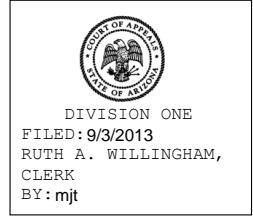


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) No. 1 CA-CR 12-0792  
)  
Appellee, ) DEPARTMENT S  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
SHAWNA RAE MUELLER, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-138589-001 DT

The Honorable Joseph C. Kreamer, Judge

**CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AS MODIFIED**

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Thomas C. Horne, Attorney General Phoenix  
By Michael O'Toole, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Margaret M. Green, Deputy Public Defender  
Attorneys for Appellant

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**J O H N S E N**, Chief Judge

¶1 Shawna Rae Mueller appeals from the superior court's imposition of concurrent fines and assessments resulting from her 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 convictions but modify the judgment to provide that Mueller must pay only one set of fines and assessments for her convictions on both charges.<sup>1</sup>

#### FACTS AND PROCEDURAL BACKGROUND

¶12 Mueller 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).<sup>2</sup> Both convictions arose out of a single incident. The court sentenced Mueller to concurrent terms of 4.5 years in prison for each DUI conviction. The court also imposed the following separate, but identical, set of fines and assessments for each of the DUI convictions: A fine of \$1,380; DUI abatement fee of \$250; assessment of \$1,500 to be paid to the Prison Construction and Operations Fund; and an assessment of \$1,500 to be paid to the State General Fund.

¶13 On appeal, Mueller argues the court's imposition of the fines and assessments amounts to impermissible double

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<sup>1</sup> Mueller also was convicted of possession or use of dangerous drugs, a Class 4 felony, and possession of drug paraphernalia, a Class 6 felony. On appeal, she does not contest these convictions or the resulting sentences.

<sup>2</sup> Absent material revision after the date of an alleged offense, we cite a statute's current version.

punishment. We have jurisdiction of Mueller's delayed 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

¶14 We review the court's imposition of fines and assessments for fundamental error because Mueller did not object at 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*, \_\_\_ Ariz. \_\_\_, \_\_\_, ¶ 7, 304 P.3d 212, 213-14 (App. 2013). Such an error is prejudicial. *Id.*

¶15 Citing *McDonagh*, Mueller asserts that the fines and assessments 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." The State confesses error,

agreeing that the court erred under *McDonagh* by imposing the concurrent fines and assessments.

¶16 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*, \_\_ Ariz. \_\_ at ¶ 9, 304 P.3d at 214. Accordingly, while the court may impose two identical sets of fines and assessments against Mueller, one for each of her two DUI convictions, because both convictions arose from the same incident, the fines and assessments imposed must be concurrent, meaning she can be required to pay them just once, not twice. See *id.* at ¶ 18, 304 P.3d at 216.

#### CONCLUSION

¶17 We affirm Mueller’s convictions and the resulting sentences, but modify the judgment to provide that the fines, assessments and time payment fees imposed on Count 3 are concurrent with those imposed on Count 4.

\_\_\_\_\_/s/\_\_\_\_\_  
DIANE M. JOHNSEN, Chief Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
LAWRENCE F. WINTHROP, Judge

\_\_\_\_\_/s/\_\_\_\_\_  
SAMUEL A. THUMMA, Judge