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.

FILED BY CLERK
DEC -7 2011
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,
Appellant,

v.

MAURO ACUNA,
Appellee.

2 CA-CR 2011-0059
DEPARTMENT B

MEMORANDUM DECISION
Not for Publication
Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR20090300006 & CR20101997001

Honorable Teresa Godoy, Judge Pro Tempore

APPEAL DISMISSED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines — Tucson
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By Rafael F. Gallego — Tucson
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V Á S Q U E Z, Presiding Judge.

¶1 In this appeal, the state challenges the trial court's sentencing of appellee Mauro Acuna, arguing the "court imposed an illegal sentence by departing from the sentencing range set forth in the plea agreement."[1] For the reasons stated below, we dismiss the appeal for lack of jurisdiction.

Factual and Procedural Background

¶2 Pursuant to a plea agreement, Acuna was convicted of possession of a deadly weapon during the commission of a felony drug offense, a class four felony. The agreement provided that probation was not available and that the following statutory range would apply to the sentence imposed by the trial court:

1. Mitigated Sentence: N/A years
2. Minimum Sentence: N/A years
3. Presumptive Sentence: 2.5 years
4. Maximum Sentence: 3.00 years
5. Aggravated Sentence: 3.75 years

¶3 At the change-of-plea hearing, the court informed Acuna it was obligated under the plea agreement to sentence him to prison and "[t]he minimum sentence under this plea you can receive is 2-1/2 years and the maximum is 3 years and 9 months." At the sentencing hearing, the prosecutor stated "it looks like under the plea the defendant

[1]Acuna entered a single plea agreement pertaining to cause numbers CR-20090300-006 and CR-20101997-001, and the trial court consolidated the matters for sentencing. Although the state's Amended Notice of Appeal cites both cause numbers, its opening brief does not contain any argument concerning his sentence for CR-20101997-001, and the state has therefore waived any claim pertaining to that sentence. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) ("[A]ppellant's brief shall include . . . the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on."); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). In this decision, we address only the state's claim of error for the sentence imposed in CR-20090300-006.

has to serve at least 2.5 years. That's the term that the state is recommending . . . ." And it appears from the transcript of the sentencing hearing, defense counsel acknowledged that under the agreement Acuna could receive no less than the presumptive prison term of 2.5 years. However, the trial court responded:

> I disagree with that. Way I read the plea agreement, what's not available to the Court is the substantially mitigated of one year. And the mitigated of a year and a half. But what is available to the Court is anything above a year and a half. Because there is not a special term in the plea that says the minimum sentence available is two and a half years. Just says what's not available to me is one year and one and a half. But what is available is one year and half plus a day and above. That's the way I interpret it.

¶4 The court sentenced Acuna to nineteen months in prison, and the state now appeals from that sentence.

Discussion

¶5 The state argues "the trial court misinterpret[ed] the plea agreement to allow a sentence lower than the presumptive sentence." And on that basis the state contends the court imposed an illegal sentence. But Acuna challenges this court's jurisdiction to consider the state's appeal, arguing the state is not entitled to appeal a sentence that is within the prescribed statutory range.

¶6 Appeals by the state in criminal matters are not favored and are permitted only when that right clearly is provided by constitution or statute. *State ex rel. McDougall v. Gerber*, 159 Ariz. 241, 242, 766 P.2d 593, 594 (1988). We therefore "presume, in the absence of express legislative authority, that the state lacks the ability to appeal in criminal matters." *State v. Dawson*, 164 Ariz. 278, 280, 792 P.2d 741, 743

(1990). And unless the state has a constitutional or statutory right to appeal, "an appellate court has no subject matter jurisdiction to consider that appeal." *Id.*

¶7 The legislature has statutorily authorized the state to appeal from an adverse decision in a criminal proceeding in only limited situations—those listed in A.R.S. § 13-4032. Section 13-4032(5) allows the state to appeal from "[a] sentence on the grounds that it is illegal, or if the sentence imposed is other than the presumptive sentence authorized by § 13-702, § 13-703, § 13-704 or § 13-706, subsection A." Generally, a sentence is illegal if it is "one that is outside the statutory range." *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991).

¶8 Here, the state does not dispute that the sentence imposed by the trial court was within the prescribed statutory range. Rather, it maintains the parties intended that the presumptive sentence of 2.5 years would be the minimum sentence available to Acuna and therefore the sentence imposed by the court is illegal.[2] And it asserts the parties' intent was apparent not only from the statements of the prosecutor, defense counsel, and the trial court at the change-of-plea hearing, but also from the terms of the written plea agreement. The state relies on *Coy v. Fields* for the proposition that "[p]lea agreements are contractual in nature and subject to contract interpretation." 200 Ariz. 442, ¶ 9, 27 P.3d 799, 802 (App. 2001). And quoting from *Taylor v. State Farm Mut. Auto. Ins. Co.*, 175 Ariz. 148, 152, 854 P.2d 1134, 1138 (1993), it contends "[o]ur courts

[2]In his answering brief, Acuna correctly asserts that "[t]he state does not argue this court has jurisdiction under the second portion of § 13-4032(5), which allows the state to appeal a sentence if it is 'other than the presumptive sentence authorized by'" the applicable sentencing statutes.

'attempt to enforce a contract according to the parties' intent,' [and t]he courts' purpose is to discover that intent and make it effective." The state reads these cases too broadly.

¶9 A trial court is not bound by any provision in a plea agreement. *State v. Oatley*, 174 Ariz. 124, 125, 847 P.2d 625, 626 (App. 1993). And the court's failure to impose a sentence in conformity with the agreement's sentencing provisions does not make that sentence "illegal" within the meaning of § 13-4032(5). Rule 17.4, Arizona Rules of Criminal Procedure, governs plea negotiations and agreements and gives the parties the right to negotiate and reach agreement on "any aspect of the case." Ariz. R. Crim. P. 17.4(a). This language has been interpreted broadly to mean "the State and the defendant may bargain both as to the plea of guilty and as to the sentence to be imposed." *State v. Superior Court*, 125 Ariz. 575, 577, 611 P.2d 928, 930 (1980).

¶10 However, Rule 17.4 also grants trial courts considerable discretion in deciding whether to accept or reject plea agreements. *State v. De Nistor*, 143 Ariz. 407, 411, 694 P.2d 237, 241 (1985). And even if a trial court accepts a plea agreement, it retains discretion to reject the agreement's sentencing provisions if it determines the provisions are inappropriate. *Espinoza v. Martin*, 182 Ariz. 145, 147, 894 P.2d 688, 690 (1995); *see also* Ariz. R. Crim. P. 17.4(d) (court not bound by any provision in agreement regarding sentence "if, after accepting the agreement and reviewing a presentence report, it rejects the provision as inappropriate").[3]

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[3]The trial court noted that in preparing for Acuna's sentencing it reviewed the presentence report, a doctor's report, a number of letters submitted on Acuna's behalf, and certificates showing Acuna had completed "a number of recovery services." The court also stated it had "staffed [the] case with probation."

¶11 When a trial court rejects the proposed sentencing provisions in a plea agreement, either party is permitted to withdraw from the agreement. *Aragon v. Wilkinson ex rel. Cnty. of Maricopa*, 209 Ariz. 61, ¶ 8, 97 P.3d 886, 889 (App. 2004); *see also* Ariz. R. Crim. P. 17.4(e). "If either party withdraws, the agreement is void and the parties are returned to their original positions." *Id., citing Dominguez v. Meehan*, 140 Ariz. 329, 331, 681 P.2d 912, 914 (App. 1983); *see also State v. Superior Court*, 125 Ariz. at 578, 611 P.2d at 931 (recognizing applicability of Rule 17.4(e) to State although rule mentions only defendants). "If neither party elects to withdraw, the court may proceed to impose a sentence within the legal range." *Aragon*, 209 Ariz. 61, ¶ 8, 97 P.3d at 890. This is precisely what occurred here.[4] And although the prosecutor questioned the court's interpretation of the agreement's sentencing provisions, the state never requested to withdraw from the plea agreement. Because the sentence imposed by the court was within the statutory range, we cannot say it is an illegal sentence under § 13-4032(5).

Disposition

¶12 For the foregoing reasons, the state's appeal is dismissed.

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

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[4]At sentencing, the trial court stated it found no aggravating factors and it found the following circumstances supported a mitigated sentence: the sentences received by the co-defendants, the defendant's role in the offense; family support; and Dr. Martinez's report.

CONCURRING:

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Judge