

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

KENNETH ALLEN MONTIEL, *Appellant*.

No. 1 CA-CR 15-0327
FILED 3-24-16

Appeal from the Superior Court in Yavapai County
No. P1300CR201400676
The Honorable Tina R. Ainley, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Colby Mills
Counsel for Appellee

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

STATE v. MONTIEL
Decision of the Court

MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Maurice Portley joined.

NORRIS, Judge:

¶1 After a jury convicted Kenneth Allen Montiel on one count of transportation for sale of a dangerous drug (methamphetamine) (“meth count”), one count of transportation for sale of a narcotic drug (“narcotic count”), two counts of possession of drug paraphernalia (“possession counts”), and two counts of misconduct involving weapons (“weapons counts”), the trial judge imposed an aggravated sentence of 13.5 years’ imprisonment on the meth count, seven years’ imprisonment on the narcotic count, aggravated sentences of two years’ imprisonment on each of the possession counts, and the presumptive sentence of two and a half years’ imprisonment on each of the weapons counts, with all sentences to run concurrently. On appeal, Montiel challenges the aggravated sentences,¹ arguing the trial judge improperly imposed harsher sentences than the State had offered him at the settlement conference, and thus we must presume the judge’s sentences were motivated by judicial vindictiveness. Accordingly, he argues we must vacate the aggravated sentences and remand for resentencing by a different trial judge or impose the sentence offered to him at the settlement conference.

¶2 Montiel did not raise judicial vindictiveness in the superior court. Therefore, we review it for fundamental error. *State v. Henderson*, 210 Ariz. 561, 563, ¶ 1, 115 P.3d 601, 603 (2005) (when defendant fails to raise the issue at trial, we review for fundamental error); *State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54 P.3d 368, 369 (App. 2002) (“Imposition of an illegal sentence constitutes fundamental error.”). As we explain, we reject Montiel’s argument.

¹We cannot determine from Montiel’s briefing on appeal whether he is challenging all of the aggravated sentences or just the aggravated sentences imposed by the court on the meth count and the narcotic count. We have given Montiel the benefit of the doubt and have construed his briefing as challenging all of the aggravated sentences.

STATE v. MONTIEL
Decision of the Court

¶3 As an initial matter, Montiel rests his argument on a presumption of judicial vindictiveness he asserts categorically exists when, as here, a trial judge participates in the settlement conference and imposes a harsher sentence after trial than that offered by the State at the settlement conference.² But, as a matter of law, no such presumption exists under these circumstances. *See Wilson v. State*, 845 So. 2d 142, 150 (Fla. 2003) (court declined to “adopt a presumption of vindictiveness that arises whenever the trial judge participates in the plea negotiations and the defendant subsequently receives a harsher sentence after a trial or hearing”); *State v. Davis*, 584 A.2d 1146, 1147 (Vt. 1990) (“the presumption of vindictiveness does not arise when the sentencing judge has participated in plea bargain discussions that did not lead to an agreement” and then imposes a harsher sentence); *German v. United States*, 525 A.2d 596, 598, 600-04 (D.C. Cir. 1987) (no presumption of vindictiveness when trial judge participated in the plea negotiations and imposed a “heavier” sentence after trial). *See also Alabama v. Smith*, 490 U.S. 794, 801, 109 S. Ct. 2201, 2205, 104 L. Ed. 2d 865 (1989) (no presumption of judicial vindictiveness when on remand after vacating a guilty plea, trial judge imposed a harsher sentence on defendant than he had received as consequence of guilty plea because “the relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial”).

¶4 Further, even if these circumstances could by themselves give rise to a presumption of judicial vindictiveness, the record rebuts such a presumption. The aggravated sentences imposed by the trial judge were based on aggravating circumstances found by the jury and then by the trial judge based on the trial evidence—circumstances not presented to or discussed with the judge at the settlement conference. *Texas v. McCullough*, 475 U.S. 134, 142, 106 S. Ct. 976, 981, 89 L. Ed. 2d 104 (1986) (court must rebut a presumption of vindictiveness with “objective information . . . justifying the increased sentence”) (citation omitted).

¶5 As of the settlement conference, the State had not alleged any aggravating circumstances, including prior convictions. After the judge confirmed at the settlement conference that the State would likely recommend the minimum sentence—five years, A.R.S. § 13-3407 (Supp.

²In this case, the trial judge participated in the settlement conference by confirming the range of sentences under the governing statutes, explaining the State’s plea offer on the record, and noting that she would probably impose the minimum sentence, as the State recommended, based on the information she had been provided.

STATE v. MONTIEL
Decision of the Court

2015)—if Montiel plead guilty to the meth count, the judge then said she “would probably impose the five years as well” because Montiel did not have any prior felony convictions and had not transported an “overly-large amount” of drugs. At trial, however, the jury found two aggravating circumstances—Montiel had acted with an accomplice and “committed the offense as consideration for the receipt, or the expectation of the receipt of anything of pecuniary gain.” Ariz. Rev. Stat. § 13-701(D) (Supp. 2015).³ And, based on the trial evidence, the judge found a third aggravating circumstance—Montiel had been transporting a large amount of drugs, four pounds of methamphetamine and almost a half of a pound of heroin. Based on these aggravating circumstances, the trial judge imposed the aggravated sentences rather than the minimum sentence discussed at the settlement conference.

¶6 Because no categorical presumption of judicial vindictiveness existed here, Montiel must show the judge acted with actual vindictiveness in imposing the sentences. *Smith*, 490 U.S. at 799, 109 S. Ct. at 2205. The record, however, does not support such a finding, and Montiel has not argued otherwise.

¶7 Accordingly, for the foregoing reasons, we affirm Montiel’s convictions and sentences on all counts.



Ruth A. Willingham · Clerk of the Court
FILED : jt

³Although the Arizona Legislature amended certain statutes cited in this decision after the date of Montiel’s offense, the revisions are immaterial to our resolution of this appeal. Thus, we cite to the current version of all statutes.