

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: 02/07/2012
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0813
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
HENRY WHITE, JR.,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-106973-001DT

The Honorable Sam J. Myers, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
And Adriana M. Zick, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Terry Reid, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Following conviction by a jury and a trial on priors, Henry White, Jr., ("Defendant") was sentenced to a slightly aggravated term of imprisonment following the trial court's

finding of two historical priors based on two Florida aggravated assault convictions from the 1990s. Defendant argues that the trial court erred in finding that one of the Florida offenses would have constituted a felony under Arizona law, and that it was a historical prior felony "forever" allegeable because of its dangerous nature.¹ Because a reading of the relevant Florida statute and the charging document reveals that the use of a deadly weapon or dangerous instrument was essential to Defendant's 1991 conviction, we affirm the conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2 After a jury trial, Defendant was convicted of Cruelty to Animals, a Class 6 felony, for severely beating and injuring his puppy. Before trial, the state filed an allegation of five historical prior convictions, which it later amended. On the date set for sentencing, the court held a trial on priors during which the state submitted a penitentiary packet ("pen pack") that included a fingerprint card and documents from the Florida Department of Corrections and the United States District Court for the Northern District of Florida evidencing Defendant's prior convictions. The court received testimony from a Phoenix Police Department detective who fingerprinted Defendant after

¹ Under A.R.S. § 13-105(22), convictions for dangerous offenses constitute "historical prior felony convictions," and are colloquially known as "forever" priors.

the jury trial and from a forensic scientist who compared the prints the detective took from Defendant to the prints in the pen pack. Of the five convictions documented, the state argued that two of the four Florida convictions -- a 1991 Aggravated Assault Without a Firearm conviction and a 1992 Aggravated Assault With a Weapon conviction -- would qualify as "forever" priors in Arizona and that the other two Florida convictions did not qualify as Arizona felonies. Defense counsel conceded that it does appear that the elements of the aggravated assault in Florida do "match up" and that both convictions were "forever" priors.

¶13 At the court's request, the state further explained that the two aggravated assaults constituted "forever" priors because they "involve[d] the threatening exhibition of a dangerous instrument or deadly weapon" as required by A.R.S. § 13-105.22(ii). The court further inquired how this applied to the 1991 "without a firearm" conviction and the state explained that the factual basis was that the incident involved a knife and "[i]t wouldn't have been an aggravated assault under Florida law if it hadn't involved that knife."

¶14 The court found that Defendant had two historical prior convictions and that these convictions were "analogous" to dangerous crimes under Arizona law and therefore qualify as "forever priors" that would be used to enhance the sentence.

The court then heard from defense counsel, who asked the court to consider a mitigated sentence because of Defendant's ties to the community, his status as a veteran, and his remorsefulness -- not for committing the crime but because one of his dogs was taken from him and the other died. Defense counsel made no objection to the court's finding that both of the Florida aggravated assault convictions were allegeable "forever" priors and argued instead that his client should receive the mitigated sentence under the "two prior category."

¶15 The trial court found both the aggravating factor of Defendant's criminal history and the mitigating factors of his status as a veteran, and his efforts to reform following the arrests in the 1990s. The court then sentenced Defendant to a slightly aggravated term of four years in prison.

¶16 Defendant timely filed a *pro per* notice of appeal in addition to the timely notice of appeal filed on his behalf by the Public Defender.² We have jurisdiction under Article 6, Section 9, of the Arizona Constitution; A.R.S. § 12-120.21(A)(1); and A.R.S. §§ 13-4031 and -4033.

² Defendant also filed a Motion for Modification of Sentence on the ground that the trial court improperly considered his prior convictions because of their age; the trial court denied the motion.

DISCUSSION

¶7 Defendant does not challenge the judgment of guilt -- he only appeals the trial court's finding that he had two, rather than one, historical prior convictions for the purpose of sentence enhancement.³ Specifically, Defendant asserts that the trial court improperly found that the 1991 Florida aggravated assault conviction was a historical prior conviction, because the court relied on the factual basis of the crime to determine both that the offense would have been a felony under Arizona law and that it was a "forever" prior under Arizona law. He further argues that this error resulted in prejudice because he received an illegally enhanced sentence. Because the determination whether a foreign conviction is a felony under Arizona law is an issue of law, our review of the trial court's determination is *de novo*. *State v. Smith*, 219 Ariz. 132, 136, ¶ 20, 194 P.3d 399, 403 (2008) (citation omitted). We will affirm a trial court's ruling if the result was legally correct for any reason. *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶8 Defendant failed to object to the trial court's finding and use of the 1991 Florida conviction as a "forever" prior and we therefore review for fundamental error. *Smith*, 219

³ Defendant does not argue on appeal that the trial court erred in finding that the 1992 Florida aggravated assault conviction was an alleageable Arizona prior conviction and therefore concedes that he is at minimum eligible for sentencing as a category two repetitive offender under A.R.S. § 13-703(I).

Ariz. at 136, ¶ 20, 194 P.3d at 403. To prevail under fundamental error review, a defendant must establish: (1) "that fundamental error exists"; and (2) "that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). "[I]mproper use of a prior foreign conviction to enhance a prison sentence goes to the foundation of a defendant's right to receive a valid and legal sentence" and therefore such improper use, where it exists, constitutes fundamental error. *Smith*, 219 Ariz. at 136, ¶ 22, 194 P.3d at 403.

I. THE 1991 CONVICTION WAS PROPERLY USED TO ENHANCE DEFENDANT'S SENTENCE.

¶19 A.R.S. § 13-703⁴ details Arizona's sentencing scheme for repetitive offenders -- those defendants who have one or more provable historical prior felony convictions. Section 13-703(M) provides that a foreign conviction can be used for enhancement purposes when the conduct underlying the foreign conviction "if committed in this state would be punishable as a felony." See also *State v. Thompson*, 186 Ariz. 529, 530, 924 P.2d 1048, 1049 (App. 1996). If a foreign felony conviction passes this test, it may be used for sentencing enhancement as a

⁴ Portions of the Arizona criminal sentencing code were renumbered in 2008, including § 13-604 which was renumbered to § 13-703 without substantive change to the text. To aid future reference, we refer to the renumbered statutes as they are presently numbered.

historical prior felony regardless of the age of the prior conviction -- i.e., it is a "forever" prior -- if it qualifies under A.R.S. § 13-105(22)(a).

A. The 1990 Offense Would Have Been a Felony Under Arizona Law.

¶10 To use a foreign felony conviction under the repetitive offender sentencing scheme, "the sentencing court must determine that the defendant was convicted of a crime that would have constituted a felony under Arizona law." *Thompson*, 186 Ariz. at 530, 924 P.2d at 1049; see also *Smith*, 219 Ariz. at 134, ¶ 10, 194 P.3d at 401 (The sentencing court "must first conclude that the foreign conviction includes every element that would be required to prove an enumerated Arizona offense.") (internal quotations and citations omitted). For this comparison to result in use of the prior foreign conviction for enhancement, strict conformity must exist between the elements of the foreign felony and the elements of an Arizona felony. *State v. Clough*, 171 Ariz. 217, 219, 829 P.2d 1263, 1265 (App. 1992).

¶11 Defendant concedes that the conduct that would constitute the predicate offense of assault in Florida in 1990 would also constitute the predicate offense of assault in Arizona in 1990. We agree. However, Defendant asserts that "the differences between the elements used to aggravate an

assault" in Florida versus Arizona -- and the absence of a designated sub-subsection of statute under which Defendant pled -- create an ambiguity regarding which section of the aggravated assault statute Defendant pled to, and that the trial court improperly resolved the ambiguity by considering documentary evidence. The state argues that the trial court properly considered the charging document. The state further argues that the "without a firearm" qualifier to the aggravated assault charge to which Defendant ultimately pled does not create an unresolvable ambiguity because the judgment of conviction specifies that Defendant pled to Count I and the charging document's Count I specifies use or threatened use of a deadly weapon.

¶12 In *Thompson*, we held that:

[T]he State may qualify an out-of-state conviction as an enhancing prior felony by establishing that the defendant was convicted under a particular subsection of a foreign statute, if that subsection encompasses only conduct that would constitute a felony in Arizona.

186 Ariz. at 532, 924 P.2d at 1051. Using this framework, we considered the defendant's two second-degree burglary convictions under Colorado Revised Statute § 18-4-203(2). *Id.* As to the first conviction, we noted that the judgment stated that the conviction was under Count I of the charging document and that the charging document "expressly" identified the

subsection of the statute by noting the burglary was "with the objective of theft of a controlled substance" (which we determined would constitute an Arizona felony) rather than "of a dwelling." *Id.* The sentencing court's consideration of the judgment and the charging document in combination to pinpoint the exact subsection of the statute under which the defendant pled was proper because it remained a legal analysis, not a factual one.

¶13 We do not see how the circumstances here differ meaningfully from those qualifying the first conviction in *Thompson*. In 1990, Florida Statute ("F.S.") § 784.021 provided that an assault was aggravated when it occurred in one of two ways: under subsection (1)(a), with a deadly weapon without intent to kill; or (1)(b), with the intent to commit a felony. The judgment of conviction here identifies that Defendant's guilty plea in case number 90-889 is to Count I, Aggravated Assault Without a Firearm under F.S. §§ 784.021/775.087,⁵ a class 3 felony. Count I of the information for case number 90-889

⁵ Though F.S. § 775.087 is referenced both in the information and in the judgment, it is irrelevant to the crime with which Defendant was charged and pled. *Perez v. State*, 431 So. 2d 274, 275 (Fla. Dist. Ct. App. 1983) (explaining that aggravated assault with a deadly weapon is an enhanced penalty crime; the use of a weapon makes it a more serious crime than simple assault; and thus section 775.087(1) does not enhance such a crime further). Section 775.087(2) also does not apply, and therefore is not helpful in distinguishing what subsection Defendant pled to, because it only applies when a defendant possessed a "firearm" or "destructive device." *Id.*

charges Defendant with an assault in which he "possess[ed] and threaten[ed] to use a deadly weapon, to wit: a knife and/or a pistol" in violation of F.S. §§ 784.021 and 775.087. The charging document here can properly be used to "narrow the foreign conviction to a particular subsection of the statute [here, (1)(a)] that served as the basis of the foreign conviction," not to establish "the factual nature of the prior conviction." *State v. Crawford*, 214 Ariz. 129, 132, ¶ 11, 149 P.3d 753, 756 (2007) (citation omitted). The state's reference to the unsworn affidavit providing the factual basis for the crime does not make the use of the charging document to define the conviction improper -- we disregard the affidavit, and rely only on the charging document.

¶14 Further, Defendant's plea to Aggravated Assault Without a Firearm does not create an ambiguity regarding the nature of his conviction. The "Without a Firearm" qualifier prevents the conclusion that the deadly weapon was a firearm, but it does not prohibit the conclusion that he used a deadly weapon. Moreover, the qualifier does not lead to a conclusion that he may have pled under subsection (1)(b), because the charging document contains no allegation that Defendant intended to commit a felony.

¶15 Defendant concedes that the elements of Florida's 1990 aggravated assault statute § 784.021(1)(a) "appear[] to comport"

with Arizona's 1990 aggravated assault statute § 13-1204(A)(2). Section 784.021(1)(a) defines an aggravated assault as an assault "[w]ith a deadly weapon without intent to kill." In 1990, A.R.S. § 13-1204(A)(2) defined an aggravated assault as an assault with the use of a "deadly weapon or dangerous instrument." As noted above, the elements of the 1990 Arizona and Florida statutes for the predicate offense of assault strictly conform. A comparison of the aggravated assault statutes easily demonstrates that the elements of the aggravated offense strictly conform as well.

¶16 Accordingly, the sentencing court properly found that the offense underlying the 1991 Florida conviction for Aggravated Assault Without a Firearm would have been a felony under 1990 Arizona law.

B. The 1991 Conviction Qualifies as a "Forever" Prior.

¶17 Defendant argues that the 1991 conviction cannot qualify as a "forever" prior because the trial court could only conclude that Defendant's 1991 conviction involved a deadly weapon by engaging in an impermissible factual inquiry. We disagree.

¶18 Under A.R.S. § 13-105(22)(a)(ii), a prior conviction may be used for sentence enhancement, regardless of its age, if the prior offense "[i]nvolved a dangerous offense." Section 13-105(13) defines a dangerous offense as "an offense involving the

discharge, use or threatening exhibition of a deadly weapon or dangerous instrument or the intentional or knowing infliction of serious physical injury on another person." Deadly weapons include "anything designed for lethal use" and dangerous instruments include "anything that under the circumstances in which it is used, attempted to be used, or threatened to be used is readily capable of causing death or serious physical injury." A.R.S. §§ 13-105(15), (12).

¶19 1990 Florida law defined a weapon as "any dirk, metallic knuckles, slungshot, billie, tear gas gun, chemical weapon or device, or any other deadly weapon except a firearm or a common pocketknife." Fl. Stat. Ann. § 790.001 (1990). "Whether an object used as a weapon in an assault is a deadly weapon is a factual question to be resolved by the finder of facts at trial and is to be determined upon consideration of its likelihood to produce death or great bodily injury." *State v. Nixon*, 295 So. 2d 121, 122 (Fla. Dist. Ct. App. 1974) (citations omitted). *McCoy v. State* further explains that in Florida, "a weapon is a deadly weapon if it is used or threatened to be used in a way likely to cause death or great bodily harm." 493 So. 2d 1093, 1095 (Fla. Dist. Ct. App. 1986).

¶20 As discussed above, the record demonstrates that Defendant pled to subsection (1)(a) of the 1990 Florida aggravated assault statute which requires use of a "deadly

weapon." We therefore need not engage in a factual inquiry to determine what the actual object was to conclude that whatever he used, he used it in a manner that made it a deadly weapon as a matter of law. See *State v. Ault*, 157 Ariz. 516, 521, 759 P.2d 1320, 1325 (1988) (holding that the elements that a jury must have found to convict a defendant under foreign law support the conclusion that the same elements would be satisfied in the comparable Arizona law). Comparing the "deadly weapon" definition in the Florida case law with A.R.S. § 13-105(12)'s definition of a "dangerous instrument" readily demonstrates that the two definitions are substantially identical.

¶21 A conviction for aggravated assault with a deadly weapon under 1990 Florida law necessarily requires a finding that the instrument the defendant used was deadly because of the manner in which it was used, and that its deadliness is "determined upon consideration of its likelihood to produce death or great bodily injury." *Nixon*, 295 So. 2d at 122. Accordingly, it was proper for the trial court to conclude that the 1991 conviction was a "forever" prior and therefore the trial court properly used the 1991 Florida Aggravated Assault Without a Firearm conviction to sentence Defendant as a category three repetitive offender with two historical prior felony convictions under A.R.S. § 13-703(C) and (J).

CONCLUSION

¶22 Because we find that the trial court did not err in finding that the 1991 conviction was a historical prior conviction under Arizona law, we need not reach the issue of prejudice, and therefore affirm the Defendant's conviction and sentence.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

JON W. THOMPSON, Judge