DIVISION ONE
FILED: 11-30-2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0699
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	
MAURICIO ERIVES,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-160616-001 DT

The Honorable John R. Ditsworth, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Presiding Judge

¶1 Mauricio Erives ("Appellant") appeals his sentence to 2.25 years' imprisonment for unlawful flight from a law

enforcement vehicle. Appellant contends the trial court erred when it enhanced his sentence with a prior felony conviction and when it found Appellant committed the offense while on probation. Appellant further asks us to review certain sealed records from the Phoenix Police Department to determine if they contained potentially exculpatory material that should have been disclosed pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). For the reasons that follow, we affirm Appellant's conviction and sentence.

I. Factual and Procedural History

¶2 "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998)(citation omitted). On May 26, 2008, a Phoenix police officer observed Appellant driving at a high rate of speed. When the officer attempted to make a traffic stop, Appellant fled. During the subsequent chase, police lost contact with Appellant's vehicle. The vehicle was eventually located, however, and Appellant was later apprehended.

¶3 Appellant was convicted of unlawful flight from a law enforcement vehicle. The trial court found Appellant had a historical prior felony conviction for solicitation to commit burglary. The trial court further found Appellant committed the

instant offense while on probation for the prior conviction for solicitation to commit burglary.[1]

¶4 The court made these findings after Appellant attempted to stipulate to the existence of the prior conviction for solicitation and the resulting probationary status. At a presentence hearing, Appellant's counsel informed the trial court, "[t]o avoid his probation officer coming back and having to return to court, we will agree that Mr. Erives does have that conviction [for solicitation to commit burglary] and he was on probation at that time." The trial court then engaged Appellant in a discussion in which Appellant identified his prior conviction for solicitation to commit burglary; confirmed the class of felony; confirmed the cause number of the case; stated that he was represented by counsel during the proceedings leading up to his prior conviction; and confirmed the date of the offense and the date of the conviction. The court did not, however, ask Appellant any other questions. The State offered no further proof of this prior conviction or Appellant's probationary status.

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[1] The existence of the historical prior felony conviction enhanced the maximum available sentence to three years. A.R.S. § 13-604(A)(2001). The finding that Appellant was on probation made the presumptive term of 2.25 years' imprisonment the minimum term that could be imposed. A.R.S. § 13-604.02(B)(2001).

¶5 Appellant was sentenced to a presumptive term of 2.25 years' imprisonment based in part on the existence of one historical prior felony conviction and his probationary status. The sentence was ordered to run concurrently with the sentences imposed in two other matters. Appellant now appeals his sentence. We have jurisdiction pursuant to Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2003), 13-4031 (2010) and 13-4033 (2010).

II. Discussion

¶6 Appellant argues on appeal there was insufficient proof he had a prior conviction for solicitation to commit burglary and/or that he was on probation for that offense at the time he committed the instant offense. Appellant argues his admissions to the trial court were invalid because the trial court failed to conduct a "plea-type colloquy" that complied with the requirements of Arizona Rules of Criminal Procedure 17. Appellant further argues there was otherwise insufficient proof of either factor to permit their consideration for sentencing purposes.

¶7 Arizona Rules of Criminal Procedure 17.2 and 17.6 provide that "before accepting a defendant's admission to a prior conviction, a trial court must advise the defendant of the nature of the allegation, the effect of admitting the allegation

on the defendant's sentence, and the defendant's right to proceed to trial and require the State to prove the allegation." *State v. Anderson*, 199 Ariz. 187, 194, ¶ 36, 16 P.3d 214, 221 (App. 2000). A similar colloquy must take place before a trial court may accept a defendant's admission that an offense was committed while on any type of release for another offense. *Id*. Such a colloquy is required whether the defendant personally admits to the prior or defense counsel stipulates to the prior. *State v. Morales*, 215 Ariz. 59, 60, ¶ 1, 157 P.3d 479, 480 (2007).

¶8 While Appellant raised no objection below, the State concedes the trial court failed to conduct a Rule 17 colloquy. The failure to conduct a Rule 17 colloquy where required constitutes fundamental error.[2] *Id.* at 61-62, ¶ 10, 157 P.3d at 481-82. The existence of fundamental error does not, however, automatically entitle Appellant to a remand. Even where fundamental error exists from the failure to conduct a Rule 17 colloquy, remand is not required unless and until a defendant proves the failure to conduct the colloquy caused prejudice.

[2] We note that the court also failed to comply with the requirements in Ariz. R. Crim. P. 17.2 that it apprise Appellant of the due process rights being waived by stipulating to prior convictions and probation violations. *State v. Carter*, 216 Ariz. 286, 289, ¶ 13, 165 P.3d 687, 690 (App. 2007). Appellant, however, did not raise this issue at trial or on appeal, and accordingly, we do not address it here. *See State v. Roseberry*, 210 Ariz. 360, 372 n.10, ¶ 65, 111 P.3d 402, 414 n.10 (2005)

Id. at 62, ¶ 11, 157 P.3d at 482 (requiring the defendant to prove that he "would not have admitted the fact of the prior conviction had the colloquy been given."). Further, where a trial court fails to conduct a Rule 17 colloquy, remand is not required where the record disproves any prejudice. *See State v. Carter*, 216 Ariz. 286, 291, ¶ 22, 165 P.3d 687, 692 (App. 2007).

¶9 Appellant is not entitled to a remand because the record clearly establishes Appellant suffered no prejudice from the trial court's failure to conduct a Rule 17 colloquy. Regardless of the parties' insufficient attempt to stipulate to the existence of Appellant's prior conviction and probationary status, the record establishes Appellant had a prior conviction for solicitation to commit burglary, a class 5 felony, and that he was on probation for that offense at the time he committed the instant offense. The same judge who presided over the instant matter presided over the revocation of Appellant's probation for solicitation to commit burglary. The same judge revoked Appellant's probation in part because Appellant committed the instant offense while on probation. The same judge then imposed a presumptive term of 1.5 years' imprisonment for solicitation to commit burglary. All of this took place as part of a consolidated sentencing hearing in which the same judge imposed sentence in the instant case literally moments

later.[3] In short, the judge who imposed sentence in this case presided over the prior conviction and probation that Appellant now claims could not be considered by that same judge moments later.

¶10 The fact the trial court revoked probation and imposed a prison sentence in the other matter as part of the same sentencing proceeding in the instant case, and did so in part because of Appellant's conviction in the instant case, established the existence of that prior conviction and probationary status for sentencing purposes.[4] Where, as here, the record conclusively establishes the existence of a prior conviction, the defendant is not entitled to remand. *Morales*, 215 Ariz. at 62, ¶ 13, 157 P.3d at 482. The same holds true when the record conclusively establishes a defendant was on probation at the time an offense was committed. Under such

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[3] Appellant does not argue his probation could not be revoked or that he could not be subsequently sentenced to a term of imprisonment.

[4] Because the probation revocation and prison sentence for solicitation to commit burglary were consolidated with sentencing in this case, we also take judicial notice of the June 27, 2007 minute entry in *State v. Erives*, Maricopa County Cause Number CR 2006-005237-002 DT, in which Appellant was found guilty of solicitation to commit burglary and placed on three years' probation. *See State v. Valenzuela*, 109 Ariz. 109, 110, 506 P.2d 240, 241 (1973)(finding that the court of appeals may take judicial notice of the records of the superior court). (http://www.courtminutes.maricopa.gov/docs/Criminal/062007/m2737339.pdf)

circumstances, "there would be no point in remanding for a hearing[.]" *Id*.

III. Review of the Sealed Records

¶11 Prior to trial, the State asked the trial court to conduct an *in camera* review of records from the Phoenix Police Department to determine whether those records contained exculpatory material that should be disclosed pursuant to *Brady*, 373 U.S. at 87. The court reviewed the records and found nothing within that was potentially exculpatory or that might affect the credibility of a prosecution witness. The court then sealed the records. Whether a defendant is entitled to disclosure is a matter of the trial court's discretion. *State v. Roberts*, 139 Ariz. 117, 120, 677 P.2d 280, 283 (App. 1983).

¶12 Appellant asks us to also conduct an *in camera* review of those sealed records to determine if they contain any information that should have been disclosed pursuant to *Brady*. Appellant has not seen the records, does not allege any error on the part of the trial court and does not raise any particular issue or argument regarding the court's determination. He simply asks that we review the records.[5] We have reviewed the records in their entirety and found no information within that was potentially exculpatory, that affected the credibility of

[5] We invited Appellant to make this request as an issue on appeal after we denied his motion to unseal the records.

any trial witness, or that should otherwise have been disclosed pursuant to *Brady*. Therefore, the trial court did not abuse its discretion when it found no disclosure was required.

IV. Conclusion

¶13 Because we find no prejudice concerning the sentence, or any error concerning the sealed records, we affirm Appellant's conviction and sentence.

_____/S/_____
LAWRENCE F. WINTHROP, Presiding Judge

CONCURRING:

_____/S/_____
PATRICIA K. NORRIS, Judge

_____/S/_____
PATRICK IRVINE, Judge