

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: 09/18/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0646
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JAREN TROY DAVID LAMB,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court of Coconino County

Cause No. CR 2010-00745

The Honorable Joseph J. Lodge, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Division Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Joseph T. Maziarz, Section Chief Counsel
And Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

White Law Offices, PLLC Flagstaff
By Wendy F. White
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Defendant Jaren Troy David Lamb appeals his sentences for two counts of aggravated DUI committed on March 25, 2010. For the reasons that follow, we affirm.

¶2 On September 23, 2010, the state charged defendant with one count of aggravated DUI - impaired, and one count of aggravated DUI - .08 or more, both class 4 felonies. The state disclosed a list of nine prior felony convictions it intended to use at trial for crimes committed by defendant on September 22, 2000 (one offense), October 7, 2000 (three offenses), and December 16, 2001 (five offenses). The state requested a jury determination of defendant's conviction of one prior felony offense committed within ten years preceding the current offenses, citing the five felonies committed on December 16, 2001. The state further alleged that defendant had "prior and repetitive convictions" pursuant to Arizona Revised Statutes (A.R.S.) § 13-703 (2010), citing the felony committed on September 22, 2000 and the three felonies committed on October 7, 2000.

¶3 After a jury trial which he did not attend, defendant was convicted as charged. The trial court then conducted a bench trial on defendant's historical priors and concluded that defendant had two prior felonies for enhancement purposes and a third prior felony for aggravation purposes. After considering aggravating and mitigating circumstances, the court sentenced defendant to concurrent ten-year presumptive sentences with credit for 77 days of pre-sentence incarceration. Defendant timely appealed. We have jurisdiction pursuant to Arizona

Constitution Article VI, Section 9, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A) (2010).

Sentence Enhancement

¶4 Defendant first argues that the trial court erred in sentencing him as a category three repetitive offender. The trial court found that defendant had two historical prior felony convictions for the purposes of sentence enhancement - one committed on September 22, 2000, and another committed on October 7, 2000. Defendant did not object at trial to the use of these two priors for enhancement purposes; we therefore review this issue for fundamental error. See *State v. Rasul*, 216 Ariz. 491, 496, ¶ 20, 167 P.3d 1286, 1291 (2007).

¶5 We find no error, fundamental or otherwise. A.R.S. § 13-703(C) provides, in relevant part, that "a person shall be sentenced as a category three repetitive offender if the person . . . stands convicted of a felony and has two or more historical prior felony convictions." Here, defendant was convicted of two felonies, and had two historical prior felony convictions committed on September 22, 2000 and October 7, 2000. Defendant argues that the trial court should have sentenced him as a category two repetitive offender under A.R.S. § 13-703(B)(1) because the September 22, 2000 and October 7, 2000 felonies were consolidated for plea proceedings, citing *State v. Ofstedahl*, 208 Ariz. 406, 407, ¶ 4, 93 P.3d 1122, 1123 (App.

2004). *Ofstedahl* does not support defendant's argument. In *Ofstedahl*, we held that the term "historical prior conviction" meant that the conviction on a prior offense must precede the conviction on a defendant's present offense, explaining that the legislature had eliminated the use of *Hannah*¹ priors for sentence enhancement purposes in 1993. 208 Ariz. at 407-08, ¶ 4-5, 93 P.3d at 1123-24. The *Ofstedahl* scenario, where some of a defendant's convictions were used to enhance other convictions entered at the same time, is not present here. Accordingly, we find no error.

Presumptive Sentences

¶6 Next, defendant argues that the trial court abused its discretion in sentencing him to presumptive terms of incarceration. He argues that the court used an improper aggravator and failed to weigh the mitigating and aggravating factors.

¶7 In sentencing defendant, the trial court stated:

I'm going to find the following aggravating factors: your extensive criminal history. I'm not here to yell at you. I'm not here to beat you up, but you've got an extensive criminal history.

With respect to the felonies, there's two for enhancement; one for aggravation. [The] mitigating factors are that you were

¹ *State v. Hannah*, 126 Ariz. 575, 617 P.2d 527 (1980), *superseded by statute as stated in State ex rel. Romley v. Hauser*, 209 Ariz. 539 (2005).

employed, you have tremendous family support, and you are indeed remorseful.

When defendant objected to the court's finding that defendant had an "extensive criminal history" on the basis that it fell under the catch-all provision of A.R.S. § 13-701(D), the trial court clarified that it was using the remaining historical prior felony conviction not used to enhance defendant's sentence as an aggravator:

Let me be clear: The aggravating factor is the extensive criminal history. I thought I said that he had the two historical priors, which would take care of two of the felonies. . . .Then there's the remaining felony as an example of his extensive criminal history.

We find no abuse of discretion with regard to the aggravator. See A.R.S. § 13-701(D)(11) (2010) (prior felony conviction within ten years preceding the date of current offense is an aggravating factor). Nor did the trial court abuse its discretion by failing to weigh the mitigating and aggravating circumstances. It is well-established that the trial court need not state factors supporting a presumptive sentence, but "[i]n balancing aggravating and mitigating factors, the trial court is not required to make its decision based upon the mere numbers of aggravating or mitigating circumstances." *State v. Willcoxson*, 156 Ariz. 343, 347, 751 P.2d 1385, 1389 (App. 1987). The trial court in this case clearly considered the individual

circumstances of defendant before sentencing him to presumptive terms.

¶8 For the foregoing reasons, we affirm defendant's convictions and sentences.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

MAURICE PORTLEY, Presiding Judge

/s/

ANDREW W. GOULD, Judge

