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



DIVISION ONE
FILED: 7/30/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 12-0358
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
CHRISTOPHER DARRYN GRADY,) Rule 28, Arizona Rules of
) Civil Appellate Procedure)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-030414-001

The Honorable Jerry Bernstein, Judge *Pro Tempore*

AFFIRMED; JUDGMENT MODIFIED

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J O H N S E N, Chief Judge

¶1 Christopher Darryn Grady appeals from the superior court's imposition of fines and fees resulting from his convictions of two counts of aggravated driving or actual

physical control of a vehicle while under the influence of intoxicating liquor or drugs. We affirm the sentences and modify the judgment to clarify that Grady must pay only one set of fines and fees for his convictions on both charges.

FACTS AND PROCEDURAL BACKGROUND

¶2 Grady was convicted of two counts of aggravated driving while under the influence ("DUI") pursuant to Arizona Revised Statutes ("A.R.S.") section 28-1383(A)(1) (West 2013).¹ Both counts arose out of a single incident. An individual is guilty of aggravated DUI pursuant to A.R.S. § 28-1383(A)(1) if that individual drives while under the influence while his or her license is suspended. The court sentenced Grady to concurrent terms of four months in prison for each count and placed him on supervised probation for three years.

¶3 The court also imposed the following separate, but identical, set of fines and fees for each count:

Probation Service Fee: \$65 per month

Fine: \$1,380

DUI Abatement Fund: \$250

Prison Construction & Operations Fund:
\$1,500

State General Fund: \$1,500

¹ Absent material revision after the date of an alleged offense, we cite a statute's current version.

Probation Surcharge: \$20

Time Payment: \$20

At the sentencing hearing the court explained to Grady that although it was imposing the same set of fines and fees for each conviction, the fines and fees were concurrent with each other, meaning he would be required to pay each set of them just once.

The sentencing minute entry lists the fines as follows:

PROBATION SERVICE FEE: Counts 1 and 2 -
\$65.00 per month

FINE: Counts 1 and 2 - Total amount of
\$1,380.00

PRISON CONSTRUCTION & OPERATIONS FUND:
Counts 1 and 2 - \$1,500.00

STATE GENERAL FUND: Counts 1 and 2 -
\$1,500.00

PROBATION SURCHARGE: Counts 1 and 2 - \$20.00
. . . .

Counts 1 and 2: Time payment fee pursuant to
A.R.S. § 12-116 in the amount of \$20.00 . .
. .

¶4 On appeal, Grady does not contest his convictions but argues that the court's imposition of the fines and fees amounts to double punishment because the court did not make clear that he must pay them just once, not twice. Grady asserts "the trial court erred when it imposed separate fines for two felony convictions arising from the same act of driving or when it was inarticulate in expressing the possible intent that the

mandatory fines, fees and surcharges were only legally applicable once.”

¶15 We have jurisdiction of Grady’s timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 13-4031 (West 2013) and -4033(A)(4) (West 2013).

DISCUSSION

¶16 We review the court’s imposition of fines for fundamental error because Grady did not object at the sentencing. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (“Fundamental error review . . . applies when a defendant fails to object to alleged trial error.”). “To prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice.” *Id.* at ¶ 20. The imposition of an improper or otherwise unauthorized fine “renders a criminal sentence illegal, and an illegal sentence constitutes fundamental error.” *State v. McDonagh*, 660 Ariz. Adv. Rep. 6, ¶ 7 (App. May 7, 2013). Such an error is prejudicial. *Id.*

¶17 Grady asserts that the fines and fees imposed constitute an illegal sentence because they amount to double punishment, a violation of A.R.S. § 13-116 (West 2013). The statute provides that “[a]n act or omission which is made punishable in different ways by different sections of the laws

may be punished under both, but in no event may sentences be other than concurrent." In *State v. Sheaves*, 155 Ariz. 538, 540, 747 P.2d 1237, 1239 (App. 1987), we explained that "[t]he legislature enacted § 13-116 to protect a defendant from the imposition of multiple punishment when he or she is convicted of two or more offenses all arising from the same factual situation."

¶18 The cases are clear that "[a] fine, and related surcharge, imposed in a criminal case is a 'criminal penalty' constituting a 'sentence' subject to A.R.S. § 13-116's limitation." *McDonagh*, 660 Ariz. Adv. Rep. 6 at ¶ 9. Accordingly, while the court may impose two identical sets of fines and fees against Grady, one for each of his two DUI convictions, because both convictions arose from the same incident, the fines imposed must be concurrent, meaning he can be required to pay them just once, not twice. *Id.* at ¶ 18.

¶19 Grady argues that the fines and fees imposed on him were not concurrent, however, because the court's words at the sentencing hearing and in the minute entry are "ambiguous" and could result in him having to pay each set of fines and fees twice.

¶10 The sentencing transcript shows that the court first listed the fees and fines it was imposing in connection with Count 1. The court then specifically explained to Grady,

you are also required to have fines for both counts, but they will be concurrent. So, *it's not a double; it's still according to statute, but you are not paying double.*

(Emphasis added). The court then detailed a second identical set of fees and fines imposed on Grady's conviction for Count 2 and reiterated that they were "as per Count 1" and "concurrent." The sentencing minute entry states the concurrent nature of the fines by listing the "total amount" Grady must pay for each component fine or fee next to "Counts 1 and 2."

¶11 Although the court made clear on the record at the sentencing hearing that Grady needed to pay each set of fees and fines just once, the sentencing minute entry may be ambiguous in that respect. To avoid any confusion, we modify the judgment to clarify that while the court imposed two sets of fines and fees, both sets are concurrent, meaning he must pay them just once, not twice. See *State v. Burton*, 144 Ariz. 248, 253, 697 P.2d 331, 336 (1985) (modifying judgment to provide that sentences would be concurrent).²

CONCLUSION

¶12 For the foregoing reasons, we affirm Grady's convictions and the court's imposition of two concurrent sets of

² Grady's opening brief suggests that double jeopardy principles prevent imposition of consecutive sets of fees and fines for his two convictions. We need not address this argument because we agree with the superior court that Grady must pay the fines and fees imposed once, not twice.

fines and fees. We modify the judgment, however, to clarify that Grady must pay only one set of the fines and fees. We also modify the judgment to clarify that Grady must pay the time payment fee pursuant to A.R.S. § 12-116 (West 2013) just once, not monthly.

_____/s/_____
DIANE M. JOHNSEN, Chief Judge

CONCURRING:

_____/s/_____
LAWRENCE F. WINTHROP, Judge

_____/s/_____
RANDALL M. HOWE, Judge