DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 10-0604 PRPC
	)	
Respondent,	)	DEPARTMENT A
	)	
v.	)	Mohave County
	)	Superior Court
DAVID LEE COLLINS,	)	No. CR2008-0346
	)	
Petitioner.	)	
	)	**DECISION ORDER**

Petitioner David Lee Collins filed a petition for review from the dismissal of his petition for post-conviction relief. Presiding Judge Maurice Portley and Judges Ann A. Scott Timmer and Andrew W. Gould have considered his petition, and based on the following, grant review and relief.

Collins pled guilty to failure to comply with sex offender registration requirements, a class 4 felony, and stalking, a class 5 felony, with one historical prior felony conviction. *See* Ariz. Rev. Stat. ("A.R.S.") sections 13-3824(A) (West 2008) (failure to comply with sex offender registration requirements) and 13-2923(A)(1), (B) (West 2008) (stalking). He entered into a plea agreement with the State, and the agreement

provided that the trial court would sentence him to an aggregate term of ten years' imprisonment. The agreement, however, gave the court discretion as to how it would determine the ten-year aggregate sentence.[1]

The court sentenced Collins to an exceptionally aggravated term of 6.5 years' imprisonment for failure to comply with sex offender registration requirements and an exceptionally aggravated, consecutive term of 3.5 years for stalking. The court identified two aggravating factors to support the exceptionally aggravated sentences: Collins's "prior record" and the fact that he was on parole when he committed the offenses.

Collins filed a timely petition for post-conviction relief, and argued that his sentences were illegal because the

[1] In order to impose a ten-year aggregate sentence, the court would have to impose an "exceptionally" aggravated sentence for at least one of the counts pursuant to A.R.S. § 13-702.02(C) (West 2008) (repealed Jan. 1, 2009) and order that the sentences be served consecutively. *See* A.R.S. § 13-604(A) (West 2008) (maximum sentences for class 4 and 5 felonies with one historical prior felony conviction are six and three years, respectively); A.R.S. § 13-702.01(C) (West 2008) (maximum sentences for class 4 and 5 felonies may be exceptionally aggravated to 7.5 and 3.75 years, respectively). And, in order to impose an exceptionally aggravated sentence pursuant to § 13-702.01(C), the court must find that at least two of the aggravating factors listed in A.R.S. § 13-702(C) (West 2008) apply.

court considered a "catch-all" factor as one of the two aggravating factors necessary to impose an exceptionally aggravated sentence pursuant to § 13-702.01(C).[2] He correctly noted that a court may impose an exceptionally aggravated sentence under § 13-702.01 only if *both* of the necessary aggravating factors found by the court are specifically enumerated in § 13-702(C); the court, however, may not impose an exceptionally aggravated sentence if one of the two necessary aggravating factors comes under the "catch-all" provision in § 13-702(C). *State v. Perrin*, 222 Ariz. 375, 378, ¶ 9, 214 P.3d 1016, 1019 (App. 2009).[3] A defendant's parole status is not one of the specifically enumerated aggravating factors listed in §

[2] At the time Collins was sentenced, the "catch-all" provision identified as an aggravating factor "[a]ny other factor that the state alleges is relevant to the defendant's character or background or to the nature or circumstances of the crime." A.R.S. § 13-702(C)(24).

[3] *Perrin* was issued just twenty-five days before Collins was sentenced. The record reveals that neither Collins nor the State informed the court of the *Perrin* opinion at sentencing. Even though *Perrin* addressed an earlier version of the statutory "catch-all" provision that permitted the trial court "to consider any [other] factors it deem[ed] appropriate to the ends of justice," 222 Ariz. at 377, ¶ 4, 214 P.3d at 1018 (citation and internal quotation marks omitted), the *Perrin* analysis applies to the later version of the statutory "catch-all" provision at issue here. *See State v. Zinsmeyer*, 222 Ariz. 612, 622-23, ¶¶ 24-25, 218 P.3d 1069, 1079-80 (App. 2009) (citations omitted).

13-702(C). It is, as the court later acknowledged, a factor that necessarily fell within the "catch-all" provision of § 13-702(C)(24).[4]

Despite recognizing that Collins's parole status fell under the statutory "catch-all" provision, the court summarily dismissed his petition for post-conviction relief. The court stated, however, that it would impose the same sentences even if we ordered the court to resentence Collins on remand. The court indicated that if Collins had to be resentenced, it would consider his prior felony convictions within ten years of the offenses in this case as separate and distinct aggravating factors pursuant to § 13-702(C)(11).

We exercise our discretion and grant review of the petition. Because *Perrin* applies, the court could not use

[4] The trial court later determined that the identification of Collins's "prior record" as an aggravating factor was not sufficient to identify it as a specifically enumerated factor in § 13-702(C)(11) (felony conviction "within the ten years immediately preceding the date of the offense"), but was sufficient to identify it as a "catch-all" factor pursuant to § 13-702(C)(24). In his petition, however, Collins only argued that his parole status was within the "catch-all" provision. Because we find that Collins's parole status was not a specifically enumerated aggravating factor found in § 13-702(C), we need not address whether the identification of his "prior record" as an aggravating factor was sufficient to identify it as a specifically enumerated factor pursuant to § 13-702(C)(11).

Collins's parole status as one of the two necessary aggravating factors to impose exceptionally aggravated sentences because it was a "catch-all" factor. *See State v. Zinsmeyer*, 222 Ariz. 612, 622-23, ¶¶ 24-25, 218 P.3d 1069, 1079-80 (App. 2009) (citations omitted). Accordingly, we grant relief by vacating the aggregate sentences imposed and remanding for resentencing.

Collins next asserts that we must set aside the plea agreement. We disagree. The trial court may sentence him on remand. "Double jeopardy principles generally do not apply to sentencing proceedings." *State v. Ring*, 204 Ariz. 534, 548, ¶ 27, 65 P.3d 915, 929 (2003) (citation omitted); *accord Monge v. California*, 524 U.S. 727, 728 (1998) (citation omitted). "An illegal sentence is no sentence at all." *State v. Pyeatt*, 135 Ariz. 141, 143, 659 P.2d 1286, 1288 (App. 1982) (quoting *State v. Ortiz*, 104 Ariz. 493, 495, 455 P.2d 971, 973 (1969)). Therefore, when a sentence has been vacated, sentencing begins anew. *State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984).

Finally, the trial court asserted that it intends to resentence Collins according to his plea agreement. We do not disagree with the statement but note that the court cannot find

that two prior historical felonies constitute two separate aggravating factors. We have previously stated that where a defendant has more than one prior felony conviction that qualifies as an aggravating factor pursuant to § 13-702(C)(11), those multiple, qualifying felony convictions constitute a single aggravating factor. *State v. Provenzino*, 221 Ariz. 364, 368, ¶ 15, 212 P.3d 56, 60 (App. 2009) (citations omitted). Consequently, the court cannot use the two priors as two distinct aggravating factors on resentencing to impose exceptionally aggravated sentences.

Based on the foregoing, we grant review, grant relief by vacating Collins's sentences, and remand for proceedings consistent with this Order.

/s/
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MAURICE PORTLEY, Presiding Judge