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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. LARRY ALAN KLEVENOW, Petitioner.	2 CA-CR 2010-0333-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091716001

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF GRANTED

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

¶1 Petitioner Larry Klevenow seeks review of the trial court's order denying his of-right petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P., in which he alleged the trial court violated the terms of his plea agreement and his due

process rights by imposing a "flat-time" sentence. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). As explained below, we agree with Klevenow that the court abused its discretion in denying post-conviction relief, and we therefore grant relief.

¶2 Pursuant to a plea agreement, Klevenow was convicted of two counts of second-degree child molestation, both preparatory dangerous crimes against children. The plea agreement provided he "must serve approximately [eighty-five] percent of the sentence imposed before []he is eligible for release on any basis." The trial court imposed consecutive, ten-year terms, ordering they "be served day for day," in other words, as "flat-time."

¶3 Klevenow then initiated proceedings pursuant to Rule 32, arguing in his petition that "[a]t the time of accepting the plea agreement, [his] understanding [had been] that he would be eligible for release after serving approximately eighty-five percent of his imposed prison sentence." He emphasizes that the court had informed him "he would have to serve eighty-five percent of his sentence and then would be eligible for release" and that he had "relied upon" that information in "making the decision to plead guilty." He maintained the sentences therefore "violated the terms of his plea agreement and [his] due process rights."

¶4 The trial court ordered supplemental memoranda, requesting that the parties address whether Klevenow had entered his plea voluntarily and intelligently, as well as the type of release for which he claimed eligibility. In his memorandum, Klevenow

stated the plea agreement had been entered intelligently and voluntarily and maintained he did not seek to void the agreement, but to enforce its terms. According to Klevenow, the flat-time sentences imposed by the court violated the terms of his agreement, and he requested that he be resentenced to allow him to earn early-release credits. After reviewing the memoranda submitted, the court summarily denied relief on Klevenow's petition, concluding "the sentence imposed complied with . . . the plea agreement."

¶5 In his petition for review filed in this court, Klevenow essentially reiterates the arguments he made below and also argues the trial court erred in relying on *State v. Pac*, 165 Ariz. 294, 798 P.2d 1303 (1990), for its conclusion that "failure to inform [a] defendant of his ineligibility to earn early-release credits [does] not render his plea involuntary or constitute error." We agree with Klevenow that the flat-time sentence imposed by the trial court was not consistent with the terms of his plea agreement.

¶6 Generally, we apply contract analysis to plea agreements. *Mejia v. Irwin*, 195 Ariz. 270, ¶ 12, 987 P.2d 756, 758 (App. 1999). In interpreting a contract, our purpose "is to determine and enforce the parties' intent." *US West Commc'ns, Inc. v. Ariz. Corp. Comm'n*, 185 Ariz. 277, 280, 915 P.2d 1232, 1235 (App. 1996). In determining the parties' intent, we "look to the plain meaning of the words as viewed in the context of the contract as a whole." *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 259, 681 P.2d 390, 411 (App. 1983); *see also State ex rel. Goddard v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, ¶ 13, 75 P.3d 1075, 1078 (App. 2003) (in interpreting contract, we consider context of words and purpose of agreement). "But, as with all contracts, if the meaning of a[] . . . provision remains uncertain after

consideration of the parties' intentions, as reflected by their language in view of surrounding circumstances, a secondary rule of construction requires the provision to be construed against the drafter." *MT Builders, L.L.C. v. Fisher Roofing, Inc.*, 219 Ariz. 297, ¶ 10, 197 P.3d 758, 763 (App. 2008).

¶7 In its answer to Klevenow's petition for post-conviction relief, the state maintained that "neither the plea agreement nor the Court promised [Klevenow] that he would be released after serving approximately eighty[-]five percent of his sentence," or that he would receive a sentence allowing for such release. We agree with the former contention but not the latter. Although it is true that the plea agreement did not expressly guarantee early release, something Klevenow would have to earn with good behavior, it did suggest that he would be eligible for early release.

¶8 The agreement stated, as noted above, that Klevenow "must serve approximately [eighty-five] percent of the sentence imposed before []he is eligible for release on any basis." And it did not contain any mention of the possibility of a flat-time sentence. Thus, at a minimum, the plea agreement was unclear as to whether Klevenow would be entitled to early-release eligibility or whether that status was merely a possibility. In keeping with the rules of contract interpretation stated above, we therefore construe the plea agreement against the state as the drafter and conclude the agreement did provide for early-release eligibility.

¶9 Additionally, Klevenow's presentence report indicated he would "[n]ot be eligible for release from confinement on any basis . . . until [he] has served the sentence imposed by the Court, *is eligible for release* or the sentence is commuted." (Emphasis

added.) Likewise, when the trial court accepted his plea, it informed Klevenow he was required to "serve approximately [eighty-five] percent of [his] sentence before [he was] eligible for release." Thus, the court's advisory to Klevenow also suggested that he would be eligible for release once he had served eighty-five percent of his sentence. The court did not advise Klevenow that a flat-time sentence was a possibility.

¶10 In ruling on Klevenow's petition below, the trial court relied on *Pac* and concluded it had not erred in failing to advise Klevenow of the possibility of a flat-time sentence. But, even assuming that *Pac* remains good law under the current sentencing code, it does not address the issue presented here—whether a flat-time sentence is consistent with a plea agreement that includes a provision for early-release eligibility and does not advise a defendant of the possibility that he may receive a flat-time sentence.[1] *See Pac*, 165 Ariz. at 294, 798 P.2d at 1303.

¶11 In any event, separate from the provisions of the plea agreement, it is unclear whether the trial court here was statutorily authorized to impose a flat-time sentence. Section 13-1410(B), A.R.S., provides that molestation of a child "is punishable pursuant to § 13-705." That section sets forth the sentencing ranges for various dangerous crimes against children and preparatory crimes against children. Section 13-705(D) provides the sentencing ranges for persons convicted of dangerous crimes against children in the first degree, including molestation, and subsection (H) dictates that such

[1]Unlike the defendant in *Pac*, Klevenow does not assert he is entitled to withdraw from his plea because the court failed to properly advise him as required by Rule 17.2(b), Ariz. R. Crim. P. *See Pac*, 164 Ariz. at 295-96, 798 P.2d at 1304-05. Rather, he argues only that he "is entitled to be resentenced."

persons are not eligible for release except for so-called compassionate leave under A.R.S. § 31-233. Section 13-705(O) explains that "[a] dangerous crime against children is in the first degree if it is a completed offense and is in the second degree if it is a preparatory offense."

¶12 In this case, as set forth above, Klevenow was convicted of two counts of molestation of a child in the second degree, preparatory dangerous crimes against children.[2] As such, he was not subject to the requirements of subsection (H), but rather to the sentencing range and requirements set forth in § 13-705(J). Under § 13-705(J), a person "who is convicted of a dangerous crime against children in the second degree pursuant to subsection [(D)] . . . is guilty of a class 3 felony and if the person is sentenced to a term of imprisonment, . . . the person is not eligible for release from confinement on any basis except as specifically authorized by[, *inter alia*, A.R.S.] § 41-1604.07."

¶13 Section 41-1604.07(A) states:

> Pursuant to rules adopted by the director, each prisoner who is in the eligible earned release credit class shall be allowed an earned release credit of one day for every six days served, including time served in county jails, except for those prisoners who are sentenced to serve the full term of imprisonment imposed by the court.

[2]Klevenow committed one offense in 2009, but the other was committed "[o]n or about the 1st day of January, 2005 through the 18th day of April, 2009." The Arizona criminal sentencing code has been renumbered, "effective from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 15-49, 119-20. For ease of reference and because the renumbering included no substantive changes relevant to this appeal, *see id.*, we refer in this decision to the current section number rather than that in effect at the time of the offense in this case.

Thus, although § 13-705(J) does not expressly require a flat-time sentence, we acknowledge that § 41-1604.07 could be read to give the trial court discretion to impose such a sentence.

¶14 "[A] trial court's sentencing authority is derived from the legislative mandates regarding sentencing . . . ." *State v. Vargas-Burgos*, 162 Ariz. 325, 326, 783 P.2d 264, 265 (App. 1989). Those mandates "distribute[] the authority to control the sentence so that the court, the department of corrections and the parole board each serves its purpose, and within its specified sphere of competence, individualizes the sentence." *State v. Harris*, 133 Ariz. 30, 31, 648 P.2d 145, 146 (App. 1982). Accordingly, a trial court may impose a sentence "only as authorized by statute and within the limits set down by the legislature." *Id.*

¶15 Our supreme court addressed an issue similar to the one presented here in the case of *In re Webb*, 150 Ariz. 293, 723 P.2d 642 (1986). In *Webb*, the defendant had been convicted of misdemeanor criminal trespass in violation of former A.R.S. § 13-1504.[3] *Webb*, 150 Ariz. at 293, 723 P.2d at 642. The trial court sentenced the defendant to a six-month jail term and ordered the sentence be served as flat-time. *Webb*, 150 Ariz. at 293-94, 723 P.2d at 642-43. The defendant argued that the court had exceeded its authority in imposing a flat-time term and that he was eligible for earned release credits pursuant to A.R.S. § 31-144, governing earned release credits for prisoners in city and county jails. Neither former § 13-1504 nor former A.R.S. § 13-707, the statute governing

[3]The version in effect at the time *Webb* was decided is found at 1982 Ariz. Sess. Laws, ch. 279, § 2.

misdemeanor sentences, however, explicitly authorized or mandated the trial court to impose flat time. *Webb*, 150 Ariz. at 294, 723 P.2d at 643; *see* 1978 Ariz. Sess. Laws, ch. 201, §§ 104, 107 (former § 13-707 in effect at time of *Webb* decision).

¶16 The state, nonetheless, insisted the court could, in its discretion, impose a flat-time jail term, reasoning that, because § 31-144 states it does not apply "in cases in which a specific release date is set forth," the court's imposition of flat time rendered the defendant ineligible for earned release credits. *Webb*, 150 Ariz. at 294, 723 P.2d at 643. Citing *Harris*, the supreme court reasoned that, absent specific language to the contrary in applicable sentencing statutes, "[w]hether . . . a prisoner is eligible for . . . absolute discharge [based on earned release credits] is not for the courts to decide; it is within the control of the . . . department of corrections." *Webb*, 150 Ariz. at 294, 723 P.2d at 643; *see Harris*, 133 Ariz. at 31, 648 P.2d at 146. The supreme court concluded that "'flat' time sentences are not permitted in misdemeanor cases unless specifically authorized per statute," and determined the sentence imposed in that case was, therefore, illegal. *Webb*, 150 Ariz. at 294, 723 P.2d at 643.

¶17 Likewise, in *State v. Nguyen*, 185 Ariz. 151, 152-53, 912 P.2d 1380, 1381-82 (App. 1996), this court considered whether a defendant sentenced to a flat-time prison term of 5.25 years was eligible for a disproportionality review. The court compared the mandatory flat-time term the defendant had received to the sentence he would have received had he been sentenced after the relevant sentencing statutes, former A.R.S. § 13-701(C)(1) and former A.R.S. § 13-3408(D), had been amended. *Nguyen*, 185 Ariz. at 153, 912 P.2d at 1382. The court concluded that had the defendant been sentenced under

the amended statutes, whose operative language parallels the statutes pursuant to which Klevenow was sentenced, the defendant "would . . . have been eligible for earned release credits." *Id.* at 153, 912 P.2d at 1382; *see* 1993 Ariz. Sess. Laws, ch. 255, §§ 10, 44 (amending former §§ 13-701 and 13-3408).

¶18 Furthermore, our legislature knows how to authorize a flat-time sentence and how to preclude the Department of Corrections from granting earned release credits under § 41-1604.07, and has explicitly done so in other statutes. *See, e.g.*, A.R.S. § 13-707(E) (trial court "may direct" that defendant "shall not be released on any basis until the sentence imposed by the court has been served"); A.R.S. § 13-709.02(A) (mandating term of "calendar years" for terrorism conviction); A.R.S. § 13-708(A) (person convicted of dangerous felony while on release not eligible for release "on any basis until the sentence imposed is served"); *see also State v. Ross*, 214 Ariz. 280, ¶ 22, 151 P.3d 1261, 1264 (App. 2007) (we interpret statutes consistent with "'the statutory scheme as a whole'"), *quoting Hughes v. Jorgenson*, 203 Ariz. 71, ¶ 11, 50 P.3d 821, 823 (2002). And, we have found no Arizona cases in which a trial court has sentenced a defendant to a flat-time term absent such explicit statutory authority and based solely on language like that in § 13-705(J). In the absence of such express language, we decline to interpret the last clause of § 41-1604.07 as necessarily empowering a trial court to impose a flat-time prison term. *See Webb*, 150 Ariz. at 294, 723 P.2d at 643. We think that clause merely clarifies that the entitlement to earned release eligibility as described under § 41-1604.07 is available only to those defendants who have received sentences properly authorizing such potential eligibility in the first instance. Thus, the trial court not only imposed a

flat-time sentence in contradiction to the plea agreement, but arguably in the absence of statutory authority.

¶19 Given the legal complexity of the question of whether a flat-time sentence was lawful, and given that both plea agreements and plea colloquys are intended and understood by the parties to convey all the potential consequences of the plea, *see* Ariz. R. Crim. P. 17.2, the failure of the state to advise Klevenow in either context that he could receive a flat-time sentence, strongly suggests that Klevenow's agreement with the state did not contemplate any such possibility. *Cf.* Ariz. R. Crim. P., 17.4(e) (if court rejects provision in plea agreement it must "give the defendant an opportunity to withdraw his or her plea, advising the defendant that if he or she permits the plea to stand, the disposition of the case may be less favorable to him or her than that contemplated by the agreement"). Thus, regardless of whether the trial court had the authority to impose a flat-time sentence pursuant to § 13-705(J), Klevenow is entitled to early-release eligibility under the terms of his agreement. We therefore grant the petition for review and grant relief, striking the flat-time requirement from his sentence.

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

CONCURRING:

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

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