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: 01/24/2012
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	1 CA-CR 10-0928
v.	DEPARTMENT C
SEAN DAVID ELLINGTON, Appellant.	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2010-104232-001 DT

The Honorable Steven P. Lynch, Commissioner

AFFIRMED AS CORRECTED

Thomas C. Horne, Arizona 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 Eleanor S. Terpstra, Deputy Public Defender
Attorneys for Appellant

N O R R I S, Judge

¶1 Sean David Ellington timely appeals from his convictions and sentences for credit card theft and aggravated assault. After searching the record on appeal and finding no

arguable question of law that was not frivolous, Ellington's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Ellington to file a supplemental brief *in propria persona*, but Ellington did not do so. Instead, through counsel, Ellington argues his trial counsel "did not ask the right questions" and did not inform him of the consequences of a guilty verdict -- arguments we interpret as a claim of ineffective assistance of counsel -- and the superior court should have granted his oral motion to continue the trial, made after the prosecution had rested, to allow him to obtain new counsel. We disagree with both arguments and, after reviewing the entire record and finding no fundamental error, affirm Ellington's convictions and sentences as corrected.

FACTS AND PROCEDURAL BACKGROUND[1]

¶2 On January 20, 21, and 22, 2010, Ellington used his mother's debit card to make purchases at several locations, including a casino and an electronics store. When his mother discovered he had used her card at a casino, she "got very

[1]We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Ellington. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

angry” and called the police. At trial, Ellington’s mother testified that although she had often given Ellington permission to use her card to run errands in the past, she told the police he did not have permission to use her card on those occasions. Although Ellington’s mother testified she regretted calling the police, she confirmed she had told the police she wanted Ellington to be prosecuted for using her card without permission.

¶3 After speaking with Ellington’s mother, the police confronted Ellington, who was living in a trailer in the backyard of his mother’s home. After an officer told him why they were there and began to question him, Ellington told the officer he “wanted to go inside and talk to his mom.” After the officer refused to allow Ellington to do so and made him sit down, Ellington stood up and “started walking pretty fast towards the back door” of his mother’s house. The officer followed Ellington and told him to come back. Ellington ignored him and attempted to open the back door of the house, and the officer grabbed Ellington’s arm and, after Ellington pushed back at the officer, forced Ellington to the ground. After a brief struggle, the officer, with the help of another officer, handcuffed Ellington and continued to question him.

¶4 A grand jury indicted Ellington on three counts of theft of a credit card or obtaining a credit card by fraudulent

means, class five felonies, one count of aggravated assault, and one count of resisting arrest, both class six felonies. At trial, after the State had rested its case-in-chief, Ellington asked the court to delay the rest of the trial so he could hire private counsel because he didn't think he was "being represented very well" and his counsel "didn't ask all the questions that were pertinent to the case at all." The superior court denied his request for a continuance, explaining that the jury had already been impaneled and would likely have difficulties if the trial continued beyond its appointed time, Ellington had plenty of time to hire private counsel while the charges were pending, the State had already rested, and, in the court's opinion, Ellington's current attorney was prepared and competent. The court told Ellington he could represent himself, have new counsel immediately available, or continue with his existing counsel. The court also told Ellington it would allow him to put the questions he wanted asked on the record. Ellington continued with his existing attorney, and the record does not reflect that he entered any questions he felt should have been asked.

¶5 The jury found Ellington guilty of three counts of credit card theft and one count of aggravated assault, but not guilty of resisting arrest. The superior court sentenced him, as a category two repetitive offender, to concurrent terms of

1.5 years on the credit card theft counts and one year on the aggravated assault count.

DISCUSSION

I. Ineffective Assistance of Counsel

¶6 By arguing that his trial counsel did not "ask the right questions" and did not inform him of the consequences of a guilty verdict, Ellington essentially asserts he received ineffective assistance of counsel. We do not review claims of ineffective assistance of counsel on direct appeal; any such claim must be brought pursuant to Arizona Rule of Criminal Procedure 32. *See State v. Spreitz,* 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

II. Denial of Request for Continuance

¶7 We review the superior court's denial of Ellington's motion to continue for an abuse of discretion. *See State v. Sullivan*, 130 Ariz. 213, 215, 635 P.2d 501, 503 (1981) ("the granting of a continuance is not a matter of right, but is left to the sound discretion of the trial judge."). Under the circumstances present here, *see supra* ¶ 4, we hold the superior court did not abuse its discretion in denying Ellington's motion for a continuance.

III. Anders *Review*

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

881. Ellington received a fair trial. He was represented by counsel at all stages of the proceedings and was present at all critical stages.

¶9 The evidence presented at trial was substantial and supports the verdicts. The jury was properly comprised of eight members and the court properly instructed the jury on the elements of the charges, Ellington's presumption of innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, and Ellington was given an opportunity to speak at sentencing.

¶10 The superior court's sentencing minute entry contains several errors. First, the sentencing minute entry states Ellington entered a plea of guilty and waived trial, and describes Ellington's offenses as "non-repetitive," although he was sentenced as a category two repetitive offender. We hereby correct the sentencing minute entry to read that Ellington pled not guilty but was found guilty by the jury after a trial, and that his offenses were repetitive.

¶11 Second, the sentencing minute entry states the court imposed mitigated sentences on counts one through three, although the 1.5 year sentence imposed was the minimum, not the mitigated, sentence. *See* Ariz. Rev. Stat. ("A.R.S.") § 13-703(I) (2008). Although the sentencing minute entry's reference

to a mitigated sentence tracks the terminology used by the superior court at the sentencing hearing, A.R.S. § 13-703(F), on its face, only permitted the court to impose mitigated and aggravated sentences for category two repetitive offenders falling under A.R.S. § 13-703(B)(2) (2008) (defendant who "is at least eighteen years of age or has been tried as an adult and stands convicted of a felony and has one historical prior felony conviction") and not those, like Ellington, falling under A.R.S. § 13-703(B)(1) (defendant who "[i]s convicted of three or more felony offenses that were not committed on the same occasion but that either are consolidated for trial purposes or are not historical prior felony convictions.")[2] Although the court could not lawfully impose a mitigated sentence, it is clear the court intended to impose a sentence less than the presumptive as it imposed the minimum sentence established by the statute of 1.5

[2]Further, even if A.R.S. § 13-703(F) did permit the superior court to give Ellington a mitigated sentence, it is not at all clear the court found there were "at least two . . . mitigating circumstances" as required by A.R.S. § 13-703(K). The circumstances the court described could easily be read to describe only one mitigating circumstance: "because of [Ellington's] relationship [with his mother] and because of the fact that this had been something that had been ongoing for a period of time, under the unique circumstances I think a mitigated term on each of the first three counts is appropriate." *See State v. Harrison*, 195 Ariz. 1, 4, ¶ 12, 985 P.2d 486, 489 (1999) (court should "at a minimum . . . articulat[e] at sentencing the factors the judge considered to be aggravating or mitigating and [explain] how these factors led to the sentence[] imposed. Anything less would force the appellate courts . . . to speculate or infer.").

years. We therefore correct the sentencing minute entry to reflect the superior court imposed a minimum sentence on each count of credit card theft.

¶12 Finally, according to the sentencing hearing transcript and the sentencing minute entry, the superior court imposed a "presumptive" sentence of one year for count four, aggravated assault, a class six felony. The presumptive term for a class six felony committed by a category two repetitive offender was 1.75 years. *See* A.R.S. § 13-703(I). Thus, Ellington received a shorter sentence than that mandated by the statute. Nevertheless, because "in the absence of an appeal by the state, an appellate court has no subject matter jurisdiction to consider the issue of an illegally lenient sentence," *State v. Anderson*, 171 Ariz. 34, 35, 827 P.2d 1129, 1130 (1992); *see also State v. Dawson*, 164 Ariz. 278, 792 P.2d 741 (1990), and because Ellington has not "successfully challenged a sentence which was in fact imposed by the trial court," *Anderson,* 171 Ariz. at 35, 827 P.2d at 1130, we will not disturb Ellington's sentence for aggravated assault.

CONCLUSION

¶13 We decline to order briefing. We affirm Ellington's convictions and sentences as corrected.

¶14 After the filing of this decision, defense counsel's obligations pertaining to Ellington's representation in this

appeal have ended. Defense counsel need do no more than inform Ellington 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

¶15 Ellington has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Ellington 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

_/s/_______________________________
PATRICIA K. NORRIS, Judge

CONCURRING:

_/s/_______________________________
MICHAEL J. BROWN, Presiding Judge

_/s/_______________________________
PHILIP HALL, Judge