

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



DIVISION ONE
FILED: 07/31/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 11-0443
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
MARK STEPHEN DESANTI,) Arizona Supreme Court)
)
Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-136679-001 DT

The Honorable John R. Hannah, Jr., Judge

AFFIRMED

Thomas C. Horne, 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 Terry J. Reid, Deputy Public Defender
Attorneys for Appellant

P O R T L E Y, Judge

¶1 This is an appeal under *Anders v. California*, 386 U.S.
738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878
(1969). Counsel for Defendant Mark Stephen Desanti has advised

us that, after searching the entire record, she has been unable to discover any arguable questions of law, and has filed a brief requesting us to conduct an *Anders* review of the record. Defendant was given the opportunity to file a supplemental brief but has not done so.

FACTS¹

¶2 Defendant and another man were seen parking a green Ford truck in front of Progressive Industries ("Progressive"). An eyewitness watched the two men as they used a yellow or orange apparatus to pull a large piece of metal through the fence and put it in the truck.

¶3 The police arrived shortly, and the eyewitness accompanied them to try to find the truck. The truck was located next to another building and the eyewitness saw and identified Defendant and his accomplice. The police informed the suspects of their *Miranda*² rights, and interviewed them separately. Defendant acknowledged that he had taken a metal rack from Progressive.

¶4 The jury convicted Defendant of burglary in the third degree, a class 4 felony. The jury further found an aggravating circumstance – the presence of an accomplice. The court

¹We view the facts "in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997) (citation omitted).

²*Miranda v. Arizona*, 384 U.S. 436 (1966).

subsequently found that Defendant had two prior felony convictions, which constituted an additional aggravating factor. The court, however, found the nature of the crime – a petty theft – to be a mitigating circumstance. Defendant was then mistakenly sentenced as a category one repetitive offender, see Ariz. Rev. Stat. (“A.R.S.”) section 13-703(A)³ (West 2012),⁴ ordered to serve 1.5 years in prison, and given credit for 118 days of presentence incarceration.

¶15 The court subsequently acknowledged that Defendant actually had been convicted as a category two repetitive offender, see A.R.S. § 13-703(B)(1),⁵ and vacated the prior sentence. At the resentencing, Defendant was sentenced to a mitigated term of 2.25 years in prison, with 139 days of presentence incarceration credit. We have jurisdiction over his appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1) (West 2012).

³ “A person shall be sentenced as a category one repetitive offender if the person is convicted of two felony offenses that were not committed on the same occasion” A.R.S. § 13-703(A).

⁴ Section 13-703 was amended in March 2012. See 2012 Ariz. Sess. Laws, ch. 96, § 2 (2d Reg. Sess.). The enacted revisions, however, do not affect the statutory provisions applicable in this case.

⁵ “A person shall be sentenced as a category two repetitive offender if the person . . . [i]s convicted of three or more felony offenses that were not committed on the same occasion” A.R.S. § 13-703(B)(1).

DISCUSSION

¶6 Defendant has asked his counsel to raise two issues on appeal: (1) the sufficiency of the evidence, and (2) the legality of the sentence. We have examined the issues and find no reversible error.

I. Sufficiency of the Evidence

¶7 Defendant argues that the verdict was not supported by the evidence. Evidence is sufficient if it would have enabled a rational trier of fact to find guilt beyond a reasonable doubt. *State v. Rienhardt*, 190 Ariz. 579, 588, 951 P.2d 454, 463 (1997) (citation omitted). Viewing "the evidence in the light most favorable to sustaining the verdict, *id.* at 588-89, 951 P.2d at 463-64 (citation omitted), we will affirm "unless there is no substantial evidence to support the jury's verdict." *State v. Scott*, 187 Ariz. 474, 477, 930 P.2d 551, 554 (App. 1996) (citation omitted).

¶8 Defendant was convicted of burglary in the third degree. The trial court properly instructed the jury that "[t]he crime of burglary in the third degree requires proof that the defendant entered or remained unlawfully in or on a fenced commercial yard, and that he did so with the intent to commit [a] theft therein." At trial, the eyewitness testified that he witnessed the theft and identified Defendant as one of the men who had taken the metal rack from Progressive's fenced-in

property. In addition, the police officers identified Defendant as one of the suspects they detained shortly after the burglary, and testified that Defendant had admitted to taking the metal rack. Consequently, there was sufficient evidence to sustain the conviction.

II. Legality of the Sentence

¶9 Defendant also argues that his sentence is illegal because the court did not make the necessary finding of two prior felony convictions as required in A.R.S. § 13-703(B)(1). We disagree.

¶10 Generally, "sentencing is the responsibility of the trial judge and, absent an abuse of discretion, the sentence will not be altered." *State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996) (quoting *State v. Mincey*, 141 Ariz. 425, 445, 687 P.2d 1180, 1200 (1984)). We will therefore sustain a sentence unless it is based on an error of law, *State v. Green*, 200 Ariz. 496, 502, ¶ 28, 29 P.3d 271, 277 (2001) (citation omitted), is "arbitrary or capricious, or [if] the court fail[ed] to conduct an adequate investigation into the facts relevant to sentencing." *Fillmore*, 187 Ariz. at 184, 927 P.2d at 1313 (citation omitted).

¶11 Here, after the court vacated the initial, erroneous sentence, Defendant was sentenced to a mitigated term of 2.25 years in prison. Although the court did not specifically list

Defendant's two prior felony offenses at the re-sentencing, the court affirmed the "findings of prior felony offenses from the previous hearing" in determining the appropriate sentencing range. See A.R.S. § 13-703(I). The court therefore incorporated by reference the findings necessary to support the imposed sentence. As a result, we find no abuse of discretion.

¶12 Defendant also argues that he believed the first sentence "was the final word." A trial court, however, may resentence a defendant after vacating the initial sentence, *State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984) (absent constitutional constraints, trial court may vacate previous, unlawful sentence and impose new, legal sentence), because "[a]n illegal sentence is no sentence at all." *State v. Pyeatt*, 135 Ariz. 141, 143, 659 P.2d 1286, 1288 (App. 1982) (quoting *State v. Ortiz*, 104 Ariz. 493, 495, 455 P.2d 971, 973 (1969)). Consequently, double jeopardy claims generally are inapplicable to sentencing proceedings. *State v. Ring*, 204 Ariz. 534, 548, ¶ 27, 65 P.3d 915, 929 (2003) (citation omitted). Here, the court vacated the illegal sentence and sentenced Defendant anew in accordance with the statutory sentencing range. We find no error.

¶13 We have read and considered counsel's brief and have searched the entire record for reversible error. We find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. The record, as

presented, reveals that all of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, that Defendant was represented by counsel at all stages of the proceedings, and that the sentence imposed was within the statutory limits.

CONCLUSION

¶14 Accordingly, we affirm Defendant's conviction and sentence. After this decision is filed, counsel's obligation to represent Defendant in this appeal has ended. Counsel must only inform Defendant of the status of the appeal and of Defendant's future options, unless counsel identifies an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 585, 684 P.2d 154, 157 (1984). Defendant may, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

/s/

MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

ANN A. SCOTT TIMMER, Judge

/s/

ANDREW W. GOULD, Judge