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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
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 08-0925
)
Appellee,) DEPARTMENT C
)
v.)
)
JUAN RICARDO TORRES) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-114511-001 DT

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

Terry Goddard, Arizona 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 Tennie B. Martin, Deputy Public Defender
Attorneys for Appellant

K E S S L E R, Judge

¶1 Juan Ricardo Torres ("Torres") was tried and convicted of unlawful flight from a law enforcement vehicle, a class 5 felony. Counsel for Torres filed a brief in

accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Torres was given the opportunity to, but did not file, a supplemental brief *in propria persona*. For the reasons that follow, we affirm Torres's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶12 Torres was charged with theft of means of transportation and unlawful flight from a law enforcement vehicle. Torres pled not guilty to the charges.

¶13 On January 14, 2008, E. realized that his mother's Ford Fusion had been stolen. Neither E. nor his mother had given anyone permission to take the car. When the theft was discovered, E. called the police to file a report.

¶14 On March 4, 2008, Officer S. noticed a light green Ford Fusion. On account of the size of S.'s vehicle and the angle of his headlights, S. testified that he noticed the driver of the Ford Fusion and later identified him as Torres. After S. made the U-turn, the green Ford Fusion began to accelerate "at a high rate of speed." When S. noticed that the Ford Fusion did not have a license plate located on the back of the vehicle, he also accelerated and activated his lights and siren. The Ford Fusion shut off its lights completely, and

then sped through a red stop light at 67th Avenue and Osborn Road. S. stopped at the intersection and then continued to follow the fleeing vehicle. At 65th Avenue the Ford Fusion crashed into a cinder block fence, and the suspect fled from the accident. S. stayed to clear the car and called other units to respond to the scene. Once a perimeter was set up, S. ran the Vehicle Identification Number (V.I.N.) for the Ford Fusion in a computer system, and found that it was the vehicle reported stolen by E.

¶15 Officers B. and V. responded to S.'s request for additional units. The officers found Torres hiding in the shadows of a nearby carport, sweating and out of breath. S. went to their location and identified Torres.

¶16 Torres did not testify. He argued that his friend was driving the vehicle, and that he did not realize it was stolen until his friend began to speed up when S. attempted to pull them over. He also stated that he panicked after the crash, and then ran from the scene of the accident.

¶17 The jury convicted Torres of unlawful flight from a law enforcement vehicle, and found him not guilty of theft of means of transportation. At sentencing, Torres admitted to a prior felony conviction in exchange for the presumptive term of 2.25 years, with 217 days of presentence incarceration. Defense counsel then submitted to the court a certified copy

of the minute entry of the prior conviction affixed with Torres's thumbprint. The judge did not engage in a Rule 17.6 plea-type colloquy with Torres at sentencing. However, before trial at the settlement conference, the judge did engage Torres in a discussion explaining the sentence enhancement (minimum and maximum penalties) should the State prove the prior conviction.

¶18 Torres filed a timely appeal. See Ariz. R. Crim. P. 31.3. We have jurisdiction under Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") section 13-4033(A)(1) (2010).

DISCUSSION

¶19 This court has reviewed the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. See *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). In order to obtain a reversal, the defendant must also demonstrate that the error caused prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607. On review, we examine the facts in a light most favorable to sustaining the judgment and resolve inferences against the defendant. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d

897, 898 (App. 1998). In reviewing the record, we find only one issue that raises concern.

¶10 Arizona Rule of Criminal Procedure 17.6 states that “[w]henever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule, unless admitted by the defendant while testifying on the stand.” Ariz. R. Crim. P. 17.6. Whether the prior conviction is admitted to by the defendant, or stipulated to by defense counsel, Rule 17 requires the judge to advise the defendant of the effects and consequences of the admission in a plea-type colloquy. Ariz. R. Crim. P. 17.2. An admission of a prior conviction for sentence enhancement leads to a waiver of certain constitutional rights, including the defendant’s right to a trial on that issue. *State v. Morales*, 215 Ariz. 59, 61, ¶ 8, 157 P.3d 479, 481 (2007). The Rule 17 colloquy helps to protect the defendant’s right to due process by ensuring the admission is made intelligently and voluntarily. *Id.*

¶11 Generally the omission of a plea-type colloquy is considered fundamental error; however, it does not always necessitate resentencing. *Id.* at 61-62, ¶¶ 5-11, 157 P.3d at 481-82. Torres first needs to demonstrate that the error caused prejudice. *Id.* at 62, ¶ 11, 157 P.3d at 482. Remand is appropriate upon a showing that the defendant would not have

admitted to the prior conviction but for the absence of the Rule 17 colloquy. *Id.* In *Morales*, the court found that a finding of prejudice was unwarranted as a copy of his prior conviction was admitted at a pretrial hearing. *Id.* at 62, ¶ 13, 157 P.3d at 482. Neither party challenged the document's authenticity, and the evidence was considered to be conclusive proof of Morales' prior conviction. *Id.*

¶12 When Torres admitted to the prior conviction at his sentencing hearing, the trial court failed to conduct the required Rule 17 colloquy at that time. The conversation only included a brief explanation that Torres would be sentenced to the presumptive 2.25 years if he freely admitted to the prior conviction. However, the court did engage Torres in such a dialogue at the settlement conference prior to trial. During this early discussion, the trial court informed Torres of the sentencing effects of a prior conviction (detailing the minimum and maximum penalties under the assumption that the State proves the prior conviction). As in *Morales*, even if the court were to find that fundamental error had occurred, defense counsel submitted to the court a certified copy of the minute entry affixed with Torres's thumbprint. We find there is no reason to remand for a hearing for the following reasons: (1) the trial court explained to Torres that he would receive the presumptive 2.25 years if he admitted to the prior

conviction, (2) the trial court explained to Torres the sentencing range, and (3) defense counsel explained the prior conviction at sentencing, gave the judge a certified copy of the minute entry with thumbprint, and no one contested the prior conviction.¹ Under these circumstances, we find no reason to remand and have the trial court go through the futile exercise of re-explaining the presumptive sentence to determine if Torres would have admitted the prior conviction if a colloquy had taken place.

CONCLUSION

¶13 After careful review of the record, we find no meritorious grounds for reversal of Torres's conviction or modification of the sentence imposed. The evidence supports the verdict, the sentence imposed was within the sentencing limits, and Torres was represented at all stages of the proceedings below. Accordingly, we affirm Torres's conviction and sentence.

¶14 Upon the filing of this decision, counsel shall inform Torres of the status of the appeal and his options. Defense counsel has no further obligations, unless, upon review, counsel finds an issue appropriate for submission to

¹ The minute entry of the prior conviction is not in the record on appeal. We presume that any absent document in the record supports the trial court's conclusions. *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995).

the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Torres shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
PATRICK IRVINE, Presiding Judge

/s/
MICHAEL J. BROWN, Judge