

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JESUS MANUEL GAMEZ,
Appellant.

No. 2 CA-CR 2017-0284
Filed April 18, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20170578001
The Honorable Richard S. Fields, Judge

AFFIRMED AS MODIFIED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Diane Leigh Hunt, Assistant Attorney General, and
Jairo Holguin, a student certified pursuant to
Rule 38(d), Ariz. R. Sup. Ct., Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Abigail Jensen, Assistant Public Defender, Tucson
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Brearcliffe concurred.

STARING, Presiding Judge:

¶1 On appeal, Jesus Gamez accurately asserts he did not receive full credit for his presentence incarceration. For the reasons that follow, therefore, we affirm his conviction and sentence as modified.

Factual and Procedural Background

¶2 The parties agree to the following facts. On January 26, 2017, Gamez was arrested and booked for attempted arson of a structure. The trial court released Gamez to pretrial services on February 13. Gamez later pleaded guilty to attempted arson of a property having a value of more than \$100. On May 18, the court suspended the imposition of sentence and placed Gamez on a three-year term of probation. The same day, Gamez violated the conditions of his probation and was again taken into custody. He contested the alleged probation violations and, after an evidentiary hearing, the court found him in violation of his probation. On July 11, the court revoked probation and imposed a sentence of 1.5 years' imprisonment with forty-three days of presentence incarceration credit.

¶3 Gamez appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(4). *See State v. Regenold*, 226 Ariz. 378, ¶¶ 1, 8 (2011) (defendant may pursue appeal of sentence despite guilty plea where sentence resulted from contested probation violation).

Discussion

¶4 On appeal, Gamez argues, and the state agrees, that the trial court erroneously calculated the full amount of his presentence incarceration credit. Gamez did not object below, however. Accordingly, we review only for fundamental, prejudicial error.¹ *State v. Henderson*,

¹In *State v. Vermuele*, 226 Ariz. 399, ¶¶ 6, 14 (App. 2011), we concluded that “[b]ecause a trial court’s pronouncement of sentence is procedurally unique in its finality under our rules of criminal procedure, and because a defendant has no appropriate opportunity to preserve any objection to

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210 Ariz. 561, ¶¶ 19-20 (2005). The imposition of an illegal sentence is fundamental error and will be reversed despite a lack of objection below. *State v. Cox*, 201 Ariz. 464, ¶ 13 (App. 2002). A sentence is illegal if it does not conform with the mandatory sentencing statutes. *Id.*

¶5 Pursuant to A.R.S. § 13-712(B), a defendant is entitled to presentence incarceration credit for “[a]ll time actually spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment for such offense.” In calculating presentence incarceration credit, a court must include “the day on which [the defendant] was booked into a detention facility, regardless of the time of day the booking occurred.” *State v. Carnegie*, 174 Ariz. 452, 454 (App. 1993). Presentence incarceration credit does not include the date of sentencing itself. *State v. Hamilton*, 153 Ariz. 244, 245 (App. 1987).

¶6 Gamez was incarcerated between January 26 and February 13, 2017 (nineteen days), and again between May 18 and July 10, 2017 (fifty-four days) before being sentenced on July 11. Accordingly, Gamez spent a total of seventy-three days in presentence incarceration. Pursuant to A.R.S. § 13-4037(A), we modify the trial court’s sentence to include presentence incarceration credit of seventy-three days instead of the forty-three days originally ordered. *See Carnegie*, 174 Ariz. at 455.

Disposition

¶7 For the foregoing reasons, we affirm Gamez’s conviction and sentence as modified.

errors arising during the court’s imposition of sentence,” the failure to object to “errors that did not become apparent until the . . . court pronounced sentence” did not result in waiver. Here, however, after the trial court miscalculated the amount of presentence incarceration credit, but before the imposition of sentence was complete, defense counsel provided the erroneous forty-three-day figure, which the court adopted. *Vermuele* is inapplicable.