



DIVISION ONE  
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 RUTH A. WILLINGHAM,  
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IN THE COURT OF APPEALS  
 STATE OF ARIZONA  
 DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0860  
 )  
 Appellee, ) DEPARTMENT C  
 )  
 v. )  
 ) **SUPPLEMENTAL OPINION**  
 BEN WESLEY LONEY, )  
 )  
 Appellant. )  
 )  
 \_\_\_\_\_ )

Appeal from the Superior Court in La Paz County

Cause No. S1500CR201100145

The Honorable Michael J. Burke, Judge

**AFFIRMED**

Thomas C. Horne, Arizona Attorney General Phoenix  
 By Kent E. Cattani, Chief Counsel  
 Criminal Appeals/Capital Litigation Section  
 And Joseph T. Maziarz, Assistant Attorney General  
 Attorneys for Appellee

David Goldberg, Attorney at Law Fort Collins, CO  
 By David Goldberg  
 Attorney for Appellant

**B R O W N**, Judge

¶1 This court previously issued an opinion affirming Ben Wesley Loney's convictions for two counts of sexual conduct with a minor (Counts Two and Three of the indictment). *State v. Loney*, 230 Ariz. 542, \_\_\_, ¶ 1, 287 P.3d 836, 837 (App. 2012).

We also affirmed Loney's sentence on Count Three, but determined his sentence on Count Two was based on an erroneous interpretation of Arizona Revised Statutes section 13-703(A) (2012). *Id.* at \_\_\_\_, ¶ 22, 287 P.3d at 841. We concluded the error constituted fundamental, prejudicial error and therefore remanded for resentencing. *Id.*

¶2 The State moved for reconsideration, arguing we misapplied the prejudice prong of fundamental error and failed to hold Loney to his burden of establishing prejudice. In response, Loney asserted his release from prison was imminent and therefore our order remanding for resentencing was effectively mooted. Loney also indicated he had no desire to be resentenced to probation, having already served both of the flat-time sentences originally imposed by the trial court. Recognizing these concerns, and because Loney was actually released from the custody of the Arizona Department of Corrections on January 10, 2013, the State's argument regarding prejudice is moot. *See State v. Peters*, 110 Ariz. 316, 317, 518 P.2d 566, 567 (1974) (noting that issue relating to legality of jail sentence was mooted by the passage of time).

¶3 Accordingly, we deny the State's motion for reconsideration, but we modify our opinion by vacating the last textual sentence of paragraph 22 (and the accompanying citation) and the order remanding for resentencing. *See Loney*, 230 Ariz.

at \_\_\_\_, ¶¶ 22-23, 287 P.3d at 841. The remainder of the opinion stands, as it provides clarification of the law.

/s/

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MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

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LAWRENCE F. WINTHROP, Judge

/s/

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JOHN C. GEMMILL, Judge