DIVISION ONE
FILED: 11/12/10
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. ROBERT TY VAUGHN, Appellant.	)	No. 1 CA-CR 10-0138 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-113034-001 DT

The Honorable Lisa M. Roberts, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Attorney General By Kent E. Cattani, Chief Counsel Criminal Appeals/Capital Litigation Section Attorneys for Appellee	Phoenix
James J. Haas, Maricopa County Public Defender By Paul J. Prato, Deputy Public Defender Attorneys for Appellant	Phoenix
Robert Ty Vaughn *In propria persona*	Kingman

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), from the superior court's order

designating an open-ended offense as a felony. Vaughn's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. *See Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel now asks this court to search the record for fundamental error. After reviewing the entire record, we affirm the order.

FACTS AND PROCEDURAL HISTORY

¶2 On September 14, 2006, Vaughn pled guilty to possession of marijuana, a Class 6 undesignated offense. The court suspended imposition of sentence and imposed a one-year term of probation. In an order entered September 27, 2007, the court discharged Vaughn from probation but ordered the offense to remain undesignated. Roughly two years later, Vaughn was convicted of three additional drug charges. At sentencing on those offenses on January 21, 2010, over Vaughn's objection, the court granted the State's request to designate the prior offense as a felony.

¶3 Vaughn timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1)

(2003), 13-4031 (2010) and -4033(A)(2) (2010); *see State v. Delgarito*, 189 Ariz. 58, 59, 938 P.2d 107, 108 (App. 1997).[1]

DISCUSSION

¶4 Due process requires that a defendant must be afforded notice and a right to a hearing before the court may designate an open-ended offense as a felony. *Id.* Whether to designate an open-ended offense as a felony or a misdemeanor is within the discretion of the superior court. *See State v. Soriano*, 217 Ariz. 476, 481, ¶ 15, 176 P.3d 44, 49 (App. 2008).

¶5 The court took up the issue of the open-ended offense at the sentencing hearing, apparently without prior notice to Vaughn. Nevertheless, Vaughn, who was present and represented by counsel, did not object to the court's decision to address the matter. His counsel had the opportunity to cross-examine the probation officer who testified to the existence of the prior offense. Moreover, through his counsel, Vaughn had the opportunity to argue why the court should not designate the offense as a felony.

¶6 We cannot conclude the court committed fundamental error by ruling on the issue without prior notice to Vaughn. *See State v. Henderson*, 210 Ariz. 561, 568, ¶¶ 24, 26, 115 P.3d 601, 608 (2005) (defendant who does not object to alleged trial

[1] Absent material revisions after the date of an alleged offense, we cite a statute's current version.

error forfeits review unless he can demonstrate fundamental error that caused him prejudice). Fundamental error is error that "goes to the foundation of [a defendant's] case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608. Given that Vaughn was present at the hearing with counsel, who cross-examined the witness and argued against the request that the offense be designated a felony, we cannot conclude the court committed fundamental error or that, if error occurred, Vaughn was prejudiced.

¶7 Nor can we conclude the court erred by exercising its discretion to designate the offense a felony. Although the court had before it evidence that Vaughn had completed his probation, that alone would not compel it to designate the open-ended offense as a misdemeanor rather than a felony. Moreover, at the time the court ruled, a jury had convicted Vaughn of three subsequent offenses. Under the circumstances, the court acted within its discretion in deciding to designate the prior offense as a felony. *See Soriano*, 217 Ariz. at 481, ¶ 16, 176 P.3d at 49 (in deciding the issue, "a trial court may consider events and circumstances that arise between the end of the probationary period and the designation hearing").

¶8 Vaughn filed a supplemental brief, but each of the issues he raises pertains to the convictions on which he was sentenced on January 21, 2010, not to the court's decision at that time to designate his prior conviction as a felony.

CONCLUSION

¶9 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. After the filing of this decision, defense counsel's obligations in this appeal have ended. Defense counsel need only inform Vaughn of the outcome of this appeal and his future options, unless, upon review, counsel finds "an issue appropriate for submission" to the Arizona Supreme Court by petition for review. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Vaughn has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Vaughn has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Judge

/s/
JOHN C. GEMMILL, Judge