DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JESUS FRANCISCO MILLAN-LEAL, Appellant.	)	No. 1 CA-CR 09-0054 DEPARTMENT C **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-007930-001 DT

The Honorable Michael D. Jones, Judge

CONVICTIONS AFFIRMED; SENTENCES VACATED AND REMANDED

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B R O W N, Judge

¶1 Jesus Francisco Millan-Leal ("Appellant") appeals from his convictions and sentences on one count of possession of narcotic drugs and one count of possession of drug paraphernalia. Appellant challenges only his sentences, asserting that the trial court was required to impose probation rather than incarceration for these convictions because they constituted first and second strikes under Arizona Revised Statutes ("A.R.S.") section 13-901.01 (2001) and the State failed to allege a prior violent crime before trial as required under A.R.S. § 13-604.04 (2001).[1] For the following reasons, we find that the State was required to allege a violent offense prior to trial pursuant to § 13-604.04 in order to disqualify Appellant from mandatory probation under § 13-901.01. Accordingly, we vacate Appellant's sentences and remand for resentencing.

BACKGROUND

¶2 In November 2007, Appellant was charged by indictment with one count of possession of a narcotic drug for sale, a class 2 felony, and one count of possession of drug paraphernalia, a class 6 felony. He was sentenced together with

[1] Effective January 1, 2009, A.R.S. § 13-604.04 was renumbered as § 13-901.03. 2008 Ariz. Sess. Laws, ch. 301, § 19 (2d Reg. Sess.). For ease of reference in this decision, we will refer to the statute as it was at the time of the offense.

three other criminal cases, one involving a plea agreement entered prior to trial,[2] and two involving plea agreements entered after trial.[3] In relation to the sentences for the narcotics offenses at issue here, defense counsel argued that A.R.S. § 13-901.01(A) (Proposition 200) applied, and Appellant should therefore be sentenced only to probationary terms to be served consecutively to his prison sentences in the other cases. The trial court disagreed, finding that automatic probation was precluded under § 13-901.01(B) because Appellant was being sentenced contemporaneously in one of the plea agreement cases for a "dangerous" kidnapping offense. As a result, Appellant was sentenced to the presumptive terms of two and one-half years on count one and one year on count two, to be served concurrently with one another but consecutively to the other sentences imposed.

¶3 Appellant filed a timely appeal. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution,

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[2] Appellant plead guilty to one count of unlawful use of means of transportation, a class 6 undesignated felony, a non-dangerous and non-repetitive offense, in CR 2006-134087-001 and was sentenced to the presumptive term of one year.

[3] Appellant plead guilty in CR 2007-163569-001 DT to one count of misconduct involving weapons, a class 4 felony, a non-dangerous and non-repetitive offense; and one count of narcotic drugs for sale, a class 2 felony, also non-dangerous and non-repetitive. He also plead guilty in CR 2008-006031-001 DT to one count of kidnapping, a class 2 dangerous felony.

and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), -4033(A) (Supp. 2009).

DISCUSSION

¶4 Appellant argues that the trial court erred in sentencing him to a term of imprisonment rather than mandatory probation because the State failed to meet its statutory obligation to allege that he had a committed a violent crime.[4] The State counters that a disqualifying prior conviction under § 13-901(B) could be found by the court even if the State did not file such allegations in the indictment or otherwise provide notice that such a conviction would be used to disqualify the defendant from mandatory probation. These are issues of statutory construction; thus, we review the trial court's decision de novo. *State v. Reinhardt*, 208 Ariz. 271, 273, ¶ 7, 92 P.3d 901, 903 (App. 2004).

¶5 Whether a defendant who has been convicted of personal possession and use of controlled substances is entitled to mandatory probation is governed by A.R.S. § 13-901.01, which reads in pertinent part:

> A. Notwithstanding any law to the contrary, any person who is convicted of the personal possession or use of a controlled substance...is eligible for probation. The court shall suspend the imposition or

[4] Appellant does not dispute that the kidnapping charge at issue in CR 2008-006031-001 DT is a violent crime pursuant to A.R.S. § 13-604.04.

> execution of sentence and place such person on probation.

A number of exceptions to mandatory probation are enumerated thereunder, including the exception at issue here relating to prior convictions for violent offenses. The relevant section reads:

> B. Any person who has been convicted of or indicted for a violent crime *as defined in § 13-604.04* is not eligible for probation as provided for in this section but instead shall be sentenced pursuant to the other provisions of chapter 34 of this title.

A.R.S. § 13-901.01(B) (emphasis added). Pursuant to § 13-604.04, an allegation that the defendant committed a violent crime must be alleged prior to trial.[5]

¶6 After trial and immediately prior to sentencing in this case, the State requested that the stipulations in Appellant's plea agreements be followed. The State also noted that one of the pleas was for kidnapping, a dangerous offense, and that "[i]f the Court is inclined to not give [Appellant] supervised probation, we would ask for a consecutive term in the

[5] A.R.S. § 13-604.04(A) reads: "the allegation that the defendant committed a violent crime shall be charged in the indictment or information and admitted or found by the court. The court shall allow the allegation that the defendant committed a violent crime at any time before the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings."

department of corrections." Defense counsel responded that at the time of the conviction for the narcotics offenses, there was no prior conviction for the kidnapping charge; therefore, § 13-901.01(A) applied and Appellant should receive mandatory probation for the narcotics offenses, rather than incarceration. The trial judge concluded that Appellant was ineligible for mandatory probation under § 13-901.01(A). The judge reasoned that he did "[not] think as a matter of law [he could] ignore the dangerous offense that [Appellant] has [] plead guilty to and for which he is today before the Court for sentencing." As such, the judge determined that he could not place Appellant on probation.

¶7 Appellant relies on *State v. Benak* to assert that the court erred in using his conviction for kidnapping to preclude mandatory probation under § 13-901.01(A) because the State failed to provide notice pursuant to § 13-604.04 that it planned to use the kidnapping conviction for such purposes. *See* 199 Ariz. 333, 336, ¶ 10, 18 P.3d 127, 130 (App. 2001) (finding that "the State must provide notice pursuant to [§] 13-604.04 if it intends to preclude a sentence of probation on the grounds that a defendant has been convicted of a violent crime"). In *Benak*, the State alleged before trial that the defendant had four *nondangerous* felony convictions. 199 Ariz. at 334, ¶ 3, 18 P.3d at 128. After trial, the court found that one of the

convictions was a class 3 aggravated assault, a violent crime. *Id*. As a result, the court sentenced the defendant to a term of incarceration pursuant to § 13-901.01(B) rather than probation pursuant to § 13-901.01(A). *Id*. at 334-35, ¶¶ 3, 6, 18 P.3d at 128-29. On appeal, we held that fundamental fairness and due process demanded the State allege before trial that the defendant committed a violent offense in order to disqualify him from mandatory probation under § 13-901.01(B). *Id*. at 336-37, ¶ 14, 18 P.3d at 130-31. We explained that this requirement was intended to provide a defendant with the opportunity to "accurately ascertain the potential punishment he faces should he elect to exercise his right to trial." *Id*. at 337, ¶ 14, 18 P.3d at 131.

¶8 Here, the State contends that *Benak* does not control and instead relies on *Raney v. Lindberg* to assert that the trial court was not constrained by the mandatory notice provisions of § 13-604.04 because § 13-901.01(B) specifically directs the court to impose a sentence pursuant to the provisions of Chapter 34 of the criminal statutes in cases where the defendant has been convicted of a violent offense. 206 Ariz. 193, 197, ¶ 11, 76 P.3d 867, 871 (App. 2003). The State also asserts that under *Raney* the trial court may determine as a matter of law whether a defendant is entitled to be sentenced pursuant to § 13-901.01 notwithstanding any failure on the part of the State to make

such allegations prior to trial. *Id.* (recognizing that "whether a defendant is entitled to be sentenced pursuant to [§] 13-901.01 is a matter of law to be decided by the court"). We find the State's reliance on *Raney* misplaced.

¶9 In that case, Raney was charged with possession of a dangerous drug and possession of drug paraphernalia, among other things. *Id*. at 195, ¶ 2, 76 P.3d at 869. The State alleged that he also had a historical prior conviction for solicitation to possess a dangerous drug. *Id*. A plea agreement was entered in which Raney agreed to plead guilty to possession of drug paraphernalia on the condition that the State dismiss the other counts and the enhancement allegations. *Id*. Notwithstanding this agreement, at sentencing the court imposed both probation and a term of 280 days in county jail because this was Raney's second Proposition 200 drug offense. *Id*. at 195-96, ¶¶ 3-4, 76 P.3d at 869-70. On appeal, Raney argued that he could not be incarcerated under § 13-901.01 unless the State alleged and proved the prior drug-related offenses. *Id*. at 196, ¶ 7, 76 P.3d at 870. We rejected that argument, finding that § 13-901.01(F) and (G) did not require such allegations. *Id*. at 197-98, ¶¶ 12-14, 76 P.3d at 871-72. We also held that the trial court could determine the existence of relevant prior convictions at the time of sentencing as a matter of law. *Id*. at 198, ¶ 16, 76 P.3d at 872.

¶10 The case before us is distinguishable from *Raney* on at least one significant point. In *Raney*, the statutes at issue were § 13-901.01(F) and (G). Those subsections state in pertinent part:

> F. If a person is convicted a second time of personal possession or use of a controlled substance as defined in § 36-2501, the court may include additional conditions of probation[.]
>
> G. A person who has been convicted three times of personal possession or use of a controlled substance as defined in § 36-2501 is not eligible for probation[.]

Subsections F and G both relate to convictions for prior drug-related offenses. Conversely, the statute at issue here, § 13-901.01(B), relates to convictions for prior violent crimes. Of particular import is the reference to § 13-604.04. Section 13-901.01(B) specifically states that "[a]ny person who has been convicted of or indicted for a violent crime *as defined in section 13-604.04* is not eligible for probation[.]" (Emphasis added.) Under § 13-604.04, an "allegation that the defendant committed a violent crime *shall be charged in the indictment or information* and admitted or found by the court." A.R.S. § 13-604.04(A) (emphasis added); *see Benak*, 199 Ariz. at 337, ¶ 14, 18 P.3d at 131 (holding that "A.R.S. [§] 13-604.04 applies to A.R.S. [§] 13-901.01 and requires the State to allege before trial that a defendant has committed a violent crime in order to

exclude a defendant from probation eligibility pursuant to [§] 13-901.01(B)"). The statutes at issue in *Raney* neither mention § 13-604.04 nor impose a similar requirement that the State allege prior convictions before trial. This is an important distinction that makes *Raney* inapposite in this case. As such, we find that *Benak* controls here and conclude that the State was required to allege the kidnapping charge pursuant to § 13-604.04 before trial in order for it to be used to disqualify Appellant from mandatory probation.

¶11 The record before us reflects that the State did not allege the kidnapping charge[6] as required under § 13-604.04. The original indictment for the narcotics charges did not include an allegation of the kidnapping charge because the kidnapping occurred a year later. Nonetheless, the State could have amended the indictment to include the kidnapping charge. The State amended the indictment in December 2007 to add aggravating circumstances relating to the other plea cases, but it failed to further amend the indictment to include an allegation of the pending kidnapping charge. The State also failed to include the kidnapping charge in the joint pretrial statement even though

[6] Under A.R.S. § 13-901.01, a person may have been either *convicted or indicted* for a violent crime as defined in A.R.S. § 13-604.04. Here, because the State does not even suggest that it complied with the notice requirements, we need not address any distinctions between a conviction and an indictment; in either case, Appellant was not given notice of increased punishment.

other sentencing enhancements were alleged. Our review of the record reflects that the State did not raise the kidnapping charge at all as a possible enhancement factor in relation to the narcotics offenses until the sentencing hearing. Accordingly, we find that the State did not provide the required pretrial allegation of a violent crime pursuant to §§ 13-901.01(B) and 13-604.04 and the trial court therefore erred in sentencing Appellant to incarceration instead of probation.

CONCLUSION

¶12 For the foregoing reasons, we affirm Appellant's convictions but we vacate his sentences and remand for resentencing in accordance with A.R.S. § 13-901.01(A).

/s/
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MICHAEL J. BROWN, Judge

CONCURRING:

/s/
_____
PATRICK IRVINE, Presiding Judge

/s/
_____
DONN KESSLER, Judge