

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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.

CARLOS JUNIOR NELSON, *Appellant*.

No. 1 CA-CR 18-0346
FILED 12-20-2018

Appeal from the Superior Court in Maricopa County
No. CR2017-140285-001
The Honorable Peter C. Reinstein, Judge (Retired)

SENTENCE VACATED; REMANDED FOR RESENTENCING

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jennifer L. Holder
Counsel for Appellee

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

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MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Judge James B. Morse Jr. and Judge Paul J. McMurdie joined.

T H U M M A, Chief Judge:

¶1 This is a criminal case in which the State of Arizona agrees on appeal that defendant Carlos Junior Nelson was improperly sentenced as a Category 3 repetitive offender and that a \$20 probation assessment was improper.

¶2 After a jury trial, Nelson was found guilty of unlawful flight, a Class 5 felony. The State had timely alleged Nelson had one historical non-dangerous felony conviction, possession of burglary tools, a Class 6 felony in CR 2007-005149. As conceded by the State on appeal, “[a]t no time during the seven-month pretrial process here did the State allege or give notice that it would use . . . any other conviction . . . to enhance his sentence under the repetitive-offender statute to a category three.” After an evidentiary hearing, however, the superior court found the State proved Nelson had the following prior felony convictions: (1) possession of burglary tools, a Class 6 felony in CR 2007-005149; (2) aggravated assault, a Class 3 felony in CR 2009-177768 and (3) possession of marijuana, a Class 6 felony in CR 2014-113520.

¶3 Sentencing Nelson as a Category 3 repetitive offender, *see* Ariz. Rev. Stat. (A.R.S.) section 13-703(C) (2018), the court imposed a four year prison term, with 258 days of presentence incarceration credit. Although the court did not orally order a \$20 probation assessment, the written sentencing order imposed that assessment. This court has jurisdiction over Nelson’s timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033(A).

¶4 Nelson does not challenge his conviction on appeal. Instead, he argues the superior court erred in sentencing him as a Category 3 repetitive offender, when the State’s written notice alleged only one prior felony conviction. As a result, Nelson argues he should have been sentenced as a Category 2 repetitive offender, *see* A.R.S. § 13-703(B), and his sentence was illegal. Nelson asks this court to vacate his sentence and

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remand for resentencing as a Category 2 repetitive offender. He also argues that the \$20 probation assessment, imposed in the sentencing order but not orally at sentencing, was in error and should be vacated. *See State v. Hanson*, 138 Ariz. 296, 304-05 (App. 1983) (oral sentence controls when there is a discrepancy between the oral sentence and the written judgment).

¶5 The State confesses error, noting that it “only properly alleged one historical prior felony conviction before trial” and “asks that this Court remand with instructions to resentence Nelson as a category-two repetitive offender.” The State also concedes that the \$20 probation assessment was error, asking that the remand allow the superior court to cure that error.

¶6 Having considered the parties’ briefs and the relevant portions of the record, this court accepts the State’s confession of error. As a result: (1) Nelson’s sentence as a Category 3 repetitive offender (including the \$20 probation assessment) is vacated; and (2) this matter is remanded so that Nelson can be resented as a Category 2 repetitive offender pursuant to A.R.S. § 13-703(B).



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