

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

SEP 14 2012

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0322
)	DEPARTMENT A
)	
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
BYRON LEE HAGANS,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR033517

Honorable Christopher C. Browning, Judge

AFFIRMED

Harriette P. Levitt

Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 In this appeal, filed pursuant to *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), appellant Byron Hagans seeks review of the trial court's order resentencing him to consecutive, presumptive prison terms totaling 147 years. Counsel avows she has reviewed the record thoroughly, including the resentencing transcript, and

found no arguable issues to raise on appeal. She asks us to review the record for “error.” Hagans has filed a supplemental brief. We affirm.

¶2 Following a jury trial in absentia, Hagans was convicted of six counts of sexual conduct with a person under fourteen, three counts of sexual abuse of a person under fourteen, and one count of attempted sexual conduct with a person under fourteen. With the exception of one sexual conduct count, all of the offenses were dangerous crimes against children pursuant to former A.R.S. § 13-604.01.¹ In 1996, the trial court, a different court than the resentencing court, imposed consecutive, presumptive terms of imprisonment totaling forty-seven years, to be followed by seven consecutive life terms of imprisonment, each with the possibility of parole after thirty-five years.

¶3 In June 2011, Hagans filed a delayed pro se petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., asserting the trial court had improperly used convictions consolidated for trial as predicate prior offenses for sentencing purposes in violation of *State v. Brown*, 191 Ariz. 102, 952 P.2d 746 (App. 1997), and he is entitled to concurrent sentences pursuant to A.R.S. § 13-116. In August 2011, the court granted relief, ordering that Hagans was entitled to be resentenced under *Brown*, but reserving for resentencing the issue of concurrent or consecutive sentences. After considering the parties’ sentencing memorandums and the arguments presented at the September 2011

¹The law in effect at the time Hagans committed the underlying offenses, A.R.S. § 13-604.01(J), provided: “The sentence imposed on a person . . . for a dangerous crime against children . . . shall be consecutive to any other sentence imposed on the person at the time.” 1985 Ariz. Sess. Laws, ch. 364, § 6. As part of the reorganization of Arizona’s sentencing statutes, former § 13-604.01 was renumbered as A.R.S. § 13-705. 2008 Ariz. Sess. Laws, ch. 301, §§ 17, 29.

sentencing hearing, the court imposed the 147-year term of imprisonment from which Hagans now appeals.

¶4 In his supplemental brief, Hagans argues the imposition of consecutive prison terms violated § 13-116 and the statutory prohibition against double punishment, presumably based upon the assertion that many of the offenses occurred at the same time and arose from the same act. Section 13-116 precludes consecutive sentences for “[a]n act or omission . . . made punishable in different ways by different sections of the laws.” Accordingly, under § 13-116, “a trial court may not impose consecutive sentences for the same act.” *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006). At the resentencing hearing, the state argued the offenses of which Hagans was convicted occurred between certain dates, as described by the victims, which is why the state had alleged a range of dates; the acts were “separate and . . . specific”; and, “the jury found that they were distinct charges, and to merge them at this point would be inappropriate.”

¶5 Pursuant to our obligation under *Anders*, we have reviewed the record pertaining to Hagans’s resentencing. *Cf. State v. Hartford*, 145 Ariz. 403, 405, 701 P.2d 1211, 1213 (App. 1985) (validity of underlying conviction, previously affirmed on appeal, beyond scope of appeal of resentencing after remand). To the extent Hagans is entitled to have this court review the record for fundamental error pursuant to *Anders*, our review is limited to that portion of the record related to the resentencing. Accordingly, having reviewed the transcript and commitment order from the resentencing, we find no error, fundamental or otherwise.

¶6 “We review de novo whether consecutive sentences are permissible under § 13-116.” *State v. Siddle*, 202 Ariz. 512, ¶ 16, 47 P.3d 1150, 1155 (App. 2002). Hagans was convicted of multiple violations under two statutes, A.R.S. §§ 13-1404 and 13-1405. To the extent Hagans asserts consecutive sentences were improper as to any of the convictions under the same statute, § 13-116 is inapplicable because those acts constitute multiple acts in violation of the same statute, not an act in violation of different statutes. *See State v. Griffin*, 148 Ariz. 82, 85, 713 P.2d 283, 286 (1986) (no violation of § 13-116 when defendant “charged with and convicted of four counts of the same offense: sexual assault”); *State v. Williams*, 182 Ariz. 548, 562, 898 P.2d 497, 511 (App. 1995) (where “[d]efendant violated the same statute . . . multiple times” in committing sexual assaults, § 13-116 inapplicable); *see also State v. Henley*, 141 Ariz. 465, 467, 687 P.2d 1220, 1222 (1984) (when “both counts are punishable under the same sections of the law,” § 13-116 does not bar consecutive sentences), *abrogated on other grounds by State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045 (2009); *State v. Brown*, 217 Ariz. 617, n.4, 177 P.3d 878, 882 n.4 (App. 2008) (same).

¶7 Additionally, to the extent Hagans argues § 13-116 applies to those convictions based on separate statutes, the record before us is not sufficient for us to meaningfully apply the test our supreme court established in *State v. Gordon*, 161 Ariz. 308, 312, 778 P.2d 1204, 1208 (1989). That test requires courts to “determine whether a constellation of facts constitutes a single act, which requires concurrent sentences, or multiple acts, which permit consecutive sentences.” Nor has Hagans explained how the three factors in the *Gordon* test apply to him. Moreover, because Hagans appeals from

the resentencing only, the underlying facts necessary for such a determination are not part of the record before us. Accordingly, to the extent § 13-116 may be applicable here, Hagans has not met his burden to show that sentencing error occurred. *See State v. Burdick*, 211 Ariz. 583, n.4, 125 P.3d 1039, 1042 n.4 (App. 2005) (claim defendant's sentences violated § 13-116 waived "[b]ecause he failed to develop th[e] argument as required by Rule 31.13(c)(1)(vi), Ariz. R. Crim. P."). We thus do not address this argument further.

¶8 We have reviewed the entire record provided related to the resentencing, and have found no error, much less error that can be characterized as fundamental and prejudicial. Accordingly, we affirm the sentences imposed on resentencing.

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

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge