

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

JESSICA NUNEZ,  
*Appellant.*

No. 2 CA-CR 2018-0180  
Filed June 3, 2019

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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NOT FOR PUBLICATION  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).*

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Appeal from the Superior Court in Graham County  
No. CR201300461  
The Honorable Michael D. Peterson, Judge

**AFFIRMED**

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COUNSEL

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Joseph T. Maziarz, Chief Counsel  
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**MEMORANDUM DECISION**

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

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BREARCLIFFE, Judge:

¶1 Jessica Nunez appeals the trial court's order revoking her probation and the sentence imposed following a contested probation violation hearing. We affirm.

**Issues**

¶2 Nunez contends that the trial court erred in revoking her probation by not applying principles of contract formation and interpretation to her October 16, 2017 probation violation plea agreement. The state contends (1) this court lacks direct appellate jurisdiction over any challenge to the validity of the plea agreement or the sentence entered pursuant to it; (2) if appellate jurisdiction exists, Nunez's sole remedy is voiding of the plea agreement; (3) Nunez failed to preserve her appellate arguments below and has not argued fundamental error; and finally, (4) even if fundamental error had been argued, it does not exist. The issues are whether this court has appellate jurisdiction and, if so, whether Nunez has preserved and effectively raised any claims on appeal as to which we may grant relief.

**Factual and Procedural Background**

¶3 On November 13, 2013, Nunez was indicted on one felony count of forgery and one misdemeanor count of attempted theft. On February 18, 2014, she entered into a plea agreement in which she agreed to plead guilty to forgery, and the state agreed to dismiss the misdemeanor charge. Under the agreement, she faced a potential prison sentence ranging from one to 3.75 years, but with a stipulated term of supervised probation in lieu of a prison sentence.

¶4 Nunez pleaded guilty and the trial court accordingly found her guilty of the forgery charge. At sentencing, Nunez was placed on three years' probation "under the supervision of the Adult Probation Department of this Court, in accordance with the formal Judgment and Order suspending sentence and imposing terms of probation signed by the

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Court.” The court then issued, and Nunez signed, a Uniform Conditions of Supervised Probation form setting forth the conditions of her probation.

¶5 Over the next three and a half years, the state filed five successive petitions to revoke Nunez’s probation, denominated respectively as Petitions “A,” “B,” “C,” “D,” and “E.” As to each of Petitions A through D, Nunez entered into written probation violation plea agreements pursuant to which she admitted, and was correspondingly found guilty of, probation violations. Each disposition following her admissions as to Petitions A, B, and C resulted in the trial court continuing Nunez on probation. Following each disposition on Petitions A and C, the court issued, and Nunez signed, a new Uniform Conditions of Supervised Probation form. In each of these forms, as with the one issued after her original plea, Nunez was ordered, under Condition 11, to “actively participate and cooperate in any program of counseling or assistance as determined by [Adult Probation Department], or as required by law, given assessment results and/or my behavior.” Condition 12 required that Nunez “not possess or use illegal drugs or controlled substances and . . . submit to drug and alcohol testing as directed by the [Adult Probation Department].” By signing each document, Nunez acknowledged that “by not abiding by the conditions of probation” that probation could be “revoked and the Court may sentence [her] in accordance with the law.”

¶6 On October 9, 2017, the state filed Petition D, in which it alleged that Nunez had violated Condition 12 on three separate occasions. Following the filing of Petition D, Nunez and the state entered into a probation violation plea agreement dated October 16, 2017. In that agreement, Nunez agreed “to admit to allegations of violation of probation as alleged in the Petition to Revoke Probation ‘D,’ dated October 9, 2017.” The plea agreement further stated:

- A. There are no agreements as to prison or probation, other than the following: The Defendant shall agree to waive time and delay sentencing until after she has enrolled in an inpatient drug treatment program lasting no fewer than four (4) months.
- B. If the Defendant successfully completes the drug treatment program on her first attempt, it is agreed that the Defendant shall be placed on supervised probation.

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- C. If the Defendant fails to complete the inpatient drug treatment program, is expelled, asked to leave, voluntarily leaves or is unsuccessful for any reason on his (sic) first attempt at rehab, it is agreed that the Defendant shall be sentenced to the maximum term of 3.5 years in the Arizona Department of Corrections.

Pursuant to that agreement, Nunez admitted to violating probation as alleged in Petition D, the plea was accepted, and disposition was set for November 2013.

¶7 Between Nunez's admission hearing and the disposition hearing on Petition D, Nunez was expelled from a residential drug treatment program she entered in accordance with the October 16, 2017 probation violation plea agreement. On February 16, 2018, the state filed its final petition to revoke probation, Petition E. The petition noted that "[d]isposition on Petition to Revoke 'D' was deferred pending the defendant's completion of residential treatment." It then specifically alleged that Nunez

has violated the conditions and regulations of probation as follows:

CONDITION #11: I will actively participate and cooperate in any program of counseling or assistance as determined by the Adult Probation Department.

VIOLATION: On or about February 15, 2018, [Nunez] was expelled from the Lifewell Behavioral Wellness residential program for failing to comply with program rules.

At her arraignment, the trial court entered a denial on her behalf "as to the allegations in Petition to Revoke Probation 'E.'" A probation violation hearing was set for May 10, 2018.

¶8 In her testimony at the May 10 hearing, Nunez stated that she was expelled from the drug rehabilitation program because she refused to report other patients' illegal drug use. Contrarily, the state presented evidence that Nunez was terminated from the program because of her own use of illegal drugs while at the program. After the close of testimony, Nunez's sole argument to the court was, in referring to the October 16, 2017

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agreement, if the trial court found “terms of the agreement . . . inappropriate . . . the Court can modify those terms.” Nunez claimed that the plea agreement language as to the need to successfully complete the program was inappropriate because she was asked to leave the program in “retaliation” and that it was not her choice to leave.

¶9 The trial court found that Nunez had violated probation as alleged in Petition E. It then set disposition for June 11, 2018. At the disposition hearing, the court adjudged Nunez “guilty of violating probation as alleged in Petition to Revoke Probation ‘E,’ filed on February 16, 2018, on the original conviction of: Count I: Forgery.” It further found that her probation was “unsuccessfully terminated.” After finding two aggravating factors, the court sentenced Nunez to 3.5 years’ imprisonment. This appeal followed and, for the reasons explained more fully below, we have jurisdiction. A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4033(A)(1).

**Analysis**

**Jurisdiction**

¶10 The state argues that this court lacks direct appellate jurisdiction over Nunez’s challenges to the validity of the October 16, 2017 probation violation plea agreement, and that her remedy was to file a petition for post-conviction relief under Rule 32, Ariz. R. Crim. P. Nunez, in her reply brief, makes a general argument that we have jurisdiction over matters of contractual interpretation, but does not address the state’s specific arguments. This court is “a court of limited jurisdiction and has only jurisdiction specifically given to it by statute.” *State v. Eby*, 226 Ariz. 179, ¶ 3 (App. 2011) (quoting *Campbell v. Arnold*, 121 Ariz. 370, 371 (1979)). Whether jurisdiction is challenged or not, we must always ensure we have jurisdiction over the appeal. *See State v. Kalauli*, 243 Ariz. 521, ¶ 4 (App. 2018).

¶11 “The Arizona Constitution guarantees defendants in criminal prosecutions ‘the right to appeal in all cases.’” *Hoffman v. Chandler*, 231 Ariz. 362, ¶ 5 (2013) (quoting Ariz. Const. art. II, § 24). Generally, we have “[a]ppellate jurisdiction in all actions and proceedings originating in or permitted by law to be appealed from the superior court, except criminal actions involving crimes for which a sentence of death has actually been imposed.” A.R.S. § 12-120.21(A)(1). However, a defendant in a noncapital case is not permitted to “appeal from a judgment or sentence that is entered pursuant to a plea agreement or an admission to a probation violation.” A.R.S. § 13-4033(B).

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¶12 A proceeding to revoke a defendant's probation is initiated by the filing of a petition to revoke probation. Ariz. R. Crim. P. 27.6. A defendant is thereafter arraigned on the charged violation, at which time he may admit the violation or deny it. Ariz. R. Crim. P. 27.8(a). If he does not admit the violation, a violation hearing is thereafter held at which the state bears the burden of proving the violation by a preponderance of the evidence. Ariz. R. Crim. P. 27.8(b). If the trial court finds that the defendant violated a condition of probation, whether after an admission or a violation hearing, a disposition hearing is set at which the court may revoke, modify, or continue probation. Ariz. R. Crim. P. 27.8(c). If probation is revoked, the defendant is sentenced in accordance with the plea agreement as to the original conviction. *Id.*; see *State v. Herrera*, 121 Ariz. 12, 15 (1978) (punishment imposed after revocation of probation is not for violating probation conditions but for original charge).

¶13 When a defendant admits a probation violation and is sentenced, as stated above, he may not appeal, but must challenge the finding of a violation and sentence by Rule 32 petition. *State v. Regenold*, 226 Ariz. 378, ¶¶ 5-6 (2011); see also § 13-4033(B) ("In noncapital cases a defendant may not appeal from a judgment or sentence that is entered pursuant to . . . an admission to a probation violation."). However, when a defendant contests the allegation and is found to have violated probation after a violation hearing, he retains the right to appeal the finding of the violation and sentence. *Regenold*, 226 Ariz. 378, ¶¶ 7, 8, 10. In such circumstances, the defendant is not sentenced "pursuant to [the] plea agreement" for the purposes of § 13-4033. *Id.* ¶ 8 (quoting § 13-4033(B)). Although the sentence is *in accordance* with the original plea agreement, and is punishment *for* the original conviction the defendant pleaded to, the "punishment imposed after a probation revocation hearing is a consequence that would not exist but for the defendant's violation of probation." *Id.* Therefore, as our supreme court concluded, Rule 32.1 does not control and the defendant may "combine the finding of a violation and the sentence imposed following a finding of a probation violation in one appeal." *Id.* ¶¶ 10, 11.

¶14 Here, Nunez denied the probation violation alleged in Petition E, and the matter proceeded to a violation hearing. After the hearing, she was found guilty of the probation violation, her probation was revoked, and she was sentenced in accordance with the 2014 plea agreement as to her forgery conviction. Because Nunez did not admit, but rather contested, the violation alleged in Petition E and was found guilty of the violation and sentenced, she maintained her right to appeal. See

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*Regenold*, 226 Ariz. 368, ¶ 1. Consequently, we have jurisdiction over this appeal.

**Failure to Preserve**

¶15 Notwithstanding our having appellate jurisdiction, Nunez has failed to preserve her arguments on appeal. Each of Nunez's arguments are that the trial court failed to apply well-recognized principles of contract interpretation to its enforcement of the October 16, 2017 probation violation plea agreement. But, as the state correctly argues, because she did not raise these arguments in the trial court she did not preserve them, and, because she has not argued that fundamental error occurred, we decline to further address her claims. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005) (failure to object forfeits appellate review except for fundamental error); *see also State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (failure to argue the alleged error was fundamental waives the argument).

**Disposition**

¶16 We affirm the revocation of Nunez's probation and sentence imposed.