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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: 02/24/11
RUTH WILLINGHAM,
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BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0263
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
PUBLIO HERNANDEZ GUZMAN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-011335-001 DT

The Honorable Roland J. Steinle III, Judge

CONVICTIONS AFFIRMED; SENTENCE MODIFIED IN PART

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D O W N I E, Judge

¶1 Publio Hernandez Guzman ("defendant") appeals from the sentence he received upon conviction of possession of marijuana

for sale and possession of drug paraphernalia. We affirm the convictions but modify the sentence in part.

FACTS AND PROCEDURAL HISTORY

¶12 A jury convicted defendant of possession of marijuana for sale, a class 2 felony, and possession of drug paraphernalia, a class 6 felony.¹ The State alleged two aggravators: (1) that the offenses involved the use, threatened use, or possession of a deadly weapon or dangerous instrument during commission of the crimes; and (2) that the offenses were committed for pecuniary gain.

¶13 After the guilty verdicts were rendered, a jury trial was held regarding the alleged aggravators. The jury was given only one verdict form. It limited the jury's consideration of aggravators to the possession of marijuana for sale charge, reading: "We, the jury, duly empanelled and sworn in the above-entitled cause, do upon our oaths unanimously find beyond a reasonable doubt the following aggravating circumstance(s) as to *Count 1 - Possession of Marijuana for Sale.*" (Emphasis added.) The jury found that the State had proven the two aggravating factors alleged.

¶14 Defendant was sentenced to a super-aggravated term of 12.5 years' imprisonment on count one (possession of marijuana

¹ Defendant does not challenge his convictions on appeal, but only the resulting sentence.

for sale), to be served concurrently with a super-aggravated term of 2 years' imprisonment for count 2 (possession of drug paraphernalia). The trial court found no mitigating factors.

¶15 Defendant 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), 13-4031, and 13-4033(A)(1).

DISCUSSION

¶16 Defendant argues that because the jury found aggravators as to only count 1, the trial court erred by ordering a super aggravated sentence for count 2. The State confesses error.

¶17 "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). "[T]he 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *State v. Molina*, 211 Ariz. 130, 134, ¶ 14, 118 P.3d 1094, 1098 (App. 2005) (citation omitted). Under Arizona law, the statutory maximum is the presumptive term. *Id.*

¶18 In the case at bar, no mitigating factors were found. Defendant had no prior felonies. In the absence of aggravators found by a jury, the permissible statutory maximum sentence for count 2 was the presumptive term of one year. See A.R.S. § 13-701(C)(5) (Supp. 2004).²

CONCLUSION

¶19 We affirm the convictions but modify the sentence on count 2 (possession of drug paraphernalia) to a one year term of imprisonment, to run concurrently with the sentence imposed for count 1. See A.R.S. § 13-4037(A). We affirm the sentence as to count 1.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
DANIEL A. BARKER, Presiding Judge

/s/
MICHAEL J. BROWN, Judge

² Since 2005, when the offenses were committed, the sentencing guidelines have been renumbered and restructured. Former § 701(C) (Supp. 2004) is now A.R.S. § 13-702(D) (2010).