DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0250
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
DL THOMAS, JR.,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-178969-001DT

The Honorable Susan M. Brnovich, Judge

AFFIRMED IN PART, VACATED AND REMANDED IN PART

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G E M M I L L, Judge

¶1 DL Thomas, Jr. appeals from his three convictions and accompanying sentences. On appeal he challenges only the term of probation imposed on his conviction for possession of marijuana. For the reasons that follow, we affirm Thomas's three convictions and we affirm his sentences for possession of dangerous drugs (methamphetamine) for sale and possession of drug paraphernalia. Because of sentencing error on his possession of marijuana conviction, we vacate his term of probation and remand for resentencing.

FACTUAL AND PROCEDURAL HISTORY

¶2 "We view the record in the light most favorable to sustaining the trial court's decision." *See State v. Sasak*, 178 Ariz. 182, 189, 871 P.2d 729, 736 (App. 1993). Based on this principle, the following facts were revealed at trial.

¶3 In January 2009, Thomas was indicted on the following three counts: count one, possession of dangerous drugs for sale, a class two felony; count two, possession or use of marijuana, a class six felony; and count three, possession of drug paraphernalia, a class six felony. Counts one and three involved the possession of methamphetamine or drug paraphernalia related to possession of methamphetamine. After all the evidence was presented, a jury found Thomas guilty on all three counts.

¶4 In November 2010, the trial court held a trial to

determine prior convictions. In this trial, the State proved that Thomas had four prior felony convictions with two qualifying as historical prior felony convictions. In March 2011, Thomas was sentenced to a thirteen-year flat sentence for count one and a presumptive 3.75-year sentence for count three, both sentences to be served concurrently. For count two, the court suspended imposition of sentence and imposed a two-year term of probation, to be served after the sentences on the other two counts. The trial court ordered probation for count two, the possession of marijuana count, after concluding that the conviction met the criteria for mandatory probation under Proposition 200.

¶5 Thomas timely appeals and we have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).[1]

ANALYSIS

¶6 Thomas raises one issue on appeal: whether the trial court committed error when it imposed probation for possession of marijuana. Thomas failed to object to this issue at sentencing, and, therefore, our review is confined to a review for fundamental error on appeal. *See State v. Henderson*, 210

[1] We cite to the current versions of statutes when no revisions material to this decision have occurred since the date of the alleged offenses.

Ariz. 561, 567, ¶¶ 19–20, 115 P.3d 601, 607 (2005) (failing to object at the trial level limits appellate review for fundamental prejudicial error). Under fundamental error review, Thomas must prove that the trial court erred, the error was fundamental (error impacting the foundation of the case), and that he was thereby prejudiced by the error. *See id.*

¶7 "Probation is not a sentence." *State v. Muldoon*, 159 Ariz. 295, 298, 767 P.2d 16, 19 (1988). Nonetheless, an improper order of probation is illegal and fundamental error, just like an illegal sentence. *See State v. Bouchier*, 159 Ariz. 346, 347, 767 P.2d 233, 234 (App. 1989). Therefore, we will analyze Thomas's term of probation in this light.

¶8 Thomas argues that his probation term was illegal and fundamental error because the trial court improperly applied A.R.S. § 13-901.01 (2010) (colloquially known as Proposition 200). Thomas asserts that his conviction for marijuana possession was not Proposition 200 eligible. We agree.

¶9 Section 13-901.01(A) mandates that the trial court place a defendant on probation in response to a conviction for "personal possession or use of a controlled substance or drug paraphernalia." Section 13-901.01(H)(4), however, provides that "[a] person is ***not eligible*** for probation under this section . . . if the court finds the person . . . [w]as convicted of the personal possession or use of a controlled substance or drug

paraphernalia and the offense involved ***methamphetamine***." (emphasis added).

¶10 At the time of Thomas's sentencing, the trial court did not have the benefit of guidance from a recent opinion issued by this court that interprets and applies A.R.S. § 13-901.01 under similar facts. In *State v. Siplivy*, 228 Ariz. 305, 265 P.3d 1104 (App. 2011), this court answered the question whether a defendant "who was convicted simultaneously of multiple offenses, some of which otherwise would qualify for mandatory probation and some of which do not, is entitled to mandatory probation for the qualifying offenses under § 13–901.01." *Id.* at 307, ¶ 4, 265 P.3d at 1106. The trial court in *Siplivy* did not provide terms of probation for the non-methamphetamine offenses as ordinarily mandated by § 13-901.01. *Id.* at 306, ¶ 1, 265 P.3d at 1105. This court analyzed the statutory purpose of A.R.S. § 13-901.01 and concluded:

> [g]iven the announced public policy concerning persons who commit methamphetamine related offenses, we cannot conclude that the legislature intended to impose such incentives on the methamphetamine-related offenses, but not the other associated offenses. We conclude, therefore, that the legislature intended to exclude defendants convicted of methamphetamine-related offenses from mandatory probation rather than just excluding those offenses.

Id. at 308, ¶ 11, 265 P.3d at 1107.

¶11 The State acknowledges that the trial court erred in its application of § 13-901.01 to Thomas's marijuana conviction. Count one (possession of methamphetamine for sale) and count three (possession of drug paraphernalia related to methamphetamine) were methamphetamine-related charges. Based on the language of § 13-901.01(H) and *Siplivy*, we conclude that the trial court erred in imposing probation instead of a prison sentence regarding Thomas's possession of marijuana conviction.

¶12 The State argues, however, that Thomas is not entitled to appellate relief because the error was not fundamental. The State further contends that Thomas suffered no prejudice because the trial court had discretion to sentence Thomas to probation and the term of probation was within the permitted statutory range.

¶13 We are not persuaded by the State's arguments. First, the imposition of probation was not justified under the applicable statutes, as we explain herein. Therefore, Thomas received the functional equivalent of an illegal sentence, which constitutes fundamental error. *See Bouchier*, 159 Ariz. at 347, 767 P.2d at 234. Thomas does not qualify for a term of probation. The trial court found that Thomas had four prior felony convictions after a trial on priors. Two of these were found to be historical priors pursuant to A.R.S. § 13-105(22) (Supp. 2011). Section 13-703(C) (Supp. 2011) provides that a

person such as Thomas, who has been convicted of at least two historical prior felony convictions, "shall be sentenced as a category three repetitive offender." Thomas's possession or use of marijuana conviction is a class six felony. *See* A.R.S. § 13-3405(A)(1), (B)(1) (Supp. 2011). Accordingly, under A.R.S. § 13-703(J), the trial court must sentence Thomas within the following ranges: 2.25 years to 5.75 years. Therefore, Thomas does not qualify for a term of probation. *See* A.R.S. § 13-703(O) ("A person who is sentenced pursuant to this section is *not* eligible for . . . probation.") (emphasis added).

¶14 Thomas must also establish that he was prejudiced by the term of probation under fundamental error review. *See Henderson*, 210 Ariz. at 568-69, ¶ 26, 115 P.3d at 608-09. He argues that he was prejudiced by the trial court's combination of sentences and probation because he must serve the term of probation *after* he completes his prison terms for the concurrent counts one and three. This "probation tail" means that Thomas was given a term of probation to be served consecutively to the other two sentences. Thomas suggests that if the trial court sentences him properly, without applying Proposition 200, it *could* impose a term of prison to be served concurrently with the other two sentences — leaving no probation tail and no consecutive sentence. We agree that Thomas has met the requisite showing that he was prejudiced here, in order to

establish reversible fundamental error. We express no opinion as to whether the trial court on remand should impose a concurrent or consecutive sentence for count two, the marijuana conviction.

CONCLUSION

¶15 For the foregoing reasons, we affirm all three of Thomas's convictions. We also affirm his sentences for possession for sale of dangerous drugs (methamphetamine) and possession of drug paraphernalia. Thomas's term of probation for possession of marijuana is vacated and this matter is remanded for resentencing on that conviction.

_____/s/_____
JOHN C. GEMMILL, Presiding Judge

CONCURRING:

___/s/_____
PETER B. SWANN, Judge

___/s/_____
ANDREW W. GOULD, Judge