

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



DIVISION ONE
FILED: 07-01-2010
PHILIP G. URRY, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
) No. 1 CA-CR 09-0755
)
) DEPARTMENT E
 Appellee,)
)
) **MEMORANDUM DECISION**
 v.)
) (Not for Publication -
 NED OSBORN, JR.,) Rule 111, Rules of the
) Arizona Supreme Court)
 Appellant.)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-120510-002 DT

The Honorable Rosa Mroz, Judge

SENTENCE 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 Peg Green, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969), following Ned Osborn, Jr.'s resentencing on September 18, 2009, on his conviction on one count of possession or use of dangerous drugs. Osborn's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Osborn was given the opportunity to file a supplemental brief but did not do so. Counsel now asks this court to search the record for fundamental error. After reviewing the entire record, we affirm Osborn's sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 Osborn was charged with two counts of aggravated assault, both Class 3 dangerous felonies; one count of misconduct involving weapons, a Class 4 felony; and one count of possession or use of dangerous drugs, also a Class 4 felony. A jury found Osborn not guilty on both counts of aggravated assault and guilty on the count of possession or use of dangerous drugs, but was unable to reach a verdict on the misconduct involving weapons charge (which the State later dismissed with prejudice). After finding Osborn had been convicted of an historical prior felony offense, the court sentenced him to a presumptive term of 4.5 years' imprisonment on the single count of which he was convicted.

¶13 Osborn appealed, and in *State v. Osborn*, 220 Ariz. 174, 204 P.3d 432 (App. 2009), we held the superior court had committed fundamental error by basing its finding of an historical prior felony conviction on a pretrial stipulation Osborn had entered into in connection with the weapons misconduct charge. *Id.* at 179, ¶ 13, 204 P.3d at 437. In our opinion, we noted double jeopardy principles would not bar the State from seeking to prove Osborn's prior felony upon resentencing. *Id.* at ¶ 14.

¶14 On remand, the State submitted evidence of Osborn's prior felony conviction. A probation officer testified Osborn had been on probation under her supervision after being convicted of a felony on November 7, 2006. The officer also testified Osborn was on probation for that conviction on March 29, 2007, the date he committed the drug offense in this case. Additionally, the State submitted into evidence a certified copy of the minute entry from the sentencing on Osborn's prior felony conviction.

¶15 The court found the State had proved Osborn's prior felony conviction and that he was on probation at the time of the offense in this case. The court sentenced Osborn to a presumptive term of 4.5 years' imprisonment with 632 days of presentence incarceration credit. Osborn timely appealed. We

have jurisdiction 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 (2010).

DISCUSSION

¶16 The court had before it sufficient evidence that Osborn had committed an historical prior felony conviction pursuant to A.R.S. § 13-604(A) (Supp. 2008), and that he was on probation at the time he committed the offense in the current case. The court received and considered a presentence report and addressed its contents during the sentencing hearing and imposed a legal sentence on the charge of which Osborn was convicted. The State's allegation of an historical prior felony conviction upon resentencing did not violate the guarantee against double jeopardy. *See Osborn*, 220 Ariz. at 179, ¶ 14, 204 P.3d at 437 (citing *Monge v. California*, 524 U.S. 721, 730 (1998)). Likewise, the court had the power to find that Osborn committed the offense while on probation, *see State v. Cox*, 201 Ariz. 464, 468, ¶ 16, 37 P.3d 437, 441 (App. 2002), and evidence supported that finding.

CONCLUSION

¶17 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶18 After the filing of this decision, defense counsel's obligations pertaining to Osborn's representation in this appeal have ended. Defense counsel need do no more than inform Osborn of the outcome of this appeal and his future options, unless, upon review, counsel finds "an issue appropriate for submission" to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Osborn has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Osborn has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICK IRVINE, Judge

/s/
PHILIP HALL, Judge