to find a

meritorious issue for appeal." Counsel has, however, noted as an arguable issue that by his comments above, Judge Tang "arguably failed to properly exercise his sentencing discretion." Counsel has also asked us to search the record for error. Acosta-Garcia has not filed a supplemental brief.

¶4 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and considered the arguable issue identified by counsel. As to that issue, we agree with Acosta-Garcia's counsel's concession that, based on the trial court's overall statements at sentencing, it would have imposed the same term without the arguably improper consideration. Accordingly, we do not remand. *See State v. Ojeda*, 159 Ariz. 560, 562, 769 P.2d 1006, 1008 (1989).

¶5 We have found only one reversible error. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (*Anders* requires court to search record for fundamental error). In its sentencing minute entry, the trial court affirmed "the previously ordered Criminal Restitution Order" (CRO), which had encompassed all "fines, fees, assessments and/or restitution." But this court has determined that, based on A.R.S. § 13-805(C), "the imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). Therefore, this portion of the sentencing minute entry is not authorized by statute. Accordingly, we vacate the CRO, but otherwise affirm Acosta-Garcia's sentence.