IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Respondent*,

v.

MONTA JOE EVANS, *Petitioner*.

No. 1 CA-CR 16-0832 PRPC
FILED 1-11-2018

Petition for Review from the Superior Court in Mohave County
No. CR2014-01250
The Honorable Lee Frank Jantzen, Judge

REVIEW GRANTED AND RELIEF DENIED

COUNSEL

Mohave County Attorney's Office, Kingman
By Matthew J. Smith
Counsel for Respondent

Monta Joe Evans, Douglas
Petitioner

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Kent E. Cattani joined.

H O W E, Judge:

¶1 Petitioner Monta Joe Evans petitions this Court for review from the dismissal of his timely, "of right" petition for post-conviction relief under Arizona Rule of Criminal Procedure 32.1. We have considered the petition for review and for the reasons stated, grant review but deny relief.

¶2 Evans pled guilty to aggravated assault, a class 3 dangerous felony, aggravated driving under the influence of intoxicating liquor ("DUI"), a class 4 felony, and criminal damage, a class 4 felony. Evans was sentenced to an aggravated term of 12.5 years on the aggravated assault count and to aggravated terms of 3 years' imprisonment on each of the other two counts. All counts were ordered to be served consecutively, resulting in a total term of 18.5 years' imprisonment.

¶3 Evans filed a notice of post-conviction relief and his attorney filed a notice of completion. Evans then filed a pro se petition for post-conviction relief challenging the lawfulness of his sentence under double punishment grounds. The trial court summarily dismissed his petition.

¶4 Evans reiterates his claim that his crimes all arose out of a single incident and that he is therefore entitled to concurrent sentences under A.R.S. § 13–116. He also adds claims of ineffective assistance of counsel, a challenge to the indictment, and a challenge to the trial court's jurisdiction. None of these added claims were raised before the trial court. Issues not presented to the trial court may not be presented in the petition for review. Ariz. R. Crim. P. 32.9(c)(4)(ii); *State v. Ramirez*, 126 Ariz. 464, 468 (App. 1980).

¶5 We review the denial of post-conviction relief for an abuse of discretion. *State v. Decenzo*, 199 Ariz. 355, 356 (App. 2001). We review statutory interpretations de novo. *State v. Peek*, 219 Ariz. 182, 183 (2008). The evidence and factual basis from the record indicate that Evans was drinking at home, left his home, drove with a suspended license, turned onto Stockton Road in Kingman, struck a car from behind, damaged the car, and injured the occupant ("J.L."). Evans then continued to hit the shoulder of the road and became airborne and damaged multiple cars at an auto dealership ("K.C."). His blood alcohol concentration was measured at .288 on a preliminary test and .244 on a final test. His speed was estimated to be 75 MPH in a 35 MPH zone. The area was dark when the accident occurred, witnesses observed Evans driving before the collision, and he admitted to drinking at home and driving before the collision.

¶6 A.R.S. § 13–116 states in relevant part: "An act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." In *State v. White*, 160 Ariz. 377 (App. 1989), the court held that A.R.S. § 13–116 does not bar the imposition of consecutive sentences where the defendant has been convicted of multiple offenses under different sections of the criminal code as a result of a single act. 160 Ariz. at 381. The court further found that the defendant's single act caused "a separate criminal result" with respect to his four victims. *Id.*

¶7 Evans's act resulted in multiple offenses arising under different sections of the code with two different victims: aggravated assault against J.L. and criminal damage against K.C. However, the State chose to join the damage to J.L.'s car with the damage to K.C. *See* A.R.S. § 13–1605 (Aggregation of amounts of damage). Therefore, an overlap occurred.

¶8 While this appears to result in a "single act" for purposes of analysis of double punishment under *State v. Gordon*, 161 Ariz. 308, 315 (1989), we conclude that the record shows that K.C. alone sustained damage well in excess of $10,000. Even subtracting out the damage to J.L., sufficient evidence exists to support the reckless act that damaged the second victim, K.C. *Cf. State v. Belyeu*, 164 Ariz. 586, 591 (App. 1990) (holding that consecutive sentences for burglary and criminal damage arising after entry into the residence was complete did not result in double punishment). Therefore, the court did not abuse its discretion by ordering a consecutive sentence on the criminal damage count.

¶9 Additionally, the trial court did not abuse its discretion in sentencing Evans to a consecutive sentence on the aggravated DUI. The trial court found at sentencing that Evans could commit the DUI "without committing the other two offenses in this matter . . . ." Under the first part of the analysis in *Gordon*, we "consider[] the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges." 161 Ariz. at 315.

¶10 The most serious of all the charges in this case is the aggravated assault, which requires an intentional, knowing, or reckless state of mind. *See* A.R.S. § 13–1203(A)(1). Evans contends that because he was impaired while driving and then injured another person and damaged property during the same act of driving, his actions constituted one act and were inexorably intertwined. However, after subtracting the elements necessary to convict on the aggravated assault and the criminal damage, we

need not discard his driving under the influence of alcohol on a suspended license, which occurred by his own admission and was observed by witnesses.

¶11 The next step is to consider whether Evans could "commit the ultimate crime without also committing the secondary crime." *See Gordon*, 161 Ariz. at 315. If so, then the likelihood will decrease that Evans committed a single act. *See id.* In this case, the acts of DUI and the reckless acts are separate. Evans, by his own admission, started driving after drinking at home, drove on a suspended license, and was impaired. Soon after, Evans drove over twice the speed limit in the dark and the accident occurred. Even without the DUI, sufficient evidence is present to show his actions were at least reckless.

¶12 We also note that the risk of harm inherent in a DUI is "exposing the public to unsafe driving." *State v. McDonagh*, 232 Ariz. 247, 250 (App. 2013). Thus, once Evans chose to get behind the wheel and drive while impaired and with his license suspended, the crime of aggravated DUI was complete. He then went beyond the statute's general purpose and caused the victims individual harm. In other words, his actions were separable. *See e.g., State v. Tucker*, 113 Ariz. 475, 477 (1976) (in interpreting A.R.S. § 13–1641, the predecessor to A.R.S. § 13–116, the court held that punishment for reckless driving and the use of a car to commit aggravated assaults against two police officers did not constitute double punishment).

¶13 Evidence in the record shows that Evans sent J.L.'s car into a spin, and it ended up over 300 feet away. As a result of his conduct, additional damage was done to J.L. and to K.C. The State did not need to prove the secondary crime (DUI) to convict Evans of the ultimate crime of aggravated assault or criminal damage. Therefore, we conclude that the trial court did not abuse its discretion by sentencing Evans to a consecutive term on the DUI charge.

¶14 Accordingly, we grant review but deny relief.

AMY M. WOOD • Clerk of the Court
FILED: AA