IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06-29-2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,	)	1 CA-CR 09-0473
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
LINDA LOUISE JOHNSON,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-166766-001 DT

The Honorable James T. Blomo, Judge Pro Tempore

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Sherri Tolar Rollison, Assistant Attorney General
Attorneys for Appellee

James Haas, Maricopa County Public Defender — Phoenix
by Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

H A L L, Judge

¶1 On October 13, 2007, Phoenix Police Department Officer C.M. witnessed an African-American male hand defendant a clear

plastic baggie containing a light-colored object as defendant sat behind the wheel of a vehicle in the parking lot of a Circle K in the vicinity of 19th Avenue and Southern.[1] He then saw defendant hand the African-American male something in return.

¶2 Police executed a traffic stop after observing defendant throw some garbage out her car window. They discovered a plastic baggie containing a golf-ball-sized rock of crack cocaine in the glove box. They also located a small baggie of marijuana in the coin pocket of defendant's purse.

¶3 The state charged defendant with one count of possession of a narcotic drug, a Class 4 felony; and one count of possession of marijuana, a Class 6 felony.[2] A jury acquitted defendant of the possession of narcotic drug charge but found her guilty of possession of marijuana. On May 28, 2009, the trial court sentenced defendant to the presumptive sentence of 3.75 years in prison for the possession of marijuana, with two historical prior convictions. On that same date, and based on a stipulation in the plea agreement, the trial court also

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[1] We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against defendant. *State v. Vandever*, 211 Ariz. 206, 207 n.2, 119 P.3d 473, 474 n.2 (App. 2005).

[2] A third charge, robbery, a Class 4 felony, was severed for trial. On April 22, 2009, defendant entered into a plea agreement in which she pled guilty to the charge with one prior felony conviction for possession of a dangerous drug, a Class 4 felony.

sentenced defendant to 4.5 years in prison for the robbery conviction to which she had pled guilty with one prior historical felony. The trial court also ordered that these sentences be served concurrently.

¶4 Defendant timely appealed from her conviction for possession of marijuana. We have jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 and -4033 (2010).

DISCUSSION

¶5 On appeal, defendant argues for the first time that the trial court erred when it found that she had two prior historical felonies and sentenced her to an enhanced sentence. Defendant concedes that, because she did not raise this argument before the trial court, she has therefore forfeited appellate relief on her claim unless she can prove that fundamental error occurred and that it caused her prejudice in this case. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005). However, before we engage in a fundamental error analysis, we must first determine that the trial court committed some error. *State v. Lavers*, 168 Ariz. 376, 385, 814 P.2d 333, 342 (1992).

¶6 The imposition of an illegal sentence constitutes fundamental error. *State v. Thues*, 203 Ariz. 339, 340, ¶ 4, 54

P.3d 368, 369 (App. 2002). Generally, a sentence is illegal if it is outside the statutory range. *State v. House*, 169 Ariz. 572, 573, 821 P.2d 233, 234 (App. 1991); *see also State v. Suniga*, 145 Ariz. 389, 393, 701 P.2d 1197, 1201 (App. 1985) (sentence unlawful if not within statutory limits). We conclude that the trial court in this case committed no error, let alone fundamental error, in sentencing defendant to an enhanced sentence based on its finding that she had two prior historical felony convictions.

¶7 Before trial, the state alleged that defendant had eight prior felony convictions. During the trial, in discussing whether or not defendant would testify, the trial court ruled that should she opt to take the stand, the state could impeach defendant with three of her eight prior convictions. The court also stated that the three priors that it would permit the state to use for impeachment purposes were "the 2001-092841 . . . possession of marijuana, the Class 6 felony . . . the 2001-095847 . . . Class 6 felony [] shoplifting . . . [a]nd the 2002-093407 . . . Class 4 shoplifting," which were the "three latest in time." The court further noted that the need for a trial on the priors after the fact would be obviated if the priors were proved while defendant testified. Defendant did not object or contest the need for a trial on the priors, nor did she ever request one prior to sentencing.

¶8 Defendant chose to testify at trial and, on direct questioning by defense counsel, admitted that she had pled guilty and was convicted of "three prior felony convictions" in Maricopa County consisting of CR 2001-092841, CR 2001-095847, and CR 2001-093407. She also admitted the date of each offense, the date she pled guilty, and the fact that she had been represented by an attorney on each offense.

¶9 On appeal, defendant maintains that her testimony was not sufficient proof of the two prior historical felony offenses because there was no testimony at trial about the class of the felonies, how much time, if any, she spent in custody, or the amount of drugs involved in the prior marijuana conviction.

¶10 It is well established that a defendant's admission of a prior conviction under oath at trial is sufficient to establish the prior conviction. *State v. Whitney*, 159 Ariz. 476, 485, 768 P.2d 638, 647 (1989); *see also* Ariz. R. Crim. P. 17.6 ("[A]n admission [to a prior conviction] shall only be accepted under the procedures of this rule, *unless admitted by defendant while testifying on the stand*.") (emphasis added). Therefore, defendant's testimony admitting the three prior felony convictions is sufficient to support the trial court's finding that she had two prior felonies for sentence enhancement purposes. A.R.S. § 13-105(22)(d) (2010).

¶11 Defendant relies on *State v. Avila,* 217 Ariz. 97, 170 P.3d 706 (App. 2007), and *State v. Morales*, 215 Ariz. 59, 157 P.3d 479 (2007) for her argument that she did not waive her right to a hearing and that the state should have been required to prove the priors notwithstanding her admissions. However, neither of these cases supports defendant's argument. In *Morales*, our supreme court, citing Criminal Rule 17.6, held that "[t]he need for a hearing may be obviated . . . if the defendant admits to the prior conviction." 215 Ariz. at 61, ¶ 7, 157 P.3d at 481. In *Avila*, this court similarly held that the fact of a prior conviction may be established through a defendant's own admissions during trial testimony. 217 Ariz. at 99, ¶ 8, 170 P.3d at 708.

¶12 Defendant also maintains that the state failed to establish that the priors she admitted were valid historical priors by showing that they were committed within the qualifying statutory time limits and otherwise met the statutory requirements needed for use for enhancement purposes. However, before defendant was sentenced in this case, she also admitted a fourth and separate prior felony conviction for possession of dangerous drugs, a Class 4 felony, in CR 98-04342, as part of her plea agreement on the severed robbery charge. Therefore, as the state correctly notes, her admitted third and fourth convictions would qualify as historical priors regardless of

when appellant committed them or how much time passed between the third or more prior offenses and the present one. A.R.S. § 13-105(22)(d). *See State v. Garcia*, 189 Ariz. 510, 515, 943 P.2d 870, 875 (App. 1997) (once person has been convicted of three prior felony offenses, third in time may be used to enhance later sentence regardless of passage in time); *see also Morales*, 215 Ariz. at 62, ¶ 13 (defendant not entitled to resentencing when evidence already in the record conclusively proved a prior conviction).

¶13 Defendant also contends that there was insufficient evidence in the record to support the allegations regarding the class of the offenses or the dates of commission and sentencing. However, the record indicates that the trial court had defendant's full criminal record before it at the sentencing hearing as well as the plea agreement, which would have contained that information.

CONCLUSION

¶14 For the foregoing reasons, we affirm defendant's conviction and sentence.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
MICHAEL BROWN, Presiding Judge

/s/
DANIEL A. BARKER, Judge