

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



DIVISION ONE
FILED: 10/31/2013
RUTH A. WILLINGHAM,
CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 13-0084
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JOHN JAY HELIE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Yavapai County

Cause No. V1300CR201180415

The Honorable Michael R. Bluff, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
by Joseph T. Maziarz, Chief Counsel,
Criminal Appeals Section
and Adele Ponce, Assistant Attorney General
Attorneys for Appellee

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

S W A N N, Judge

¶1 John Jay Helie appeals from sentences he received after pleading guilty to transporting marijuana for sale and possessing drug paraphernalia. The sole issue before us is

whether the state presented sufficient evidence to prove that Helie was on felony release at the time he committed these offenses, a fact which the superior court relied upon to enhance Helie's sentences. We find sufficient evidence, and therefore affirm.

FACTS AND PROCEDURAL HISTORY

¶12 On September 1, 2011, a Department of Public Safety ("DPS") officer arrested Helie when an automobile search revealed that Helie was transporting nearly 100 pounds of packaged marijuana. Shortly thereafter a Yavapai County Grand Jury returned an indictment charging Helie with one count of transportation of marijuana for sale, a class 2 felony, and one count of possession of drug paraphernalia, a class 6 felony ("the Arizona felonies").

¶13 The state amended the indictment to allege, for sentencing enhancement purposes, that Helie committed the Arizona felonies while released on bond on charges in Gray County, Texas, for possessing between 50 and 2000 pounds of marijuana ("the Texas felony").

¶14 On November 7, 2012, the superior court conducted a *Donald* hearing¹ to explain to Helie that accepting the state's plea agreement on the Arizona felonies would require the court to impose between seven and nine years of imprisonment. Helie

¹ *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000).

responded, "[T]hat's really steep. I mean I - you know, it's - it's alleged - it's not even a prior. It's - it's just it was felony release. That's a fact, but it's not a conviction yet." Because Helie expressed a wish to reject the agreement, the court further explained that the Arizona felonies carried a presumptive five-year sentence, with a maximum fourteen-and-a-half-year sentence if it found that he committed them while on felony release. With this understanding, Helie decided to plead guilty without a sentencing agreement. Helie then waived his right to a jury trial on the alleged felony release, though he reserved the right to challenge his sentence.

¶15 On November 14, 2012, the superior court held an aggravation hearing during which the state introduced certified documents purporting to demonstrate Helie's felony-release status. These documents included certified records from the Gray County Jail indicating that Helie was arrested on July 23, 2010, for the Texas felony and thereafter released on a \$10,000 bond. The Gray County records contained a certified indictment, dated February 2, 2011, charging Helie with the Texas felony, a fingerprint card with Helie's name and arrest date, and a booking record with his photograph and the bonding company's name. The indictment specified that Helie remained released on bond at that time.

¶16 The state further introduced a Gray County District Attorney's application for extraditing Helie to Texas, which states:

[Helie] stands charged by the accompanying certified copy of Indictment #8799 now pending in the 31st Judicial District Court of Gray County, Texas, with the crime of [felony possession of marijuana between 50 and 2000 pounds], committed while physically present in said county and state, on or about the 23rd day of July, 2010, but who has, since the commission of said offense, and with a view of avoiding prosecution, fled from the jurisdiction of this State and is now a fugitive from justice and has taken refuge and is now to be found in the County of Yavapai, State of Arizona.

Finally, the state presented a Governor's Warrant, dated October 3, 2011, and a request to withhold extradition pending local charges, dated October 6, 2011. Each document was admitted without objection, though Helie argued at the hearing, and maintains on appeal, that the documents fail to establish his felony-release status on the date he committed the Arizona felonies.

¶17 During the aggravation hearing, the state also called a DPS detective to testify regarding Helie's release status. Without objection, the detective recounted her communication with Texas authorities from which she understood Helie to have been released on pending felony charges. During cross-examination, the detective acknowledged that Texas authorities

had not disclosed any basis for asserting that Helie was on felony release.

¶18 The superior court took the matter under advisement and ruled that Helie was on felony release when he was arrested for the Arizona felonies. On January 25, 2013, the court then sentenced Helie to concurrent prison terms of six years and one year, granting him 511 days of presentence incarceration credit. Because the court found that Helie committed the Arizona felonies while on felony release, it added two years to each prison term for a total of eight years and three years. Helie timely appeals.

DISCUSSION

¶19 Helie contends that the evidence presented failed to support the superior court's determination that he was on felony release when he committed the Arizona felonies, and that his sentences therefore should not have been enhanced. Because sentencing is the responsibility of the trial court, we will not alter the trial court's sentencing determination absent an abuse of discretion. *State v. Mincey*, 141 Ariz. 425, 445, 687 P.2d 1180, 1200 (1984). In considering a sufficiency-of-the-evidence claim, we review the record to determine whether substantial evidence supports the court's findings of fact. *State v. Gunches*, 225 Ariz. 22, 25, ¶ 14, 234 P.3d 590, 593 (2010). We view the evidence in the light most favorable to upholding the

trial court's ruling. *State v. Ellison*, 213 Ariz. 116, 126, ¶ 25, 140 P.3d 899, 909 (2006).

¶10 Evidence is sufficient when it is more than a mere scintilla, and could convince reasonable persons of the defendant's guilt beyond a reasonable doubt. *State v. Tison*, 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981). A defendant's alleged felony-release status must likewise be proven beyond a reasonable doubt before his or her sentence can be enhanced on that basis. *State v. Gross*, 201 Ariz. 41, 42, ¶ 1, 31 P.3d 815, 816 (App. 2001). Sufficient evidence may be either direct or circumstantial, and may support differing reasonable inferences. *State v. Anaya*, 165 Ariz. 535, 543, 799 P.2d 876, 884 (App. 1990). Accordingly, "[w]e do not consider if we would reach the same conclusion as the trier-of-fact, but only if 'there is a complete absence of probative facts to support its conclusion.'" *State v. Carlisle*, 198 Ariz. 203, 206, ¶ 11, 8 P.3d 391, 394 (App. 2000) (citation omitted). Here, we conclude that the evidence was sufficient to support Helie's sentencing enhancements.

I. THE STATE PRESENTED SUFFICIENT EVIDENCE TO SUPPORT HELIE'S SENTENCING ENHANCEMENTS.

¶11 In pertinent part, A.R.S. § 13-708(D) provides:

A person who is convicted of committing any felony offense that is committed while the person is released on bond or on the person's own recognizance on a separate felony offense or while the person is escaped

from preconviction custody for a separate felony offense shall be sentenced to a term of imprisonment two years longer than would otherwise be imposed for the felony offense committed while on release.

¶12 In *State v. Strong*, we examined the necessary quantum of evidence to establish release status under this statute.² 185 Ariz. 248, 251, 914 P.2d 1340, 1343 (App. 1995). There, the state introduced certified documents that established the defendant's grant of parole in Ohio approximately ten months before he committed robbery in Arizona. *Id.* A parole officer also testified that the defendant was on parole on the date of the robbery. *Id.* We concluded that such evidence was "more than sufficient to permit the trial court to find that defendant was on parole when he committed the offenses and, therefore, was subject to the sentence enhancement provisions of [current A.R.S. § 13-708(D)]." *Id.*

¶13 In *State v. Sowards*, the state similarly presented certified copies of the defendant's judgment and sentence in Texas, along with his fingerprints and photograph. 147 Ariz. 185, 188, 709 P.2d 542, 545 (App. 1984), *remanded on other grounds*, 147 Ariz. 156, 709 P.2d 513 (1985). There was, however, no evidence offered that the defendant's presence in Arizona, one year after having been sentenced to a two-year term in Texas, was due to parole, commutation of sentence, pardon,

² The statute was previously numbered A.R.S. § 13-604.02.

early release, or escape. *Id.* Contrary to the result in *Strong*, the court found the evidence insufficient to support a sentence enhancement and remanded the case for resentencing. *Id.* at 188-89, 709 P.2d at 545-46 (holding that upon remand, the state could submit additional evidence of the defendant's release status from the Texas Department of Corrections at the time he committed the offenses in Arizona).

¶14 In this case, Helie pled guilty to the Arizona felonies he committed on September 1, 2011. He was thereby "convicted of committing [a] felony offense" for purposes of A.R.S. § 13-708(D). As in both *Strong* and *Sowards*, the state introduced certified documents showing Helie's felony release on bond from another jurisdiction. The evidence further showed that Helie was indicted on February 2, 2011, on charges stemming from the Texas felony. The evidence also contains an extradition request from Texas dated September 6, 2011, a Governor's Warrant dated October 3, 2011, and a request to withhold extradition pending local charges dated October 6, 2011. Unlike the situation in *Sowards*, these documents demonstrate that Helie had a pending felony charge in Texas at the time he committed the Arizona felonies. We therefore find evidence sufficient to support a reasonable inference that Helie remained on felony release when he committed the Arizona

felonies, which, per A.R.S. § 13-708(D), mandates a two-year sentencing enhancement for each convicted felony offense.

¶15 Like the testimony offered in *Strong*, the state also called a DPS detective in this case to testify, without objection, that Texas authorities told her Helie was released on pending felony charges. When "hearsay evidence is admitted without objection, it becomes competent evidence admissible for all purposes. . . . But when hearsay evidence is admitted without objection, it is not conclusive proof of the matter for which it was offered." *State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982) (citations omitted). Although the Texas authorities did not disclose to the detective their basis for asserting that Helie was on felony release, we conclude that the detective's testimony could have provided additional support for a reasonable inference that Helie remained on release at the relevant time.

¶16 And though the court did not appear to rely on it in reaching its decision, we further note that during his change of plea proceeding Helie himself stated, "It's -- it's just it was a felony release. That's a fact, but it's not a conviction yet." In *State v. Lane*, we found a defendant's similar admission to release status, likewise made during a change of plea proceeding, sufficient to establish a factual basis for enhancing his sentence. 173 Ariz. 217, 219, 841 P.2d 212, 214

(App. 1992) ("I was released from. . . . I was still in prison but they was going to house me at my home instead. And they sent me out on a job search and I didn't come back."); *cf. State v. Brown*, 212 Ariz. 225, 231, ¶ 26, 129 P.3d 947, 953 (2006) (holding that a defendant's admission during a judicial proceeding to "an aggravating factor necessary to impose a sentence" does not affect his right to a jury trial on that aggravating factor unless the admission "necessarily establishes the aggravating factor" or "the defendant has appropriately waived his right to jury trial with respect to [the] aggravating factors"). Here, the court could reasonably have viewed Helie's statement as support for the proposition that he was on felony release while committing the Arizona felonies.

II. THE AVAILABILITY OF A DEFENSE TO THE TEXAS INDICTMENT DID NOT AFFECT HELIE'S RELEASE STATUS AT THE TIME HE COMMITTED THE ARIZONA FELONIES.

¶17 Helie asserts, for the first time on appeal, that based on Texas law he was not actually on "release" at the time he committed the Arizona felonies. He argues that "the time for issuance of an indictment [on the Texas felony] had lapsed by law" and that his bond should have been discharged. Helie relies on article 32.01 of the Texas Code of Criminal Procedure, which in relevant part provides:

When a defendant has been . . . held to bail . . . the prosecution, unless otherwise ordered by the court, for good cause shown, supported by affidavit, shall be

dismissed and the bail discharged, if indictment or information be not presented against such defendant on or before the last day of the next term of the court which is held after his commitment or admission to bail or on or before the 180th day after the date of commitment or admission to bail, whichever date is later.

¶18 The court terms of the 31st Judicial District of Gray County begin on the first Mondays in January and July. Tex. Gov't Code Ann. § 24.133(b)(1). Based on the foregoing, Helie claims that Texas had "until December 31, 2010, or at the very latest January 23, 2011 (180 days after arrest), to formally charge [him] by indictment." Because Helie was indicted on the Texas felony charge on February 2, 2011, he argues that he was not on "release" when he committed the Arizona felonies on September 1, 2011, reasoning that his bond would have been discharged under article 32.01 as untimely.

¶19 But the question in this case is not whether Helie *could* have sought dismissal of the Texas charge in a Texas court -- the question is whether he was on release status at the time he committed the Arizona felonies. Because there is no evidence that Helie's bond was *actually* discharged at the time he committed the Arizona felonies, we find Helie's argument unavailing.³

³ Though we do not decide the issue, we note our skepticism about the merits of the argument under Texas law. The evidence shows that Helie was arrested and granted bail on July 23, 2010, which fell during the July-December term of the Gray County

CONCLUSION

¶20 For the foregoing reasons, we affirm.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

PATRICIA K. NORRIS, Judge

/s/

ANDREW W. GOULD, Judge

District Court. See Tex. Gov't Code Ann. § 24.133(b)(1). The next court term began on the first Monday in January 2011 and ended on the first Sunday in July 2011 (i.e., the day before the first Monday in July). See *id.* A plain reading of article 32.01 would give a Gray County grand jury until July 3, 2011 to indict Helie, which is the later date of 180 days from Helie's admission to bail or "the last day of the next term of the court which is held after his commitment or admission to bail." Tex. Code Crim. Proc. Ann. art. 32.01 (emphasis added). Because the evidence shows that Helie was indicted on the Texas felony charge on February 2, 2011, we doubt that his bail was subject to discharge under article 32.01 at that time.