

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: 12/16/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0797
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
)
PHILLIP JOHN LYNCH,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-005934-001 DT

The Honorable Lisa Ann Vandenberg, Judge

AFFIRMED

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

Maricopa County Public Defender's Office Phoenix
By Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Lynch appeals from his conviction and sentence for burglary in the third degree, a class four felony. Lynch's counsel filed a brief in compliance with *Anders v. California*,

386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. Lynch was afforded the opportunity to file a supplemental brief *in propria persona* but did not do so. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶13 On August 16, 2008, Lynch went to a restaurant in Scottsdale. Lynch informed the manager, Y.L., that he was waiting for someone. Y.L. then seated Lynch at a booth in the front of the restaurant to wait. Thirty minutes later, still alone, Lynch went to the counter where the cash register is located and asked Y.L.'s sister for a glass of water. When Y.L.'s sister turned around to pour Lynch a glass of water, Y.L. observed Lynch looking at the cash register, so she yelled at him. Lynch then reached over the counter into the cash register, grabbed some money, and ran out the door. Lynch ran into the glass front door in his haste to leave, broke it, and fell down. Once he was outside, Lynch got onto his motorcycle,

but Y.L. and a customer surrounded him. When Lynch tried to drive away, he crashed and was injured. Lynch then attempted to run away, but since he was hurt, he instead collapsed in the bushes nearby. Shortly thereafter, paramedics and police arrived on the scene.

¶14 Y.L. identified Lynch to the police. A witness, E.G., also reported that he heard a crash of glass as he was parking his car outside the restaurant and saw Lynch running from the restaurant. E.G. also stated that he saw Lynch try to drive away on his motorcycle, but Lynch fell on the pavement and started bleeding.

¶15 Police recovered seventy dollars crumpled up and bloody in Lynch's pockets. They also noted that Lynch was bleeding from his head, and he stated that he thought his leg and back were broken. Lynch spoke with the police and admitted to stealing the money, detailing the previous events.

¶16 At trial Lynch did not deny taking money from the restaurant, but he contested whether his actions rose to the level of burglary. On the second day of trial, the court declared a mistrial because Lynch's wife made inappropriate comments in front of the jury. The court banned Lynch's wife from the courthouse and selected a new jury. This jury convicted Lynch as charged.

¶17 At the hearing regarding Lynch's prior convictions,

the State and defense counsel made an agreement. Lynch agreed to admit to two prior felony convictions in exchange for the State's promise to recommend a mitigated sentence of eight years.

¶18 At sentencing, the court sentenced Lynch to the recommended eight years in prison with 191 days of presentence incarceration credit.

DISCUSSION

¶19 Having considered defense counsel's brief and examined the record for reversible error, see *Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. The sentence imposed falls within the range permitted by law, and the evidence presented supports the conviction. As far as the record reveals, Lynch was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶10 Additionally, we reject Lynch's argument that "the trial court erred in sentencing by considering aggravators not proven to the jury, specifically [that] [] Lynch committed the offense for pecuniary gain and laid in wait to gain advantage over the victim." Lynch asserts that without the finding of these two aggravators, he would have been eligible to receive a super-mitigated sentence of six years instead of the mitigated

sentence of eight years that he did receive.

¶11 We do not find error by the trial court in sentencing, even though it is possible that Lynch's mitigated sentence might have been shorter if the trial court had not considered the above aggravating factors. It is important to note that the court's determination of these aggravating factors did not result in punishment in excess of the statutory maximum.

¶12 "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." *State v. Johnson*, 210 Ariz. 438, 440-441, ¶ 9, 111 P.3d 1038, 1040-41 (App. 2005) (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). In *Blakely v. Washington*, the Court explained that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." 542 U.S. 296, 303-304 (2004) (emphasis in original).

¶13 According to Arizona law, the maximum punishment authorized by a jury verdict alone, without any additional findings, is the presumptive term. Ariz. Rev. Stat. ("A.R.S.") §§ 13-701(C) (2010), 13-702(A) (2010) (outlining the presumptive prison terms as required punishment absent finding any aggravating or mitigating factors); *Johnson*, 210 Ariz. at 441, ¶

10, 111 P.3d at 1041. Although the trial court considered aggravating factors not proved to the jury, it ultimately imposed a mitigated sentence. Since Lynch's punishment is below the statutory maximum allowed by the jury verdict alone, the trial court did not err by finding additional aggravating factors. *Id.* at 442, ¶ 13, 111 P.3d at 1042.

¶14 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Lynch of the disposition of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. Lynch has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶15 The conviction and sentence are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge