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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. DAVID GEORGE BOTBYL, Appellant.	2 CA-CR 2011-0021 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR201000444

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

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E S P I N O S A, Judge.

¶1 After a jury trial, David Botbyl was convicted of possession of methamphetamine and two counts of possession of drug paraphernalia. The trial court

sentenced him to enhanced, aggravated, concurrent prison terms totaling six years. Botbyl raises a number of issues on appeal. For the following reasons, we affirm.

Factual Background and Procedural History

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). In January 2010, after engaging in surveillance of Botbyl's residence, Benson police officers obtained a warrant to search both the residence and Botbyl's person. Botbyl was present at the time of the search, and officers found $190 and three small baggies containing methamphetamine in his pants pocket. Throughout the residence, the officers located methamphetamine and related paraphernalia, including pipes, plastic baggies, hypodermic needles, a scale containing methamphetamine residue, and at least one cellular telephone.

¶3 Botbyl was arrested and charged with possession of methamphetamine, possession of methamphetamine for sale, and three counts of possession of drug paraphernalia.[1] He was convicted and sentenced as outlined above. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

Motion to Suppress

¶4 Botbyl first argues the trial court erred in denying his motion to suppress the evidence found pursuant to the warrant. When reviewing a trial court's denial of a

[1]One of the paraphernalia charges was dismissed prior to trial, and the jury acquitted Botbyl of possession of methamphetamine for sale.

motion to suppress, we consider only the evidence presented at the suppression hearing and view that evidence in the light most favorable to upholding the trial court's factual findings. *See State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). We review the court's decision "'for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo.'" *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007), *quoting State v. Booker*, 212 Ariz. 502, ¶ 10, 135 P.3d 57, 59 (App. 2006). We presume a search warrant is valid, and it is the defendant's burden to prove otherwise. *State v. Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d 618, 621 (App. 2002).

¶5 Prior to trial, Botbyl moved to suppress the evidence discovered in his residence and on his person, arguing the police lacked probable cause for the warrant. At the suppression hearing, police detective Arnold testified that on January 12, 2010, after an anonymous informant had reported observing methamphetamine in Botbyl's house, police began surveillance of the house. They observed an individual come out and then hurry back inside, apparently having noticed the officers' patrol car. A few minutes later, two men drove away in a white pickup truck that had been parked in the alley behind the house. After police followed the truck and stopped it for a traffic violation, they discovered approximately ninety pounds of marijuana in two spare tires in the truck's bed. Meanwhile, Botbyl drove a Jeep from the house to a closed gas station and put air in a spare tire in the back of the Jeep. He returned to the residence, backing the Jeep into the backyard and stopping near the back door.

¶6 There is probable cause to issue a warrant when, "given all the circumstances set forth in the affidavit . . . , there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 230 (1983); *Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d at 621. We reject Botbyl's contention, based on superseded Arizona precedent, that an informant's statements must be excised from the affidavit when considering probable cause, *see State v. Lopez*, 115 Ariz. 40, 42, 563 P.2d 295, 297 (App. 1976), and instead, consider the anonymous tip together with all other information presented for the probable cause determination, *see Gates*, 462 U.S. at 227-31 (adopting totality-of-the-circumstances approach, thereby overturning former *Spinelli* rule which independently examined anonymous informant's tip for reliability and basis of knowledge); *see also Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d at 621 (totality of circumstances must indicate substantial basis to issue warrant). The anonymous tip, the truck that left Botbyl's home with marijuana in spare tires, Botbyl's late-night visit to the gas station to put air in a spare tire, and his return to the residence through the backyard and parking at the back door, all amounted to a fair probability that contraband or evidence of a crime would be found in Botbyl's residence or on his person.

¶7 Botbyl also cites *State v. Hansen*, 117 Ariz. 496, 573 P.2d 896 (App. 1977), for the proposition that a person cannot be arrested or searched merely on the basis of proximity to a crime. He argues proximity plus "something substantial" such as flight is required to support a probable cause determination, citing *State v. Moroyoqui*, 125 Ariz. 562, 564, 611 P.2d 566, 568 (App. 1980). But, even accepting that argument, the totality

of the circumstances here provides the "something substantial" to support probable cause. Although Botbyl asserts there are innocent explanations for filling up a spare tire, when all the circumstances are viewed together, as they must be, *Gates*, 462 U.S. at 230; *Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d at 621, they are sufficient to establish probable cause to believe a crime was in progress, *see State v. O'Meara*, 198 Ariz. 294, ¶¶ 7-10, 9 P.3d 325, 326-27 (2000) (while inferences of innocent behavior could be drawn from observing a particular activity, totality-of-circumstances analysis does not permit each individual factor to be parsed, categorized as potentially innocent, and rejected; all factors must be examined collectively). Accordingly, the trial court did not err in concluding the warrant was supported by probable cause.[2]

Introduction of the Search Warrant at Trial

¶8 Botbyl next asserts the trial court erred in admitting the search warrant as an exhibit, first because its admission violated his Confrontation Clause rights, and second because the document constitutes vouching by way of judicial approval of the search. The court admitted the warrant over Botbyl's objection, denied his motion for mistrial, and later gave a limiting instruction to the jury. Evidentiary rulings that implicate the Confrontation Clause are reviewed *de novo*. *State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006), *citing Lilly v. Virginia*, 527 U.S. 116, 137 (1999).

[2]Having found the warrant was properly issued, we find it unnecessary to address the state's reliance on the good-faith exception under A.R.S. § 13-3925 and *United States v. Leon*, 468 U.S. 897, 924-26 (1984).

¶9 The protection of the Confrontation Clause is directed primarily to testimonial hearsay statements. *State v. C. King*, 212 Ariz. 372, ¶ 19, 132 P.3d 311, 315 (App. 2006), *citing Crawford v. Washington*, 541 U.S. 36, 53 (2004). A declaration is testimonial if it is "the reasonable expectation of the declarant" that the statement may later be used at trial. *Id*. (restating *Crawford* formulations).[3] Although a warrant can be considered a declaration by the signing judge, its objective is only to authorize a police search; the issuing judge has no expectation of appearing at trial as a witness against any potential defendant. *See United States v. Leon*, 468 U.S. 897, 917 (1984) ("Judges and magistrates are not adjuncts to the law enforcement team; as neutral judicial officers, they have no stake in the outcome of particular criminal prosecutions."). However, the admission of a warrant and supporting affidavit may violate a defendant's confrontation rights when a defendant is unable to challenge the veracity, recollection, or bias of an anonymous informant. *See State v. Albert*, 115 Ariz. 354, 357, 565 P.2d 534, 537 (App. 1977) (defendant's confrontation right violated where court admitted search warrant and hearsay affidavit containing assertions of anonymous informant and police officer).

¶10 Here, the trial court admitted the search warrant into evidence but not the accompanying probable cause affidavit. The warrant contained the justice of the peace's signature and finding of probable cause, as well as physical descriptions of Botbyl and

[3]*Crawford* described three types of testimonial statements: (1) *ex parte*, in-court testimony that declarants would reasonably expect to be used prosecutorially, (2) extrajudicial statements contained in formalized testimonial materials such as affidavits, (3) statements made under circumstances which would lead the objective witness reasonably to believe the statement would be available for use at a later trial. *C. King*, 212 Ariz. 372, ¶ 19, 132 P.3d at 315, *citing Crawford*, 541 U.S. at 51-52.

the premises to be searched, but included no witness accusations or statements about Botbyl. Moreover, the warrant was not offered at trial to prove the truth of the matters asserted therein, but rather to demonstrate that the officers conducted an authorized search. *See* Ariz. R. Evid. 801(c). We therefore cannot find that the language within the warrant was testimonial hearsay implicating the Confrontation Clause.

¶11 Botbyl also asserts admission of the warrant constituted prosecutorial misconduct because the state sought to vouch for the case officer's testimony through the issuing judge's finding of probable cause.[4] Prosecutorial vouching may involve either personal assurances of a witness's veracity, or prosecutorial remarks that bolster a witness's credibility by reference to matters outside the record. *State v. E. King*, 180 Ariz. 268, 277, 883 P.2d 1024, 1033 (1994); *State v. Bible*, 175 Ariz. 549, 601, 858 P.2d 1152, 1204 (1993); *State v. Vincent*, 159 Ariz. 418, 423, 768 P.2d 150, 155 (1989) (prosecutor's comments placed prestige of state behind witness when prosecutor told jury state believed every word of witness's testimony and urged jury do likewise). Botbyl does not identify, nor have we found, any instance in the record in which the state made comments bolstering a witness. Nor does he cite any authority for his proposition that merely introducing the warrant into evidence would constitute prosecutorial vouching.

[4]Botbyl first raised "judicial vouching" during the motions in limine hearing, upon the mistaken belief that the search warrant contained avowals of the unidentified confidential informant. He later supplemented his argument, asserting admission of the warrant improperly suggested to the jury the judge's belief that criminal activity was occurring at the residence. Botbyl cited no authority below, nor has he done so on appeal, for his theory of "judicial vouching," and we find it unpersuasive.

See E. King, 180 Ariz. at 277, 883 P.2d at 1033. We conclude there was no vouching by the prosecution and no error by the trial court in admitting the warrant.

Admission of Text Messages and Right to Confront

¶12 Botbyl next argues the trial court abused its discretion in admitting text messages discovered on his cellular telephone at the time of his arrest because they were hearsay. The messages included statements such as, "Need 2 smoke bowl," "I just never thought u would let me work," and "I need some dope can you help," sent to Botbyl's phone from a variety of other numbers and contacts. Over Botbyl's objection, the trial court, citing *State v. Chavez*, 225 Ariz. 442, 239 P.3d 761 (App. 2010), found the messages were not hearsay. We review a trial court's ruling on admissibility of evidence over hearsay objections for an abuse of discretion, and we will affirm the court's ruling if the result was legally correct for any reason. *Id.* ¶ 5.

¶13 Hearsay is a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). In *Chavez*, this court upheld the admission of text messages from unidentified senders indicating the defendant had drugs for sale, on the ground they were not offered to prove the truth of the matter they asserted: that the prospective buyers wanted to purchase drugs from the defendant. *Chavez*, 225 Ariz. 442, ¶ 9, 239 P.3d at 763. Likewise, the text messages here were not admitted for their truth, but as circumstantial evidence that Botbyl had drugs for sale. *See* Fed. R. Evid. 801(c) advisory committee's note (no issue raised as to truth of anything asserted and statement

not hearsay if significance of offered statement lies solely in fact that it was made).[5] We see no meaningful distinction between the facts of the present case and those of *Chavez* and cannot say the trial court abused its discretion in reaching the same conclusion here.

¶14 Botbyl nevertheless urges us to depart from *Chavez*, arguing its analysis is incomplete in failing to discuss the trustworthiness or motives of the declarants and therefore should be rejected. *See* Ariz. R. Evid. 803(24) (hearsay exceptions may require weighing for circumstantial guarantees of trustworthiness), 806 (credibility of hearsay declarant may be attacked). And Botbyl maintains the trial court in this matter abused its discretion by making the same omission, citing *State v. Bass*, 198 Ariz. 571, ¶¶ 31-32, 12 P.3d 796, 804 (2000) (weighing reliability of excited utterance). However, because we have determined the text messages are non-hearsay, the trustworthiness tests for hearsay statements are inapplicable. *See generally Chavez*, 225 Ariz. at 442, 239 P.3d at 761; *see also State v. Arvizu*, 137 Ariz. 402, 403, 670 P.2d 1226, 1227 (App. 1983) (court may not weigh non-hearsay statements not offered to prove truth of words spoken nor exclude deliberate falsehoods contained therein); *State v. Rivera*, 139 Ariz. 409, 414, 678 P.2d 1373, 1378 (1984) ("relevancy is the unifying requisite factor for the admissibility of statements for non-hearsay purposes").

¶15 Botbyl additionally argues he was denied the opportunity to cross-examine the individuals who sent the text messages, thus violating his right of confrontation.[6] But

[5]Rule 801(c), Ariz. R. Evid., is identical to Rule 801(c), Fed. R. Evid., and is derived from the same. *Chavez*, 225 Ariz. 442, ¶ 7 & n.4, 239 P.3d 761, 763 & 763 n.4.

Botbyl again assumes the text messages are hearsay, while failing to present authority that non-hearsay statements raise Confrontation Clause concerns. *See Tennessee v. Street*, 471 U.S. 409, 413-14 (1985) (non-hearsay confession raises no Confrontation Clause concerns); *see also State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) ("opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised"). Finally, the jury found Botbyl not guilty of the charge of possession of methamphetamine for sale, demonstrating the text messages did not prejudice him and if any error occurred in their admission, it was harmless. *See State v. Williams*, 133 Ariz. 220, 228-29, 650 P.2d 1202, 1210-11 (1982) (no reversal where admission of hearsay did not prejudice defendant). Accordingly, we find no error in the admission of the text messages.

Allegation and Application of Aggravating Factors

¶16 Botbyl lastly contends the trial court improperly applied aggravating factors at sentencing, resulting in an illegal sentence.[7] Sentencing determinations are reviewed for an abuse of discretion. *State v. Davolt*, 207 Ariz. 191, ¶ 112, 84 P.3d 456, 481 (2004). Whether the trial court applied the correct sentencing statute is reviewed *de novo* as a question of law. *State v. Hollenback*, 212 Ariz. 12, ¶ 12, 126 P.3d 159, 163 (App. 2005).

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[6]Contrary to the state's contention, Botbyl preserved his Confrontation Clause argument through his objections on the basis of hearsay and his inability to cross-examine the witnesses. *See C. King*, 212 Ariz. 372, ¶ 14, 132 P.3d at 314.

[7]The trial court subsequently upheld Botbyl's sentence in a ruling denying his motion to correct sentence, issued during the pendency of this appeal.

Probation Status

¶17 The jury found as an aggravating factor that Botbyl had committed the offenses while on probation. The trial court cited that factor in enhancing Botbyl's sentence under A.R.S. § 13-708(C), as well as in aggravating the sentence under A.R.S. § 13-701(D)(24). Botbyl maintains the court's use of his probation status for both purposes violated his due process rights because the state failed to provide notice that his probation status would be applied as an aggravator until after the commencement of trial. He also asserts the trial court engaged in "impermissible double counting." We find these contentions without merit for several reasons.

¶18 First, double-punishment principles do not preclude a court from using a single aggravating factor to both enhance and aggravate a sentence. *See State v. Alvarez*, 205 Ariz. 110, ¶ 7, 67 P.3d 706, 709 (App. 2003), *citing State v. Bly*, 127 Ariz. 370, 372, 373, 621 P.2d 279, 281, 282 (1980); *State v. Ritacca*, 169 Ariz. 401, 403, 819 P.2d 987, 989 (App. 1991); *State v. LeMaster*, 137 Ariz. 159, 166, 669 P.2d 592, 599 (App. 1983). Neither is there any statutory prohibition in this regard as concerns probation status absent any specific limitation by the legislature. *Cf.* A.R.S. § 13-701(D)(2) (use of a deadly weapon during commission of crime may not be considered as aggravator if used to enhance range of punishment). Botbyl identifies no authority precluding consideration of probation status as both an aggravating circumstance and a sentence enhancement, nor any authority for attributing sentencing error on this basis.

¶19 Second, although the state provided no notice it intended to urge probation status as an aggravator,[8] Botbyl did not object to the inclusion on the verdict form of this aggravator during discussion of the verdict forms, nor did he raise the issue at the sentencing hearing, but only in a post-trial motion to correct the sentence.[9] Because Botbyl failed to timely object to the alleged error, he has forfeited his right to relief absent fundamental, prejudicial error. *See State v. Zinsmeyer*, 222 Ariz. 612, ¶ 26, 218 P.3d 1069, 1080 (App. 2009). An illegal sentence, however, would constitute fundamental error, *id*.; we therefore examine whether sentencing error occurred.

¶20 Regardless of any lack of notice by the state, the trial court could have applied probation status as an aggravating circumstance because Botbyl admitted he was on probation at the time of the offense. *See* § 13-701(C) (trial court may impose maximum term pursuant to A.R.S. § 13-703 if aggravating circumstance admitted by defendant); *cf. State v. Marquez*, 127 Ariz. 3, 5-6, 617 P.2d 787, 789-90 (App. 1980) (court may find aggravating circumstance pursuant to § 13-702 absent state allegation; statute permits findings on any evidence submitted prior to sentencing and no statutory requirement that state formally introduce such evidence). We therefore conclude there was no error on this basis, much less fundamental error.

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[8]The state did provide notice to Botbyl that it would seek sentence enhancement based on his probation status.

[9]Botbyl raised improper notice of probation status as an aggravator for the first time in his opening brief on appeal. His "double punishment" argument was first raised in a post trial "motion to correct sentence" which the trial court denied during the pendency of this appeal.

Proximity to Daycare

¶21 Botbyl further contends he was denied due process by the state's failure to notify him prior to trial of the specific statutory subsections under which it sought an aggravated sentence for proximity of the offense to a daycare facility. Although the state identified this as an aggravating factor for sentencing purposes prior to trial, it did not specify the catchall provision of § 13-701(D)(24) until the first day of trial. The jury found that factor, and the sentencing judge applied it, noting it had "some significance."

¶22 Botbyl argues that notice to a defendant of the state's intent to increase a sentence must be such that the defendant is not "'misled, surprised or deceived in any way by the allegations'" because the defendant must be able to identify his or her potential sentence and options. *See State v. Benak*, 199 Ariz. 333, ¶¶ 16-18 & ¶ 16, 18 P.3d 127, 131-32 & 131 (App. 2001) (defendant's probation eligibility), *quoting State v. Bayliss*, 146 Ariz. 218, 219, 704 P.2d 1363, 1364 (App. 1985). But the authority Botbyl cites, *State v. Cons*, 208 Ariz. 409, ¶ 6, 94 P.3d 609, 612 (App. 2004), *State v. Styers*, 177 Ariz. 104, 116, 865 P.2d 765, 777 (1993), and *State v. Waggoner*, 144 Ariz. 237, 239, 697 P.2d 320, 322 (1985), are inapposite because those cases relate to sentence enhancers, not sentence aggravation within a determined sentencing range. *See generally Alvarez*, 205 Ariz. 110, ¶¶ 4-5, 67 P.3d at 708 (distinguishing between sentence aggravation and sentence enhancement). Botbyl has provided no legal support for his assertion that the state should have notified him of the specific statutory subsection under which it sought an aggravated sentence, nor are we aware of any. We therefore decline to

consider it further. *See Carver*, 160 Ariz. at 175, 771 P.2d at 1390 (appellant must present significant arguments, supported by authority, in opening brief).

State v. Schmidt

¶23 Botbyl makes a final argument for the first time on appeal that *State v. Schmidt*, 220 Ariz. 563, ¶¶ 8-12, 208 P.3d 214, 217 (2009), prohibited the trial court from "increas[ing] the length of [his] sentence beyond the presumptive based solely on the catch-all aggravator" of § 13-701(D)(24). The record reflects the court applied both aggravating factors pursuant to the catch-all provision in § 13-701(D)(24), and found no mitigating factors. Thus, Botbyl is correct that his sentence was increased beyond the presumptive term contrary to the express holding of *Schmidt*, 220 Ariz. 563, ¶ 12, 208 P.3d at 217. Because Botbyl did not raise this theory below, we consider whether the imposition of sentence in contravention of *Schmidt* constituted fundamental, prejudicial error. *See Zinsmeyer*, 222 Ariz. 612, ¶ 26, 218 P.3d at 1080.

¶24 Although imposition of an illegal sentence indeed constitutes fundamental error, *id.*, we must also determine whether Botbyl was prejudiced thereby, *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). It is Botbyl's burden to establish the error is both fundamental and prejudicial. *Id.* In addition to the two catch-all aggravators found by the jury, the trial court took judicial notice of Botbyl's previous conviction of a felony within ten years immediately preceding the date of the offense. This prior conviction could be applied as an enumerated aggravator under § 13-701(D)(11). At sentencing, the court acknowledged it had found the prior

conviction, but did not apply that factor as an enumerated aggravator, relying solely upon the catch-all aggravators found by the jury.

¶25 Because Botbyl admitted his probation status and the court expressly took judicial notice of the prior conviction, the trial judge could have applied the prior conviction as an aggravating factor *sua sponte*. § 13-703(K) (trial court retains broad discretion to consider additional information presented at trial or submitted before sentencing when at least two aggravating circumstances are found true by trier of fact or admitted by defendant). Thus, although the trial court aggravated Botbyl's sentence based solely on the non-enumerated aggravators under the catch-all provision, it made all findings necessary to impose the prior conviction as an aggravator. Once the court made specific findings of fact that would qualify as an aggravator, Botbyl was lawfully exposed to an aggravated sentencing range even though that factor was not expressly relied upon as an aggravator during sentencing. *See Schmidt*, 220 Ariz. 563, ¶ 11, 208 P.3d at 217 ("elements" of aggravated offense identified with sufficient clarity when one or more clearly enumerated aggravators are found consistent with *Apprendi*, allowing imposition of aggravated sentence under relevant statutory scheme); *see also State v. Carreon*, 211 Ariz. 32, ¶¶ 4, 6, 116 P.3d 1192, 1193 (2005) (judge's statement during sentencing that defendant had prior felony convictions and was on release when offenses were committed exposed defendant to aggravating sentencing range in spite of judge's failure to make specific findings of aggravation); *State v. Martinez*, 210 Ariz. 578, ¶¶ 26-27, 115 P.3d 618, 625-26 (2005) (where aggravator implicit in jury's verdict raised permissible

sentencing range, no fundamental error in trial court's use of additional aggravators not found by jury in imposing sentence).

¶26 Finally, it is plain from the sentencing transcript that the trial court intended to impose an aggravated sentence and found no mitigating factors, and § 13-708(C) set the floor of Botbyl's sentence at the presumptive term. *See State v. Munniger*, 213 Ariz. 393, ¶ 12, 142 P.3d 701, 705 (App. 2006) (no prejudice where an aggravated sentence would have been imposed even had sentencing error not occurred). Accordingly, although the court erred in relying solely upon the catch-all aggravators during sentencing, Botbyl was not prejudiced because the court made findings consistent with § 13-701(D)(11) and *Schmidt*.

Disposition

¶27 For the foregoing reasons, Botbyl's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge