

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

FILED BY CLERK

AUG 30 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2013-0024
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
FREDDIE TORRES,)	the Supreme Court
)	
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201100123

Honorable Dwight P. Callahan, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Kathryn A. Damstra

Tucson
Attorneys for Appellee

Harriette P. Levitt

Tucson
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 Freddie Torres appeals from the prison term the trial court imposed after revoking his probation. He argues that because he was not informed during his change of plea that he could face prison should his probation be revoked, he is entitled to “specific

performance” of the state’s “stipulat[ion]” in the plea agreement that he “would receive probation and no jail time.” He additionally asserts his sentence must be vacated because the trial court imposed an aggravated sentence based on factors not found by a jury. We affirm.

¶2 In 2011, Torres pled guilty to theft and possession of marijuana. The trial court suspended the imposition of sentence and placed Torres on a three-year probation term. In April 2012, after admitting a probation violation, Torres was reinstated on probation with additional terms. In September 2012, the state filed a second petition to revoke Torres’s probation and, after a contested revocation hearing, the court revoked Torres’s probation and sentenced him to an aggravated, two-year prison term for theft and to time served for possession of marijuana.

¶3 On appeal, Torres claims that, during his plea colloquy, he was not “personally advised” of the potential sentences he could face if his probation were revoked or “what could happen if he were to subsequently violate his probation.” Relying primarily on *Santobello v. New York*, 404 U.S. 257 (1971), and *State v. Romero*, 145 Ariz. 485, 702 P.2d 714 (App. 1985), he thus asserts he is entitled to “specific performance” of the state’s purported promise that he would not face prison time.

¶4 Torres’s reliance on *Santobello* and *Romero* is misplaced. Those cases address the state’s failure to honor promises regarding sentencing recommendations. *See Santobello*, 404 U.S. at 262-63; *Romero*, 145 Ariz. at 487-88, 702 P.2d at 716-17. But Torres has not identified any promise made by the state that it failed to fulfill. The state agreed he would be placed on probation upon pleading guilty, which is precisely what

occurred. The state did not promise, expressly or implicitly, that Torres would not face prison time if he violated the conditions of that probation. Indeed, Torres's signed plea agreement unambiguously states that his probation could be terminated if he violated the probation conditions and that, as a result, he could be sentenced to the prison terms described in the plea agreement. And the agreement clearly sets forth Torres's potential prison terms.

¶5 Torres next argues that the trial court's imposition of an aggravated sentence violated his rights under the Sixth Amendment to the United States Constitution because the court imposed an aggravated sentence based on its own findings instead of findings made by a jury. *See Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); *see also Blakely v. Washington*, 542 U.S. 296, 303 (2004) (statutory maximum for *Apprendi* purposes is maximum sentence judge may impose solely on basis of facts reflected in jury verdict or admitted by defendant). But, although Torres claims there was no valid waiver of his right to have a jury determine aggravating factors, he ignores the provision in his plea agreement, which he initialed, expressly waiving that right. *See State v. Brown*, 212 Ariz. 225, ¶ 7, 129 P.3d 947, 953 (2006) ("[N]othing prevents a defendant from waiving his *Apprendi* rights' and . . . the State may condition a defendant's guilty plea on his willingness to waive his right to a jury trial both on elements of the crime charged and on aggravating factors."), *quoting Blakely*, 542 U.S. at 310. Torres has cited no authority, and we find none, suggesting the court was required

to personally apprise him of that specific right during the plea colloquy. And he stated during his plea colloquy that he had read his plea agreement and understood its terms. Thus, we find no error in the court's imposition of an aggravated sentence.

¶6 For the reasons stated, the trial court's revocation of probation and the sentences imposed are affirmed.

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

CONCURRING:

/s/ Michael Miller
MICHAEL MILLER, Judge

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