IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ANDREW ALLEN MEINERZ, *Appellant*.

No. 1 CA-CR 18-0557
FILED 6-27-2019

Appeal from the Superior Court in Maricopa County
No. CR2012-108548-001
The Honorable Mark H. Brain, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Maricopa County Attorney's Office, Phoenix
By Andrea L. Kever
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Jennifer Roach
Counsel for Appellant

MEMORANDUM DECISION

Judge Maria Elena Cruz delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge James B. Morse Jr. joined.

C R U Z, Judge:

¶1 Andrew Allen Meinerz appeals the monetary sanctions imposed following his conviction for possession or use of marijuana and possession of drug paraphernalia. For the following reasons, we affirm in part and vacate in part.

FACTS AND PROCEDURAL HISTORY

¶2 After a bench trial, the superior court found Meinerz guilty of one count each of possession or use of marijuana and possession of drug paraphernalia, both class 1 misdemeanors. The court placed him on unsupervised probation for a period of six months. As relevant here, the court ordered a mandatory drug fine with the applicable surcharge, a reduced monthly probation service fee, and a penalty assessment. Meinerz filed a notice of appeal.

¶3 During the pendency of the appeal, the superior court discharged Meinerz from probation and converted any unpaid monetary sanctions to a criminal restitution order ("CRO"), including (1) the drug fine with surcharge, totaling $1,320; and (2) the probation service fee, totaling $20. The CRO became effective on January 17, 2019, and began accruing interest on that date. Meinerz filed an amended notice of appeal to incorporate issues arising from the CRO.

¶4 In a timely appeal, Meinerz seeks relief solely as to the monetary sanctions ordered by the superior court. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2019), 13-4031 (2019), and -4033(A) (2019).

DISCUSSION

I. Imposition of the Surcharge

a. Surcharge Under A.R.S §§ 12-116.01 and -116.02

¶5 Meinerz argues the superior court erred by failing to waive application of the 74% surcharge based on a showing of financial hardship. Because he did not directly raise this issue below, we review only for fundamental prejudicial error. *See State v. Escalante*, 245 Ariz. 135, 140, 142, ¶¶ 12, 21 (2018).

¶6 The superior court has the authority to waive imposition of the combined 74% surcharge on any criminal fine based on a defendant's financial hardship. *See* A.R.S. §§ 12-116.01(A)-(C), (F) (2011) (court may waive aggregate 61% surcharge), -116.02(A), (D) (2011) (court may waive the additional 13% surcharge).[1] We have previously held that the court's failure to waive this surcharge constitutes fundamental error only where the record shows "undisputed indigency." *See State v. Beltran*, 189 Ariz. 321, 322-23 (App. 1997) (finding error when "migrant worker" with no monthly income assessed a $64,900 surcharge); *State v. Torres-Soto*, 187 Ariz. 144, 146 (App. 1996) (finding error when "unemployed farmworker" assessed $85,500 surcharge). The mere fact that the court failed to make specific findings as to a defendant's financial hardship, or lack thereof, does not constitute fundamental error. *Torres-Soto*, 187 Ariz. at 145; *see also State v. Moreno-Medrano*, 218 Ariz. 349, 353, ¶¶ 12-13 (App. 2008).

¶7 At sentencing, Meinerz requested the superior court impose a reduced monthly probation service fee. Meinerz claimed he had various financial obligations, including college fees, personal bills, and the cost of financially assisting his roommate. Meinerz, however, confirmed he worked two jobs and earned up to $2,000 per month. The court granted Meinerz' request and reduced his monthly probation service fee from $65 to $10. Without any further requests from Meinerz, the court noted, "[t]here's nothing I can do much about the drug offense fines and the like." Meinerz did not object or request waiver of the 74% surcharge of $555, as applied to the mandatory drug fine of $750. *See* A.R.S. § 13-3405(D) (2010) (requiring minimum fine of $750 upon conviction of marijuana-related crime).

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[1] We apply the statutes in effect on the date of the crimes. *See State v. Newton*, 200 Ariz. 1, 2, ¶ 3 (2001).

¶8 The record does not show that the superior court erred in failing to waive the 74% surcharge *sua sponte* based on the alleged financial hardship. Given Meinerz' employment status, he did not show he was "indisputably indigent," nor did he establish the $555 surcharge to be particularly onerous. *See* A.R.S. §§ 12-116.01(F), -116.02(D); *Beltran*, 189 Ariz. at 322. The court did not, as Meinerz claims, express confusion or a mistaken belief as to its ability to waive the surcharge. The court merely noted it lacked the authority to reduce the mandatory drug fine "and the like." Without more, the court's remark does not warrant reversal or remand for clarification. *See State v. Medrano*, 185 Ariz. 192, 196 (1996) ("Judges are presumed to know and follow the law and to consider all relevant sentencing information before them.") (citation omitted). We therefore find no error, fundamental or otherwise.

b. Surcharge Under A.R.S. § 16-954

¶9 Meinerz further contends the superior court erred when it failed to waive the additional 10% surcharge under A.R.S. § 16-954(C) (1998). He argues the language in A.R.S. § 16-954(C) requiring the surcharge be "collected pursuant to 12-116.01" permitted the court to waive the 10% surcharge, as provided in A.R.S. § 12-116.01(F). This issue is raised for the first time on appeal, so we review only for fundamental prejudicial error. *See Escalante*, 245 Ariz. at 140, 142, ¶¶ 12, 21. "We review issues of statutory interpretation de novo." *State v. Rogers*, 227 Ariz. 55, 56, ¶ 2 (App. 2010) (citation omitted).

¶10 We decline to interpret A.R.S. § 16-954(C) as permitting waiver based on its reference to collecting payments pursuant to A.R.S. § 12-116.01. *See* A.R.S. § 12-116.01(H)-(L) (providing framework for transmitting and collecting amounts due). As Meinerz acknowledges, we previously interpreted A.R.S. § 16-954 to contain no provisions "suggesting the imposition of the surcharge is discretionary." *See Rogers*, 227 Ariz. at 57, ¶ 6. If the legislature intended to provide the court with such authority, it could have easily done so. *See State v. Peek*, 219 Ariz. 182, 184, ¶ 11 (2008) (internal quotations omitted). Thus, the court did not err in imposing the additional mandatory 10% surcharge.

II. Imposition of the Penalty Assessment

¶11 Meinerz argues the superior court's imposition of the penalty assessment under A.R.S. § 12-116.09(A) (2015), prescribed after the date of the crimes, violated the prohibition against ex post facto laws and constituted fundamental error. The imposition of an improper monetary

sanction beyond what is authorized by statute is an illegal sentence and constitutes fundamental, reversible error. *State v. Soria*, 217 Ariz. 101, 102, ¶ 4 (App. 2007). We review issues involving the interpretation, application, and retroactivity of statutes *de novo*. *State v. Williams*, 220 Ariz. 331, 335, ¶ 11 (App. 2008).

¶12 The ex post facto clauses of the Arizona and federal constitutions prohibit the imposition of an increased penalty for a crime committed before the effective date of the increase. *See* U.S. Const. art. 1, § 10, cl. 1; Ariz. Const. art. 2, § 25. This principle is further codified in A.R.S. § 1-246 (2019). Though intended "to secure substantial personal rights against arbitrary and oppressive legislation," the prohibition against ex post facto laws should not "limit the legislative control of remedies and modes of procedure which do not affect matters of substance." *State v. Weinbrenner*, 164 Ariz. 592, 593 (App. 1990) (citing *Beazell v. Ohio*, 269 U.S. 167 (1925)). In making an ex post facto determination, we therefore look to whether the function of the relevant law is punitive or merely regulatory. *State v. Noble*, 171 Ariz. 171, 175 (1992).

¶13 In *State v. Beltran*, 170 Ariz. 406, 407-08 (App. 1992), we held that a statutory amendment increasing a surcharge from that which was prescribed on the date of the crime was punitive for the purposes of an ex post facto analysis. We reasoned that the surcharge in the amended version of A.R.S. § 41-2403 (1990)[2] increased the underlying fine and constituted an additional criminal penalty. *Id.* at 408; *see also State v. Marquez-Sosa*, 161 Ariz. 500, 503 (App. 1989) (defining a fine as punitive). We further noted that the legislature's use of the term penalty assessment in describing the surcharge was indicative of its intent to create a criminal penalty. *Id.*; *see also State v. Sheaves*, 155 Ariz. 538, 541 (App. 1987) (defining a felony penalty assessment as a mandatory form of pecuniary punishment, much like a fine). Thus, we held that the court's imposition of the surcharge, as amended, violated the prohibition against ex post facto laws. *Id.*

¶14 Though various fees and assessments have been interpreted to be merely regulatory and nonpunitive, we find it significant that such monetary sanctions were not described by those statutes as penalty assessments on the underlying fine. *See State v. Haverstick*, 234 Ariz. 161,

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[2] Section 41-2403 was repealed effective January 1, 1994. *See* 1993 Ariz. Sess. Laws, ch. 243, §§ 17-18 (1st Reg. Sess.). As of January 1, 1994, the provisions of A.R.S. § 41-2403 can be found in A.R.S. §§ 12-116.01 and -116.02. *Id.* at § 1. The surcharge is no longer described as a penalty assessment. *See* 2011 Ariz. Sess. Laws, ch. 260, § 1 (1st Reg. Sess.).

167-68, ¶¶ 12, 20 (App. 2014) (sex offender monitoring and forensic interview assessments nonpunitive); *State v. Connolly*, 216 Ariz. 132, 132, ¶ 3 (App. 2007) (attorney fees and indigent assessments nonpunitive); *Weinbrenner*, 164 Ariz. at 594 (finding that $8.00 time-payment fee was administrative and not subject to ex post facto analysis).

¶15 As relevant here, A.R.S. § 12-116.09(A) provides that a "penalty assessment shall be levied in an amount of two dollars on every fine, penalty and forfeiture imposed and collected by the courts for criminal offenses." As with the statute considered in *Beltran*, the monetary sanction in A.R.S. § 12-116.09(A) is described as a penalty assessment and increases the underlying fine. 170 Ariz. at 407-08. Under the plain language of the statute, the penalty assessment acts as a criminal penalty and creates an additional punishment. *See State v. Pledger*, 236 Ariz. 469, 471, ¶ 8 (App. 2015) ("We give the words and phrases of the statute their commonly accepted meaning."). Because it functioned as a punitive sanction, the superior court's imposition of the penalty assessment in A.R.S. § 12-116.09(A), prescribed after the date of the crimes, violated the constitutional and statutory prohibitions against ex post facto laws.[3] We therefore vacate the $2 penalty assessment as applied.

III. Entry of Criminal Restitution Order

¶16 Meinerz argues the superior court erred in converting the unpaid monetary sanctions to a CRO during the pendency of his appeal. Without scheduling a hearing, the court entered the CRO for the remaining drug fine with surcharge and monthly probation service fee. Meinerz did not have an opportunity to address the issue below. Still, Meinerz must show error. And, if error is shown, the state may argue that any error is harmless. *See State v. Lopez*, 231 Ariz. 561, 562, ¶¶ 3-4 (App. 2013) (citing *State v. Vermuele*, 226 Ariz. 399, 403, ¶ 14 (App. 2011), and *State v. Henderson*, 210 Ariz. 561, 567, ¶ 18 (2005)). We review potential conflicts between rules and statutes *de novo*. *See State v. Hansen*, 215 Ariz. 287, 289, ¶ 6 (2007).

¶17 Upon completion of a defendant's probation or sentence, A.R.S. § 13-805(C)(1) (2019) requires the superior court enter a CRO "in favor of the state for the unpaid balance, if any, of any fines, costs, incarceration costs, fees, surcharges or assessments imposed." A criminal CRO remains "enforceable as any civil judgment" and "includes the

[3] Meinerz committed the crimes on December 4, 2011. Section 12-116.09 did not become effective until January 1, 2015. *See* 2014 Ariz. Sess. Laws, ch. 158, § 1 (2nd Reg. Sess.).

collection of interest that accrues at a rate of four percent a year." A.R.S. § 13-805(E). Pursuant to A.R.S. § 13-805(C) and (E), we have held that the CRO must be entered within a reasonable time period, *State v. Pinto*, 179 Ariz. 593, 596 (App. 1994), the CRO cannot be entered prior to the completion of probation or term of imprisonment, *State v. Lewandowski*, 220 Ariz. 531, 536, ¶ 15 (App. 2009), *disapproved in part on other grounds by State v. Cota*, 234 Ariz. 180 (App. 2014), and the accrual of interest cannot be delayed or altered upon entry of the CRO, *Lopez*, 231 Ariz. at 562, ¶ 5. We have not, however, determined whether a CRO must be stayed pending a defendant's appeal, particularly as it relates to the payment of a fine.

¶18 Under Rule 31.7(a)(2), a sentence to pay a fine must be stayed pending a defendant's appeal. Ariz. R. Crim. P. 31.7(a)(2). In *Hansen*, the Arizona Supreme Court analyzed a former version of Rule 31.7(a)(2)[4] and its conflict with A.R.S. § 13-804(D) (2001). 215 Ariz. at 288, ¶ 1. The statute barred the stay of restitution pending a defendant's appeal and the rule required restitution be stayed. *Id.* The Court concluded that the former version of Rule 31.7(a)(2) and A.R.S. § 13-804(D) provided expressly contradictory instructions and could not be harmonized. *Id.* at 289, ¶¶ 7-8. In determining whether the rule or statute prevailed, the Court looked to "whether the matter regulated can be characterized as substantive or procedural, the former being the legislature's prerogative and the latter the province of this Court." *Id.* at 289, ¶ 9. The Court held that A.R.S. § 13-804(D), promulgated to strengthen and protect crime victims' right to restitution, was substantive and trumped the requirements set forth in the former version of Rule 31.7(a)(2). *Id.* at 289-91, ¶¶ 10-17.

¶19 Here, the State fails to address whether Rule 31.7(a)(2) and A.R.S. § 13-805 can be harmonized. The State argues the superior court lacked authority under A.R.S. §§ 13-805 and -810 to vacate or reduce the unpaid amounts set forth in the CRO. Answering the State's claim, Meinerz argues the CRO does not insulate the court's imposition of monetary sanctions from appellate review. He contends the rule and statute can be harmonized and requests the CRO be vacated and stayed pending his appeal. Meinerz' request is well taken.

¶20 In making this determination, we look first to the plain language of Rule 31.7(a)(2) and A.R.S. § 13-805 and seek to harmonize their instructions if possible. *See State v. Silva*, 222 Ariz. 457, 460, ¶ 13 (App. 2009);

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[4] The current version of Rule 31.7(a)(2) pertains solely to fines and no longer contains language requiring restitution be stayed pending appeal. *See* Ariz. R. Crim. P. 31.7(a)(2).

Hansen, 215 Ariz. at 289, ¶ 7 (internal quotations omitted). Unlike the statute in *Hansen*, A.R.S. § 13-805 is silent as to whether the CRO for any unpaid fines should or should not be stayed pending appeal. Though our courts have held that a CRO must be entered within a reasonable time period after the completion of a defendant's probation or sentence, our prior holding did not anticipate whether the CRO should be stayed pending appeal and the statute does not expressly prohibit such a ruling. *See* A.R.S. § 13-805(C), (E); *State v. Unkefer*, 225 Ariz. 430, 435, ¶¶ 16-17 (App. 2010) (citing *Pinto*, 179 Ariz. at 596), *disapproved in part on other grounds by Hoffman v. Chandler*, 231 Ariz. 352 (2013). Moreover, nothing from A.R.S. § 13-805 divests this court of jurisdiction in reviewing and potentially vacating the superior court's entry of the CRO. *See* A.R.S. §§ 13-805(C), (E), -4033(A)(1), (4). When read in conjunction, the provisions of Rule 31.7(a)(2) and A.R.S. § 13-805 can be harmonized.

¶21 Without striking down any portion of A.R.S. § 13-805, we conclude that Rule 31.7(a)(2) requires that entry of a CRO for payment of a fine must be stayed pending a defendant's appeal.

CONCLUSION

¶22 For the foregoing reasons, we affirm the superior court's application of the 84% surcharge on the drug fine. We, however, vacate the court's application of the $2 penalty assessment under A.R.S § 12-116.09(A) and order reimbursement in accordance with this decision.

¶23 We further vacate the CRO for the drug fine and surcharge of $1,320, along with any accrued interest, and order the CRO be stayed until issuance of our final mandate on appeal. This decision is not meant to impact the CRO as it relates solely to the remaining monthly probation service fee of $20.

COURT OF APPEALS
STATE OF ARIZONA

AMY M. WOOD • Clerk of the Court
FILED: AA