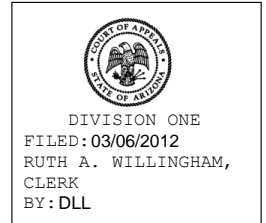


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0413  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
LARRY RAMOS MARQUEZ, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )



Appeal from the Superior Court in Maricopa County

Cause CR2010-102905-001 DT

The Honorable James T. Blomo, Judge

**AFFIRMED**

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Thomas C. Horne, Arizona Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
Michael T. O'Toole, Assistant Attorney General  
Attorneys for Appellee

Marty Lieberman, Maricopa County Legal Defender Phoenix  
By Cynthia Dawn Beck, Deputy Legal Defender  
Attorney for Appellant

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G E M M I L L, Judge

¶1 Larry Ramos Marquez appeals from his convictions for possession of dangerous drugs and possession of marijuana. The sole issue raised by Marquez is whether the trial court erred by

not granting his motion to dismiss based on the State's failure to timely file the information. Because we find no error, we affirm.

#### **PROCEDURAL BACKGROUND**

¶12 On January 20, 2010, Marquez was charged by direct complaint with one count of possession of dangerous drugs, a class 4 felony, and one count of possession of marijuana, a class 6 felony. At the conclusion of a preliminary hearing on February 23, 2010, a magistrate found probable cause to hold Marquez to stand trial, and he was arraigned on the two charges. Subsequent to the preliminary hearing, the State further alleged that the charged offenses were not subject to Proposition 200; that they were committed while on release; and that Marquez had six historical prior felony convictions.

¶13 On November 1, 2010, the day before the scheduled trial date, the clerk brought to the attention of counsel that the State had not filed the information with the court. When the trial court and counsel gathered the next day for trial, the prosecutor asked that he be allowed to cure his failure to file the information. In support of his request, the prosecutor observed that Marquez had full notice of the charges against him from the direct complaint and preliminary hearing and cited *State v. Maldonado*, 223 Ariz. 309, 223 P.3d 653 (2010), for the proposition that, absent prejudice, failure to file the

information is not fatal to the prosecution. Defense counsel opposed the untimely filing of the information and moved to dismiss without prejudice to the State refiling the charges.

¶4 Finding Marquez had adequate notice of the charges, the trial court allowed the untimely filing of the information. Trial proceeded as scheduled with Marquez being found guilty on both counts as charged. Following sentencing, Marquez timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010).<sup>1</sup>

#### **ANALYSIS**

¶5 An information is "a written statement charging the commission of a public offense, signed and presented to the court by the prosecutor." Ariz. R. Crim. P. 13.1(b). Arizona Rule of Criminal Procedure ("Rule") 13.1 provides, in pertinent part:

An information shall be filed in Superior Court within 10 days after the determination of probable cause. . . . Failure to file a timely information shall be grounds for dismissal of the prosecution on motion of the defendant under Rule 16.1(b). Such dismissal shall be without prejudice except that if the prosecution is refiled, the time limits under Rule 8.2

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<sup>1</sup> Absent material revisions to a statute after the date of an offense, we cite the current version.

shall be computed from the initial appearance on the original complaint.

Ariz. R. Crim. P. 13.1(c). Accordingly, the information in the instant case should have been filed by the State no later than March 5, 2010, the tenth day after the determination of probable cause was made at the preliminary hearing.

¶16 Marquez argues that the trial court erred by failing to dismiss the prosecution against him in accordance with Rule 16.6(b), which states: "The court, on motion of the defendant, shall order that a prosecution be dismissed upon finding that the . . . information . . . is insufficient as a matter of law." Claiming that the State's failure to timely file the information renders it "insufficient as a matter of law" and that use of the term "shall" in Rule 16.6(b) makes the granting of his motion to dismiss mandatory, Marquez contends the trial court abused its discretion in not dismissing the prosecution.

¶17 In *Maldonado*, our Supreme Court held that the filing of an indictment or information is not jurisdictional and the State's failure to file the charging document can be waived by the defendant not raising a timely objection. 223 Ariz. at 313, ¶¶ 21-24, 223 P.3d at 657. Although Rule 13.1(c) permits a defendant to move for dismissal when the State fails to timely file the information, Rule 13.5(e) provides that "[n]o issue concerning a defect in the charging document shall be raised

other than by a motion filed in accordance with Rule 16." Rule 16.1(b), in turn, requires that all motions be filed no later than 20 days before trial, unless otherwise authorized by the trial court. An untimely motion "shall be precluded, unless the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it." Ariz. R. Crim. P. 16.1(c). No claim is made by Marquez that he was unable to make his motion in compliance with the time requirement of Rule 16.1(b). Thus, the trial court could reasonably conclude that Marquez waived the State's failure to file the information by not moving to dismiss until the day of trial. See *State v. Montano*, 204 Ariz. 413, 419, ¶ 18, 65 P.3d 61, 67 (2003) (upholding denial of untimely motion to dismiss).

¶18 We reject Marquez's contention that the trial court's decision cannot be upheld based on waiver or untimeliness. Marquez concedes that the trial court could have denied his motion as untimely. He argues, however, that because the trial court determined that he had notice of the charges against him, the trial court in effect extended the time for filing pretrial motions and then erred by denying his motion to dismiss on an invalid basis. We disagree.

¶19 When a defendant fails to timely object to an error, the matter still remains subject to fundamental error review,

which involves an inquiry to whether prejudice exists. *State v. Henderson*, 210 Ariz. 561, 567, 568, ¶¶ 19, 26, 115 P.3d 601, 607, 608 (2005). Fundamental error review applies to a failure by the State to file the information. *Maldonado*, 223 Ariz. at 313, ¶ 25, 223 P.3d at 657. In finding Marquez had notice of the charges against him -- a finding that is not disputed on appeal -- the trial court was merely determining there was no prejudice in allowing the untimely filing of the information. Once this determination was made, the trial court was free to apply the general rule of preclusion to the untimely motion to dismiss and deny relief. Although Marquez is correct that the trial court did not expressly state it was denying his motion as untimely, "[w]e presume that a court is aware of the relevant law and applies it correctly in arriving at its ruling." *State v. Moody*, 208 Ariz. 424, 443, ¶ 49, 94 P.3d 1119, 1138 (2004).

¶10 We likewise find no merit to Marquez's assertion that the trial court's refusal to dismiss the prosecution wrongfully deprived him of the constitutional right not to be "prosecuted criminally in any court of record for felony . . . otherwise than by information or indictment." Ariz. Const. art. 2, § 30. As our supreme court explained in *Maldonado*, the provisions of this constitutional right assure a defendant of notice of the charges, the right to a determination of probable cause, and a record of the charged offense as protection against further

jeopardy. 223 Ariz. at 313, ¶ 22, 223 P.3d at 657. Marquez was not deprived of any of these protections; all that occurred was a technical error in that the information was not timely filed by the State. See *State v. Sheppard*, 2 Ariz. App. 242, 244, 407 P.2d 783, 785 (1965) (describing late filing of information as an "irregularity" and "technical defect"). Hence, even if the error was not waived by Marquez's failure to raise in compliance with Rule 16.1(b), given the absence of prejudice, this error does not support reversal. See Ariz. Const. art. 6, § 27 ("No cause shall be reversed for technical error in pleadings or proceedings when upon the whole case it shall appear that substantial justice has been done."); *Shaughnessy v. State*, 43 Ariz. 445, 449, 32 P.2d 337, 341 (1934) (holding technicalities in pleadings or procedures that do not prejudice rights are to be ignored on appeal).

¶11 Marquez's convictions and sentences are affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PATRICIA A. OROZCO, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
PHILIP HALL, Judge