IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee*,

*v.*

DANNY RAY MORRIS,
*Appellant*.

No. 2 CA-CR 2014-0393
Filed June 25, 2015

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Appeal from the Superior Court in Cochise County
No. CR201400112
The Honorable James L. Conlogue, Judge

**AFFIRMED AS MODIFIED**

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COUNSEL

Daniel J. DeRienzo, Prescott Valley
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

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M I L L E R, Presiding Judge:

**¶1** Pursuant to a plea agreement, Danny Morris was convicted of possessing a deadly weapon while being a prohibited possessor. The trial court suspended the imposition of sentence and placed Morris on a four-year term of probation. Thereafter, the state filed a petition to revoke his probation, and after a contested revocation hearing, the trial court concluded Morris had violated the terms of his probation by knowingly associating with someone with a criminal record, specifically his girlfriend who was convicted of a misdemeanor drug offense. The court revoked probation and sentenced Morris to a presumptive, 2.5-year term of imprisonment.

**¶2** Counsel has filed a brief in compliance with *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 has found no "error or arguable questions of law" to raise on appeal. Counsel has asked us to search the record for fundamental error.

**¶3** In a pro se supplemental brief, however, Morris argues it does not "seem fair" that his probation was revoked based on contact with his girlfriend, solely based on her misdemeanor conviction. We construe this argument as a challenge to the trial court's determination that he had violated the conditions of his probation. In reviewing such a ruling, we view the facts in the light most favorable to sustaining the revocation. *See State v. Tatlow*, 231 Ariz. 34, ¶ 15, 290 P.3d 228, 233-34 (App. 2012).

**¶4** One of the conditions of Morris's probation was that he "obtain written approval . . . prior to associating with anyone I know

who has a criminal record . . . [and] not knowingly associate with any person engaged in criminal behaviors." Morris does not dispute that his girlfriend was convicted of a misdemeanor for drug paraphernalia possession. Rather, he apparently argues that a misdemeanor is not a crime or does not indicate involvement in criminal activity. This is incorrect. *See* A.R.S. § 13-105(7) ("'Crime' means a misdemeanor or a felony."). The trial court did not abuse its discretion in concluding Morris had violated the term of his probation. *See* A.R.S. § 13-901(C) (court has discretion to revoke probation).

**¶5** Morris also contends his probation officer took insufficient action to find him a place to live or, alternatively, should have permitted him to live in his motor home. But Morris cites no authority to support the proposition that a probation officer has an obligation to secure appropriate housing for a probationer. *See* A.R.S. § 12-253 (setting forth duties of probation officers). And to the extent his argument can be construed as a challenge to the trial court's order that he be incarcerated rather than returned to probation, we reject it.

**¶6** Except in limited circumstances, "the revocation of probation has always been deemed to lie within the sound discretion of the trial court." *State v. Sanchez*, 19 Ariz. App. 253, 254, 506 P.2d 644, 645 (1973); *see also* A.R.S. §§ 13-901(C); 13-917(B). In this case, the trial court made clear that in the absence of an approved residence, "the disposition would be revocation of probation." Although Morris proposed to move in with his daughter or wife in Pima County, Pima County probation was unwilling to supervise him. The court later stated it "would be willing to reinstate . . . Morris [on probation], if he is accepted into the Salvation Army program." But because Morris incurred additional charges that were pending against him in another cause, and based on his criminal history, the program would not accept him. Because he had no approved residence and in light of his subsequent offense, the court revoked probation and ordered incarceration. We cannot say the court abused its discretion in doing so.

**¶7** Pursuant to our obligation under *Anders,* we have searched the remainder of the record for fundamental, reversible error and have found one such error. At sentencing, the trial court ordered fines, fees, and surcharges reduced to a criminal restitution order (CRO). The imposition of a CRO before the expiration of Morris's sentence "'constitute[d] 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, the CRO imposed at sentencing is vacated; Morris's conviction and sentence are otherwise affirmed.