DIVISION ONE
FILED: 04/03/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR CR 11-0589
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule
REGINALD MARK JEFFREY,	)	111, Rules of the Arizona
	)	Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-180353-001

The Honorable John R. Ditsworth, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

Bruce F. Peterson, Maricopa County Legal Advocate — Phoenix
By Thomas J. Dennis, Deputy Legal Advocate
Attorneys for Appellant

N O R R I S, Judge

¶1 Reginald Mark Jeffrey timely appeals from his sentence for one count of misconduct involving weapons, a class 4 dangerous felony. After searching the record on appeal and finding no arguable question of law that was not frivolous,

Jeffrey'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 Jeffrey to file a supplemental brief *in propria persona*, but Jeffrey did not do so. After reviewing those portions of the record regarding the superior court's sentencing of Jeffrey on this count, we find no fundamental error and, therefore, affirm Jeffrey's sentence.

FACTS AND PROCEDURAL BACKGROUND

¶2 In 2008, the superior court found Jeffrey guilty of misconduct involving weapons ("count 5") committed on December 26, 2006, and sentenced him to ten years in prison, to run concurrently with his sentences on other counts (the "original sentencing").[1] On July 22, 2010, this court remanded Jeffrey's sentence on count 5 to the superior court for "clarification on the intended sentencing scheme and possible recalculation of Jeffrey's sentence." *Jeffrey*, 1 CA-CR 08-0733, 2010 WL 2901026,

[1]A jury found Jeffrey guilty of one count of first degree murder and two counts of aggravated assault. This court affirmed the convictions and sentences on those counts, and the conviction on count 5. *State v. Jeffrey*, 1 CA-CR 08-0733, 2010 WL 2901026 (Ariz. App. July 22, 2010) (mem. decision). Thus, our review is limited to the narrow issue of the resentencing on count 5. *See State v. Schackart*, 190 Ariz. 238, 255, 947 P.2d 315, 332 (1997) (finding claim not raised in first appeal waived); *see also State v. Hartford*, 145 Ariz. 403, 405, 701 P.2d 1211, 1213 (App. 1985).

at *3, ¶ 12. At a resentencing hearing on August 3, 2011, the superior court acknowledged its previous determination the offense was dangerous, but sentenced Jeffrey to the presumptive term for a non-dangerous, repetitive class 4 felony -– ten years. *See State v. Trujillo*, 227 Ariz. 314, 321-22, ¶¶ 30-37, 257 P.3d 1194, 1201-02 (App. 2011) (citation omitted) ("[T]he law allows a trial court to select between the dangerous and repetitive sentencing options, but does not require that if the court chooses to sentence a defendant as a repeat offender, it must void the . . . finding of dangerousness."); *see also* Ariz. Rev. Stat. ("A.R.S.") § 13-604(C) (2006) (sentencing for class 4 felony with two or more historical prior felony convictions) (current version at A.R.S. § 13-703 (C), (J) (Supp. 2011)).

DISCUSSION

I. Sentencing Matters

¶3 First, the court did not ask Jeffrey if he would like to address the court at resentencing. *See* Ariz. R. Crim. P. 26.10(b)(1) (in pronouncing sentence, court shall give defendant "an opportunity to speak on his or her own behalf"). At the original sentencing, however, the court allowed Jeffrey's counsel to make a sentencing recommendation and asked his counsel if there was "[a]ny legal cause," to impose "a sentence that permits parole eligibility," to which Jeffrey's counsel replied, "I am aware of none." At resentencing, the court again

allowed Jeffrey's counsel to make a sentencing recommendation. Thus, the court effectively complied with Rule 26.10, allowing Jeffrey's counsel to speak for him, and we see no error. *State v. Dixon*, 127 Ariz. 554, 558, 622 P.2d 501, 507 (App. 1980) (citations omitted).

¶4 Second, the resentencing hearing minute entry reflects the court amended its original sentencing order to "dismiss[] the dangerous allegation on Count 5." Then, on August 10, 2011, seven days after the resentencing hearing, the court entered a "nunc pro tunc order" to delete the "dismissal" language quoted in the preceding sentence, describe the offense as "Dangerous," and clarify, "AS PUNISHMENT, IT IS ORDERED, using the 'non-dangerous but repetitive' sentencing scheme for a class 4 felony."

¶5 While the court may *nunc pro tunc* correct a clerical mistake in a prior judgment or minute entry, Ariz. R. Crim. P. 24.4, it may not, in a defendant's "absence and without a waiver, by virtue of a *nunc pro tunc* minute entry" place on the record an order or judgment that was "never previously made or rendered." *State v. Pyeatt*, 135 Ariz. 141, 143, 659 P.2d 1286, 1288 (App. 1982). Thus, if the court truly dismissed the allegation of dangerousness, it would be improper to reinstate the dismissed allegation in Jeffrey's absence via a *nunc pro tunc* order.

¶6 Here, the record reflects the court merely corrected a clerical mistake. At Jeffrey's original sentencing the court found count 5 dangerous, but its minute entry from that date reflected it was "Non Dangerous." At resentencing, the State asked the court to correct the error in the original sentencing minute entry as follows:

> [State]: [J]ust for clarification . . . it seems the Court is intending to sentence him as a nondangerous repetitive. However, I think the finding, at least from July 2d, [2008], was this is a dangerous offense.
>
> [Court]: And so . . . I'm amending my original order, is that what I have to say?
>
> [State]: I think so. And then for sentencing purposes, the sentencing scheme is under the nondangerous scheme with priors.

Consistent with this discussion and its August 10, 2011 *nunc pro tunc* order, the court noted, "for the purposes of resentencing . . . this is a Class 4 nondangerous felony." The resentencing hearing transcript reflects no discussion of "dismissing" the dangerousness finding. Thus, the record demonstrates the court's *nunc pro tunc* order merely corrected a mistake in the resentencing minute entry.

II. Anders *Review*

¶7 We have reviewed the portions of the record relevant to the superior court's sentencing of Jeffrey on count 5 for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451

P.2d at 881. Jeffrey was represented by counsel at all stages of the proceedings pertinent to our review of the record and was present at all critical stages. The superior court considered the original sentencing presentence report and this court's memorandum decision, and imposed a sentence within the range of acceptable sentences for Jeffrey's offense.[2]

CONCLUSION

¶8 We decline to order briefing and affirm Jeffrey's sentence.

¶9 After the filing of this decision, defense counsel's obligations pertaining to Jeffrey's representation in this appeal have ended. Defense counsel need do no more than inform Jeffrey 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).

¶10 Jeffrey has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for

[2]Although we note the superior court gave Jeffrey credit for one extra day of presentence incarceration credit, *see State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987) ("Where the date sentence is imposed serves, as here, as the first day of sentence . . . it does not also count for presentence credit."), we will not "correct sentencing errors that benefit a defendant, in the context of his own appeal, absent a proper appeal or cross-appeal by the [S]tate." *State v. Kinslow*, 165 Ariz. 503, 507, 799 P.2d 844, 848 (1990).

review. On the court's own motion, we also grant Jeffrey 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

/s/
PATRICIA K. NORRIS, Presiding Judge

CONCURRING:

/s/
MARGARET H. DOWNIE, Judge

/s/
LAWRENCE F. WINTHROP, Judge