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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/17/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0180
)
Appellee,) DEPARTMENT E
)
v.) **MEMORANDUM DECISION**
)
CURTIS GRAYLIN SIMMONS,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2010-005426-029 DT

The Honorable Joseph C. Welty, Judge

AFFIRMED

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By Kent E. Cattani, Chief Counsel
Criminal Appeals Section/Capital Litigation Division
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Attorneys for Appellant

J O H N S E N, Judge

¶1 Curtis Graylin Simmons appeals his convictions of sale or transfer of narcotic drugs and conspiracy, both Class 2 felonies, and the resulting sentences. We affirm.

FACTS AND PROCEDURAL HISTORY

¶2 After a three-day trial, a jury found Simmons guilty of one count of conspiracy and one count of sale or transfer of narcotic drugs.¹ The superior court heard evidence at the sentencing hearing, then found Simmons had 11 prior felony convictions, which it concluded constituted the "two or more prior felony convictions" required to bring Simmons within the enhanced sentencing range of Arizona Revised Statutes ("A.R.S.") section 13-703(J) (West 2012).² The court further found that one of the prior felonies constituted an aggravating circumstance. The court then continued:

Having made that determination, I believe I am free to consider other aggravating circumstances in the matter that were not necessarily determined by the jury

In so doing I find based upon the evidence presented at trial, find beyond a reasonable doubt that these matters with respect to both counts involve the presence

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdicts and resolve all inferences against Simmons. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

² Absent material revisions after the date of an alleged offense, we cite a statute's current version.

of an accomplice, and were committed for pecuniary gain.

Finding Simmons's health issues to be mitigating circumstances, the superior court sentenced him to aggravated terms of 20 years' imprisonment on each count, to be served concurrently.

¶3 Simmons timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and -4033 (West 2012).

DISCUSSION

¶4 Simmons contends the superior court erred by imposing aggravated sentences based on its own findings of "presence of an accomplice" and "for pecuniary gain" as aggravating circumstances. As Simmons did not object at trial, we review for fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail, Simmons must show that fundamental error occurred and that he was prejudiced as a result. *Id.* at ¶ 20.

¶5 "The Sixth Amendment requires that '[o]ther 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. Price*, 217 Ariz. 182, 184, ¶ 8, 171 P.3d 1223, 1225 (2007) (alteration in original) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Absent any additional findings, the

statutory presumptive sentence is the "maximum" term for purposes of *Apprendi* analysis. See *State v. Martinez*, 210 Ariz. 578, 583, ¶ 17, 115 P.3d 618, 623 (2005); see also *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004).

¶16 The presumptive sentence for a Class 2 felony with two or more historical prior felony convictions is 15.75 years. See A.R.S. § 13-703(C), (J). Accordingly, for the superior court to impose sentences on Simmons beyond the presumptive 15.75 years, at least one aggravating circumstance defined by A.R.S. § 13-701(D) must be found. A.R.S. §§ 13-701(C), (D), -703(G), (J), (K) (West 2012). With the sole exception of a prior felony conviction and absent a stipulation by the defendant, the jury must find the existence of an aggravating circumstance beyond a reasonable doubt. See *Price*, 217 Ariz. at 185, ¶ 10, 171 P.3d at 1226. Either the court or the jury may determine a prior felony conviction to be an aggravating circumstance. *Id.*; A.R.S. § 13-701(D).

¶17 The superior court in this case properly found as an aggravating circumstance that Simmons had been "previously convicted of a felony within the ten years immediately preceding the date of the offense." See A.R.S. § 13-701(D)(11). Simmons does not contest this finding. As noted, the court also cited, as a basis for its decision to impose aggravated sentences, its finding of two additional aggravating circumstances, presence of

an accomplice and commission for pecuniary gain. On appeal, Simmons argues the court lacked the power to find these two additional aggravating circumstances.

¶8 The superior court plainly did not violate Simmons's Sixth Amendment rights by finding the additional aggravating circumstances. Once any single aggravating circumstance is found pursuant to A.R.S. § 13-701(D), the constitution permits the court to find and consider additional aggravating circumstances in making its sentencing decision. See *State v. Burdick*, 211 Ariz. 583, 586, ¶ 13, 125 P.3d 1039, 1042 (App. 2005) (citing *Martinez*, 210 Ariz. at 585, ¶ 26, 115 P.3d at 625) ("one *Blakely*-compliant or *Blakely*-exempt factor is enough to allow the trial court to consider other aggravating factors in sentencing the defendant"). Thus, once the superior court properly found a prior conviction as an aggravating circumstance, the constitution permitted the court to determine additional aggravating circumstances.

¶9 Simmons argues, however, that A.R.S. § 13-701(F) did not permit the superior court to determine the additional aggravating circumstances. The statute states, "If the trier of fact finds at least one aggravating circumstance, the trial court may find by a preponderance of the evidence additional aggravating circumstances." *Id.* It further defines "trier of fact" to mean "a jury, unless the defendant and the state waive

a jury in which case the trier of fact means the court." § 13-701(J). Simmons contends that because the jury, as the trier of fact, did not find any aggravating circumstances, the superior court lacked the power pursuant to § 13-701(F) to determine any aggravating circumstances other than a prior conviction.

¶10 Under Simmons's argument, § 13-701 would forbid the superior court from exercising a sentencing power otherwise granted it by the United States Constitution. Simmons offers no authority, nor have we been able to find any, for the proposition that by enacting and amending the relevant sentencing statutes, the Arizona Legislature intended to grant greater protection to defendants in sentencing than that granted by the constitution, as set out in *Apprendi* and *Blakely*. See Senate Fact Sheet, S.B. 1050, 47th Leg., 2d Reg. Sess. (Jan. 6, 2006); Final Amended Senate Fact Sheet, H.B. 2522/S.B. 1093, 47th Leg., 1st Reg. Sess. (Apr. 12, 2005).

¶11 We do not have to decide the issue to resolve Simmons's appeal, however. "Under Arizona's sentencing scheme, once a jury implicitly or explicitly finds one aggravating factor, a defendant is exposed to a sentencing range that extends to the maximum punishment available" *Martinez*, 210 Ariz. at 584, ¶ 21, 115 P.3d at 624. In this case, commission for pecuniary gain was implicit in the jury verdicts finding Simmons guilty of the sale or transfer of a narcotic

drug and conspiracy to commit the sale or transfer of a narcotic drug. Thus, even under Simmons's interpretation of § 13-701(F), because the jury implicitly found the aggravating circumstance that Simmons committed his crimes for pecuniary gain, the superior court had the power to find the third aggravating circumstance, presence of an accomplice.

¶12 Simmons does not argue that insufficient evidence existed to establish any of the three aggravating circumstances the court relied on in sentencing him. Accordingly, because the aggravating circumstances were determined in compliance with the constitution and Arizona law, the superior court did not err in sentencing Simmons.

CONCLUSION

¶13 For the foregoing reasons, we affirm the convictions and sentences.

/s/

DIANE M. JOHNSEN, Judge

CONCURRING:

/s/

MAURICE PORTLEY, Presiding Judge

/s/

PHILIP HALL, Judge