

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 05/31/2011
RUTH A. WILLINGHAM,
CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0132
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
JERRY WILLIAM WRIGHT,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Mohave County

Cause No. CR 2007-1781

The Honorable Rick A. Williams, Judge

AFFIRMED

Thomas C. Horne, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender Kingman
Attorney for Appellant

N O R R I S, Judge

¶1 Jerry William Wright appeals his sentence for possession of drug paraphernalia. He argues the superior court improperly enhanced his sentence by using out-of-state

convictions that did not qualify as historical prior felony convictions ("historical priors") and by finding he committed the offense while on parole. We disagree with both arguments. First, because Wright failed to object to the State's evidence regarding the out-of-state convictions, our review is for fundamental error and he has failed to demonstrate fundamental error and prejudice. Second, because the superior court had sufficient evidence to reasonably infer Wright committed the offense while on parole, it did not abuse its discretion in making this finding.

FACTS AND PROCEDURAL BACKGROUND

¶2 The State charged Wright with possession of drug paraphernalia, a class six felony, after a police officer found a glass pipe with methamphetamine residue in his pocket on November 27, 2007 ("present offense"). Before trial, the State alleged Wright had historical priors, Ariz. Rev. Stat. ("A.R.S.") § 13-604(W)(2)(c) (Supp. 2007),¹ and had committed the present offense while on parole. A.R.S. § 13-604.02 (2001). The historical priors included Receiving Stolen Property,

¹The Arizona Legislature amended and renumbered the Arizona criminal sentencing code, see 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120 (2d Reg. Sess.), effective "from and after December 31, 2008." *Id.* § 120. In this decision, we use the statutes in effect at the time Wright committed the present offense.

committed on May 1, 2001,² in Amador County, California ("Amador prior"); Felony Vehicle Theft, committed in 2001 in El Dorado County, California ("El Dorado prior"); and Petit Theft with Prior, committed in 2000 in El Dorado County, California ("Petit Theft prior"). On the day of trial, Wright objected to a lack of proof the Petit Theft prior was "actually a felony" but did not otherwise "object to the filing of the enhancement allegations."

¶13 A jury convicted Wright of the present offense. The State submitted Wright's California "pen pack" -- a packet of certified court and prison records -- to the court as evidence of his historical priors and parole status. The superior court found Wright had committed "at least two" historical priors, subjecting him to enhanced sentences, A.R.S. § 13-604(C),³ and

²The State initially alleged Wright committed this historical prior on April 14, 2001, but official documentation later submitted to the superior court showed he committed the offense on May 1, 2001.

³Section 13-604(C) read in relevant part:

[A] person . . . who stands convicted of a class 4, 5 or 6 felony . . . and who has two or more historical prior felony convictions shall be sentenced to imprisonment as prescribed in this subsection . . . :

. . . .

<u>Felony</u>	<u>Minimum</u>	<u>Presumptive</u>	<u>Maximum</u>
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. . . .

found, over Wright's objection, he was on parole when he committed the present offense, prohibiting him from receiving a sentence less than the presumptive. A.R.S. § 13-604.02. The court sentenced Wright to a presumptive prison term of 3.75 years. Wright timely appealed, and we have jurisdiction pursuant to A.R.S. § 13-4033(A)(1) (2001).

DISCUSSION

¶4 As an initial matter, we note the standard of review on appeal for Wright's historical-prior arguments is fundamental error because he did not raise them in the superior court. *State v. Smith*, 219 Ariz. 132, 136, ¶ 20, 194 P.3d 399, 403 (2008) (claim of sentencing error not raised below reviewed for fundamental error). As a result, on appeal Wright has the burden of showing fundamental error and resulting prejudice. *State v. Henderson*, 210 Ariz. 561, 567, ¶¶ 19-20, 115 P.3d 601, 607 (2005).

¶5 First, Wright argues the El Dorado prior should not have been used as a historical prior to enhance his sentence because the State did not present sufficient evidence to prove the conviction qualified as a historical prior. We disagree.

¶6 A criminal defendant with one or more historical priors is subject to more severe sentencing ranges. A.R.S.

Class 6 3 years 3.75 years 4.5 years

§ 13-604. The definition of a historical prior includes a conviction for a class two or class three felony committed within ten years of the date of the current offense or a class four, class five, or class six felony committed within five years of the date of the current offense. A.R.S. § 13-604(W)(2)(b)-(c). In calculating whether a prior conviction is within the necessary time frames to be a historical prior, "[a]ny time [the defendant] spent . . . incarcerated is excluded." *Id.*

¶7 Wright concedes the El Dorado prior would be a felony in Arizona, but he asserts it cannot be shown to be within five years of the present offense, excluding his time spent incarcerated, because "[i]t is impossible to determine how long he was incarcerated from this record without some type of expert testimony from California prison or parole officials."⁴ Wright's impossibility argument, however, fails to meet the requirements imposed on him by *Henderson's* standard of fundamental error and resulting prejudice. As our supreme court explained in *Henderson*, fundamental error review "involves a fact-intensive inquiry." 210 Ariz. at 568, ¶ 26, 115 P.3d at 608. Wright's

⁴On appeal, the State asserts the five-year time frame is inapplicable because Wright's prior convictions would qualify as class three felonies and thus are subject to the ten-year time frame. The State did not make this argument in the superior court and, at that time, considered Wright's priors to be subject to the five-year time frame. Because this argument was not made below, we will not consider it.

invocation of "impossibility" without any analysis of the record hardly constitutes the fact-intensive inquiry required by *Henderson*. To the extent Wright believes it is impossible to calculate the age of the prior offense, he bears the burden of showing why the court could not have reached the conclusion it did on the evidence before it. Accordingly, he has failed to demonstrate fundamental error and prejudice.

¶8 Even if we considered Wright's argument, our review of the pen pack reveals the El Dorado prior was within five years of the present offense if Wright's time spent incarcerated is excluded. The pen pack shows Wright committed the El Dorado prior in 2001, but no specific date is shown. As a result, we treat the crime as occurring on January 1, 2001. *Cf. State v. Fogel*, 16 Ariz. App. 246, 248, 492 P.2d 742, 744 (1972) (statutes of limitation "construed liberally in favor of the accused"). The pen pack shows Wright was in prison from September 4, 2001, to April 21, 2002: 229 days. Wright returned to prison from September 4, 2002, to January 4, 2004: 487 days. Wright went to prison again from March 10, 2005, to April 7, 2005: 28 days. And Wright returned to prison a fourth time from October 20, 2006, to April 10, 2007: 172 days. If these periods of incarceration are added together they total 916 days, which is a little over 2.5 years.

¶9 Adding 916 days to the El Dorado-prior-offense date of January 1, 2001, moves Wright's El Dorado-prior-offense date to July 6, 2003. This date is within five years of November 27, 2007, and thus Wright's El Dorado prior occurred within five years of the date of his present offense if his time spent incarcerated is excluded.

¶10 Second, Wright argues the Amador prior should not have been used to enhance his sentence because the State failed to provide sufficient evidence the conviction qualified as a historical prior. Again, we reject this argument because the burden is on Wright, not the State, to show fundamental error and prejudice on appeal, as we explained above. *See supra* ¶ 7.

¶11 Even if we considered Wright's argument, our review of the pen pack demonstrates the Amador prior occurred within five years of the present offense if Wright's time spent incarcerated is excluded. According to the pen pack, Wright committed the Amador prior on May 1, 2001. The 916 days of prison time we calculated above, *see supra* ¶ 8, were all after May 1, 2001, and before November 27, 2007, so those days must be excluded here as well. Thus, for our calculation, adding the 916 days of prison time changes the offense date of the Amador prior from May 1, 2001, to November 3, 2003. This new date is within five years of November 27, 2007, and thus Wright's Amador prior occurred

within five years of the date of his present offense if his time spent incarcerated is excluded.

¶12 Third, Wright argues the Petit Theft prior should not have been used as a historical prior because it would not be a felony in Arizona and did not occur within five years of the present offense. We need not consider these arguments. Because the El Dorado prior and Amador prior were historical priors, see *supra* ¶¶ 7, 10, they were sufficient to subject Wright to an enhanced sentence under A.R.S. § 13-604(C) and thus the court's treatment of the Petit Theft prior was immaterial.

¶13 Fourth, Wright argues the State presented insufficient evidence he was on parole when he committed the present offense.⁵ We disagree because the superior court could reasonably infer, based on the pen pack, Wright committed the offense while on parole.

¶14 A defendant who commits a crime in Arizona while on parole cannot receive a mitigated sentence and is not eligible for suspension of sentence and placement on probation. A.R.S. § 13-604.02(B). Instead, the minimum sentence the defendant can receive becomes the presumptive prison term, although more severe punishments remain available. *Id.*

⁵Wright raised this argument in superior court, and thus our review is for an abuse of discretion. *State v. Rodriguez*, 200 Ariz. 105, 106, ¶ 3, 23 P.3d 100, 101 (App. 2001).

¶15 The pen pack contains a timeline of Wright's involvement with the California penal system, and, based on this, the court could reasonably infer he committed the present offense while on parole. On June 8, 2007, he was suspended from parole effective April 11, 2007. He committed the present offense on November 27, 2007. The next notations in the pen pack show that on February 2, 2008, Wright was "Arrested/Hold placed" and on February 8, 2008, he was reinstated on parole effective February 2, 2008. Although the pen pack does not explicitly explain what it means in California for a person's parole to be "suspended," the superior court could have inferred from the pen pack that Wright's suspension did not mean he had been released from parole. Wright's felony sentencing document for the Amador prior stated: "[I]f the defendant absconds, any period following suspension or revocation of parole until the defendant returns to custody shall not apply to the limits on the parole term." Therefore, we hold the court made a reasonable inference and did not abuse its discretion in finding Wright was on parole when he committed the present offense.

