DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0360
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
RONALD PAUL BERNAL,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-006821-001 DT

The Honorable Steven K. Holding, Judge Pro Tempore

SENTENCE VACATED AND REMANDED FOR RESENTENCING

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P O R T L E Y, Judge

¶1 Defendant, Ronald Paul Bernal, ("Bernal") challenges his sentence for possession of dangerous drugs and drug

paraphernalia. He contends that the State did not give him notice that it intended to prove his release status as an aggravating factor at sentencing. As a result, he argues he has to be resentenced. We agree.

FACTUAL BACKGROUND

¶2 Bernal was mistakenly released from the Arizona Department of Corrections ("ADOC") before he had completed the sentence for his 2006 conviction. He was subsequently arrested, tried, and convicted of the felonies in this case. Because of his two prior historical felonies, he was sentenced to ten years for the drug offense and a concurrent 3.75 years for the paraphernalia offense. Based on his release status, the trial court pursuant to Arizona Revised Statutes ("A.R.S.") section 13-708(C) (2010),[1] ordered his sentence to be consecutive to the 2006 conviction. Bernal appealed, and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 and -4033(A)(4) (2010).

DISCUSSION

¶3 Bernal contends that the trial court erred when it sentenced him pursuant to A.R.S § 13-708(C). He argues that the

[1] The Arizona criminal sentencing code was renumbered. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. Because the renumbering included no substantive changes, we refer to the current section numbers.

State did not prove he was on release from confinement at the time of the subsequent offenses or give proper notice of its intent to rely on that status at sentencing. Because he did not object to his sentences, we review for fundamental error. *State v. Smith*, 219 Ariz. 132, 136, ¶ 21, 194 P.3d 399, 403 (2008).

¶4 There is no question that Bernal was on release at the time he committed the current offense. There is no question, moreover, that the trial judge had enough information to make that finding. Bernal admitted his release status at a pretrial evidentiary hearing and stipulated that his release status would not be mentioned to the jury. The issue, however, is whether the State provided notice that it intended to use his release status at sentencing.

¶5 Although the State was not required to allege Bernal's release status in the information or indictment, s*ee State v. Waggoner*, 144 Ariz. 237, 239, 697 P.2d 320, 322 (1985), he had to receive notice before trial that "the State intend[ed] to allege his release status." *Id.*; *see State v. Benak*, 199 Ariz. 333, 336-37, ¶¶ 14 & 16, 18 P.3d 127, 130-31 (App. 2001) (finding fundamental fairness and due process require that allegations that would enhance a sentence be made before trial so the defendant can evaluate his options and is not misled, surprised, or deceived in any way).

¶6 The State argues that Bernal received sufficient notice because his release status was discussed at both settlement conferences and the trial management conference. We disagree.

¶7 Even though both parties knew about Bernal's release status, there is nothing in the record to demonstrate that the State ever gave notice before trial that it was going to use that status to enhance his sentence. It is not enough that his release status made him eligible to be sentenced pursuant to A.R.S. § 13-708(C). *See State v. LaBar*, 148 Ariz. 522, 524, 715 P.2d 775, 777 (App. 1985) (finding that where the State did not provide the defendant notice, it would be improper to sentence him under the enhancement for committing a subsequent offense while on release from confinement).

¶8 During the final settlement conference, the trial court explained the following to Bernal:

> One, you're currently incarcerated serving a nine-year sentence. If you go in front of a jury which is waiting outside, the jury will decide your innocence or guilt. If they decide you're guilty on one of the matters, there is a presumption under the law and it's statutory that the two sentences will be consecutive, back-to-back. So if found guilty, you could serve a consecutive sentence of however the Court sentences you.
>
> . . . .
>
> And if the jury finds you guilty, you're doing 15.75 years presumptive sentence. It could be mitigated as well as it could be aggravated. There is some

> argument that mitigation is not allowed due to your status, again, but I'm not going to discuss that very much further.

The State, however, never told Bernal that it intended to use his release status at sentencing, or clarified that if his status was used, he could not receive a mitigated sentence.[2]

¶9 The State never advised Bernal on the record or in writing before trial that it intended to use his release status at sentencing. In fact, the following occurred at sentencing:

> THE COURT: As it related to Count One, possession of dangerous drugs, I will find defense has proved up a mitigator of remorse, strong family ties as well as what the A.M.A. considers a medical issue — issue, drug addiction. There were no aggravators that were proved up, therefore a mitigated sentence is appropriate. I will give you —
>
> . . . .
>
> PROSECUTOR: — may I ask the Court, since I was not present, he was on parole; is it even legally possible to give him a mitigated sentence under the law?
>
> . . . .
>
> THE COURT: I will then find my error. Thank you. I will correct it. Thank you [again] for your candor toward the tribunal. I will find that the aggravators and mitigators are inappropriate in this case. I will find that the presumptive term of 10 years is appropriate, sentence you to 10 years in the Arizona Department of Corrections. As it relates to Count Two, possession of drug paraphernalia with two prior

[2] The trial court's statements during the settlement conference were incorrect statements of law. Bernal's sentence had to be "not less than the presumptive sentence" and "consecutive to any other sentence from which the convicted person had been temporarily released." A.R.S. § 13-708(C).

> felony convictions; again, for the same reasons — reasoning I find that the presumptive sentence of 3.75 years is appropriate. As it relates to the consecutive or concurrent with CR — CR 2006-005321, I will find that the presumption in the law that they should run consecutive is appropriate and sentence you to consecutive sentences with CR 2006-005321.

¶10 The defense never objected about the lack of notice. Bernal received the presumptive sentences for possession of dangerous drugs and possession of drug paraphernalia because the trial court believed it could not impose a mitigated term.

¶11 Section 13-708(C) was inapplicable because the State never notified Bernal that it intended on using his release status as a sentencing enhancement. The trial court, as a result, retained its discretion to sentence Bernal to a mitigated term. *See State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996) (holding a trial court has broad discretion to determine an appropriate sentence within statutory limits).

¶12 Our supreme court has stated that improper enhancement of a sentence goes to the foundation of a defendant's right to receive a legal sentence. *Smith*, 219 Ariz. at 136, ¶ 22, 194 P.3d at 403. Moreover, there is "substantial prejudice inherent in an improperly enhanced prison term." *State v. McCurdy*, 216 Ariz. 567, 574 n.7, ¶ 18, 169 P.3d 931, 938 n.7 (App. 2007). Consequently, because the trial court acted under the mistaken assumption that it could not give Bernal a mitigated sentence,

this constituted fundamental error, and prejudice is presumed. *See Smith*, 219 Ariz. at 136, ¶ 22, 194 P.3d at 403.

CONCLUSION

¶13 For the forgoing reasons, we vacate the sentence and remand for resentencing.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Judge

/s/
_____
PATRICIA A. OROZCO, Judge