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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 08/26/2010  
RUTH WILLINGHAM,  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 09-0531  
) 1 CA-CR 09-0538  
Appellee, ) 1 CA-CR 09-0539  
) (Consolidated)  
v. )  
) DEPARTMENT C  
JONATHAN OCHOA, )  
) **MEMORANDUM DECISION**  
Appellant. ) (Not for Publication -  
) Rule 111, Rules of the  
) Arizona Supreme Court)  
)  
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Appeal from the Superior Court in Maricopa County

Cause No. CR2006-129560-001 DT  
CR2007-143039-001 DT  
CR2008-115414-001 DT

The Honorable Sally Schneider Duncan, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Capital Litigation Section  
Attorneys for Appellee

Bruce Peterson, Maricopa County Legal Advocate Phoenix  
By Frances J. Gray, Deputy Legal Advocate  
Attorneys for Appellant

Jonathan Ochoa San Luis  
Appellant

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**S W A N N**, Judge

¶1 Jonathan Ochoa ("Defendant") appeals his convictions of Misconduct Involving Weapons and Possession or Use of Dangerous Drugs, both class 4 felonies. Additionally, he appeals the trial court's revocation of his probation. His appeal was filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969).

¶2 Counsel for Defendant has searched the record and can find no arguable question of law that is not frivolous, and requests that we search the record for fundamental error. Defendant filed a supplemental brief *in propria persona* and raised the following issues: (1) judicial bias; (2) prosecutorial misconduct; and (3) prosecutorial vindictiveness. After reviewing the record, we affirm Defendant's convictions and sentences.

*FACTS<sup>1</sup> AND PROCEDURAL HISTORY*

¶3 In 2007, Defendant pled guilty to Possession for Sale of Narcotic Drugs, a class 2 felony, and Possession or Use of Dangerous Drugs, a class 4 felony. The court suspended

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<sup>1</sup> "We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against [Defendant]." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

imposition of sentence and placed Defendant on probation for concurrent terms of four years for each conviction.

¶14 At approximately 2 a.m. on March 8, 2008, Officers Quillman and Fortune, who were traveling together in a marked patrol car, observed a Jeep Grand Cherokee exit a private drive without coming to a complete stop before it entered onto the roadway. Quillman initiated a traffic stop near Fillmore Street in Phoenix, Arizona, by turning on his emergency lights and focusing his spotlight on the rearview mirror of the Jeep. Defendant slowed the vehicle, but he did not stop. Quillman pursued the Jeep as it traveled northbound toward Roosevelt Street; he "gave a blare of [his] siren" but Defendant still did not stop. During the pursuit, the officers noticed that Defendant repeatedly looked into the rearview mirror, then to the center console area of the vehicle, and back again to the rearview mirror. Eventually, Defendant stopped the car near the intersection of 21st Avenue and Roosevelt Street. Defendant then fled on foot, running eastbound on Roosevelt Street, turning north on 21st Avenue, and then doubling back to arrive where he started.

¶15 The officers placed Defendant in custody for unlawful flight from law enforcement, and subsequently discovered that he had a suspended license. When Quillman conducted a search of Defendant, he found two translucent baggies containing

methamphetamine and three .380-caliber cartridges. Before impounding the vehicle, the officers conducted an inventory search.<sup>2</sup> During the search of the vehicle, Quillman found a .22-caliber revolver in the glove compartment and a .380-caliber semiautomatic handgun under a loose tray near the center console.

¶16 Thereafter, Defendant was advised of his *Miranda* rights, which he waived. During questioning, Defendant admitted that the methamphetamine was his and that it was for his personal use. Initially, Defendant denied knowledge of the handguns, but when Quillman asked him if there was any reason why he might find Defendant's fingerprints or DNA on the guns, Defendant admitted that he had handled the .380-caliber gun and hid it because he was afraid he would get caught with the weapon.

¶17 On March 18, 2008, Defendant was indicted and charged with one count of Misconduct Involving Weapons and one count of Possession or Use of Dangerous Drugs. On March 21, 2008, Defendant was also charged by indictment with Aggravated Assault. In the Aggravated Assault case, the State alleged that on February 13, 2008, Defendant used a handgun to cause physical injury to another. On June 26, 2008, the parties entered into a plea agreement, whereby Defendant would plead guilty to the

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<sup>2</sup> Defendant was not the owner of the Jeep.

charges of Misconduct Involving Weapons and Possession or Use of Dangerous Drugs in exchange for a reduced sentencing range of 4.5 to 7.5 years. The agreement was contingent on Defendant entering into and the trial court accepting a plea in the Aggravated Assault case. The sentence in the Aggravated Assault case would run concurrent with the term of imprisonment imposed pursuant to the June 26 plea agreement.

¶8 The court held a change of plea hearing on June 26, 2008, regarding the Misconduct Involving Weapons and Possession or Use of Dangerous Drugs charges, and the Aggravated Assault charge. The court also conducted a violation hearing with respect to the probation terms stemming from the 2007 charges. Regarding the Aggravated Assault offense, Defendant's counsel stated the factual basis for the plea. When the trial court asked Defendant if the facts set forth on the record accurately represented what occurred, Defendant's counsel reported that "Mr. Ochoa has acknowledged to me that he was not the one [who] shot the weapon, but he was present and d[oes] know who did shoot the weapon." After Defendant conferred with his counsel, the court again asked whether the facts as stated on the record accurately represented what occurred. Defendant agreed that the facts were accurate. Thereafter, the trial court found a factual basis for the plea. The court also found a sufficient factual basis for the other charges and accepted a guilty plea

as to those charges. It then found Defendant was in automatic violation of his probation.

¶9 On September 19, 2008, a disposition hearing was set for all of the charges admitted to in the plea agreements and the probation violations. After the court accepted the guilty pleas, Defendant denied responsibility for the Aggravated Assault offense. He explained that on the night of the incident, his roommate and two other friends were at his apartment when Defendant and his roommate began arguing. After one of the friends shot the victim, the friends told Defendant to leave with them. But Defendant stayed behind to call the police and to request an ambulance. He asked the victim not to tell the officers his name, and then he left before the police arrived.

¶10 After hearing Defendant's statement and upon reviewing the transcript of the June 26 plea hearing, the trial court stated that it was concerned that a manifest injustice would result if Defendant merely agreed to counsel's recitation of the facts because it was expedient, rather than because it was true. The court indicated that it was going to reject the plea on the Aggravated Assault charge. Thereafter the State offered a new plea agreement, which Defendant rejected. Upon the State's request to withdraw from the previous plea agreement and a finding that there was an insufficient basis for the plea with

respect to the Aggravated Assault charge, the trial court rejected that plea. Because the plea agreement for the Misconduct Involving Weapons and the Possession or Use of Dangerous Drugs offenses was contingent on the court accepting the plea agreement in the Aggravated Assault case, the trial court rejected both of those pleas as well, and vacated the automatic probation violations. In a minute entry, though not in open court, Defendant was advised of his right to a change of judge in the event that the matter was taken to trial. Plea negotiations stalled after Defendant elected to go to trial on the Aggravated Assault charge. The State was insistent that a plea agreement include all of the charges. During an e-mail exchange in which defense counsel attempted to renew plea negotiations, the prosecutor wrote, "[W]e are not going to allow [Defendant] to try the Aggravated Assault case and plead the Misconduct/PODD case. . . . We told you that if [Defendant] decided to go to trial on the first case, we would go to trial on the second." The Aggravated Assault case proceeded to trial; a jury acquitted Defendant of that charge.

¶11 On February 24, 2009, a three-day trial on the Misconduct Involving Weapons and Possession or Use of Dangerous Drugs charges commenced, with the same judge presiding over the trial as presided over the change of plea hearing. During the course of the trial, the court sustained a majority of

Defendant's objections. And a majority of the sustained objections were for failure to establish proper foundation. Defendant moved for a mistrial, arguing that because of the State's persistent inability to lay foundation and the subsequent sustained objections, the jury might infer that Defendant was trying to hide something. Defendant argued that this amounted to prosecutorial misconduct. The trial court summarily denied the motion.

¶12 On February 26, 2009, a 12-person jury convicted Defendant on both counts. Before sentencing, Defendant filed a motion alleging prosecutorial vindictiveness. At the onset of the sentencing hearing, the court heard arguments on the motion. The court did not find evidence of vindictive prosecution and denied Defendant's motion.

¶13 During sentencing, the court accepted the judgment of the jury and its findings of guilt with respect to the Misconduct Involving Weapons and Possession or Use of Dangerous Drugs offenses. As a consequence of the jury's verdict, the court found Defendant in automatic violation of his probation. After considering the presentence report and defense counsel's sentencing memorandum, the court ordered Defendant to serve concurrent, presumptive terms of ten years' imprisonment for the convictions of Misconduct Involving Weapons and Possession or



Use of Dangerous Drugs. With respect to those charges, the court allocated 474 days of presentence incarceration credit.

¶14 As to the probation violation stemming from the prior Possession or Use of Dangerous Drugs conviction, the court found mitigating factors and imposed a supermitigated sentence of one year of imprisonment, to be served consecutive to the Misconduct Involving Weapons and Possession or Use of Dangerous Drugs sentences. For Defendant's violation of his probation for his prior Possession for Sale of Narcotic Drugs conviction, the court found mitigating factors and sentenced Defendant to a supermitigated term of three years of imprisonment, to be served concurrent with the one-year probation violation sentence and consecutive to the Misconduct Involving Weapons and Possession or Use of Dangerous Drugs sentences. The court allocated 656 days of presentence incarceration credit for the one-year probation violation sentence and 696 days for the three-year sentence.

¶15 Defendant timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1).

#### *DISCUSSION*

¶16 Defendant raises three issues in his supplemental brief: (1) judicial bias; (2) prosecutorial misconduct; and (3)

prosecutorial vindictiveness. Because Defendant did not raise the issue of judicial bias below, we review for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). We review claims of prosecutorial misconduct and prosecutorial vindictiveness for an abuse of discretion, as they were sufficiently preserved below. See *State v. Newell*, 212 Ariz. 389, 403, ¶ 61, 132 P.3d 833, 846 (2006) (prosecutorial misconduct); *State v. Brun*, 190 Ariz. 505, 506, 950 P.2d 164, 165 (App. 1997) (prosecutorial vindictiveness).

#### I. JUDICIAL BIAS

¶17 Defendant contends that it was error for the same judge to preside over both the change of plea hearing and the trial on the Misconduct Involving Weapons and Possession or Use of Dangerous Drugs charges. We disagree.

¶18 Pursuant to Ariz. R. Crim. P. 17.4(g), "If a plea is withdrawn after submission of the presentence report, the judge, upon request of the defendant, shall disqualify himself or herself, but no additional disqualification of judges under this rule shall be permitted." (Emphases added.) Here, the trial court rejected the plea agreement regarding the Aggravated Assault charge, in part, because the State requested that the agreement be withdrawn. Defendant was then advised of his right to request a new judge, but he elected not to do so.

Accordingly, we conclude there was no error, fundamental or otherwise.

## II. PROSECUTORIAL VINDICTIVENESS

¶19 Next, Defendant argues that the prosecutor "held a grudge" against him. Defendant contends that because he elected to go to trial on the charge of Aggravated Assault, the prosecutor declined to renew any plea offers that were limited to the Misconduct Involving Weapons and Possession or Use of Dangerous Drugs charges.

¶20 "To punish a person because he has done what the law plainly allows him to do is a due process violation 'of the most basic sort.'" *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (citation omitted). A change in the charging decision that is made after an initial trial is presumptively vindictive. See *id.* at 381. But "proof of a prosecutorial decision to increase charges after a defendant has exercised a legal right does not alone give rise to a presumption in a pretrial context." *State v. Tsosie*, 171 Ariz. 683, 687, 832 P.2d 700, 704 (App. 1992) (citation omitted). "Th[e] presumption arises when a defendant presents facts that indicate a realistic likelihood of vindictiveness." *Id.* at 685, 832 P.2d at 702 (citation omitted) (internal quotation marks omitted). "[T]he defendant bears the initial burden of establishing the appearance of vindictiveness." *Id.* The burden then shifts to

the State to demonstrate that it was justified in prosecuting the charges. *Id.*

¶21 We conclude that the circumstances in this case do not give rise to a presumption of vindictiveness. Here, the State did not elect to pursue additional charges against Defendant -- it simply declined to extend a plea offer to Defendant's liking. When, as here, a defendant rejects a plea offer and requests a trial by jury on one charge, a prosecutor is given broad discretion on the extent and manner in which to prosecute the other charges. See *id.* Moreover, the decision whether to extend an offer of a plea bargain is a function of the executive. See *State v. Vallejo*, 215 Ariz. 193, 197, ¶ 15, 158 P.3d 916, 920 (App. 2007) (Howard, J., specially concurring). There is no right to a plea bargain. *State v. Morse*, 127 Ariz. 25, 31, 617 P.2d 1141, 1147 (1980). "Far from being available upon a defendant's demand, a plea bargain can be obtained only by agreement among the defendant, his counsel and the prosecuting attorney, subject to the approval of the trial court." *Id.* at 31-32, 617 P.2d at 1147-48. Accordingly, we conclude that the State's decision not to extend a plea offer limited to the Misconduct Involving Weapons and Possession or Use of Dangerous Drugs offenses does not offend the Due Process Clause. See *State v. Jackson*, 170 Ariz. 89, 91, 821 P.2d 1374,

1376 (App. 1991) ("Appellant has no constitutional right to a plea agreement, and the state is not required to offer one.").

### III. PROSECUTORIAL MISCONDUCT

¶22 Defendant also argues that the prosecutor's difficulty with trial procedures, which led to a large number of sustained objections, was tantamount to prosecutorial misconduct. We disagree.

¶23 "Prosecutorial misconduct sufficient to justify reversal must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citation omitted) (internal quotation marks omitted). Prosecutorial misconduct "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." *Pool v. Superior Court (State)*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984) (footnote omitted).

¶24 To be sure, the record indicates that the prosecutor encountered great difficulty with the rules of evidence and trial procedure throughout the trial. We cannot conclude, however, that this was the result of intentional conduct. Many of the sustained objections related to foundational issues. It

was to the prosecutor's advantage to know how to properly lay foundation so that the evidence could be admitted -- no advantage lies in subpar trial practice. Accordingly, we discern no error in the trial court's denial of Defendant's motion alleging prosecutorial misconduct.

#### *IV. REMAINING ISSUES*

¶125 The record reflects Defendant received a fair trial. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was represented at all stages of the proceedings. The court properly instructed the jury on the elements of the charged offenses. Further, the court properly instructed the jury on the State's burden of proof. The court received and considered a presentence report and imposed a legal sentence.

#### *CONCLUSION*

¶126 We have reviewed the record for fundamental error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Defendant's convictions and sentences. Defense counsel's obligations pertaining to this appeal have come to an end. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant of the status of this appeal and his future options. *Id.* Defendant

has 30 days from the date of this decision to file a petition for review *in propria persona*. See Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/

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PETER B. SWANN, Judge

CONCURRING:

/s/

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MARGARET H. DOWNIE, Presiding Judge

/s/

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DONN KESSLER, Judge