IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

USEF LATRICE SIMMONS II,
Appellant.

No. 2 CA-CR 2014-0193
Filed November 23, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Cochise County
No. CR201300111
The Honorable James L. Conlogue, Judge

AFFIRMED IN PART; VACATED IN PART;
REMANDED WITH INSTRUCTIONS

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Vásquez authored the opinion of the Court, in which Judge Howard and Judge Kelly[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, Usef Simmons was convicted of eleven drug-related offenses. The trial court sentenced him to a combination of consecutive and concurrent, presumptive prison terms. On appeal, he contends that we must vacate his sentences and remand for resentencing because there is a discrepancy between the oral pronouncement of sentence and the sentencing minute entry. In addition, he asserts that his total sentence is excessive. For the following reasons and those expressed in a separate opinion, we vacate five of Simmons's convictions and sentences, remand for clarification of his remaining sentences, and otherwise affirm.[2]

Sentencing Discrepancy

¶2 Simmons argues we should vacate his sentences and remand for resentencing because there is a discrepancy between the trial court's oral pronouncement of sentence and the sentencing minute entry. In response, the state asserts we need not remand for resentencing because the court's intent was clear based on the

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[1]The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

[2]In a separate opinion filed simultaneously with this memorandum decision, we address Simmons's challenge to his convictions for violating A.R.S. § 13-3417(A)—an issue that merits publication. *See* Ariz. R. Sup. Ct. 111(b), (h); Ariz. R. Crim. P. 31.26. Because the facts underlying the offenses are not directly relevant to the issues addressed in this memorandum decision, we do not repeat them.

record. In his reply brief, Simmons states that remand is not necessary in light of the state's concession.

¶3 "Upon finding a discrepancy between the oral pronouncement of sentence and a minute entry, a reviewing court must try to ascertain the trial court's intent by reference to the record." *State v. Stevens,* 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992). Generally, "the '[o]ral pronouncement in open court controls over the minute entry,'" and this court "can order the minute entry corrected if the record clearly identifies the intended sentence." *State v. Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d 974, 982 (2013), *quoting State v. Whitney*, 159 Ariz. 476, 487, 768 P.2d 638, 649 (1989) (alteration in *Ovante*). However, if the discrepancy "'cannot be resolved by reference to the record, a remand for clarification of sentence is appropriate.'" *State v. Provenzino*, 221 Ariz. 364, ¶ 25, 212 P.3d 56, 62 (App. 2009), *quoting State v. Bowles,* 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992).

¶4 Here, the trial court imposed the presumptive term of imprisonment for each count. At sentencing, the court referred not only to the counts as they were listed in the indictment but also to the sequential order of the counts against Simmons, omitting those counts involving his codefendants. The sentences were as follows:

Indictment count one/Simmons's count one: 15.75 years

Indictment count two/Simmons's count two: 15.75 years

Indictment count three/Simmons's count three: 10 years

Indictment count four/Simmons's count four: 10 years

Indictment count six/Simmons's count five: 15.75 years

Indictment count eight/Simmons's count six: 10 years

Indictment count nine/Simmons's count seven: 10 years

Indictment count ten/Simmons's count eight: 3.75 years

Indictment count twelve/Simmons's count nine: 10 years

Indictment count thirteen/Simmons's count ten: 3.75 years

Indictment count fourteen/Simmons's count eleven: 15.75 years

¶5 The trial court ordered the sentences for counts one, two, and three to run concurrently; four, six, and eight to run concurrently; and nine, ten, and twelve to run concurrently.[3] It also directed that the three groupings would be served consecutively to each other and that the sentence for count thirteen would run consecutively to all the rest. The court orally stated that the sentence for count fourteen was to run concurrently "with the sentences in Count Seven, Eight, and Nine," which we assume refers to indictment counts nine, ten, and twelve. The minute entry, however, indicates that the sentence for count fourteen "shall run concurrently with counts 4, 6 and 8."

¶6 If the sentence for count fourteen runs concurrently with the sentences for counts nine, ten, and twelve, Simmons's total sentence is fifty-one years' imprisonment. But the trial court orally stated that Simmons's total sentence is "45-and-one-quarter years." And applying the minute entry's notation that the sentence for count fourteen shall run concurrently with the sentences for counts four, six, and eight, Simmons's total sentence is in fact 45.25 years. Based on this, the state insists the court's intent was clear and the minute entry is accurate. However, we are not so convinced of the court's intent. *See State v. Solis*, 236 Ariz. 242, ¶ 23, 338 P.3d 982, 989 (App. 2014) (appellate court not bound by party's concession).

¶7 The trial court's statement that the total term of imprisonment was 45.25 years was made in passing at the end of the hearing. Thus, we hesitate to treat it as a clear indication of the court's intent. *See Stevens,* 173 Ariz. at 496, 844 P.2d at 663. And, this oral statement by the court is in direct conflict with its other oral statement—which it made three times—that the sentence for count fourteen shall run concurrently with the sentences for counts nine, ten, and twelve. *See Ovante*, 231 Ariz. 180, ¶ 38, 291 P.3d at 982.

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[3]For ease of our discussion, we refer to the indictment counts unless otherwise noted.

¶8 Moreover, the trial court commented that it had considered each of the three groupings as "essentially being an incident." And, it further explained, "[Count fourteen] is grouped with seven, eight, and nine, just because that's mathematical. I'd like to group it with all the first nine, but that wouldn't make sense." However, we cannot discern what the court thought would be "mathematical"—to have each of the three groupings total 15.75 years or to include the sentence for count fourteen in a group that already had a 15.75-year sentence. In addition, in light of our separate opinion vacating five of Simmons's convictions, the trial court's intent with respect to the sentencing groupings becomes even more unclear. *Cf. State v. Pena*, 209 Ariz. 503, ¶ 23, 104 P.3d 873, 879 (App. 2005) (reversal of single aggravating factor may cause sentencing calculus to change; sentencing is within trial court's discretion). Because we cannot determine from the record the court's intent with regard to count fourteen, we remand the case for clarification. *See Provenzino*, 221 Ariz. 364, ¶ 25, 212 P.3d at 62.

Excessive Sentence

¶9 Simmons also argues that the total sentence imposed is "excessive given Arizona's statutory scheme for methamphetamine offenses and the facts of this case." Because we are remanding the case for the trial court to clarify its intent with respect to sentencing, it would be premature for us to address whether Simmons's total sentence is excessive. *Cf. State v. McCurdy*, 216 Ariz. 567, ¶ 20, 169 P.3d 931, 939 (App. 2007) (declining to address propriety of aggravating factor that might not be found at resentencing on remand required by separate issue).

Disposition

¶10 For the foregoing reasons and those discussed in our separate opinion, we vacate Simmons's convictions and sentences for counts three, four, eight, nine, and twelve; remand for clarification of his sentences on the remaining counts; and otherwise affirm.