

OF1FNOTICE: 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. 31.34



DIVISION ONE  
FILED: 02/09/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 11-0279  
)  
Appellant, ) DEPARTMENT S  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
JERRY LEE NELSON, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellee. )  
)

Appeal from the Superior Court in La Paz County

Cause No. S1500CR201000078

The Honorable Michael J. Burke, Judge

**CONVICTIONS AFFIRMED; SENTENCES VACATED; REMANDED FOR  
RESENTENCING**

Samuel E. Vederman, La Paz County Attorney Parker  
By Karen L. Hobbs, Deputy County Attorney  
Attorneys for Appellant

David Goldberg Fort Collins, CO  
Attorney for Appellee

W I N T H R O P, Chief Judge

¶1 The State, through the La Paz County Attorney's  
Office, appeals Jerry Lee Nelson's sentences resulting from his  
convictions for possession of a dangerous drug and drug

paraphernalia. No issue has been raised as the propriety of Nelson's convictions. The State and defense counsel agree, however, that the trial court erred in categorizing Nelson as a category one repetitive offender based on its calculation of sentence enhancements under Arizona Revised Statutes ("A.R.S.") section 13-703 (West 2011).<sup>1</sup> The parties agree that, because Nelson had two prior nonhistorical felony convictions in addition to the current convictions, he should have been sentenced as a category two repetitive offender. Both parties therefore ask that Nelson's sentences be vacated and we remand for resentencing. Because we agree that the trial court erred in sentencing Nelson as a category one repetitive offender, we vacate his sentences and remand for resentencing.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 On September 16, 2009, a deputy for the La Paz County Sheriff's Office arrested Nelson after recognizing him as a person with an outstanding arrest warrant. The deputy transferred Nelson to the police station, and as Nelson was exiting the patrol car, he dropped a small gray container on the ground. Subsequent forensic analysis indicated that the container held 69 milligrams of methamphetamine.

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<sup>1</sup> We cite the current version of the statute available on Westlaw because no revisions material to our analysis have occurred since Nelson committed the present offenses.

¶3 A grand jury issued an indictment, charging Nelson with Count I, possession of a dangerous drug, a class four felony, and Count II, possession of drug paraphernalia, a class six felony. See A.R.S. §§ 13-3407(A)(1) (West 2011), -3415(A) (West 2011). Before trial, the State alleged that Nelson had four prior felony convictions. A jury convicted Nelson as charged.

¶4 Before sentencing, the State withdrew one prior felony conviction allegation. At sentencing, the court found that the State had proven two of the three remaining alleged convictions and further found that the convictions were nonhistorical.<sup>2</sup> The State argued that for sentencing enhancement purposes, Nelson's current convictions should be treated as a single conviction and added to the nonhistorical prior felony convictions to make Nelson a category two repetitive offender.

¶5 In making its argument, the State maintained that A.R.S. § 13-703 does not limit the felony convictions that count toward repetitive categories to only those from prior convictions, and that the current offenses should be included in determining Nelson's sentencing category. The trial court,

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<sup>2</sup> The first conviction was for theft in 1999, a class six felony. The second was for possession of a controlled substance in 1990, a crime that occurred in California and would have been a class four felony in Arizona. Given the age and class of the prior felony convictions, the parties do not contest, and we agree, that the trial court was correct in concluding the prior convictions were nonhistorical. See A.R.S. § 13-703.

however, found that only Nelson's two prior felonies, and not the current offenses, should be considered in determining any sentence enhancements. As a result, the court sentenced Nelson as a category one offender (with two applicable offenses), rather than as a category two offender (with three applicable offenses). The court ordered Nelson to serve the minimum sentence of 1.5 years' imprisonment in the Arizona Department of Corrections for Count I and 6 months' imprisonment for Count II. The court also credited Nelson for 27 days of presentence incarceration.

#### ANALYSIS

¶6 In general, we review a sentence imposed by the trial court for an abuse of discretion. *State v. Arbolida*, 206 Ariz. 306, 307-08, ¶ 5, 78 P.3d 275, 276-77 (App. 2003); *State v. Cazares*, 205 Ariz. 425, 427, ¶ 6, 72 P.3d 355, 357 (App. 2003). The interpretation of statutes, however, is a question of law that we review *de novo*. *Arbolida*, 206 Ariz. at 308, ¶ 5, 78 P.3d at 277. In interpreting a statute, our primary purpose is to give effect to the legislature's intent. *State v. Hinden*, 224 Ariz. 508, 510, ¶ 9, 233 P.3d 621, 623 (App. 2010). To that end, we first consider the statute's language because it is "the best and most reliable index of a statute's meaning." *Id.* (citations omitted). If the statutory language is plain and unambiguous, no additional analysis is necessary. *Id.*

¶7 The relevant subsections of A.R.S. § 13-703 at issue are as follows:

A. A person shall be sentenced as a category one repetitive offender if the person is convicted of two 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.

B. A person shall be sentenced as a category two repetitive offender if the person either:

1. Is 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.

¶8 Based on the plain language of A.R.S. § 13-703, the trial court erred in concluding that only prior convictions, and not current convictions, are to be used when determining a repeat offender's sentence enhancement category. The statute directs the court to sentence a person as a category two repetitive offender if the person is convicted of three or more offenses not committed on the same occasion that are not historical prior felony convictions. Nelson's current felony convictions, which were committed on the same occasion, are treated as one conviction pursuant to A.R.S. § 13-703(L). Those convictions, plus his two prior nonhistorical felony convictions, qualify for the purpose of sentencing under A.R.S. § 13-703(B)(1), and render him convicted of three felony

offenses for the purposes of that statute. Accordingly, Nelson is a category two repetitive offender.

¶9 This court's recent opinion in *State v. Smith*, 228 Ariz. 126, 263 P.3d 675 (App. 2011), supports our conclusion. In *Smith*, this court held that the trial court erred in sentencing a defendant convicted of aggravated DUI to probation as a first time offender because he also had a nonhistorical prior felony conviction. *Id.* at 129-31, ¶¶ 12-18, 263 P.3d at 678-80. In concluding that both prior and current convictions count toward determining repetitive categories, we stated:

We agree with the state's reading of the statute [A.R.S. § 13-703]. That provision plainly articulates the two categories of felony convictions subject to inclusion and the number of such felonies that trigger the enhancements required thereby. As the state correctly observes, both Smith's remote non-dangerous prior conviction and [the] instant offense fall within the categories of offenses expressly included therein.

*Id.* at 130, ¶ 15, 263 P.3d at 679 (citation omitted). As *Smith* demonstrates, interpreting A.R.S. § 13-703 in the manner chosen by the trial court would result in no sentencing enhancement for a defendant with only one nonhistorical prior felony conviction, see A.R.S. § 13-703(A), a result that would not comport with the statute's purpose of sentencing repeat offenders more severely than first-time offenders.

**CONCLUSION**

¶10 For the purpose of sentencing enhancement under A.R.S. § 13-703, a defendant who has two nonhistorical prior felony convictions not committed on the same occasion and who is currently convicted of another felony has a total of three felony convictions, and therefore must be sentenced as a category two repetitive offender. Nelson's prior felony convictions plus his current felony conviction(s) make him a category two repetitive offender as defined by A.R.S. § 13-703(B)(1). Accordingly, although we affirm his convictions, we vacate his sentences and remand for resentencing.

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LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

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DIANE M. JOHNSEN, Judge

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DONN KESSLER, Judge