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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 02/24/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 10-0349
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
DONALD ANDERSON MONTGOMERY,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2005-144471-001DT

The Honorable Raymond P. Lee, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
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By Frances J. Gray, Deputy Legal Advocate
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Donald Anderson Montgomery Tucson
Appellant

I R V I N E, Judge

¶1 This 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), following Donald Anderson Montgomery's ("Montgomery") resentencing. Counsel for Montgomery asks this Court to search the record for fundamental error. Montgomery was given an opportunity to file a supplemental brief in propria persona, and he has done so. We have conducted an independent review of the record, focusing on the narrow issues Montgomery raises in both his supplemental brief in propria persona and his addendum to that supplement. Finding no reversible error, we affirm Montgomery's sentences.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the trial court's judgment and resolve all reasonable inferences against Montgomery. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998). After a jury trial, Montgomery was found guilty of possession of narcotic drugs, a class 4 felony (count 1); possession or use of marijuana, a class 6 felony (count 2); resisting arrest, a class 6 felony (count 3); and possession of drug paraphernalia, a class 6 felony (count 4).¹ The trial court sentenced Montgomery to a 12

¹ Montgomery was charged with five offenses, but he was found not guilty of the offense charged as "count three." For purposes of this decision, we refer to the convictions as counts 1, 2, 3 and 4.

year aggravated sentence on count 1 and 3.75 year aggravated sentences for each counts 2, 3 and 4. The sentences were ordered to run concurrent.

¶3 Montgomery appealed his sentences, arguing the trial court erred by failing to advise him of the sentencing range before accepting his stipulation to his prior felony convictions and refusing to allow Montgomery to represent himself at sentencing. *State v. Montgomery*, 1 CA-CR 07-0511, 2008 WL 4152836, at *1, ¶ 1 (Ariz. App. Sep. 4, 2008) (mem. decision). On appeal, we affirmed Montgomery's sentences and convictions. *Id.* at *4, ¶ 16. Thereafter, he filed a successful petition for post conviction relief, arguing his sentence was enhanced by a prior conviction that was not alleged by the State. The State conceded error, and Montgomery was resentenced on April 9, 2010.

¶4 During resentencing, Montgomery did not stipulate to his priors as he had previously. Therefore, the State offered evidence at resentencing of four historical felony convictions. All four priors were properly alleged by the State before Montgomery was initially tried. The trial court found that the State had proven all four felony convictions. Montgomery received the identical sentences he received the first time he was sentenced. He timely appealed from the sentences imposed at resentencing.

DISCUSSION

¶15 We review Montgomery's sentences for fundamental error. See *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). In his supplemental brief, Montgomery raises four issues, arguing: (1) his constitutional rights were violated because he was resentenced to a term of imprisonment that had already expired; (2) resentencing constituted double jeopardy; (3) the prosecutor engaged in prosecutorial misconduct; and (4) his twelve year sentence for possession of narcotic drugs was clearly excessive.

Expired sentences

¶16 Montgomery argues that when he was resentenced, his concurrent 3.75 year sentences for counts 2, 3, and 4 had already expired. He contends that the trial court "reopened" his sentences and gave him 1567 days presentence incarceration credit, which "is illegal, and to attempt [sic] to cure a sentence that has expired is illegal." He further states that he "should not have been retried."

¶17 First, Montgomery was not retried, but was resentenced. His sentences were not reopened, but were instead vacated and the court resentenced him to offenses he was previously found guilty of after a trial by jury. Montgomery is correct, however, that the court gave him credit for 1567 days of presentence incarceration. He was first sentenced on May 14,

2007, and received 506 days of presentence incarceration credit. He was resentenced on April 9, 2010, and received a total 1567 days of presentence incarceration credit, which included the credit given at the first sentencing. As a result, at the time of resentencing, Montgomery had already served the 3.75 year concurrent sentences for counts 2, 3, and 4 as he had been incarcerated for 1567 days. Montgomery's sentences for counts 2, 3, and 4 had not expired at the time of resentencing, but had already been served. The court properly accounted for this when it credited Montgomery with 1567 days of presentence incarceration. We find no error.

Double jeopardy in resentencing

¶18 Montgomery claims that, because the trial court had already imposed his sentences, it could not resentence him after his successful petition for post-conviction relief without violating the principles of double jeopardy.² "Double jeopardy principles generally do not apply to sentencing proceedings." *State v. Ring*, 204 Ariz. 534, 548, ¶ 27, 65 P.3d 915, 929 (2003). It is well-settled that "a defendant can be resentenced following an appellate reversal of his or her original sentence, [but] the Double Jeopardy Clause prohibits imposing any sentence

² "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb" U.S. Const. amend. V. "No person shall . . . be twice put in jeopardy for the same offense." Ariz. Const. art. II, § 10.

of which the defendant was either actually or impliedly 'acquitted' in the first instance." *Id.* at 549, ¶ 33, 65 P.3d at 930; see *State v. Sowards*, 147 Ariz. 156, 159, 709 P.2d 513, 516 (1985) (state may relitigate defendant's release status on remand for resentencing and "may produce whatever additional evidence it has" without placing defendant twice in jeopardy).

¶19 Montgomery was found guilty of possession of narcotic drugs, possession or use of marijuana, resisting arrest and possession of drug paraphernalia. At resentencing, the trial court sentenced Montgomery for the same offenses, and he received the same sentences that were originally imposed. Additionally, Montgomery was not sentenced for any offense that he "was either actually or impliedly 'acquitted' in the first instance." *Ring*, 204 Ariz. at 549, ¶ 33, 65 P.3d at 930. The State's allegation of historical prior felony convictions upon resentencing did not violate the guarantee against double jeopardy. See *State v. Osborn*, 220 Ariz. 174, 179, ¶ 14, 204 P.3d 432, 437 (App. 2009). Consequently, the State was entitled to the opportunity of proving the prior felony convictions it had previously alleged.

Prosecutorial misconduct and prejudice

¶10 Montgomery next argues that the prosecutor committed prosecutorial misconduct in connection with his trial and the first sentencing. Specifically, Montgomery points to "the fact

that the trial court vacated [his] sentence . . . based on ineffective assistance of counsel, as well as the fact that the state failed to file a prior conviction it used in securing [his] enhanced sentence."

¶11 Montgomery's arguments focus entirely on his trial and first sentencing. Our review is limited to a review of the resentencing proceedings. See *State v. Hartford*, 145 Ariz. 403, 405, 701 P.2d 1211, 1213 (App. 1985) (stating that the validity of an underlying conviction, previously affirmed on appeal, is beyond the scope of an appeal from remand for resentencing). Accordingly, we will not address these arguments.

¶12 Even if we were to address Montgomery's prosecutorial misconduct arguments, they would be unavailing. He focuses on the fact that the State failed to allege a prior conviction that was used to enhance his sentence. Montgomery claims that "[i]t is not unreasonable to conclude that [the prosecutor] knew this was an illegal sentence." Montgomery fails to cite any portion of the record nor do we find anything to support his assertion. Furthermore, we note that, because of the State's failure to allege a prior used to enhance Montgomery's sentence, his petition for post-conviction relief was granted. His sentences were vacated and he was resentenced; the resentencing is the matter before us.

¶13 Despite his resentencing, Montgomery claims the sentencing error caused him "severe prejudice" and that during the first sentencing, he did not stipulate to the existence of a prior conviction and was not given a proper colloquy pursuant to Arizona Rule of Criminal Procedure 17.6. In our memorandum decision affirming Montgomery's convictions and sentences, we noted that the trial court erred in failing to engage Montgomery in a discussion pursuant to Rule 17.6 before he stipulated to a prior conviction. *Montgomery*, 1 CA-CR 07-0511, at *2, ¶¶ 6-8. This error was not prejudicial, however, because a certified pen-pack of Montgomery's prior convictions was admitted by stipulation at trial.³ *Id.*

Twelve year sentence for possession of narcotic drugs

¶14 Although Montgomery lists an argument contending his twelve year sentence for possession of narcotic drugs was

³ Montgomery calls into question the pen-pack he stipulated to during the first trial. Again, our review is limited to the resentencing. See *Hartford*, 145 Ariz. at 405, 701 P.2d at 1213. Even if Montgomery would not have admitted the prior convictions but for the Rule 17.6 error, however, and he did not stipulate to the pen-pack, the remedy is a resentencing hearing at which the State will have burden of proving the prior convictions. *State v. Morales*, 215 Ariz. 59, 62, ¶ 13, 157 P.3d 479, 482 (2007). In this case, a resentencing took place. At the resentencing, the State presented evidence of Montgomery's prior felony convictions. The trial court found the State had met its burden and had proven four prior felony convictions. The State did not allege any additional priors that were not properly alleged before Montgomery's trial. Accordingly, the trial court did not err.

clearly excessive, he then states he “conced[ed] to this, and make[s] no argument.” Montgomery fails to develop this issue and cites no legal authority to support it. Merely mentioning an argument is insufficient. Because Montgomery does not argue this issue, we do not address it.

¶15 Counsel for Montgomery has advised this Court that after a diligent search of the entire record, she has found no arguable question of law. The Court has read and considered counsel’s brief, Montgomery’s brief in propria persona, his addendum to his supplemental brief and fully reviewed the record relevant to this appeal, the portion relating to resentencing, for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. We decline to order briefing and we affirm Montgomery’s sentences.

¶16 Upon the filing of this decision, defense counsel shall inform Montgomery of the status of his appeal and of his future options. Defense counsel has no further obligations 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, we extend the time for Montgomery to file a pro per motion for reconsideration to thirty days from the date of this decision.

CONCLUSION

¶17 For the foregoing reasons, we affirm.

/s/
PATRICK IRVINE, Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge