FILED BY CLERK
OCT 31 2012
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TIMOTHY PATRICK GUMP, Appellant.	2 CA-CR 2011-0268 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101336001

Honorable Michael O. Miller, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

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E S P I N O S A, Judge.

¶1 After a jury trial, Timothy Gump was convicted of crimes he had committed during a series of robberies in April 2010. The trial court sentenced him to a combination of presumptive and maximum, enhanced prison terms, to be served concurrently, the longest of which were thirty years. On appeal, he argues the maximum sentences he received were imposed erroneously because the trial court intended to issue presumptive sentences on all counts. For the following reasons, we affirm in part, vacate in part, and remand.

Background

¶2 Gump was charged in a twenty-one-count indictment with nine counts each of armed robbery and aggravated assault with a deadly weapon or dangerous instrument, and one count each of attempted armed robbery, possession of a prohibited weapon, and possession of a deadly weapon by a prohibited possessor. The prohibited-possessor count was severed for trial, and the state dismissed one count of armed robbery and one count of aggravated assault. The jury acquitted Gump of attempted armed robbery but found him guilty of the lesser-included offense of attempted robbery; he was convicted as charged of all remaining counts.[1]

¶3 At sentencing, the trial court stated it had considered aggravating and mitigating factors and found that "those generally balance each other out." As the court pronounced sentence, it stated it was imposing the "presumptive sentence" on each count. The court imposed the following prison terms, to be served concurrently: on count one,

[1]Gump pleaded guilty to the prohibited-possessor count after his jury trial.

12.5 years; on count two, twenty-three years; on counts three through five, thirty years each; on count six, 2.25 years; on counts seven through nine, thirty years each; on count ten, 9.5 years; on count eleven, seventeen years; on counts twelve through seventeen, twenty-two years each; and on counts eighteen and twenty-one, 4.5 years each. We have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶4 Gump points out that although the trial court stated it intended to impose the presumptive sentence for each of his convictions, it actually imposed maximum sentences for counts two through five, seven through nine, and eleven through seventeen. He accordingly asks us to reduce his sentences on these counts to the statutory minima, which are the presumptive sentences under A.R.S. § 13-704(F) (2009). The state acknowledges the court "imposed aggravated sentences while labeling them presumptive" but contends an ambiguity exists as to whether the court intended to impose the prison terms it did but mistakenly called them "presumptive" or, alternately, intended to impose presumptive sentences but mistakenly imposed prison terms from the wrong column of the statute's sentencing table.

¶5 Gump did not object in the trial court to the sentences he now challenges on appeal. His failure to do so forfeited review for all but fundamental, prejudicial error.

See State v. Henderson, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005).[2] However, "'[t]he failure to impose a sentence in conformity with mandatory sentencing statutes makes the resulting sentence illegal.'" *State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002), *quoting State v. Carbajal*, 184 Ariz. 117, 118, 907 P.2d 503, 504 (App. 1995). And "[i]mposition of an illegal sentence . . . constitutes fundamental error. *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 26, 218 P.3d 1069, 1080 (App. 2009); *Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d at 441.

¶6 Gump contends, and we agree, that aggravated sentences are not lawful under the circumstances of this case. The Sixth Amendment right to a jury trial includes the right to have a jury determine, beyond a reasonable doubt, any fact legally required to increase the punishment for a crime beyond the prescribed statutory maximum, except for the fact of a prior conviction. *See Blakely v. Washington*, 542 U.S. 296, 303-04 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Our supreme court accordingly has held that a defendant's sentence may be increased beyond the presumptive term only if: (1) the jury finds at least one aggravating factor, (2) the defendant waives the right to a jury determination and the trial court finds an aggravating factor, or (3) the judge or jury

[2]Although a limited exception to the fundamental-error rule exists for "alleged errors that did not become apparent until the trial court pronounced sentence," *State v. Vermuele*, 226 Ariz. 399, ¶ 14, 249 P.3d 1099, 1103 (App. 2011), that exception is not implicated here because the discrepancy at issue was contained in both the presentence report and the state's sentencing memorandum, thereby forecasting the error and giving Gump the opportunity to object before sentence actually was imposed. *See id.* (defendant has duty to "raise any . . . legal challenge to the propriety of the sentencing process that becomes apparent up to the moment the trial court pronounces sentence").

finds the fact of a prior conviction to be a valid aggravator. *State v. Price*, 217 Ariz. 182, ¶ 10, 171 P.3d 1223, 1226 (2007). When no valid aggravating factors have been found, the maximum sentence that may be imposed is the presumptive one. *State v. Martinez*, 210 Ariz. 578, ¶ 17, 115 P.3d 618, 623 (2005).

¶7 Here, neither the trial court nor the jury found any factor that could properly be used to aggravate Gump's sentence under *Blakely*. Although the court considered as an aggravating factor "the extreme impact on some of the victims," this factor was not exempt under *Blakely* and thus could not support a sentence greater than the presumptive unless it had been found by a jury. *See Price*, 217 Ariz. 182, ¶ 10, 171 P.3d at 1226; *Martinez*, 210 Ariz. 578, ¶ 17, 115 P.3d at 623; *see also State v. Schmidt*, 220 Ariz. 563, ¶ 1, 208 P.3d 214, 215 (2009) (catchall aggravating factor, standing alone, may not be used to increase sentence). And, although Gump's plea of guilty to the prohibited-possessor charge alerted the court that he previously had been convicted of a felony, the court did not specifically rely on the prior conviction as an aggravating factor for sentencing, thus preventing that factor from being used to aggravate his sentence. *See Zinsmeyer*, 222 Ariz. 612, ¶¶ 23-24, 218 P.3d at 1079 (sentence may not be aggravated on basis of prior conviction when trial court finds prior conviction but does not cite it as aggravating factor).[3] Accordingly, Gump's sentences were not properly aggravated under *Blakely*, and the presumptive sentence was the maximum that could be imposed.

[3]But see *State v. Bonfiglio*, 228 Ariz. 349, ¶¶ 22-23, 266 P.3d 375, 354-55 (App. 2011), in which a department of Division One of this court concluded that A.R.S.

¶8 As both parties point out, however, the record evinces a discrepancy in the trial court's pronouncement of sentence: the court imposed maximum sentences but expressly labeled them "presumptive." Gump posits that this discrepancy likely has its source in the presentence report, which "misinterpreted" the sentencing tables contained in § 13-704(F) and on which the trial court relied in imposing sentence. The state agrees that the error likely resulted from an incorrect reading of § 13-704(F). To correct the discrepancy, Gump requests that we reduce the disputed sentences to presumptive terms under § 13-704(F). The state, on the other hand, argues that this matter should be remanded for the trial court to clarify whether it intended to impose presumptive-minimum or maximum sentences. Because we decline to speculate about the reason for the discrepancy, we remand for resentencing.[4]

Disposition

¶9 For the foregoing reasons, Gump's sentences on counts two through five, seven through nine, and eleven through seventeen are vacated, and this matter is

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§ 13-701(D) requires trial courts to consider prior convictions in determining whether to aggravate a defendant's sentence. Our supreme court has granted review in *Bonfiglio*.

[4]Although not argued by either party, we note that the record does not include the reason the sentences in this case are concurrent rather than consecutive, as required by A.R.S. § 13-711(A). *Cf. State v. Anzivino*, 148 Ariz. 593, 598, 716 P.2d 50, 55 (App. 1985) (remand required where trial court failed to state reasons for imposing consecutive sentences); *State v. Woratzeck*, 130 Ariz. 499, 502, 637 P.2d 301, 304 (App. 1981) (same); *see also* 1986 Ariz. Sess. Laws, ch. 300, § 1 (modifying former A.R.S. § 13-708 to require court to state reasons for imposing concurrent, rather than consecutive sentences).

remanded for resentencing on those counts. In all other respects, his convictions and sentences are affirmed.

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

CONCURRING:

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

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge