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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 06/19/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

STATE OF ARIZONA,) 1 CA-CR 11-0381
)
)
) DEPARTMENT B
)
) Appellee,)
)
)
) v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)
)
) DEAN HENRY BEGODY,)
)
) Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-008424-001DT

The Honorable Carolyn K. Passamonte, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Defendant-Appellant Dean Henry Begody ("Begody") was tried and convicted of two counts of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs, a class 4 felony, and sentenced to two concurrent terms of ten years in prison. Defense counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Begody had the opportunity to file a supplemental brief *in propria persona* but did not do so. We have jurisdiction under Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 13-4033(A)(1) (2010).¹

¶2 After a thorough review of the record, we find that the court fundamentally erred when it failed to provide a plea-type colloquy before Begody stipulated to prior felony convictions. The Sixth Amendment to the United States Constitution and Arizona Rule of Criminal Procedure 17.6 require a colloquy to ensure a defendant's admission to prior convictions is knowing and voluntary. Nevertheless, because we find that the court's omission did not affect the outcome of Begody's case, we affirm his conviction and sentence.

¹ We cite to the most recent version of the applicable statute where there are no relevant substantive changes.

FACTUAL AND PROCEDURAL HISTORY

¶3 On the evening of August 30, 2007, Begody, driving a white SUV and appearing lifeless, drifted through a busy intersection against a red light. Although it was dark and he had his headlights off, cross traffic managed to maneuver or stop short to avoid him and no one was hurt. A good Samaritan, fearing a medical emergency, pulled in front of Begody's vehicle to force a minor collision, bringing it to a stop. The police officer who arrived on the scene discovered Begody passed-out behind the wheel, drooling and smelling of alcohol. The Phoenix Police Department measured his blood alcohol concentration ("BAC") at .381, nearly five times the legal limit of .08. A.R.S. § 28-1381(A)(2) (Supp. 2011).

¶4 The State charged Begody with two counts of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs, a violation of A.R.S. § 28-1383(A)(1) (2011). While out on bail, Begody absconded and was tried in absentia pursuant to Arizona Rule of Criminal Procedure 9.1. The jury unanimously convicted him on both counts. Approximately a year later Begody was picked up on a warrant and sentencing procedures commenced.

¶5 The superior court ordered and received a pre-sentence report. The pre-sentence report contained a reference to an attached criminal history report, which is absent from the

record on appeal. The "commentary" section of the pre-sentence report states that Begody was convicted of seven prior DUI offenses and lists the years each offense was committed, but provides no other details about the crimes.

¶6 The State sought to enhance Begody's sentence under the sentencing provision for repetitive offenders. Under the applicable statute, Begody would face a mandatory eight to twelve years in prison if the State could prove two prior felony convictions beyond a reasonable doubt. A.R.S. § 13-604(C) (Eff. June 13, 2007).² The prosecutor arrived at the sentencing hearing prepared to prove three historical prior felonies with witness testimony, minute entries, and an Arizona Department of Corrections ("ADOC") document. However, at the beginning of the hearing, defense counsel offered to stipulate to the felony priors, and thus, the State never called its witnesses or requested admission of the minute entries.³ Still, despite the stipulation offer, the State asked the court to admit the ADOC document into evidence and the court accepted it as an exhibit. Pursuant to the defense stipulation offer, the State read key aspects of the document into the record, including the named

² The applicable sentencing statutes have been significantly reorganized since the time of the offense.

³ These minute entries were not part of the record on appeal and there is no evidence suggesting the judge received them.

offenses, cause numbers, and the dates of offense and conviction. Without conducting the colloquy Rule 17.6 requires, the court then asked Begody if he heard all the information that the prosecutor had read, whether it was correct, and whether the felony convictions belonged to him. Begody affirmed that the information was accurate and that the convictions were his.

¶7 Consequently, the court found "that the State has proven and defense has stipulated to the three historical prior felony convictions." The court used two of the historical prior convictions to apply the enhanced sentencing range for a class 4 repetitive offense, and applied the third felony conviction as an additional aggravating factor to determine the proper sentence within the statutory range. A.R.S. § 13-604(C); 13-702(C)(24) (2007). The court also found four prior misdemeanor DUI convictions as aggravators. These misdemeanors were neither stipulated by the defense nor listed in the ADOC document. The court also deemed Begody's time as a fugitive to be an aggravating factor. The court weighed these aggravators against mitigating factors, including his substance abuse problem, the non-violent nature of his crimes, and his thirteen years without a felony offense, and found that the mitigating factors cancelled out the aggravating factors. Thus, the court sentenced him to ten years, the presumptive term for a non-dangerous class 4 felon with two historical prior convictions.

DISCUSSION

¶8 In an *Anders* appeal, this Court must review the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). However, to constitute reversible error, the error must have prejudiced the defendant. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607. After careful review of the record, we find no errors warranting a reversal of Begody's conviction. He had a fair trial in accordance with the Arizona Rules of Criminal Procedure and the evidence supports the verdict. Additionally, although we do find fundamental error in the sentencing proceedings, for reasons that follow, we affirm the sentence.

I. Prior Felonies Used to Enhance Sentence

¶9 "When a defendant's sentence is enhanced by a prior conviction, the existence of the conviction must be found by the court." *State v. Morales*, 215 Ariz. 59, 61, ¶ 6, 157 P.3d 479, 481 (2007). This normally requires a hearing in which the State "offer[s] in evidence a certified copy of the conviction . . .

and establish[es] the defendant as the person to whom the document refers." *Id.* (quoting *State v. Lee*, 114 Ariz. 101, 105, 559 P.2d 657, 661 (1976)). However, if the defendant admits to the prior conviction, a hearing is rendered unnecessary. *Id.* at 61, ¶ 7, 157 P.3d at 481.

¶10 When a defendant admits or stipulates to a prior conviction that can be used for sentence enhancement, the defendant waives certain constitutional rights, and thus, such admissions "may not be accepted unless the defendant understands the consequences of the admission." *Wright v. Craven*, 461 F.2d 1109, 1109 (9th Cir. 1972). To ensure such admissions and stipulations are knowing and voluntary, Rules 17.6 and 17.2 require the court to advise the defendant of his or her right to a hearing and the effects of prior convictions on sentencing. Ariz. R. Crim. P. 17.2, 17.6; *Morales*, 215 Ariz. at 61, ¶ 6, 157 P.3d at 481. Failure to provide this Rule 17 colloquy deprives the defendant of due process and constitutes fundamental error. *Id.* at 61, ¶¶ 8, 10, 157 P.3d at 481. If the defendant can also demonstrate prejudice, such error would require remand for an evidentiary hearing at which the State would have the burden to prove the priors. However, if evidence in the record conclusively proves the prior convictions, remand is unnecessary. *Id.* at 62, ¶ 13, 157 P.3d at 482.

¶11 In *Morales*, the trial court accepted defense counsel's

stipulation to prior felonies without administering the Rule 17 colloquy. *Id.* at 61, ¶ 10, 157 P.3d at 481. The Arizona Supreme Court did not reach the issue of prejudice because copies of the defendant's conviction records were admitted at a pre-trial hearing and the defendant failed to challenge their authenticity. *Id.* Thus, the court held "there would be no point in remanding for a hearing merely to again admit the conviction records." *Id.* at 62, ¶ 13, 157 P.3d at 482.

¶12 Here, in failing to administer the Rule 17 colloquy, the superior court fundamentally erred. Yet as in *Morales*, we need not remand because there is sufficient evidence in the record for a court to have found the appellant's prior felony convictions beyond a reasonable doubt. *Id.* Here, the State admitted into evidence a notarized copy of an automated summary report from the ADOC, which purports to reflect "the true conviction and history of [Begody's] term of incarceration" and lists the three felonies. The document also contains Begody's photo and fingerprints from the ADOC database. The felony convictions are further corroborated by the comments in the pre-sentence report. The ADOC document appears equivalent to the standard of evidence on record in *Morales*, where the record contained unchallenged "copies" of the convictions. *Id.* Moreover, taken together, the trial court could reasonably conclude that the documents establish Begody's convictions

beyond a reasonable doubt. Finally, the pre-sentence report had an attached criminal history report. Although this report is absent from the record on appeal, it is the appellant's burden to properly prepare the record, and therefore, we presume missing documents support the decision of the court below. *State v. Brown*, 188 Ariz. 358, 359, 936 P.2d 181, 182 (App. 1997); *State v. Rivera*, 168 Ariz. 102, 103, 811 P.2d 354, 355 (App. 1990). As such, even without the admission of the minute entries or the witness testimony, there is sufficient evidence to conclusively prove the three prior felonies, rendering Begody's defective stipulation superfluous to the court's finding. Accordingly, we find the court properly imposed the enhanced sentencing range. A.R.S. § 13-604(C).

II. Additional Aggravating Factors

¶13 Once the court determines the appropriate sentencing range, the sentencing statutes require the court to impose the presumptive sentence within that range unless there are additional aggravating or mitigating factors. A.R.S. § 13-702(B); *State v. Martinez*, 210 Ariz. 578, 583, 585, ¶¶ 16, 26, 115 P.3d 618, 623, 625 (2005). Unlike factors used to enhance the *potential* sentence, additional facts used to determine the specific sentence *within* a sentencing range are proven by a preponderance of the evidence. *Martinez*, 210 Ariz. at 585, ¶ 26, 115 P.3d at 625.

¶14 Begody never stipulated to the prior misdemeanors, but he also never challenged their validity. He never objected to the pre-sentencing report; nor did he object when the prosecutor mentioned those priors during argument at sentencing. We assume the evidence of such misdemeanors is in the missing criminal history records. See *Brown*, 188 Ariz. at 359, 936 P.2d at 182; *Rivera*, 168 Ariz. at 103, 811 P.2d at 355. Similarly, the record leaves no doubt as to Begody's fugitive status. Thus, it was within the court's sound discretion to find the additional aggravators and consider them in sentencing.

CONCLUSION

¶15 For the foregoing reasons, we affirm Begody's convictions and sentence. Upon the filing of this decision, counsel shall inform Begody of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

Begody shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
DIANE M. JOHNSEN, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge