IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

ALFRED FREDERICK HERRMANN, III, *Appellant*.

No. 1 CA-CR 17-0371
FILED 6-5-2018

Appeal from the Superior Court in Maricopa County
No. CR 2016-145943-001
The Honorable Ronda R. Fisk, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael T. O'Toole
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Lawrence S. Matthew
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Jon W. Thompson delivered the decision of the Court, in which Judge Peter B. Swann and Judge James P. Beene joined.

T H O M P S O N, Presiding Judge:

¶1 Alfred Frederick Herrmann, III (defendant), appeals the trial court's imposition of mandatory probation for his conviction for possession of a narcotic drug given his simultaneous conviction for possession of methamphetamine, both class 4 felonies. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 On September 24, 2016, a Mesa police officer stopped defendant's vehicle following a traffic violation. After the officer removed defendant from the vehicle, he noticed defendant putting his hands in his front pants pockets. The officer detained defendant and searched him.[1] The officer found two plastic baggies in defendant's pocket, one containing 612 milligrams of methamphetamine and the other containing 225 milligrams of heroin.

¶3 The state charged defendant with one count of possession or use of a dangerous drug (methamphetamine) (count 1) and one count of possession or use of a narcotic drug (heroin) (count 2), both class 4 felonies. A jury found defendant guilty of both counts.

¶4 At the sentencing hearing, the trial court told the parties that the court was inclined to give defendant a shorter, 2.25 year prison term for count 1 (as opposed to three years in prison), with a two-year probation term for count 2 to follow, but stated that the court was also willing "to just [give defendant] three years [in prison] if [defendant] want[ed] to reject probation with community supervision. . . . " After conferring with defendant, defense counsel informed the court, "Your Honor, in light of the conversations that we have had at the bench, I spoke with my client, and

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[1] Defendant was arrested pursuant to an outstanding misdemeanor warrant, but this was not revealed to the jury due to the parties' stipulation that defendant was lawfully detained.

I'm in agreement with his decision. . . . I'm asking for a sentence of 2.25 years followed by probation with mental health terms." The court sentenced defendant to a mitigated term of 2.25 years in prison for count 1. The court suspended the imposition of sentencing for count 2 and placed defendant on supervised probation for two years, to begin upon defendant's release from prison on count 1. Defendant timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) §§ 12-120.21(A)(1) (2018), 13-4031 (2018), and -4033(A)(1) (2018).[2]

DISCUSSION

¶5 Defendant raises one issue on appeal: whether the trial court erred by imposing mandatory probation for his narcotic drug conviction (count 2), in light of the fact that he was simultaneously convicted of possession of methamphetamine (count 1). He asks this court to remand for resentencing on count 2 only.

¶6 Section 13-901.01 (2010) provides that, notwithstanding any law to the contrary, a defendant convicted of personal possession or use of a controlled substance is eligible for probation. Section 13-901.01(H)(4), however, provides that a defendant is not eligible for probation if the court finds that the defendant was convicted of the personal possession or use of methamphetamine. Simultaneous convictions for multiple drug offenses, where one or more of the drug offenses involve methamphetamine, remove the non-methamphetamine convictions from mandatory probation pursuant to A.R.S. § 13-901.01. *State v. Siplivy*, 228 Ariz. 305, 308-09, ¶¶ 11, 13 (App. 2011). Defendant argues that because he was ineligible for mandatory probation on count 2, the court's imposition of probation constituted fundamental error. *See State v. Bouchier*, 159 Ariz. 346, 347 (App. 1989). The state argues that defendant invited any error.

¶7 When a defendant invites error, we will not conduct a fundamental error review and will not reverse the error on appeal. *State v. Logan*, 200 Ariz. 564, 565-66, ¶ 9 (2001). To decide whether a party invited the error we must determine whether the party complaining of the error was "the source of the error." *Logan*, 200 Ariz. at 566, ¶ 11; *State v. Lucero*, 223 Ariz. 129, 138, ¶ 32 (App. 2009). A party need not be the only source of an error for it to be invited error. *See State v. Escalante-Orozco*, 241 Ariz. 254, 268, ¶¶ 19-20 (2017) (invited error doctrine precluded defendant from

[2] We cite to the current version of any statute unless the statute was amended after the pertinent events and such amendment would affect the result of this appeal.

arguing that the trial court violated his due process rights by failing to hold a Rule 11 competency hearing because defendant and the state stipulated to submit the competency issue to the court based on expert reports); *State v. Parker*, 231 Ariz. 391, 405, ¶¶ 57-61 (2013) (defendant's stipulation to admit videotaped interviews precluded him from asserting error on appeal); *State v. Yegan*, 223 Ariz. 213, 218-20, ¶¶ 17-24 (App. 2009) (where defendant and state both provided the court with proposed jury instructions containing the wrong definition of sexual assault defendant invited error by "affirmatively request[ing] the definition").

¶8 A party is not a source of the error if the party merely acquiesces in the error. *State v. Torres, Jr.*, 233 Ariz. 479, 481, ¶¶ 6-8 (App. 2013) (defense counsel was unsure and "in a quandry" about a proposed verdict form and did not urge the court to use the verdict form so he did not invite error even though he acquiesced); *Lucero*, 223 Ariz. at 136, ¶ 21 ("the crucial fact" in cases involving invited error is "that the party took independent affirmative unequivocal action to initiate the error and did not merely fail to object to the error or merely acquiesce in it."). In *Lucero*, this court held that a defendant did not invite but merely acquiesced in an error when his counsel "acquiesced in [an erroneous response to a jury question] but neither proposed it or argued for it." 223 Ariz. at 139, ¶ 34.

¶9 Unlike *Lucero* and *Torres*, this is not a case of mere acquiescence. Here, defense counsel affirmatively informed the court that, after having consulted with defendant, defendant preferred a more lenient prison sentence with a probation tail. Because defendant requested the sentence he received, we will not consider it as a ground of error. *See United States v. Ahmad*, 974 F.2d 1163, 1165 (9th Cir. 1992) ("Under circumstances in which the trial court announces its intention to embark on a specific course of action and defense counsel specifically approves of that course of action, we will regard any error as having been caused by the actions of defense counsel, and review the error under the doctrine of invited error.") (citation omitted).

CONCLUSION

¶10 For the foregoing reasons, defendant's convictions and

sentences are affirmed.

AMY M. WOOD • Clerk of the Court
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