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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.34



DIVISION ONE  
FILED: 3/26/2013  
RUTH A. WILLINGHAM,  
CLERK  
BY: mjt

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 12-0499  
)  
Appellee, ) DEPARTMENT S  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
DANIEL RIVERA FIERRO, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2011-135839-001

The Honorable Patricia A. Starr, Judge *Pro Tem*

**AFFIRMED IN PART; VACATED IN PART; REMANDED WITH DIRECTIONS**

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By Kent E. Cattani, Chief Counsel  
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and Alice Jones, Assistant Attorney General  
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix  
By Jeffrey L. Force, Deputy Public Defender  
Attorneys for Appellant

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W I N T H R O P, Chief Judge

¶1 Daniel Rivera Fierro appeals the trial court's March 28, 2012 sentencing minute entry suspending his sentencing, placing him on probation, and ordering that he submit to

deoxyribonucleic acid ("DNA") testing for law enforcement identification purposes and pay the applicable fee for the cost of that testing in accordance with Arizona Revised Statutes ("A.R.S.") section 13-610 (West 2012).<sup>1</sup> Fierro argues that the court erred because he was convicted of misdemeanor offenses, and thus DNA testing was not a penalty the court could legally impose under A.R.S. § 13-610. The State confesses error, and we agree.

¶12 After a one-day bench trial, the trial court found Fierro guilty of possession or use of marijuana and possession of drug paraphernalia, each a class one misdemeanor.<sup>2</sup> The court suspended sentencing, placed Fierro on concurrent one-year terms of unsupervised probation, and further ordered that Fierro submit to and pay for DNA testing.

¶13 Fierro filed a timely delayed notice of appeal from the trial court's March 28, 2012 sentencing minute entry. We have jurisdiction pursuant to Article 6, Section 9, of the

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<sup>1</sup> We cite the current Westlaw version of all applicable statutes because no revisions material to our decision have occurred since Fierro committed the acts forming the basis for his convictions.

<sup>2</sup> Fierro was charged by information with possession or use of marijuana and possession of drug paraphernalia, each a class six felony. On the day of trial, the trial court ordered the offense designated as misdemeanors upon the State's motion.

Arizona Constitution and A.R.S. §§ 12-120.21, 13-4031, and 13-4033(A).

¶4 Fierro failed to object below to the order to submit to and pay for DNA testing; consequently, we review for fundamental, prejudicial error. See *State v. Payne*, 223 Ariz. 555, 560, ¶ 13, 225 P.3d 1131, 1136 (App. 2009). If the order was unauthorized by law, it amounts to an illegal sentence and the court fundamentally erred in imposing it. See *id.* at 560-61, ¶ 14, 225 P.3d at 1136-37.

¶5 Section 13-610 provides for mandatory DNA testing for individuals who meet at least one requirement under A.R.S. § 13-610(O). Subsection (O) applies only to persons who are:

1. Convicted of any felony offense.
2. Adjudicated delinquent for [certain enumerated] offenses . . . .
3. Arrested for a violation of any offense in chapter 11 of this title, a violation of § 13-1402, 13-1403, 13-1404, 13-1405, 13-1406, 13-1410, 13-1411, 13-1417, 13-1507, 13-1508, 13-3208, 13-3214, 13-3555 or 13-3608 or a violation of any serious offense as defined in § 13-706 that is a dangerous offense.

¶6 In this case, Fierro does not meet any of the specified requirements. Fierro was convicted of two misdemeanor offenses that are not enumerated within § 13-610(O). In addition, Fierro was not adjudicated delinquent. Because Fierro does not satisfy any of the requirements of § 13-610(O), he

should not have been subject to an order of DNA testing. Consequently, the trial court erred in ordering Fierro to submit to and pay for DNA testing, and that portion of the court's March 28, 2012 sentencing minute entry is illegal.

¶7 Accordingly, we vacate the portion of the court's minute entry ordering Fierro to submit to and pay for DNA testing. We remand this matter to the trial court and direct the court to order that any fees Fierro paid be reimbursed and Fierro's DNA profile resulting from his March 28, 2012 convictions be expunged from the Arizona DNA identification system, unless the court determines that Fierro has been convicted of another offense that would require him to submit to DNA testing pursuant to A.R.S. § 13-610. See A.R.S. §§ 13-610(J); -4036; *Payne*, 223 Ariz. at 569, ¶¶ 49-50, 225 P.3d at 1145; *State v. Soria*, 217 Ariz. 101, 103, ¶¶ 7-8, 170 P.3d 710, 712 (App. 2007). We affirm the court's sentencing minute entry in all other respects.

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/S/  
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

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/S/  
MICHAEL J. BROWN, Judge

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/S/  
MARGARET H. DOWNIE, Judge