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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 08-1022
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
SONNY TURNER,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-116619-001 DT

The Honorable Steven K. Holding, Judge Pro Tem

CONVICTIONS AFFIRMED; REMANDED REGARDING SENTENCES

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G E M M I L L, Judge

¶1 After a jury trial, Appellant Sonny Turner was
convicted of possession or use of narcotic drugs and possession

or use of marijuana. Turner admitted at the sentencing hearing that he had two prior felony convictions, and he was sentenced to concurrent terms of 8 and 3.75 years' imprisonment. He now contends the trial court failed to comply with Arizona Rule of Criminal Procedure 17 in accepting his admission to prior convictions. Because we find the court committed fundamental error, we remand for a determination of whether Turner was prejudiced by the error. His convictions are affirmed.

FACTS AND PROCEDURAL BACKGROUND

¶12 In March 2007, Turner was indicted on one count of possession or use of narcotic drugs, a class four felony, and possession or use of marijuana, a class six felony. The State alleged Turner had several prior felony convictions that it intended to use during the sentencing phase of the trial if Turner was convicted. On December 11, 2007, following a two day trial, a jury found Turner guilty of both counts.

¶13 Turner was sentenced on November 20, 2008. At the start of the hearing on that day, the State informed the court it had not subpoenaed witnesses necessary to prove Turner's prior convictions but, if Turner admitted to the prior convictions, the State was prepared to proceed. Turner told the court he wanted to be sentenced that day because the sentencing hearing had already been continued several times.

¶14 The State asserted it would be able to prove through

fingerprint analysis that Turner had six prior felony convictions. The court then stated:

Mr. Turner, if the State can prove just two of the priors, the presumptive sentence is ten years in prison for the Class 4 felony.

. . .

If they can prove more of those, then you're leading up to the ten to 15 years. If they could prove all six, there is a chance you could have to do 15 years in prison. I believe the State has just made an offer now, ten years - stip to the presumptive at ten years.

Defense counsel declined the State's offer and said "we are willing to do eight." The court then took a brief recess and gave the parties time to reach an agreement.

¶15 Upon reconvening, defense counsel informed the court Turner had agreed to admit he had two prior convictions in exchange for the State seeking a sentencing range of from six to ten years' imprisonment. The State informed the court that Turner's first admitted prior conviction was for resisting arrest, a class six felony, from March 2004. The court then asked Turner:

THE COURT: Mr. Turner, is what both attorneys said true?

THE DEFENDANT: Yes, sir.

THE COURT: I should ask you, Mr. Turner, have you had any drugs, alcohol, medication in the last 24 hours?

THE DEFENDANT: No, sir.

THE COURT: Has anyone used force, used any threats to get you to admit the prior felony convictions?

THE DEFENDANT: No, sir.

The court was informed that Turner's second admitted prior conviction was for possession of marijuana, a class six felony, from March 2000. The court again asked: "Mr. Turner, same question. Is what both attorneys say true there also?" Turner responded, "Yes, sir."

¶6 The trial court then found that Turner had two prior felony convictions and, after receiving statements from the State, defense counsel, and Turner, sentenced Turner to a mitigated term of eight years' imprisonment for count one and a presumptive term of 3.75 years' for count two, to be served concurrently with count one. Turner timely appealed, and 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) (2003), 13-4031 (2010), and -4033(A) (2010)¹.

ANALYSIS

¶7 Turner argues the trial court violated Arizona Rule of Criminal Procedure 17 in finding he had two prior felony

¹ We cite the current version of A.R.S. §§ 13-4031 and -4033 because no revisions material to this appeal have since occurred.

convictions. Because he did not raise this issue below, we review only for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Turner must therefore show that any error was fundamental and that it caused him prejudice. See *id.*

¶8 Generally, the existence of a prior conviction must be found by the trial court and is established through a hearing, during which the State offers into evidence a certified copy of the conviction and establishes that the document refers to the defendant. See *State v. Morales*, 215 Ariz. 59, 61, ¶ 6, 157 P.3d 479, 481 (2007). "The need for a hearing may be obviated, however, if the defendant admits to the prior conviction." *Id.* at ¶ 6. To ensure that a defendant's admission to a prior conviction is voluntary and intelligent, the court must conduct a Rule 17 plea-type colloquy "unless the defendant makes this admission while testifying." *Id.* at 60-61, ¶¶ 1-7, 157 P.3d at 480-481. See also Ariz. R. Crim. P. 17.6.

¶9 During a Rule 17 plea-type colloquy, the trial court must inform the defendant of the constitutional rights he foregoes by admitting the existence of a prior felony conviction. See Ariz. R. Crim. P. 17.2(c) and 17.3. The constitutional rights the defendant should be aware he is waiving include the right to a jury trial, the right to confront one's accusers, and the privilege against self-incrimination.

State v. Nieto, 118 Ariz. 603, 608, 578 P.2d 1032, 1037 (App. 1978).

¶10 Here, the trial court did not inform Turner he had a right to a trial on his prior felony convictions. See *Morales*, 215 Ariz. at 62, ¶ 11, 157 P.3d at 482 (colloquy serves to ensure defendant voluntarily and intelligently waives right to trial on prior convictions). While much of the discussion at the sentencing hearing between the trial court, the prosecutor, and defense counsel presupposed that a trial would be required if Turner did not admit to prior convictions, Turner was not explicitly informed of the right. Nor was he informed during the hearing of his right to confrontation and privilege against self-incrimination. See *Nieto*, 118 Ariz. at 608, 578 P.2d at 1037.

¶11 The trial court also did not inform Turner of the range of possible sentence if he admitted he had two prior convictions. See Ariz. R. Crim. P. 17.2(b) (court must inform defendant of range of possible sentence for the offense to which the plea is offered). The court told Turner that the presumptive prison term if it found he had two prior convictions was ten years, and it informed him of the range of possible sentence if it found he had more than two prior convictions. Turner was also aware that, in exchange for his admission to two prior convictions, the State would seek a sentence of between

six and ten years' imprisonment. But based on the record before us, Turner was not informed of the statutory sentencing range if the court found he had two prior felony convictions.²

¶12 Moreover, all discussion during the hearing regarding the range of sentence pertained to Turner's conviction for possession or use of narcotic drugs, a class four felony. The record shows that the trial court, the State, and defense counsel did not discuss, and that Turner was not apprised of, the effect an admission to two prior convictions would have on the sentence for his conviction for possession or use of marijuana, a class six felony.

¶13 The State cites *State v. Nieto*, 118 Ariz. 603, 608, 578 P.2d 1032, 1037 (App. 1978), for the proposition that, "[i]f the record reveals that the defendant in fact was aware of his rights, a failure to comply with Rule 17.2(c) will be considered a technical, non-reversible error." *Nieto* is inapposite, however, because the trial court here also failed to comply with Rule 17.2(b) when it did not inform Turner of the possible range of sentence if he admitted to two prior convictions.

² The State argues that the trial court explained the possible sentencing range when it told Turner he could receive a sentence of ten to fifteen years' imprisonment. The court had earlier explained, however, that this was the range of sentence if it found he had more than two prior convictions. Under the version of A.R.S. § 13-604 in effect at that time, the range of a sentence for a class four felony with two prior convictions was eight to twelve years' imprisonment. See A.R.S. 13-604(C) (2007).

¶14 The failure to conduct a Rule 17 plea-type colloquy in this case constituted fundamental error. See *Morales*, 215 Ariz. at 61, ¶ 10, 157 P.3d at 481 (failure to enter into a colloquy constitutes fundamental error). Turner is entitled to be resentenced if he can establish that he was prejudiced by the error -- he must show "that [he] would not have admitted the fact of the prior conviction[s] had the colloquy been given." *Id.* at 62 ¶ 11, 157 P.3d at 482. We therefore remand for the trial court to conduct a hearing to determine if he was prejudiced by the error. See *State v. Carter*, 216 Ariz. 286, 290, ¶ 21, 165 P.3d 687, 691 (App. 2007) (stating general rule that defendant who demonstrates Rule 17 violation on appeal is permitted hearing on remand to show prejudice). If he was not prejudiced, his sentences are affirmed. If he was prejudiced, he is entitled to be resentenced.

CONCLUSION

¶15 Turner's convictions are affirmed. Regarding his sentences, we remand for proceedings consistent with this decision.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

_____/s/_____
PATRICIA K. NORRIS, Judge

_____/s/_____
MAURICE PORTLEY, Judge