

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.34



DIVISION ONE
FILED: 12/01/09
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0081
)
Appellee,) DEPARTMENT S
)
v.) **MEMORANDUM DECISION**
)
KRISTINA KAYE PHALEN,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-007860-001 DT

The Honorable Sally S. Duncan, Judge

CONVICTIONS AFFIRMED; SENTENCES AFFIRMED AS MODIFIED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Edith M. Lucero, Deputy Public Defender
Attorneys for Appellant

T I M M E R, Chief Judge

¶1 Kristina Kaye Phalen appeals the trial court's order sentencing her for two counts of sale or transportation of dangerous drugs, both class two felonies with two prior

convictions, pursuant to Arizona Revised Statutes ("A.R.S.") section 13-3407 (Supp. 2008).¹ Phalen asks this court to "exercise its inherent power to modify [the] sentencing minute entry" to reflect that the trial court expressly intended to impose sentence under A.R.S. § 13-604 (Supp. 2008), not under A.R.S. § 13-712 (Supp. 2008) as stated in the minute entry. The State confesses such error, and we agree.

¶2 On October 8, 2008, the trial court sentenced Phalen with two prior felony convictions to 15.75 years' imprisonment as to count one, and 15 years' imprisonment as to count two, both sentences to be served concurrently. Although it appears the court intended to sentence Phalen as a repetitive offender pursuant to A.R.S. § 13-604 on both counts, the written minute entry reflects that Phalen was sentenced pursuant to A.R.S. § 13-712.

¶3 Rule 26.16(a), Arizona Rules of Criminal Procedure, provides that "the judgment of conviction and the sentence thereon are complete and valid as of the time of their oral pronouncement in open court." When a discrepancy exists between the oral pronouncement of sentences and the sentencing minute entry that cannot be resolved by reference to the record, remand for clarification is the appropriate remedy. *State v. Bowles*,

¹ We cite to the current version of the statute as no revisions material to this decision have occurred.

173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992). In this case, however, remand is not necessary because the record reflects the court's intention to sentence Phalen as a repetitive offender pursuant to A.R.S. § 13-604(D). In *State v. Contreras*, 180 Ariz. 450, 453 n.2, 855 P.2d 138, 141 n.2 (App. 1994) (citation omitted), this court stated that "[w]hen we are able to ascertain the trial court's intention by reference to the record, remand for clarification is unnecessary."

¶14 For the foregoing reasons, we affirm Phalen's convictions but modify the sentencing minute entry as to both counts by deleting the reference to A.R.S. § 13-712 and inserting the correct provision, A.R.S. § 13-604, in its place.² We further direct the clerk of the court to send a copy of this decision to the Arizona Department of Corrections.

/s/
Ann A. Scott Timmer, Chief Judge

CONCURRING:

/s/
Jon W. Thompson, Judge

/s/
Sheldon H. Weisberg, Judge

² Phalen concedes that the correct sentence on count two under A.R.S. § 13-604 is 15.75 years' imprisonment, not 15 years as stated in the sentencing minute entry. We will not correct an erroneous sentence, however, if the error favors the defendant and the State has not filed a cross-appeal. *State v. Dawson*, 164 Ariz. 278, 281-83, 792 P.2d 741, 744-46 (1990).