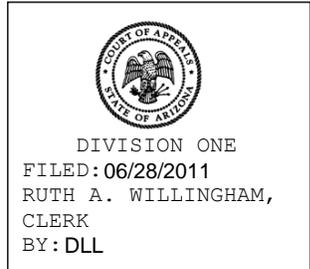


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CR 10-0655
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
QURIAN VERE ROBERSON,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2002-095105

The Honorable Linda A. Akers, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

Joe Saienni, P.C. Phoenix
By Joe Saienni
Attorney for Appellant

B R O W N, Judge

¶1 Qurian Roberson appeals the trial court's sentencing order on remand from the grant of his petition for review of post-conviction relief. For the following reasons, we affirm the order.

BACKGROUND

¶2 In June 2002, Oscar, his wife Yolanda, and their five-year-old son were operating a mobile hotdog stand in Phoenix. Roberson approached the family wearing a ski mask, pointed a rifle at them, and demanded their money. Roberson took \$87.00 from the family and fled. Immediately after the robbery, a police officer arrested Roberson, finding a ski mask and an assault rifle in the area where he was caught, along with \$87.00 in his pants pocket.

¶3 Roberson was charged with armed robbery against Oscar (Count 1); armed robbery against Yolanda (Count 2); aggravated assault against Oscar (Count 3); aggravated assault against Yolanda (Count 4); aggravated assault of a victim under age 15 (Count 5); and misconduct involving weapons as a prohibited possessor (Count 6). A jury convicted Roberson on all counts.

¶4 Roberson had two prior felony convictions and was on probation at the time of these offenses. In March 2003, the trial court sentenced Roberson to concurrent, presumptive sentences of 15.75 years' imprisonment for the armed robbery convictions (Counts 1 and 2), and presumptive sentences of 11.25

years for the aggravated assault convictions involving Oscar and Yolanda (Counts 3 and 4), to be served concurrently with each other, but consecutive to Counts 1 and 2. The court also sentenced Roberson to a presumptive sentence of 15.75 years for aggravated assault of the child (Count 5),¹ to be served concurrently with Counts 3 and 4, but consecutive to Counts 1 and 2, and a presumptive sentence of 10 years for misconduct involving weapons (Count 6), to be served concurrent with Counts 3, 4, and 5, but consecutive to Counts 1 and 2.

¶15 Roberson appealed and his counsel submitted a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). We

¹ At sentencing, the State argued that Roberson should be sentenced for a "dangerous crime against children" pursuant to Arizona Revised Statutes ("A.R.S.") section 13-604.01 (2002), now renumbered as A.R.S. § 13-705 (2010). (Absent any material revision, we cite the current version of the statute.). Because Roberson committed the crime while on probation but did not have prior convictions for dangerous crimes against children, his range of punishment would have been from a 17-year presumptive sentence to a maximum of 24 years under that statute. A.R.S. § 13-705(D). Any sentence under the statute would have also necessarily been consecutive to the other counts. A.R.S. § 13-705(M). However, at sentencing, the court granted Roberson's motion to dismiss the dangerous crimes against children allegations, finding that the statute was inapplicable to the case based on our holding in *State v. Sepahi*, 204 Ariz. 185, 190, ¶ 15, 61 P.3d 479, 484 (App. 2003), *vacated*, 206 Ariz. 321, 78 P.3d 732 (2003). The State argued in the alternative that even though the court found that the offense was not a dangerous crime against children, the court still had the discretion to sentence Count 5 consecutive to the other sentences. The court agreed, and determined that Count 5 would run consecutively to the other counts.

affirmed the convictions and sentences. *State v. Roberson*, 1 CA-CR 03-0560 (Ariz. App. Feb. 3, 2005) (mem. decision).

¶16 In 2006, Roberson filed a *pro se* petition for post-conviction relief, raising claims of ineffective assistance of counsel at trial and sentencing. The trial court rejected the claims and summarily dismissed the petition.

¶17 In 2009, we granted Roberson's petition for review and granted relief on the narrow issue that Roberson's trial counsel was ineffective by failing to argue that consecutive sentences could not be imposed for the armed robbery (Counts 1 and 2), and aggravated assault convictions (Counts 3 and 4) of the same victims, pursuant to A.R.S. § 13-116 (2010). We denied relief on all remaining claims, finding the trial court clearly identified and correctly ruled on these issues. Our decision order stated that Roberson "must still serve a consecutive sentence for the aggravated assault against [the child]." Because we held that the trial court abused its discretion in summarily dismissing the post-conviction relief proceeding, we remanded to the trial court "for proceedings consistent with this decision."

¶18 On remand, the trial court granted the petition for post-conviction relief for ineffective assistance of counsel at the original sentencing. At a subsequent hearing, the court briefly discussed the scope of the hearing with the parties.

Initially, Roberson requested a stay to "revisit" the Court of Appeals because "the Court of Appeals did not really apply the . . . analysis [to Count 5]." The trial court opined that such an appeal would be untimely, but that perhaps Roberson could raise the issue after the new sentencing order.

¶19 Roberson then suggested that the court had authority to change the sentencing on Count 5 from consecutive to concurrent imprisonment, even without a new appeal, and argued factually why that would be appropriate. The prosecutor refused to argue the facts, instead saying, "I'm assuming the [trial court] is going to proceed in accordance with the Court of Appeals mandate and, essentially, just correct the sentences, rather than go back and analyze facts[.]" The prosecutor also argued, "This Court of Appeals decision applies to, I believe, just two of the counts and that is really it . . . It's only been remanded for a very limited purpose and that is to correct those sentences with regard to those counts 3 and 4."

¶10 The court agreed with the prosecutor's understanding of the mandate: "It does not say remand to [the] court for resentencing, which I think, in that case, would allow the Court to open it up to a new sentencing process." The court then corrected the illegal sentences by ordering that the sentences imposed on Counts 1, 2, 3, and 4, be served concurrently. The court reiterated the same sentences it had previously imposed

regarding Counts 5 and 6, ordering the sentences to be served concurrent to each other, but consecutive to the sentences imposed on Counts 1 through 4. This appeal followed. We have jurisdiction to consider Roberson's appeal concerning sentencing pursuant to A.R.S. § 13-4033 (2010).

DISCUSSION

¶11 Roberson's argument appears to be that the case was remanded "for resentencing," and the trial court abused its discretion by only resentencing Counts 1 through 4, and not reconsidering Count 5 and whether it could have been ordered to be served concurrently with the other charges. The State counters that this Court did not remand "for resentencing," but remanded the PCR "for proceedings consistent with this decision." In essence, the State argues that the remand served a limited purpose—to correct the illegal consecutive sentences that had been imposed by the trial court due to a constitutional violation.

¶12 Sentencing on remand falls within the discretion of the trial court. See *State v. Doss*, 192 Ariz. 408, 413 n.2, ¶ 19, 966 P.2d 1012, 1017 n.2 (App. 1998) (finding that on resentencing the court is free to impose any sentence that is legally allowable). Therefore, we review the trial court's sentencing decision for an abuse of discretion. *State v. Arbolida*, 206 Ariz. 306, 307, ¶ 5, 78 P.3d 275, 276 (App. 2003).

An abuse of discretion is "an exercise of discretion which is manifestly unreasonable, exercised on untenable grounds or for untenable reasons." *State v. Wassenaar*, 215 Ariz. 565, 570, ¶ 11, 161 P.3d 608, 613 (App. 2007). Generally, a court abuses its discretion "where the record fails to provide substantial support for its decision or the court commits an error of law in reaching the decision." *Files v. Bernal*, 200 Ariz. 64, 65, ¶ 2, 22 P.3d 57, 58 (App. 2001).

¶13 In the decision order, we specifically limited the remand to the sentences for the armed robberies and aggravated assaults against Oscar and Yolanda (Counts 1 through 4). We denied relief as to Counts 5 and 6. From the language of the decision order, the trial court only had discretion to consider sentences imposed on Counts 1 through 4. See *State v. Hartford*, 145 Ariz. 403, 405, 701 P.2d 1211, 1213 (App. 1985) (holding that an appeal from a remand for resentencing is limited to issues related only to resentencing where the underlying conviction was previously affirmed on appeal). Thus, any issue Roberson is attempting to raise concerning Count 5 is without merit.²

² It was simply superfluous, but not error, for the court to reiterate the sentences for Counts 5 and 6 because those sentences were already complete and valid, and had been affirmed on direct appeal and on Roberson's petition for review. Ariz. R. Crim. P. 26.16(a) ("The judgment of conviction and the sentence thereon are complete and valid as of the time of their

¶14 Within the first four counts, however, the trial court had discretion to impose concurrent or consecutive sentences for the offenses committed against each victim. See *State v. Hampton*, 213 Ariz. 167, 182, ¶ 65, 140 P.3d 950, 965 (2006); *State v. Gordon*, 161 Ariz. 308, 313 n.4, 778 P.2d 1204, 1209 n.4 (1989). For example, the trial court could have ordered the sentences imposed for the armed robbery and aggravated assault of Yolanda (Counts 2 and 4) be served consecutive to the sentences imposed for the armed robbery and aggravated assault of Oscar (Counts 1 and 3). Instead, the trial court corrected the illegal sentences by ordering that the sentences imposed on Counts 1, 2, 3, and 4, be served concurrently, to Roberson's benefit.

¶15 Finally, Roberson's reliance on *Gardiner v. United States*, 114 F.3d 734 (8th Cir. 1997), is misplaced. In that case, a prisoner, who successfully argued that his weapons conviction should be set aside, was granted a resentencing on a related drug trafficking count. *Id.* at 736. The court reasoned that allowing for resentencing of a multi-count sentence was necessary because of the intertwined nature of the sentences, and the particularities of the federal sentencing guidelines. *Id.* Here, none of Roberson's convictions were vacated, and

oral pronouncement in open court."); *State v. Johnson*, 108 Ariz. 116, 118, 493 P.2d 498, 500 (1972) (judgment complete after oral pronouncement and entry in minutes).

there is no similar concern with regard to the interdependent nature of the sentences or inconsistency with application of sentencing guidelines.

¶16 In sum, the trial court did not abuse its discretion in determining that Roberson was not entitled to be resentenced on all counts. See *Anderson v. Contes*, 212 Ariz. 122, 126, ¶ 14, 128 P.3d 239, 243 (App. 2006) (concluding that the trial court is at liberty to hold such proceedings as it deems necessary to comply with the direction in the appellate court's memorandum decision).

CONCLUSION

¶17 For the foregoing reasons, we affirm the trial court's sentencing order.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PATRICIA A. OROZCO, Presiding Judge

/s/

DONN KESSLER, Judge