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

STATE OF ARIZONA, Appellee, v. ANTHONY VILLARREAL, JR., Appellant.	)	No. 1 CA-CR 09-0520
	)	DEPARTMENT C
	)	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200401543

The Honorable John P. Plante, Judge

AFFIRMED

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

Michael A. Breeze, Yuma County Public Defender — Yuma
By Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 In 2005, after a jury trial, Anthony Villareal, Jr. ("Defendant") was convicted of and sentenced for multiple offenses. He appealed, and we affirmed his convictions and sentences in *State v. Villareal*, 1 CA-CR 05-1013 (Ariz. App. June 14, 2007) (mem. decision). He thereafter sought post-conviction relief, which was granted in part: the court set aside the aggravated sentence that had been imposed for one aggravated assault count, and on that count resentenced Defendant to an aggravated sentence of identical duration based on different aggravating factors. Defendant filed a notice of appeal from the resentencing.

¶2 The appeal comes to us under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Defendant has advised us that he has searched the record on appeal and finds no arguable question of law. *See Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Defendant was given the opportunity to file a supplemental brief *in propria persona*, but did not do so.

¶3 Pursuant to our obligation under *Anders*, we have independently reviewed the portion of the record relevant to the scope of this appeal, which concerns the court's post-conviction relief actions. *See State v. Hartford*, 145 Ariz. 403, 405, 701

P.2d 1211, 1213 (App. 1985) (the validity of an underlying conviction, previously affirmed on appeal, is beyond the scope of an appeal from remand for resentencing). We find no fundamental error, and affirm.

FACTS AND PROCEDURAL HISTORY

¶4 Defendant's convictions were for the following offenses, committed on December 14, 2004:

(1) Count 3: drive by shooting, a class two dangerous felony, pursuant to A.R.S. § 13-1209;

(2) Count 5: aggravated assault, a class three dangerous felony, pursuant to A.R.S. § 13-1204(A)(1);

(3) Count 6: aggravated assault, a class three dangerous felony, pursuant to A.R.S. § 13-1204(A)(2);

(4) Count 7: misconduct involving weapons, a class four felony, pursuant to A.R.S. § 13-3102(A)(4);

(5) Count 8: possession of marijuana, a class six felony, pursuant to A.R.S. § 13-3405(A)(1) and (B)(1); and

(6) Count 9: endangerment, a class six felony, pursuant to A.R.S. § 13-1201.

Defendant was sentenced to aggravated prison terms of 21 years, 15 years, and 15 years for, respectively, Counts 3, 5, and 6. He was sentenced to presumptive prison terms of 2.5 years, 1 year, and 1 year for, respectively, Counts 7, 8, and 9. All terms were imposed concurrently.

¶5 In the post-conviction relief proceedings, which included three informal conferences pursuant to Ariz. R. Crim. P. 32.7, Defendant asserted an ineffective assistance of counsel claim based on his trial counsel's failure to request that Count 7, as well as all drug counts, be severed. He argued that the jury likely improperly considered evidence relevant to those counts – his status as a prohibited possessor and a drug user – when deciding on the other counts. The court found, however, that given the totality of the evidence, the lack of severance did not cause fundamental error.

¶6 Defendant also contended that the sentences imposed for Counts 3, 5, and 6 were improper.[1] He initially argued that Count 3 was improperly sentenced as a dangerous offense because the jury was not given a verdict form to find dangerousness, but

[1] In his petition for post-conviction relief, Defendant couched his arguments regarding sentencing in terms of ineffective assistance of counsel, based on the fact that his trial and appellate counsel failed to raise those issues. The court appeared reluctant to find ineffective assistance of counsel, but as defense counsel and the court correctly recognized, an illegal sentence is itself grounds for post-conviction relief. *See* Ariz. R. Crim. P. 32.1(a), (c).

later conceded that the finding was inherent in the conviction. He also argued that the sentences imposed for Counts 3, 5, and 6 were improper because the court aggravated those sentences by "double-counting" – that is, by using the same factors to both enhance and aggravate, in violation of A.R.S. § 13-702(C) (Supp. 2004). The jury had not been given an opportunity to find any aggravating factors, but at the sentencing hearing, the court articulated several aggravating factors:

> Well, here's my analysis: On the aggravating side I find that the defendant has a prior felony conviction, which is documented in the presentence materials. That's one aggravating factor. A second aggravating factor as found by the jury is that he inflicted serious physical injury on the victims in this case. I find a third aggravating factor by way of I think the defendant is just a very dangerous person. I say that because his priors for attempted first degree murder for which he's been convicted, has served a prison sentence, was released and now has been found guilty of committing a very similar type [of] offense. He shows no remorse, no consideration for the victim or for anyone else, and I believe it's aggravating and the fact [is] that I think he does need to be separated from innocent people in the society for a lengthy period of time. . . . On the mitigating side I really don't see anything. Nothing. So in that I do believe that an aggravated sentence is appropriate.

The court then imposed aggravated sentences for Counts 3, 5, and 6, but did not specify which factor or factors it applied to aggravate each sentence.

¶7 Defendant initially argued that it was unclear whether the court's finding of a prior felony conviction[2] was proper because it was unclear whether the court found the felony to be an enhancing factor or an aggravating factor. This lack of clarity stemmed from the court's failure to specify whether it had used subsection (I) or (J) of A.R.S. § 13-604 (Supp. 2004) in imposing sentence on Count 3. If the court had used subsection (I), Defendant noted, the court could properly find the felony to be an aggravating factor pursuant to A.R.S. § 13-702(C) (Supp. 2004). But if the court had used subsection (J), Defendant argued, the court had impermissibly found the felony to be an enhancing factor. Defendant ultimately conceded that the court appeared to have used subsection (I) because the court followed "almost verbatim" a sentencing memorandum which indicated that subsection (I) was used.

[2] In articulating the aggravating factors, the court first referred to a single prior felony conviction but later referred to "priors." The second reference appears to be either a misstatement or transcription error. Defendant had only one prior felony conviction, for attempted murder in the first degree in Colorado. Documentation of that prior felony conviction was not only contained in the presentence report, as the court noted, but had also been submitted to the court in the State's pretrial motion to amend the indictment to set forth the conviction.

¶8 Defendant argued, however, that the prior felony was impermissibly counted as an aggravating factor two times because the court not only considered the felony itself to be an aggravating factor, but also based another factor, the finding that Defendant was a dangerous person, solely on the prior felony. Defendant, who had maintained his innocence, also argued that it was not proper for the court to consider his lack of remorse as an aggravating factor.

¶9 Regarding Count 5, Defendant argued that pursuant to A.R.S. § 13-702(C)(1) (Supp. 2004), the fact that he had inflicted serious physical injury could not be used as an aggravating factor because the infliction of serious physical injury was an essential element of the offense, which had been charged under A.R.S. § 13-1204(A)(1). The same aggravating factor was also improperly applied to Count 6, Defendant argued, because Count 6 was "so intertwined" with Count 5 that "they weren't found to be two separate offenses."

¶10 The court denied post-conviction relief except as to the sentence imposed for Count 5. The court set that sentence aside and scheduled a resentencing hearing. At the resentencing hearing, Defendant was sentenced to an aggravated term of fifteen years of imprisonment. The court stated that the sentence was aggravated under A.R.S. § 13-702(C) (Supp. 2004) because Defendant had committed a prior felony within the past

ten years and because an accomplice had been present during the commission of the offense. The sentence for Count 5 was imposed concurrently with the sentences for all other counts, and Defendant was given credit for 1655 days of presentence incarceration.

¶11 We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A)(4) (Supp. 2009), and Ariz. R. Crim. P. 32.9(c).

DISCUSSION

¶12 Our review of the record reveals no fundamental error.

¶13 The post-conviction relief proceedings were conducted in accordance with Ariz. R. Crim. P. 32. Although no evidentiary hearing was held, such a hearing was not required because the issues raised were purely legal. *See* Ariz. R. Crim. P. 32.8(a) (evidentiary hearing required to determine issues of material fact).

¶14 We find no fundamental error in the court's rulings regarding Defendant's requests for post-conviction relief. We find no error in the court's ruling that trial counsel's failure to seek severance did not constitute fundamental error. The court correctly recognized that the jury impliedly found dangerousness regarding Count 3, drive by shooting, by convicting Defendant of that offense. *See State v. Smith*, 146

Ariz. 491, 499, 707 P.2d 289, 297 (1985) (holding that where an offense itself requires proof of its dangerous nature, a specific finding of dangerousness is not required); A.R.S. § 13-1209 (defining drive by shooting as "intentionally discharging a weapon from a motor vehicle at a person, another occupied motor vehicle or an occupied structure").

¶15 We also find no fundamental error in the court's apparent acceptance that Count 3 had been sentenced under A.R.S. § 13-601(I) (Supp. 2004), not A.R.S. § 13-601(J) (Supp. 2004). As Defendant ultimately recognized, the State's sentencing memorandum clearly referred to subsection (I), and the court was clearly guided by that memorandum.

¶16 It was permissible for the court to find Defendant's prior felony conviction as an aggravating factor. *See State v. Aleman*, 210 Ariz. 232, 240, ¶ 25, 109 P.3d 571, 579 (App. 2005) (explaining that *Blakely v. Washington*, 542 U.S. 296, 301 (2004), did not alter the rule expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that a prior felony conviction need not be presented to a jury and proved beyond a reasonable doubt). Once that factor was found, Defendant was eligible for the maximum terms of imprisonment authorized by the applicable sentencing statutes, and the court was free to consider additional aggravating factors. *See State v. Lamar*, 210 Ariz. 571, 577, ¶ 26, 115 P.3d 611, 617 (2005) (supplemental opinion).

The aggravated sentences imposed for Counts 3 and 6 were supported by sufficient proper aggravating factors, as was the aggravated sentence imposed upon resentencing for Count 5.

¶17 Before resentencing, the court ordered and considered a presentence report. At resentencing, Defendant was represented by counsel and was given the opportunity to speak on his own behalf. The court stated on the record the evidence and materials it considered and the factors it found in imposing sentence, and properly credited Defendant with 1655 days of presentence incarceration.

CONCLUSION

¶18 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm. Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and his future options. *Id.* Defendant has thirty days from the date of this decision to file a petition for review *in propria persona*. *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion,

Defendant has thirty days from the date of this decision in which to file a motion for reconsideration.

/S/

PETER B. SWANN, Presiding Judge

CONCURRING:

/S/

LAWRENCE F. WINTHROP, Judge

/S/

MICHAEL J.BROWN, Judge