DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0069
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
MARCOS ALBERTO TORRES-VASQUEZ, Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-103413-002 DT

The Honorable John R. Hannah, Jr., Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Sherri Tolar Rollison, Assistant Attorney General
Attorneys for Appellee

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

G E M M I L L, Judge

¶1 Marcos Alberto Torres-Vasquez ("Torres-Vasquez") appeals his conviction and sentence for possession or use of a

dangerous drug, a class-four felony. Torres-Vasquez raises two issues on appeal. He argues that the trial court erred by not engaging with him in a plea-type colloquy before allowing his defense counsel to stipulate to elements of the dangerous drug possession charge. Torres-Vasquez also argues that the trial court erred by not engaging with him in a plea-type colloquy before accepting his defense counsel's stipulation that Torres-Vasquez committed the offense while on probation. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers,* 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001). The record reveals the following facts.

¶3 On January 14, 2008, Torres-Vasquez was involved in a minor traffic accident. Following the accident, Torres-Vasquez exited the pickup truck and spoke with the driver of the other car. Torres-Vasquez told the other driver that he had a skin infection on his torso, and he asked the driver if he could leave to go to the hospital. Torres-Vasquez then lifted his shirt so that the woman could see the section of his torso that he claimed was infected.

¶4 The driver testified that she told Torres-Vasquez, "if you want to go, go; I have to call the police." Torres-Vasquez

then drove away. The driver stated that she believed Torres-Vasquez fled the scene of the accident because he did not wait for police to arrive.

¶5 When the driver of the other car contacted the police, she provided them with the license plate number of the pickup truck that Torres-Vasquez was driving. A police officer then contacted the registered owner of the pickup truck who informed the officer that the pickup truck had been left at Corona's Auto Body a little over a month ago. Police officers then drove to Corona's Auto Body to investigate.

¶6 When police officers arrived at Corona's Auto Body, they questioned the owner, Ramiro, about the pickup truck. While police officers were questioning Ramiro about the pickup truck, they saw Torres-Vasquez driving into Corona's Auto Body in the pickup truck. Torres-Vasquez testified that the reason he was driving the pickup truck was because he sometimes performed mechanical repairs on some of the cars at Corona's Auto Body and that Ramiro told him he could drive the pickup truck because it had been left at his body shop for several months. After confirming that the pickup truck was the truck from the accident, police officers arrested Torres-Vasquez for fleeing the scene of an accident.

¶7 In the search incident to arrest, police officers found a black plastic case in Torres-Vasquez's front pocket.

Officer Ortiz testified that when he asked Torres-Vasquez what was inside the plastic case, Torres-Vasquez responded, "drugs." When Officer Ortiz opened the plastic case, he found "a clear, plastic bag containing a clear crystallized [sic] substance." Torres-Vasquez testified that he found the black plastic case earlier that day while performing mechanical repairs on one of the cars in Ramiro's body shop and that he did not know what was inside the case.

¶8 The parties stipulated prior to trial that methamphetamine is a dangerous drug and that the substance contained in the black plastic case was methamphetamine, of a usable quantity in usable condition. A jury found Torres-Vasquez guilty of possession or use of a dangerous drug.[1] Following the announcement of the jury verdict, Torres Vasquez's defense counsel agreed to stipulate that Torres-Vasquez committed the offense while on probation.

¶9 The court sentenced Torres-Vasquez to serve ten years in prison, which at the time was the presumptive sentence for anyone with two prior felony convictions who committed a class-four felony.

¶10 Torres-Vasquez filed a timely notice of appeal challenging his sentence and conviction. We have jurisdiction

[1] Torres-Vasquez was also charged with unlawful use of means of transportation, and the jury found him not guilty of that offense.

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)(1) (2010).

DISCUSSION

¶11 Torres-Vasquez argues that the stipulation concerning the nature of the substance in the black plastic case was the functional equivalent of a guilty plea, and thus the court was required to ensure that the stipulation was made voluntarily and intelligently. Because no objection was made at trial, Torres-Vasquez must demonstrate prejudicial, fundamental error or structural error to obtain a reversal. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Having reviewed the record and after Torres-Vasquez's arguments, we find no error -- fundamental, structural, or otherwise.

¶12 Pleading guilty to a criminal offense has significant consequences. As the U.S. Supreme Court explained in *Boykin v. Alabama*, a "plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment." 395 U.S. 238, 242 (1969) (citing *Kercheval v. United States,* 274 U.S. 220, 223 (1927)).

¶13 Rule 17 of the Arizona Rules of Criminal Procedure requires a judge to advise a defendant in open court of the consequences of pleading guilty or no contest to ensure that the

defendant wishes to forgo certain constitutional rights. In the past, Arizona cases extended the Rule 17 colloquy requirement to a stipulation that was "tantamount to a guilty plea." *See, e.g., State v. Woods,* 114 Ariz. 385, 388, 561 P.2d 306, 309 (1977); *State v. Gaines,* 113 Ariz. 206, 207, 549 P.2d 574, 575 (1976); *State v. Crowley,* 111 Ariz. 308, 310, 528 P.2d 834, 836 (1974). Nearly thirty years ago, however, the Arizona Supreme Court rejected the "tantamount to a guilty plea" standard as unworkable. *State v. Avila,* 127 Ariz. 21, 23-24, 617 P.2d 1137, 1139-40 (1980).

¶14 Recently, the Arizona Supreme Court in *State v. Allen* cited numerous reasons why the "tantamount to a guilty plea" standard is unworkable. 223 Ariz. 125, 128, ¶ 17, 220 P.3d 245, 248 (2009). The court stated that it is often difficult for a judge to determine when a stipulation is tantamount to a guilty plea and that courts should not have to guess whether a stipulation is sufficiently significant that it will be "like pleading guilty." *Id*. In addition, the "tantamount to a guilty plea" standard provides the defendant an unfair advantage because it allows a defendant to "essentially plead guilty, yet retain rights typically waived when entering a guilty plea, such as the 'right to test searches, the right to challenge the voluntariness of pretrial admissions, and the right to test identification on appeal.'" *Id.* at ¶ 16 (quoting *State v.*

Avila, 127 Ariz. 21, 24, 617 P.2d 1137, 1140 (1980)).

¶15 The standard creates other problems as well. "It may cause interruptions in a trial to ascertain whether warnings are required and, if so, to give them." *Allen*, 223 Ariz. at 128, ¶ 16, 220 P.3d at 248. In addition, "it would be entirely unworkable to demand a *Boykin* inquiry every time the defense and prosecution come to some arrangement . . . that narrows the issues for trial." *Id.* (quoting *Adams v. Peterson*, 968 F.2d 835, 846 (9th Cir. 1992) (Kozinski, J., concurring)). Moreover, such a standard "requires inappropriate judicial speculation as to defense counsel's trial strategy." *Allen*, 223 Ariz. at 128, ¶ 17, 220 P.3d at 248. "Presumably, if the court can imagine a strategy, the stipulation may be accepted without the necessity of warnings. If, however, the court cannot identify a reason for a stipulation, a colloquy is required." *Id.*

¶16 In *Allen*, the defendant was charged with possession of marijuana. *Id.* at 126, ¶ 6, 220 P.3d at 246. The trial court instructed the jury that the crime of possession of marijuana charge requires proof that (1) the defendant knowingly possessed marijuana, (2) the substance was in fact marijuana, and (3) the defendant possessed a usable amount of marijuana. *Id.* at 127 n.1, ¶ 9, 220 P.3d at 247 n. 1. The defendant's attorney stipulated that the defendant was in possession of a usable amount of marijuana at the time he was arrested. *Id.* at 126, ¶

6, 220 P.3d at 246. The defendant argued that the stipulation was the functional equivalent of a guilty plea, and therefore the court was required to engage with him in a plea-type colloquy. *Id*. at 127, ¶ 12, 220 P.3d at 247.

¶17 The Arizona Supreme Court rejected Allen's argument that the stipulation was the functional equivalent of a guilty plea. The Court held that "stipulations to facts combined with 'not guilty' pleas are 'simply not equivalent to a guilty plea . . . even if the stipulation is to all elements necessary to a conviction and even if it might appear to a reviewing court that the stipulation serves little purpose.'" *Id.* at 127-28, ¶ 14, 220 P.3d at 247-48 (quoting *Adams*, 968 F.2d at 842). The court noted that "[p]arties routinely stipulate to easily proven facts, and courts encourage such stipulations 'to narrow issues and to promote judicial economy.'" *Allen*, 223 Ariz. at 127, ¶ 11, 220 P.3d at 247 (citing *State v. West*, 176 Ariz. 432, 447, 862 P.2d 192, 207 (1993), *overruled on other grounds by State v. Rodriquez*, 192 Ariz. 58, 961 P.2d 1006 (1998)). Furthermore, jurors are not bound by stipulations; they may accept or reject them. *Allen*, 223 Ariz. at 127, ¶ 11, 220 P.3d at 247.

¶18 Torres-Vasquez's attorney stipulated prior to trial that methamphetamine is a dangerous drug and that the substance contained inside the plastic case was methamphetamine of a usable quantity in usable condition. The final jury

instructions stated that "[t]he crime of possession of a dangerous drug requires proof of the following: 1. [t]he defendant knowingly possessed a dangerous drug; and 2. [t]he substance was in fact a dangerous drug; and 3. [t]he substance possessed was a usable amount of a dangerous drug."

¶19 Similar to *Allen*, the State still had the burden to prove that Torres-Vasquez "knowingly possessed" methamphetamine. In accordance with *Allen*, we find no error here.

¶20 Torres-Vasquez next argues that, just as Rule 17.6 of the Arizona Rules of Criminal Procedure requires a plea-type colloquy for stipulations to prior convictions, we should similarly require a colloquy whenever a defendant's attorney stipulates that the offense was committed while the defendant was on probation.

¶21 After the jury was excused at the conclusion of the trial, Torres-Vasquez's attorney stipulated that Torres-Vasquez committed the offense while on probation. Torres-Vasquez asserts that the trial court committed fundamental error by accepting the probation stipulation without first engaging with him in a plea-type colloquy to ensure the stipulation was made voluntarily and intelligently. Because no objection was made at trial, Torres-Vasquez must demonstrate prejudicial, fundamental error or structural error to obtain a reversal. *See Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d at 607. Based on this record

and on *State v. Morales*, 215 Ariz. 59, 157 P.3d 479 (2007), we find no error.

¶22 In *Morales*, the trial court did not engage in a colloquy with the defendant before accepting a stipulation that the defendant had prior felony convictions for sentence enhancement purposes. *Id.* at 60, ¶ 3, 157 P.3d at 480. The Arizona Supreme Court held that there was no need to remand the case because conclusive evidence of the defendant's prior convictions had been admitted at a pretrial hearing and neither party challenged the authenticity of the prior convictions. *Id.* at 62, ¶ 13, 157 P.3d at 482. The Court reasoned that even though the trial court was required under Rule 17.6 of the Arizona Rules of Criminal Procedure to conduct a colloquy with the defendant before accepting the prior conviction stipulation, there would be no point in remanding merely to again admit the conviction records. *Id.*

¶23 Unlike *Morales*, in which the court was required under Rule 17.6 to engage in a colloquy with the defendant, there is no similar requirement anywhere in the Arizona Rules of Criminal Procedure that obliges a trial court to engage in a colloquy with the defendant before accepting a stipulation that the defendant committed the offense while on probation. Moreover, Torres-Vasquez does not argue that the probation stipulation is inaccurate. Therefore, in accordance with the rationale of

Morales and even if a colloquy was required, there is no need for a remand merely to confirm the unchallenged fact that Torres-Vasquez was on probation when he committed the offense at issue herein. Our conclusion is further supported by the rationale of our supreme court in *Allen*.

CONCLUSION

¶24 For these reasons, we conclude that Torres-Vasquez was not denied his constitutional rights and is not entitled to a new trial. The conviction and sentence are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
SHELDON H. WESIBERG, Presiding Judge

____/s/_____
PHILIP HALL, Judge