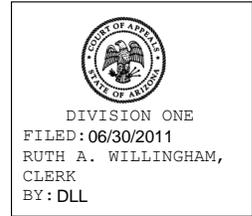


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA) 1 CA-CR 10-0438
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JEREMY DOUGLASS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-030272-001SE

The Honorable Rosa Mroz, 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

James J. Haas, Maricopa County Public Defender Phoenix
By Thomas Baird, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Douglass appeals his sentences for fifty-six counts of

surreptitious recording, attempted surreptitious recording, sexual abuse, sexual assault, and burglary in the third degree. He does not appeal the underlying convictions. The State concedes on appeal that the trial court erred in sentencing Douglass in the order listed on the indictment rather than in a chronological manner. As a result, we correct Douglass's sentences on appeal.

BACKGROUND

¶2 The facts supporting Douglass's convictions are not relevant to this appeal.

¶3 In March 2010, following a six-day trial, a jury found Douglass guilty of thirty counts of surreptitious recording, one count of attempted surreptitious recording, eight counts of sexual assault, seven counts of sexual abuse, and ten counts of burglary in the third degree.

¶4 The trial court sentenced Douglass to the presumptive sentences on all fifty-six counts, for a total of 151.25 years' imprisonment.¹ The court advised Douglass that he was not eligible for early release on any of the sexual assault violations, specifically counts 12, 13, 18, 19, 20, 22, 23, and 24, which totaled 74 years' imprisonment. The court designated count 1 as Douglass's first offense, count 2 as Douglass's

¹ Douglass was originally indicted on fifty-seven counts. The trial court, however, granted a directed verdict on count 56 during trial.

second offense, and counts 3 through 55 and 57 as third and subsequent offenses.

¶15 Douglass timely appealed, and 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 13-4033(A)(1) (2010).

DISCUSSION

¶16 On appeal, Douglass argues that the court erred in sentencing by following the sequence of the counts as listed in the indictment rather than the chronological dates of commission of the offenses.

¶17 Specifically, Douglass asserts that the trial court used count 1 to enhance subsequent counts, but count 1 was not the count earliest in time. Count 33 occurred on April 3, 2007, while count 1 occurred on December 12, 2007. Douglass argues that by enhancing count 33, the trial court added 2 years to the prison sentence. Instead, Douglass states that, if count 1 had been enhanced, it would have yielded only .75 years. Thus, the enhancement of count 33, a class 4 felony, and not count 1, a class 5 felony, created a 1.25 year increase in his sentence.

¶18 Douglass requests that this court remand for resentencing, and he argues that the court should review this sentencing issue for fundamental error because no objection was made at trial. *See State v. Henderson*, 210 Ariz. 561, 567, ¶

19, 115 P.3d 601, 607 (2005). Generally, an illegal sentence constitutes fundamental error. *State v. Soria*, 217 Ariz. 101, 102, ¶ 4, 170 P.3d 710, 711 (App. 2007).

¶9 The State concedes that the trial court failed to impose a sentence for Douglass chronologically, and this error resulted in illegal sentences being imposed. The State argues that the proper remedy is for this court to correct Douglass's sentences for counts 1, 2, 4, 33, 34, and 35 on appeal. We agree.

¶10 "When we are able to ascertain the trial court's intention by reference to the record, remand for clarification is unnecessary." *State v. Contreras*, 180 Ariz. 450, 453 n.2, 885 P.2d 138, 141 n.2 (App. 1994). In addition, we may correct an illegal sentence if it has been imposed upon a lawful finding of guilt by the trial court. A.R.S. § 13-4037 (2010). Here, remand for resentencing is unnecessary because the trial court made clear that the presumptive terms should be imposed for all counts. In addition, Douglass agrees that the cumulative change in his sentences would be a decrease of 1.25 years out of 151.25.

¶11 As an initial matter, Douglass incorrectly argues that count 33 was committed first. Instead, count 4, committed on January 24, 2007, was earliest in time.

¶12 If the trial court followed a chronological order, as

Douglass now requests on appeal, count 4 would have been designated as Douglass's first offense. The term for count 4, surreptitious recording, a class 5 felony, would have been 1.5 years' imprisonment as a first offense. See A.R.S. § 13-701 (2007). Additionally, counts 33, 34, and 35 were all committed on the same occasion and involved either April Mosley or Christopher Mosley, or both victims. As a second offense, for count 33, burglary in the third degree, a class 4 felony, the presumptive sentence would have been 2.5 years. A.R.S. § 13-702.02 (2007). Also included as a second offense, the presumptive sentence for counts 34 and 35, surreptitious recording, class 5 felonies, would have been 1.5 years' imprisonment for each count. A.R.S. § 13-702.02(B)(3). Counts 33, 34, and 35 were to be served concurrently.

¶13 In addition, count 1, committed on December 12, 2007, and count 2, committed on December 18, 2007, would serve as subsequent offenses. The presumptive sentences for count 1 and 2, surreptitious recording, class 5 felonies, would be 2.25 years for each count. A.R.S. § 13-702.02(B)(4).

CONCLUSION

¶14 We correct Douglass's sentences so that Douglass receives terms of imprisonment of 1.5 years for count 4, instead of 2.25 years, a difference of .75 years. For count 33, 2.5 years, instead of 4.5 years, to be served concurrently with

counts 34 and 35, for a difference of 2 years. For counts 34 and 35, Douglass's sentence is 1.5 years, instead of 2.25 years, per count, for a difference of .75 years. For count 1, we correct Douglass's sentence to be 2.25 years, instead of 1.5, an increase of .75 years, and also for count 2, a sentence of 2.25 years, instead of 1.5 years, an increase of .75 years. In total, because counts 34 and 35 are to be served concurrently with 33, the difference in Douglass's overall sentences is 1.25 years. Thus, Douglass's new sentences total 150 years' imprisonment.

¶15 Douglass's convictions are affirmed. His sentences are modified as described herein.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICK IRVINE, Presiding Judge

_____/s/_____
PHILIP HALL, Judge