IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

VIRGIL MARVEL TOGSTAD, III, *Appellant*.

No. 1 CA-CR 15-0113
FILED 6-14-2016

Appeal from the Superior Court in Maricopa County
No. CR2010-006838-001
The Honorable Bruce R. Cohen, Judge

AFFIRMED AS MODIFIED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Christopher M. DeRose
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Christopher V. Johns
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Maurice Portley and Judge John C. Gemmill joined.

T H U M M A, Judge:

¶1 Virgil Marvel Togstad, III, appeals his three sentences of natural life in prison. Togstad argues the sentences are unconstitutional because they are aggravated sentences that were imposed without a jury finding that an aggravating circumstance was present. Because Togstad has shown no error, the sentences are affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 Togstad was visiting his parent's home in June 2008, while his brother and others also were present. After several people took turns shooting a BB gun at a target in the yard, Togstad pulled a pistol from his waistband and fired at the target. Togstad's father chastised Togstad for firing the gun in the neighborhood and angrily told him to put the gun away. Togstad then shot his father multiple times, killing him. Togstad's brother told the others to run and attempted to take the gun from Togstad. Before he could do so, however, Togstad reloaded the pistol and shot his brother multiple times, killing him. Togstad went into the house and shot his mother multiple times, killing her. Togstad then went outside, sat down and started cleaning his gun and leaving papers around the bodies of his father and brother. Togstad also called 9-1-1.

¶3 Deputy sheriffs arrived within minutes and found Togstad walking unarmed in the road. They arrested Togstad without incident and he tested negative for drugs. Deputies discovered that the papers Togstad left around the bodies were fingerprint cards, and they found an ink pad nearby. One of the victims' fingers had ink on them.

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[1] On appeal, this court views the evidence in the light most favorable to sustaining the conviction and resolves all reasonable inferences against the defendant. *State v. Karr*, 221 Ariz. 319, 320 ¶ 2 (App. 2008).

¶4 Togstad was charged with three counts of first degree murder, Class 1 dangerous felonies, and one count of misconduct involving a weapon, a Class 4 felony.[2] The State also alleged Togstad committed the offenses while on felony probation and that he had one historical prior felony conviction. Togstad, who had a history of mental illness, participated in restoration services and was restored to competency. Togstad did not contest that he had killed the victims, but raised a defense of guilty except insane. Togstad claimed that he killed the victims because he believed they had been replaced with imposters masquerading as his family, sometimes referred to as Capgras syndrome.

¶5 After an 11-day trial, the jury found Togstad guilty as charged and that he had not proven his insanity defense. The jury also found that Togstad used a deadly weapon in the commission of the crimes and committed the crimes while on felony probation. During sentencing, the superior court found Togstad had one historical prior felony conviction, committed in 2007. The court sentenced Togstad to three terms of natural life for the murder convictions (Counts 1, 2, and 3) and 4.5 years in prison for the misconduct involving a weapon conviction (Count 5), with the prison terms running concurrently, except one natural life term (Count 3) was imposed consecutively to the other prison terms. The court credited Togstad with 2,389 days of presentence incarceration credit for the concurrent terms.[3]

¶6 Togstad timely appealed his natural life sentences but not his convictions. This court has jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) §§ 12–120.21(A)(1), 13–4031, and –4033(A) (2016).[4]

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[2] Togstad also was charged with aggravated assault, a Class 3 dangerous felony, but the superior court granted his motion for judgment as a matter of law on that charge after the State rested.

[3] Togstad was arrested on June 23, 2008 and sentenced on January 30, 2015 and held in custody continuously during this time. Accordingly, the correct presentence incarceration credit is 2,412 days and his sentence is modified accordingly.

[4] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

DISCUSSION

¶7 Togstad argues, first, that his sentences on the murder convictions are unconstitutional because they are enhanced sentences that could only be imposed after a jury finding that an aggravating circumstance had been proven. Second, Togstad argues that a prior felony conviction must be found by the jury, not the court, to be used as an aggravating circumstance for sentencing. Because Togstad did not raise either issue in the superior court, this court reviews both for fundamental error. *See* Ariz. R. Crim. P. 21.3(c); *State v. Henderson*, 210 Ariz. 561, 567 ¶¶ 19-20 (2005). "Accordingly, [Togstad] 'bears the burden to establish that "(1) error exists, (2) the error is fundamental, and (3) the error caused him prejudice."'" *State v. James*, 231 Ariz. 490, 493 ¶ 11 (App. 2013) (citations omitted).

I. It Was Not Unconstitutional To Sentence Togstad To Natural Life In Prison Without A Jury Finding An Aggravating Circumstance.

¶8 For a conviction for first degree murder where the death penalty is not imposed, the defendant "shall be sentenced to . . . imprisonment . . . for life or natural life as determined and in accordance with the procedures provided in § 13-703.01." A.R.S. § 13-703(A) (2007).[5] A person "sentenced to natural life is not eligible for commutation, parole, work furlough, work release or release from confinement on any basis," while a person sentenced to life "shall not be released on any basis until the completion of the service of twenty-five calendar years." A.R.S. 13-703(A) (2007). "In determining whether to impose a sentence of life or natural life, the court: 1. May consider any evidence introduced before sentencing or at any other sentencing proceeding. 2. Shall consider the aggravating and mitigating circumstances listed in § 13-702 and any statement made by a victim." A.R.S. § 13-703.01 (2007).

¶9 The Sixth Amendment to the United States Constitution "requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 133 S. Ct. 2151, 2156 (2013). "[A] fact is by definition an element of the offense and must be submitted to the jury if it increases the punishment above what is otherwise legally prescribed." *Id.* at 2158 (citation omitted). Togstad argues that the imposition of a natural life sentence is an increased punishment "above

[5] The sentencing statutes enacted in 2007 became effective January 1, 2008. Accordingly, the 2007 sentencing statutes apply to acts that occurred in 2008.

what is otherwise legally prescribed," meaning *Alleyne* requires that such a sentence can only follow a jury finding an aggravated circumstance.

¶10 Before *Alleyne*, the Arizona Supreme Court held that, to impose a sentence of natural life, no jury finding beyond a guilty verdict for first degree murder is required. *State v. Fell*, 210 Ariz. 554, 557-558 ¶11 (2005) (interpreting A.R.S. § 13-703 (2000)). Togstad argues that *Alleyne* "changed the landscape of sentencing in Arizona," meaning he could not be sentenced to natural life absent a jury finding an aggravating circumstance. Accordingly, Togstad argues, his sentences on the murder convictions should be reduced from natural life to life, meaning he could seek release after serving 25 years in prison.

¶11 Contrary to Togstad's argument, *Alleyne* did not change the sentencing landscape. It merely clarified earlier decisions holding that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). *Alleyne* made clear that "[f]acts that increase the mandatory minimum sentence . . . are elements" of the crime, just as *Apprendi* and other cases held with regard to maximum allowable sentences. *Alleyne*, 133 S. Ct. at 2158.

¶12 Togstad argues that natural life is an aggravated sentence under *Apprendi* and, more recently, *Alleyne*. *Fell*, however, rejected that argument, holding that the sentencing scheme for non-capital first degree murder gives the court discretion to impose a sentence of life or natural life. *Fell*, 210 Ariz. at 558 ¶¶ 13-15. As stated in *Fell*, sentencing for non-capital first degree murder differs from sentencing for other felony convictions. *Id.* Unlike sentencing schemes for other felonies that state, absent aggravating circumstances, the person "shall be sentenced to a presumptive term," *see e.g.* A.R.S. § 13-710(A) (2007), sentencing for non-capital first degree murder is for "life or natural life," A.R.S. § 13-703(A). Thus, for these other felonies, the Legislature has authorized a presumptive sentence, which *Fell* held is the "maximum" sentence under *Apprendi*. 210 Ariz. at 557 ¶ 9. By contrast, the Legislature imposed no such presumptive sentence for non-capital first degree murder convictions.

¶13 Instead, the statute properly allows the court, in its discretion, to choose either life or natural life based on the court's assessment of the relevant factors. *See Alleyne*, 133 S. Ct. at 2163 ("We have long recognized that broad sentencing discretion, informed by judicial factfinding, does not violate the Sixth Amendment.") (citations omitted). Sentences for life and natural life are within the punishment prescribed by law. Indeed, life or

natural life are the only prescribed punishments. Thus, *Alleyne* and *Apprendi* do not require the jury to find aggravating circumstances or any other facts beyond a guilty verdict in imposing either sentence. Because a sentence of natural life is not an aggravated sentence, and does not require any aggravating circumstance, Togstad's sentences without a jury finding of any aggravating circumstance do not violate the Sixth Amendment. Accordingly, Togstad has shown no error.[6]

CONCLUSION

¶14 Togstad's sentences are affirmed as modified to reflect 2,412 days of presentence incarceration credit for Counts 1, 2 and 5.

[6] As a result, this court need not address Togstad's argument that for a prior conviction to be used as an aggravating circumstance, it must be found by the jury, not the court. Moreover, the two cases Togstad cites for this argument (*Alleyne* and *Apprendi*) make clear that prior convictions used as aggravating circumstances need not be determined by a jury. *See Alleyne*, 133 S. Ct. at 2168 ("'Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'") (quoting *Apprendi*, 530 U.S. at 490).