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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: 10/25/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0453
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JASON ADEL KADRI) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-112299-001SE

The Honorable Joseph C. Welty, Judge

CONVICTIONS AFFIRMED; REMANDED REGARDING SENTENCING

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G E M M I L L, Judge

¶1 Jason Adel Kadri appeals his convictions and sentences for possession of drugs for sale. Kadri raises one issue on appeal, applicable only to his sentences: whether the trial

court erred at the sentencing hearing when it failed to give Kadri a full colloquy as required by Arizona Rule of Criminal Procedure 17.6 ("Rule(s)"), in conjunction with his stipulation to five prior felony convictions. We affirm Kadri's convictions and remand for a determination of whether he can establish prejudice from the absence of a full colloquy preceding his stipulation to the five prior felony convictions.

FACTS AND PROCEDURAL HISTORY

¶12 Kadri was pulled over in a routine traffic stop. A police officer smelled drugs in the vehicle. Kadri consented to a search, and the officer located drugs in the car. At the police station and after his *Miranda*¹ rights were given, Kadri admitted to selling and using drugs. A jury convicted Kadri of five offenses: Two counts of possession of dangerous drugs for sale (psilocyn and MDMA); two counts of possession of drug paraphernalia (baggies and pipe); and one count of possession of marijuana for sale.

¶13 At the sentencing hearing, Kadri agreed to stipulate to five prior felony convictions. The State provided case numbers, dates of the offenses, and the types of convictions.² Kadri's attorney acknowledged and agreed to the stipulation.

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

² The State had listed this information in its Rule 609 pretrial motion.

Kadri's attorney stated that he had reviewed the superior court documents, the case numbers, the Arizona Department of Corrections packet, and the forensic fingerprint comparison evidence. Moreover, Kadri spoke with his attorney and agreed to stipulate to the five prior convictions.

¶4 The trial judge engaged in a limited colloquy with Kadri to "make absolutely sure" that Kadri understood the stipulation. The judge explained the distinctive sentencing ranges with and without the stipulation; explained the State's obligation to prove the prior felony convictions for enhancement purposes; and asked Kadri if he was in a state of mind capable of making an informed decision (if Kadri had any drugs, alcohol or other medication in the last twenty-four hours). Kadri answered affirmatively to all the trial judge's queries. The court found that "Kadri understands the consequences of agreeing to the existence of his prior felony convictions, and that he is knowingly, intelligently, [and] voluntarily" agreeing to the prior felony convictions. Kadri received presumptive sentences that were enhanced because of the prior convictions.

¶5 We have jurisdiction over Kadri's appeal pursuant to Arizona Constitution Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(a)(1) (2003), 13-4031, and -4033(A) (2010).

ANALYSIS

¶16 Kadri argues that the trial court failed to properly and completely advise him of his rights during sentencing. "Specifically, the court failed to inform him of the constitutional rights he waived as a result of his stipulation, and his right to plead not guilty" under Rule 17. We agree that the colloquy was incomplete and did not sufficiently cover his constitutional rights.

The Colloquy Was Incomplete

¶17 The term colloquy means a discussion "in which the judge ascertains the defendant's understanding of the proceedings and of the defendant's rights." Black's Law Dictionary 259 (7th ed. 1999). Rule 17.6 provides: "Whenever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule, unless admitted by the defendant while testifying on the stand." The rationale behind Rule 17.6 is to ensure that the defendant's admission or stipulation is knowing and voluntary. See *State v. Morales*, 215 Ariz. 59, 60, ¶ 1, 157 P.3d 479, 480 (2007) (holding a colloquy is required for stipulations to existence of prior convictions "for purposes of sentence enhancement"). Rule 17.6 does not set forth a road map for applying its requirements, but this court has held that Rule 17.2 provides "the procedures" a trial court must follow when engaging in a colloquy under Rule 17.6. See *State v. Geeslin*,

221 Ariz. 574, 578, ¶ 13, 212 P.3d 912, 916 (App. 2009), *vacated in part on other grounds* by 223 Ariz. 553, 554, ¶ 1, 225 P.3d 1129, 1130 (2010).

¶8 Rule 17.2 sets forth the following requirements before a court may accept a guilty or no contest plea:

Before accepting a plea of guilty or no contest, the court shall address the defendant personally in open court, informing him or her of and determining that he or she understands the following:

- a. The nature of the charge to which the plea is offered;
- b. The nature and range of possible sentence for the offense to which the plea is offered, including any special conditions regarding sentence, parole, or commutation imposed by statute;
- c. The constitutional rights which the defendant foregoes by pleading guilty or no contest, including his or her right to counsel if he or she is not represented by counsel;
- d. The right to plead not guilty;
- e. That by pleading guilty or no contest in a noncapital case the defendant will waive the right to have the appellate courts review the proceedings by way of direct appeal, and may seek review only by filing a petition for post-conviction relief pursuant to Rule 32 and, if denied, a petition for review;

Although Rule 17.2(e) is inapplicable to Rule 17.6 colloquies, subparagraphs (a) through (d) of Rule 17.2 are, with appropriate modification, applicable.

¶9 The State contends that the trial court's colloquy was "adequate to ensure [Kadri] knowingly and voluntarily stipulated to the existence of his historical prior felony convictions." The trial court did ask and inform Kadri about his stipulation to five prior convictions. The court explained the range of the sentences and the impact the stipulations could have on Kadri's sentencing. Moreover, the court described the State's obligation to prove the prior felony convictions. The court asked Kadri if he agreed to the stipulations and if he possessed all of his mental faculties (was not under the influence of any substances). The trial court asked if Kadri understood, and he answered affirmatively to each of the judge's questions. Based on this colloquy, the court determined that Kadri understood the consequences of agreeing to his prior felony convictions, and that he knowingly, intelligently, and voluntarily agreed to the stipulations.

¶10 The trial court did not address, however, the constitutional rights that Kadri would forgo by his stipulation. Although reciting those rights may seem redundant for a person with more than two felony convictions, in *State v. Carter* we held that the requirements of Rule 17 were not met when the superior court failed to ascertain whether the defendant understood the nature of the stipulation, the requirements placed on the State to prove the prior conviction, and knowledge

he was forgoing his constitutional rights by stipulating to a prior conviction. 216 Ariz. 286, 289, ¶ 17, 165 P.3d 687, 690 (App. 2007). Our concern here centers on Kadri's constitutional rights.

¶11 In *Boykin v. Alabama*, the United States Supreme Court articulated three rights that must be communicated to a defendant in order to comport with proper due process regarding knowing and voluntary pleas: 1) the right to a jury trial; 2) the right to confront one's accusers; and 3) the privilege against self-incrimination. 395 U.S. 238, 243 (1969). Our supreme court has applied the *Boykin* standard to admissions of prior convictions and held "that Rule 17.6 applies equally to an admission by a defendant and a stipulation by defense counsel to the existence of a prior conviction." *Morales*, 215 Ariz. at 61, ¶ 9, 157 P.3d at 481. In addition to the *Boykin* rights, Rule 17 also includes the right to deny the allegations that a defendant committed the prior convictions and the right to have counsel present. See, e.g., Rule 17.2(c) and (d).

¶12 Kadri did not have a complete discussion of his constitutional rights during the colloquy. The Comment to Rule 17.2 refers to Form 19 for a checklist. Form 19 is promulgated by the Arizona Supreme Court. See Rule 41, Form 19, Guilty/No Contest Plea Proceeding (explaining that the "forms contained in the following Appendix are recommended for use in Arizona courts

and are sufficient to meet the requirements of these rules").³ Items 8(a) through (f) of Form 19 provide the trial judge with a list of rights the defendant forgoes by pleading guilty or, as applied to the issue before us here, by stipulating to prior felonies. Additionally, the Arizona Supreme Court has published a Bench Book that provides a checklist created specifically for admissions of prior convictions, designed to assist the court in covering the defendant's constitutional rights. See Civil/Criminal Bench Book, Guilty Plea, 10-7 (2011).

¶13 Although we recognize that Kadri had just completed a jury trial, the colloquy was incomplete because the following constitutional rights were not addressed before the stipulation was accepted by the court:

1. Right to deny the prior convictions and have a trial to determine the issue;
2. Presumption of innocence of the prior convictions;
3. Right to confront and cross examine the witnesses called by the State;
4. Right to present evidence and to subpoena witnesses;
5. Right to testify at the trial on the prior convictions, and the right to remain silent and not testify, and to

³ In *State v. Aranda*, we observed that Form 19 is not a rule *per se*; however, it is advisory and illustrative to ensure that trial courts comply with the rules and comport with constitutional protections of due process. 118 Ariz. 21, 23, 574 P.2d 489, 491 (App. 1978).

not have his refusal to testify be used against him.

¶14 Rules 17.6 and 17.2, Form 19, and cases such as *Morales* and *Carter* require the trial court to advise defendants, such as Kadri, of their constitutional rights before accepting an admission or stipulation to prior convictions. The Civil/Criminal Bench Book provides additional guidance and assistance. Because the Rules and the case law require a more complete colloquy, the court erred here.

Fundamental Error

¶15 Kadri failed to object to any error in the colloquy at trial. Therefore, our review is limited to a showing of fundamental error. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (holding only fundamental error may be raised for the first time on appeal). To prevail, Kadri must prove error, that the error was fundamental, and the error was prejudicial. *Id.* at ¶ 20, 115 P.3d at 607. "A complete failure to afford a Rule 17.6 colloquy is fundamental error because a defendant's waiver of constitutional rights must be voluntary and intelligent." *Morales*, 215 Ariz. at 61, ¶ 10, 157 P.3d at 481. As noted, the trial court did initiate a colloquy but the colloquy was incomplete. The trial court did not specifically advise Kadri of two of the rights emphasized in *Boykin*: the right to confront one's accusers and the privilege against self-

incrimination. Because Kadri was not fully advised of his constitutional rights before he stipulated to the prior felony convictions, we find fundamental error. *Cf. Boykin*, 395 U.S. at 242-43 (establishing constitutional rights that must form part of a colloquy before accepting pleas of guilt); *Morales*, 215 Ariz. at 61, ¶ 10, 157 P.3d at 481 (holding that the complete absence of the required colloquy, when accepting a stipulation to prior convictions, is fundamental error).

Prejudice

¶16 Both parties concede, and we agree, that there is not enough in the record to determine prejudice. *See State v. Osborn*, 220 Ariz. 174, 178, ¶ 10, 204 P.3d 432, 436 (App. 2009) (concluding “remand for a determination of prejudice is the appropriate remedy when the defendant’s prior convictions are not entered into evidence”). A showing of prejudice requires “that the defendant would not have admitted the fact of the prior conviction had the colloquy been given.” *Morales*, 215 Ariz. at 62, ¶ 11, 157 P.3d at 482.

¶17 Unlike a typical *Henderson* prejudice determination, if the defendant demonstrates a Rule 17 violation and the record is insufficient to prove that the defendant was not aware of his constitutional rights during the colloquy, it is appropriate to remand to the trial court for resentencing. *See Carter*, 216 Ariz. at 291-92, ¶¶ 21-22, 165 P.3d at 692-93 (stating the

"general rule" is to allow remand for a resentencing hearing for a Rule 17 violation). *Cf. Morales*, 215 Ariz. at 62, ¶ 13, 157 P.3d at 482 (finding remand appropriate for resentencing unless evidence of prior convictions admitted into evidence at trial and contained within the record); *Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608 (stating defendant bears burden to prove error caused prejudice).

¶18 Here, the record does not demonstrate that Kadri was fully apprised of his constitutional rights and the documents supporting the five convictions were not admitted nor did the court take judicial notice of the Maricopa County felonies. Because we have found fundamental error and relief will be appropriate if Kadri can show prejudice, we remand to the trial court to determine if Kadri would still have stipulated to the convictions even though he did not receive a full colloquy. If Kadri can establish prejudice (i.e., that he would not have stipulated to the convictions if a full colloquy had occurred), he must be resentenced, and the State will have an opportunity to prove the prior convictions.

¶19 Our dissenting colleague points out, quite logically, that we have no reason, on this record, to believe that Kadri did not commit the five prior convictions or that the State could not prove the prior convictions. Nonetheless, we believe that this limited remand is appropriate based on Rule 17 and

pertinent case law.

CONCLUSION

¶120 For the foregoing reasons, we affirm Kadri's convictions but remand for a determination of prejudice with respect to his sentences, as described herein, and for resentencing if necessary.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
MAURICE PORTLEY, Judge

THOMPSON, Judge, concurring in part and dissenting in part.

¶121 Because he did not object to the proceedings in which he admitted the priors below, Kadri was required to allege and show prejudice resulting from the purportedly inadequate colloquy. *Henderson*, 210 Ariz. at 568, ¶ 22, 115 P.3d at 608. This he has not⁴ and cannot do.

¶122 Kadri has previously pled guilty to several prior offenses. He has just had a trial by jury. Having been advised

⁴ The prejudice he must assert is that he would not have stipulated to the prior conviction if the required colloquy had been given. *Morales*, 215 Ariz. at 62, ¶ 11, 157 P.3d at 482. Kadri does assert prejudice in that he got lengthier sentences with the priors.

that, but for his admissions, the state is required to prove his priors, and also having been told of the consequences of his admissions, he has admitted the priors allegations. He knows what a trial is and how it is waived, based on his own courtroom experiences. His lawyer avowed that he had just examined the documents proffered by the state and that they indeed proved the priors. There is literally no chance that Kadri would have put the State to its proof if every word of Rules 17.1 through 17.6 had been recited to him by the trial court. Obviously this is why he did not allege that he would have demanded his trial but for the asserted deficiencies in the colloquy.

¶23 Indeed, the record before us, including the presentence report and criminal history, establishes the priors and shows that the court's findings must be sustained, with or without the admissions.

¶24 Accordingly, I would affirm the sentences.

_____/s/_____
JON W. THOMPSON, Presiding Judge