

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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL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

JEFFREY SCOTT DOUGLAS, *Appellant*.

No. 1 CA-CR 18-0410
FILED 10-31-2019

Appeal from the Superior Court in Maricopa County
No. CR2017-137433-001
The Honorable Joan M. Sinclair, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joshua C. Smith
Counsel for Appellee

The Stavris Law Firm, PLLC, Scottsdale
By Alison Stavris
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Michael J. Brown and Judge Kenton D. Jones joined.

S W A N N, Chief Judge:

¶1 Jeffrey Scott Douglas contends that the superior court erred by allowing the late filing of an allegation that he was on probation at the time of the offense for which he was tried. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 The state charged Douglas with theft of a means of transportation. Before trial, the state alleged historical prior felony convictions, multiple offenses not committed on the same occasion, and other prior felony convictions. On the morning of the first day of trial, before jury selection, the state added an allegation that Douglas was on probation when he committed the charged offense. The state admitted that the new allegation was untimely. Over Douglas's objection, the superior court allowed the allegation on the ground that Douglas had prior notice of the state's intent to assert it.

¶3 The jury found Douglas guilty of the lesser-included offense of unlawful use of means of transportation. Douglas admitted at trial to two historical prior felonies, and admitted at sentencing to having committed the trial offense while on probation. The court sentenced him as a category three repetitive offender to a presumptive five-year prison term. Douglas appeals.

DISCUSSION

¶4 Douglas contends that the superior court erred by allowing the state to amend the charging document with the untimely probation-status allegation.

¶5 "[T]he defendant must receive notice before trial commences that the state intends to allege that he or she was on probation when the offense was committed to enhance the penalty." *State v. Love*, 147 Ariz. 567, 570 (App. 1985). It is undisputed that the probation-status allegation was not filed within the pretrial period prescribed by Ariz. R. Crim. P. ("Rule")

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13.5(a) and 16.1(b), and therefore was subject to potential exclusion under Rule 16.1(c). But the superior court has discretion to allow amendment of an allegation any time before trial. *State v. Williams*, 144 Ariz. 433, 442 (1985). Amendment of a charging document is permissible if it does not change the nature of the offense or create prejudice. *State v. Fimbres*, 222 Ariz. 293, 303, ¶ 38 (App. 2009).

¶6 Here, the record supports the superior court's finding that Douglas suffered no prejudice because he had prior notice of the state's intent to use his probationary status as a sentencing enhancement. As Douglas's trial counsel acknowledged at argument on the objection to the probation allegation, Douglas's probationary status and its effect on his sentencing exposure were discussed at pretrial hearings. The court therefore did not err by permitting the allegation. Further, Douglas identifies no prejudice in the effect of the allegation on his sentence. The allegation, when proved, removed the court's discretion to sentence Douglas to less than the presumptive prison term. A.R.S. § 13-708(C). Douglas received the presumptive term under A.R.S. § 13-703(J), and does not specify how he might have received a lesser sentence in the absence of the probation-status allegation.

CONCLUSION

¶7 We affirm Douglas's conviction and sentence for the reasons set forth above.



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