

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. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



DIVISION ONE
FILED: 04-13-2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,) 1 CA-CR 09-0453
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
DAVID LEON STOKES, II,) Arizona Supreme Court)
)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 1999-007812

The Honorable Rosa Mroz, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
by Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Judge

¶1 David Leon Stokes, II ("Appellant"), appeals from his sentences for one count of attempted kidnapping and one count of attempted robbery, both class three dangerous and repetitive

felonies. Appellant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this court that after a search of the record on appeal he finds no arguable question of law. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738. This court afforded Appellant the opportunity to file a supplemental brief *in propria persona*, but he did not do so. Counsel now asks this court to search the record for fundamental error. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). After reviewing the entire record, we affirm Appellant's sentences.

FACTS AND PROCEDURAL BACKGROUND

¶2 On November 16, 1999, a jury found Appellant guilty of attempted kidnapping and attempted armed robbery, both class three dangerous offenses. After trial to the court concerning Appellant's prior felony convictions, the court determined Appellant had previously been convicted of three felonies. The court sentenced Appellant as a repetitive nondangerous offender, found additional aggravating factors,¹ and imposed concurrent, super-aggravated sentences of twenty five years on each count.

¹ The court found three aggravating factors: (1) physical and emotional harm to the victim; (2) Appellant was convicted of felonies within ten years immediately preceding the date of the offense; and (3) Appellant's 1981 convictions for kidnapping and

¶3 This court affirmed Appellant's convictions and sentences. See *State v. Stokes*, 1 CA-CR 99-1040 (Ariz. App. July 20, 2000) (mem. decision). After the United States District Court for the District of Arizona denied Appellant *habeas corpus* relief, the Ninth Circuit affirmed the trial court's sentencing decision in part and reversed in part, determining (1) the sentencing court did not violate *Apprendi v. New Jersey*, 530 U.S. 466 (2000), by disregarding the jury's dangerousness finding in opting to sentence Appellant under the repeat offender statute with a longer maximum sentence than the dangerousness offender statute; and (2) the sentencing court violated *Apprendi* by finding aggravating circumstances not found by the jury and using them to enhance Appellant's sentence above the statutory maximum of twenty years. See *Stokes v. Schriro*, 465 F.3d 397, 404 (9th Cir. 2006). The Ninth Circuit remanded this matter for resentencing. *Id.*

¶4 At resentencing, the court found three prior felony convictions were proved at the original sentencing hearing. It considered two of the prior convictions for sentence enhancement purposes and the third as the sole aggravating factor. The court sentenced Appellant to an aggravated term of twenty years

aggravated assault were "strikingly similar to the instant offenses."

on each count to run concurrently, with 3457 days of presentence incarceration credit.

¶15 Appellant filed a delayed notice of appeal in this matter.² We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") section 12-120.21 (2003).

ANALYSIS

¶16 Appellant's counsel raises two issues at Appellant's request, which we review in turn. We review questions of law *de novo*. *Arizona Water Co. v. Arizona Corp. Comm'n*, 217 Ariz. 652, 655, ¶ 10, 177 P.3d 1224, 1227 (App. 2008).

¶17 Appellant first argues that the sentencing court violated his Sixth Amendment rights under the Federal Constitution by failing to submit the aggravating factor, a prior conviction, to the jury. We disagree. In *Apprendi*, the Supreme Court of the United States held, "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. The only aggravating factor that the sentencing court considered was a prior conviction, and, under *Apprendi*,

² Appellant's notice of appeal was filed one day late, at which point he filed a Rule 32 petition for post-conviction relief requesting a delayed appeal. This petition was granted and Appellant filed a timely delayed notice of appeal.

prior convictions are excluded from the requirement that aggravating factors be submitted to a jury.

¶8 Second, Appellant argues that the sentencing court erred by using his three prior convictions duplicatively - two as enhancement factors and the third as an aggravating factor. Again, we disagree. "[D]ouble punishment principles do not preclude the trial court from using prior convictions to impose an enhanced sentence under the recidivist statute, . . . and to find aggravating circumstances[.]" *State v. Ritacca*, 169 Ariz. 401, 403, 819 P.2d 987, 989 (App. 1991) (citing former versions of A.R.S. §§ 13-604 and 13-702); *State v. LeMaster*, 137 Ariz. 159, 166, 669 P.2d 592, 599 (App. 1983). The trial court did not err in its treatment of Appellant's prior felony convictions.

¶9 Further, we have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The sentences were within the statutory limits. Appellant was represented by counsel and was offered the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

CONCLUSION

¶10 We affirm Appellant's sentences. After the filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
PETER B. SWANN, Presiding Judge

_____/S/_____
MICHAEL J. BROWN, Judge