DIVISION ONE
FILED: 02/01/2011
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0315
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
JOSHUA COULTER,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-153879-001 DT

The Honorable John R. Ditsworth, Judge

CONVICTION AFFIRMED; SENTENCE VACATED AND REMANDED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
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and Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

Maricopa County Public Defender — Phoenix
by Edith M. Lucero, Deputy Public Defender
Attorneys for Appellant

I R V I N E, Judge

¶1 Joshua Coulter ("Coulter") appeals his sentence for possession or use of marijuana, a class six felony. Coulter

argues the State failed to provide him with pretrial notice pursuant to Arizona Revised Statutes ("A.R.S.") section 13-604.04 (2007)[1] that he was precluded from receiving probation pursuant to A.R.S. § 13-901.01 (2010)[2] because he had been indicted or convicted of a prior violent offense. For the reasons that follow, we agree and therefore vacate Coulter's sentence and remand for resentencing in accordance with A.R.S. § 13-901.01(A).

FACTS AND PROCEDURAL HISTORY

¶2 Coulter was charged by direct complaint with one count of possession or use of marijuana, a class 6 felony for an April 18, 2007 incident. After a trial by jury, Coulter was found guilty as charged. Sentencing was continued until the resolution of a second case proceeding against Coulter. In the second case originating from an August 5, 2007 incident, Coulter was found guilty of second degree murder, a class 1 dangerous felony, and aggravated assault, a class 3 dangerous felony. He was sentenced for all convictions on April 17, 2009. Coulter received one year

[1] Significant portions of the Arizona criminal sentencing code have been renumbered. 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. Effective January 1, 2009, A.R.S. § 13-604.04 was renumbered as § 13-901.03. 2008 Ariz. Sess. Laws, ch. 301, § 19 (2d Reg. Sess.). For ease of reference in this decision, we refer to the statute as it was numbered at the time of the offense.

[2] Unless otherwise specified, we cite the current versions of the applicable statutes when no revisions material to this decision have since occurred.

imprisonment for the drug charge,[3] which was ordered to be served consecutive to his sentence for the murder and aggravated assault. Coulter timely appealed his sentence for the possession or use of marijuana.[4]

DISCUSSION

¶3 Coulter argues the trial court erred in sentencing him to one year of imprisonment rather than mandatory probation. Specifically, he contends the State failed to provide pretrial notice that he was ineligible for probation pursuant to A.R.S. § 13-901.01[5] because he had been indicted or convicted for a violent offense.[6] Coulter concedes this issue was not raised at sentencing. Therefore, we review only for fundamental error. *State v. Provenzino*, 221 Ariz. 364, 369, ¶ 18, 212 P.3d 56, 61

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[3] Coulter was not credited with presentence incarceration for the drug charge. His presentence incarceration was applied to the murder and aggravated assault convictions.

[4] This Court affirmed Coulter's convictions and sentences for second degree murder and aggravated assault in CR 2007-150738-001 DT on September 2, 2010. *State v. Coulter*, 1 CA-CR 09-0282 (Ariz. App. Sep. 2, 2010) (mem. decision).

[5] Section 13-901.01 is the codification of Proposition 200, the voter-approved initiative formally titled "The Drug Medicalization, Prevention, and Control Act of 1996." *State v. Gomez*, 212 Ariz. 55, 56, ¶ 4, 127 P.3d 873, 874 (2006). Proposition 200 mandates certain non-violent drug offenders placed on probation and provided drug treatment. *State v. Estrada*, 201 Ariz. 247, 249, ¶ 2, 34 P.3d 356, 358 (2001).

[6] Coulter does not dispute the second degree murder and aggravated assault convictions in CR 2007-150738-001 DT are violent crimes pursuant to A.R.S. § 13-604.04.

(App. 2009). An illegal sentence constitutes fundamental error. *State v. Mason*, 225 Ariz. 323, 328, ¶ 10, 238 P.3d 134, 139 (App. 2010). An illegal sentence is "one that is outside the statutory range." *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991).

¶4 Section 13-901.01 governs whether a defendant who has been convicted of possession or use of controlled substances is entitled to mandatory probation. Section 13-901.01(A) provides, in relevant part, that a "person who is convicted of the personal possession or use of a controlled substance . . . is eligible for probation." Various exceptions for the mandatory probation requirement are listed thereafter, including the provision at issue here: exclusion of a person who has been convicted or indicted for a violent offense. A.R.S. § 13-901.01(B). Section 13-901.01(B) states that a "person who has been convicted of or indicted for a violent crime as defined in § 13-604.03 is not eligible for probation as provided for in this section but instead shall be sentenced pursuant to chapter 34 of this title."

¶5 Pursuant to A.R.S. § 13-604.04, an "allegation that the defendant committed a violent crime *shall be charged in the indictment or information* and admitted or found by the court." (Emphasis added.) This allegation provides a defendant notice that the State intends to seek enhancement of his sentence

because of prior convictions. We have previously held that, in light of fundamental fairness and due process considerations, A.R.S. § 13-604.04 applies to A.R.S. § 13-901.01 and requires the State to allege pretrial that a defendant is disqualified from probation eligibility pursuant to A.R.S. § 13-901.01(B). *State v. Benak*, 199 Ariz. 333, 337, ¶ 14, 18 P.3d 127, 131 (App. 2001).

¶6 The State concedes that it failed to allege Coulter had committed a violent offense pursuant A.R.S. § 13-604.04 that would disqualify him from receiving probation pursuant to A.R.S. § 13-901.01(B). The State contends, however, that Coulter "had pretrial notice that a conviction on the possession charge could result in imprisonment." The State points to a proceeding where the court reset Coulter's trial on the drug charge. The court stated, in full:

> THE COURT: All right. Mr. Coulter, you understand right now that you're being circled by both a gnat and a large lion, correct?
>
> [Coulter]: Yes.
>
> THE COURT: This case that we are dealing with is the gnat. In comparison to the other charges that you face, this is an insignificant circumstance. How long have you been in custody?
>
> [Coulter]: Since last year, August.
>
> THE COURT: So realistically, assume the worst in this gnat-sized case, that you are

> convicted and sentenced to prison – you've served the time. So all we are dealing with is whether or not you're in fact guilty of that crime. That's an important decision because it does have some impact on the large case that circles you.

The trial court apparently believed it could apply Coulter's presentence incarceration time against the drug charge. But the court ultimately applied the credit against the concurrent terms imposed in the other case, which occasioned the presentence incarceration.

¶7 Notice must serve to sufficiently inform a defendant so that he "is not 'mislead, surprised or deceived in any way by the allegations' of prior convictions." *Benak*, 199 Ariz. at 337, ¶ 16, 18 P.3d at 131 (quoting *State v. Bayliss*, 146 Ariz. 218, 219, 704 P.2d 1363, 1364 (App. 1985)). Sufficient notice of the State's intent to enhance provides a defendant the opportunity to know the full range of potential punishment upon conviction, to evaluate any potential sentence and any other available options. *Id.* at 336-37, ¶ 14, 18 P.3d at 130-31.

¶8 In the exchange with the court, there was no mention of A.R.S. § 13-901.01 or disqualification from probation due to the charges for violent offenses. Coulter was not informed of what his sentence would be if convicted; the court simply informed Coulter that, if convicted, he would have already served his time for the drug charge. Although we understand how

the State reads this as informing Coulter he might get a prison sentence, he could have understood this statement to mean that he would *not* be going to prison on the drug charge. Under these circumstances, we cannot say that A.R.S. § 13-604.04 was satisfied here.

¶9 Furthermore, our review of the record reflects that the State never alleged the violent convictions. Understandably, the original complaint for the drug charge did not include an allegation of the murder and aggravated assault charges because they occurred nearly four months later. The complaint, however, was never amended to include the murder and aggravated assault charges. Although Coulter was convicted for the murder and aggravated assault after he was convicted for the drug charge, the State never filed any type of notice stating it intended to disqualify Coulter from mandatory probation if he was convicted of the violent offenses. The State did not provide the required pretrial allegation of a violent crime, and we disagree that the court's brief exchange at a trial resetting proceeding provided Coulter with the notice A.R.S. § 13-604.04 requires.

¶10 The State next argues that, because Coulter was not offered a plea agreement, the reasons for providing a defendant notice by alleging prior violent offenses disqualifying him from probation are satisfied here. Notice of the State's intent to enhance provides a defendant the opportunity to know the range

of punishment, evaluate any potential sentence and any other available options. *Benak*, 199 Ariz. at 336-37, ¶ 14, 18 P.3d at 130-31. The State seems to argue that, because Coulter was not offered a plea, he did not have any options to evaluate. We disagree. Coulter proceeded to trial on the drug charge, a decision that may not have been made if he was aware he was not eligible for probation because of his prior violent offenses. The State's obligation to allege prior violent offenses that would disqualify a defendant from receiving probation pursuant to A.R.S § 13-901.01 is not relieved simply because a defendant is not offered a plea.

¶11 The State also contends that Coulter's one-year sentence was well within the sentencing range, so the trial court did not err. It argues that because the same judge presided over both trials and specifically stated he did not believe probation was appropriate for the drug charge, Coulter was properly sentenced. Although the judge was aware of both cases proceeding against Coulter and the possible sentencing consequences, A.R.S. § 13-901.01 requires the State to allege disqualifying prior violent offenses, which provides notice to *a defendant* he is ineligible for sentencing pursuant to A.R.S. § 13-901.01(A). Whether the judge was aware of Coulter's disqualification from probation due to a prior violent offense is not relevant to our analysis.

¶12 The State did not provide the mandated pretrial allegation of a violent crime pursuant to A.R.S. §§ 13-604.04 and 13-901.01(B), and Coulter's brief exchange with the court was insufficient to satisfy the statutory requirement that the State inform him of its intent to disqualify him from mandatory probation. Therefore, the trial court imposed an illegal sentence when it sentenced Coulter to incarceration instead of probation.

CONCLUSION

¶13 For the foregoing reasons, we vacate Coulter's sentence and remand with instructions to sentence Coulter to probation pursuant to A.R.S. § 13-901.01(A).

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
PETER B. SWANN, Presiding Judge

/s/
MAURICE PORTLEY, Judge