

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

---

THE STATE OF ARIZONA,  
*Appellant,*

*v.*

TERRELL ISAAH HOLMES,  
*Appellee.*

No. 2 CA-CR 2019-0202  
Filed December 3, 2020

---

Appeal from the Superior Court in Pima County  
No. CR20185547001  
The Honorable Deborah Bernini, Judge

**REVERSED**

---

COUNSEL

Barbara LaWall, Pima County Attorney  
By Jacob Lines, Deputy County Attorney, Tucson  
*Counsel for Appellant*

Law Offices of Cornelia Wallis Honchar P.C., Tucson  
By Cornelia Wallis Honchar  
*Counsel for Appellee*

**OPINION**

Presiding Judge Staring authored the opinion of the Court, in which  
Chief Judge Vásquez and Judge Brearcliffe concurred.

---

STARING, Presiding Judge:

STATE v. HOLMES  
Opinion of the Court

¶1 The state appeals from the dismissal of its indictment charging Terrell Holmes with weapons misconduct. For the reasons that follow, we reverse.

**Factual and Procedural Background**

¶2 In September 2018, Holmes pled guilty in CR20174852 to solicitation to commit burglary in the third degree, described in the plea agreement as “a class six undesignated offense.” The plea agreement stated that an undesignated offense “shall be treated as a felony for all purposes unless and until the Court enters an order designating the offense a misdemeanor.”<sup>1</sup> The trial court accepted Holmes’s guilty plea at the hearing and set entry of judgment and sentencing. Holmes thereafter failed to appear for sentencing on multiple occasions.

¶3 In December 2018, Holmes was charged with weapons misconduct—possession of a deadly weapon by a prohibited possessor—under A.R.S. § 13-3102(A)(4) based on the state’s allegation that he had knowingly possessed a firearm on November 29, 2018, after he pled guilty in CR20174852. Holmes filed a motion to dismiss pursuant to Rule 16.4(b), Ariz. R. Crim. P., arguing that because he had been “denied his due process right to notice” that he was a convicted felon and, thus, a prohibited possessor, “his actions [did] not lawfully constitute criminal conduct” and the indictment was insufficient as a matter of law. He also claimed he had received ineffective assistance of counsel in his previous case.

¶4 The trial court granted Holmes’s motion, concluding he had been “deprived of the notice required by the due process clause in both the United States and Arizona Constitution[s] that he was a convicted felon at the time he entered into his plea to a class six open-ended offense.” The state timely appealed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4032(1).

---

<sup>1</sup>The plea agreement also provided: “The defendant agrees that the offense may be permanently designated a felony at any time and shall not be designated a misdemeanor unless and until Defendant has successfully completed 12 months on probation.” Further, both Holmes and his attorney acknowledged in the agreement that Holmes had been advised of and understood the terms and implications of accepting the plea.

STATE v. HOLMES  
Opinion of the Court

**Discussion**

¶5 The state argues the trial court erred in dismissing Holmes’s indictment because it was legally sufficient under Rule 16.4(b), which “does not allow pretrial dismissal based on the facts of the case.” Further, the state asserts, “even if the court could look past legal sufficiency . . . and consider Holmes’s factual arguments,” Holmes had notice that he was a prohibited possessor and dismissal was improper. We review a court’s ruling on a motion to dismiss based on insufficiency of the indictment for an abuse of discretion. *State v. Wood*, 198 Ariz. 275, ¶ 6 (App. 2000). Additionally, “we review questions of statutory interpretation and constitutional law de novo.” *State v. Ramsey*, 211 Ariz. 529, ¶ 5 (App. 2005).

¶6 Rule 16.4(b) provides that “[o]n a defendant’s motion, the court must order a prosecution’s dismissal if it finds that the indictment, information, or complaint is insufficient as a matter of law.” An indictment is sufficient as a matter of law “if it informs the defendant of the essential elements of the charges; is sufficiently definite so that the defendant can prepare to meet the charges; and protects the defendant from subsequent prosecution for the same offense.” *State v. Rickard-Hughes*, 182 Ariz. 273, 275 (App. 1995) (discussing legal sufficiency of an indictment under former Rule 16.6(b), Ariz. R. Crim. P., now Rule 16.4(b)).

¶7 The state contends Holmes’s indictment for prohibited possession was legally sufficient because it provided him with notice of the crime with which he was charged, allowed him to prepare to defend against that charge, and protected him from later prosecution for the same conduct. Further, the state asserts, Holmes’s argument for dismissal below was based on facts rather than law, and because factual defenses to a charge are irrelevant to the issue of legal sufficiency of the indictment, *State v. Kerr*, 142 Ariz. 426, 431 (App. 1984), dismissal was improper. Specifically, the state argues that whether Holmes had been convicted of a crime and whether he had notice and knowledge that he was a prohibited possessor are questions of fact “not cognizable in a motion to dismiss.” The state also argues that although an indictment may be legally insufficient if a defendant can admit to all of the allegations therein and still not have committed a crime, *Mejak v. Granville*, 212 Ariz. 555, ¶ 4 (2006), “[i]f Holmes admitted to the allegations in the indictment, it would be clear that a crime was committed.”

¶8 Holmes counters that the indictment was defective because “ignorance of a ‘legal fact’ can negate an element of the offense,” and the

STATE v. HOLMES  
Opinion of the Court

state failed to allege he “knew of an alleged felony status or had any knowledge that he was an alleged prohibited possessor.” Although Holmes conceded below that “knowledge he was a prohibited possessor is not an element of the offense,” he contends on appeal that, consistent with *Rehaif v. United States*, \_\_\_ U.S. \_\_\_, 139 S. Ct. 2191 (2019), which interprets 18 U.S.C. § 922(g), the state is now required to prove a defendant knew he was a convicted felon and prohibited possessor at the time of the offense. And, relying on *State v. Barnett*, 209 Ariz. 352, ¶ 18 (App. 2004), he asserts “a factual impossibility existed” in that he “was not a convicted felon” and “had no knowledge that he was prohibited from possessing a weapon.” He further claims the language of A.R.S. § 13-3101(A)(7)(b) supports his position in that, because his right to possess a weapon “had never been rescinded,” he could not have had that right “restored.” Thus, he argues, the indictment was not dismissed based on facts but rather “based on the lack of probable cause to support each of the elements of the indictment, making the indictment legally insufficient.”

¶9 Section 13-3102(A)(4), A.R.S., provides that a person commits weapons misconduct by “[p]ossessing a deadly weapon or prohibited weapon if such person is a prohibited possessor.” A “prohibited possessor” includes any person “[w]ho has been convicted . . . of a felony . . . and whose civil right to possess or carry a gun or firearm has not been restored.”<sup>2</sup> 2016 Ariz. Sess. Laws, ch. 297, § 1. Our supreme court has concluded the “popular meaning of the word” “conviction” is that a person has been convicted “after a determination of guilt is made” even when no sentence or formal judgment has been imposed. *State v. Green*, 174 Ariz. 586, 587 (1993). Further, the court has held that “[o]ne is convicted when there has been a determination of guilt by verdict, finding, or the acceptance of a plea.” *State v. Thompson*, 200 Ariz. 439, ¶ 7 (2001). “Sentencing is not required.” *Id.*

¶10 A felony is defined as “an offense for which a sentence to a term of imprisonment in the custody of the state department of corrections is authorized by any law of this state.” A.R.S. § 13-105(18). Under A.R.S. § 13-604(A), a class six undesignated offense “shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor.” And, the “contingent possibility

---

<sup>2</sup>We cite to the version of § 13-3101(A)(7)(b) in effect at the time Holmes committed the weapons-misconduct offense. See 2016 Ariz. Sess. Laws, ch. 297, § 1.

STATE v. HOLMES  
Opinion of the Court

that the offense may ultimately be designated a misdemeanor at some future date does not detract from the reality that the person has been convicted of a class 6 felony within the meaning of § [13-604(A)], and that it should be treated as a felony for all purposes unless and until it is designated otherwise.” *State v. Arana*, 173 Ariz. 370, 371 (1992) (defendant convicted of a class six undesignated offense required to pay felony sanctions despite possibility offense would eventually be designated a misdemeanor).

¶11 The indictment in this case charged Holmes with possession of a deadly weapon by a prohibited possessor, a class four felony, stating: “On or about the 29th day of November, 2018, Terrell Isaiah Holmes, knowingly possessed a deadly weapon, to wit: firearm, while having been convicted of a felony, in violation of A.R.S. § 13-3102(A)(4).” Thus, it informed him of the elements of the charge against him, allowed him to prepare to defend against the charge, and protected him from later prosecution for the same offense. *See Rickard-Hughes*, 182 Ariz. at 275. And, if Holmes were to admit to all of the allegations in the indictment – that he knowingly possessed a firearm after previously having been convicted of a felony—he would be guilty of possession of a deadly weapon by a prohibited possessor. *See Mejak*, 212 Ariz. 555, ¶ 4.

¶12 Holmes’s conviction in CR20174852 occurred when the trial court accepted his plea in September 2018. *See Thompson*, 200 Ariz. 439, ¶ 7; *Green*, 174 Ariz. at 587. Indeed, during argument on Holmes’s motion to dismiss, the court stated: “I accepted the plea, found a factual basis and found that he knowingly, intelligently and voluntarily entered into it . . . .” Consequently, before he is alleged to have committed weapons misconduct, Holmes had been convicted of solicitation to commit burglary in the third degree. And, as noted in the plea agreement, that offense was to be “treated as a felony for all purposes unless and until” the court designated it a misdemeanor.

¶13 To the extent Holmes relies on *Barnett*, 209 Ariz. 352, to support his argument that he could not have committed weapons misconduct because he was not a convicted felon and had not had his right to possess a weapon rescinded, that case is distinguishable. *Barnett* pled guilty to two felony drug offenses and was released pending sentencing. *See id.* ¶ 2. Before he was sentenced, *Barnett* was arrested for possessing a deadly weapon and was charged with weapons misconduct under

STATE v. HOLMES  
Opinion of the Court

§ 13-3101(A)(7)(b) and (d)<sup>3</sup> based on his previous plea to the drug offenses. *Id.* ¶¶ 3-5. The trial court dismissed the charges and this court affirmed, concluding the prohibited-possession charge under § 13-3101(A)(7)(d) was properly dismissed in part because Barnett had not yet been convicted of the drug offenses at the time of his arrest on the weapons charge. *Id.* ¶¶ 6, 8, 12-19. There, however, because the state did not argue Barnett had been convicted at the time he entered his guilty plea in the previous case, the court “assume[d] that, [at the time] he was arrested . . . Barnett had not yet been convicted” for the drug offenses. *Id.* ¶ 8. And, although the record did not reflect whether the court had accepted Barnett’s guilty plea on the earlier charges, it did reflect the state’s concession that no judgment of guilt had yet been entered on the drug charges at the time of his arrest for weapons misconduct. *Id.* n.3. Here, because the court had accepted Holmes’s plea when he pled guilty in CR20174852 and before he committed weapons misconduct, this case is fundamentally different from *Barnett*.

¶14 As to Holmes’s claim that it was factually impossible for him to have committed weapons misconduct because he did not know he was a convicted felon, and knowledge of his status is required following the Supreme Court’s decision in *Rehaif*, we disagree. First, *Rehaif* is not dispositive in this case. As stated in *Mata v. United States*, 969 F.3d 91, 93 (2d Cir. 2020):

The Supreme Court’s *Rehaif* decision resolved only a question of statutory interpretation and did not announce a rule of constitutional law (much less a new one, or one . . . that was previously unavailable). *Rehaif* clarified the mens rea applicable to a violation of 18 U.S.C. § 922(g), holding that the government must prove that a defendant knew both that he possessed a firearm and that he belonged to the relevant class of persons barred from possessing a firearm. In reaching that decision, the Supreme Court applied a standard “interpretive maxim” to discern “congressional intent” about the meaning of the word “knowingly” as it appears

---

<sup>3</sup>We cite the statute in effect at the time of Holmes’s offense but note that at the time of Barnett’s crime, the applicable provisions were numbered § 13-3101(A)(6)(b) and (d). See 2002 Ariz. Sess. Laws, ch. 181, § 4.

STATE v. HOLMES  
Opinion of the Court

in the text of § 922(g). In other words, the Supreme Court was simply construing a statute.

(Citations omitted.) Thus, this is an issue of statutory interpretation rather than one of constitutional law, and “we are not bound by the interpretation placed by the United States Supreme Court on the federal statute.” *E. Vanguard Forex, Ltd. v. Ariz. Corp. Comm’n*, 206 Ariz. 399, ¶ 36 (App. 2003) (Arizona courts not bound by Supreme Court’s interpretation of analogous federal statutes).<sup>4</sup>

¶15 Further, the facts in *Rehaif* are distinguishable from those in the instant case. There, Rehaif attended a university in the United States on a nonimmigrant student visa but was dismissed and informed his “‘immigration status’ would be terminated unless he transferred to a different university or left the country,” but he did neither. 139 S. Ct. at 2194. Rehaif subsequently went shooting at a firing range and was prosecuted and convicted for possessing a firearm while unlawfully present in the United States. *Id.* On review, the Supreme Court concluded that in prosecutions under § 922(g) in combination with 18 U.S.C. § 924(a)(2), which provides penalties for those who “knowingly” violate § 922(g), the government is required to prove “both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm.”<sup>5</sup> *Id.* at 2200. The Court expressed concern about situations in which “an alien who was brought into the United States unlawfully as a small child [is] therefore unaware of his unlawful status” or “a person who was convicted of a prior crime but sentenced only to probation . . . does not know that the crime is ‘punishable by imprisonment for a term exceeding one year.’” *Id.* at 2197-98

---

<sup>4</sup>Moreover, as Justice Alito noted in his dissent, “all the Federal Courts of Appeals and all the state courts of last resort to have interpreted statutes prohibiting certain classes of persons from possessing firearms agreed that knowledge of status was not required.” *Rehaif*, 139 S. Ct. at 2210 (Alito, J., dissenting).

<sup>5</sup>The Court noted it “express[ed] no view, however, about what precisely the Government must prove to establish a defendant’s knowledge of status in respect to other § 922(g) provisions not at issue here.” *Rehaif*, 139 S. Ct. at 2200. Relevant here, these provisions include possession of a firearm by someone “who has been convicted in any court of . . . a crime punishable by imprisonment for a term exceeding one year.” § 922(g)(1).

STATE v. HOLMES  
Opinion of the Court

(emphasis added in *Rehaif*) (quoting § 922(g)(1)). Here, however, Holmes signed an agreement indicating he was pleading guilty to solicitation to commit burglary, a class six undesignated offense that would be “treated as a felony for all purposes” until otherwise designated. Thus, his status as a convicted felon was clear, which distinguishes his case from one in which a defendant could plausibly have been unaware of his restricted status.

¶16 Because we decline to apply *Rehaif* and distinguish it on its facts, § 13-3102(A)(4) still requires only that a defendant knowingly possessed the firearm, not that he knew he was a prohibited possessor. See *State v. Harmon*, 25 Ariz. App. 137, 139 (1975) (fact of possession of gun constitutes the crime and defendant “need not have known he acted illegally”); *State v. Tyler*, 149 Ariz. 312, 316 (App. 1986) (state must prove only knowing possession, not that defendant possessed weapon with criminal intent). Moreover, in general, “[i]gnorance or mistake as to a matter of law does not relieve a person of criminal responsibility.” A.R.S. § 13-204(B). Holmes’s claim that he did not know he had been convicted when he entered the plea agreement is based on a mistake of law and is not a defense to the crime of weapons misconduct. See *Harmon*, 25 Ariz. App. at 139 (that defendant thought his full status as citizen had been restored was mistake of law, and accordingly, not cognizable defense to crime of weapons misconduct); *State v. Olvera*, 191 Ariz. 75, 77 (App. 1997) (that defendant believed he could possess firearm based on statute in effect at time of offense was mistake of law and therefore not a defense).

¶17 Although the indictment provided Holmes with sufficient notice of the charge against him in the instant case, the trial court’s ruling on his motion to dismiss turned on his due process right to notice that he was a convicted felon, and therefore a prohibited possessor, at the time he entered his guilty plea in CR20174852. Specifically, the court stated that although Holmes had been “deemed ‘convicted’ once he entered into the plea agreement,” it was unclear whether he had been convicted of a felony or a misdemeanor. As addressed above, Holmes had been convicted of a felony, and we turn now to the question of whether Holmes had sufficient notice of his status as a convicted felon as required by due process.

¶18 In its ruling, the trial court first noted that the colloquy in CR20174852 had informed Holmes of the crime to which he was pleading guilty, the potential sentence and financial consequences, “and the trial and appellate rights being waived by pleading guilty.” But the court further noted that Holmes had not been notified “that he would be deemed a convicted felon the moment the plea was accepted by the Court and before



STATE v. HOLMES  
Opinion of the Court

judgment was entered at sentencing, and that his constitutional rights to vote, serve on a jury, and possess a firearm were vitiated with the plea.” Further, the court stated, the plea agreement did not contain such a notification, and counsel had not advised Holmes that his right to possess a firearm would be suspended at the time he pled guilty.

¶19 Next, the trial court examined the language and legislative history of § 13-604(A), which provides that an undesignated offense “shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor.” It concluded this language presumes a defendant has been sentenced and “is at best ambiguous as to its applicability to defendants who have not yet been sentenced.” Further, the court stated, “[n]owhere else in the criminal code is the treatment of class six undesignated offenses post-plea agreement but pre-sentence addressed.” The court cited *State v. Benson*, 176 Ariz. 281 (App. 1993), and *State v. Smith*, 166 Ariz. 118 (App. 1990) – which involved post-sentencing designation of offenses left undesignated throughout the defendants’ probationary terms—for the proposition that due process requires a defendant to have actual notice and a hearing before an offense is designated a felony. The court ultimately concluded:

If our appellate courts have found that the statutory language of A.R.S. [§] 13-604(A) cedes to a defendant’s due process rights post-sentencing, then it defies logic that a defendant who entered into a written plea agreement that appeared to contain all the rights being waived but omitted the critical ramification of losing his civil rights, who was not correctly advised by counsel [or the Court] . . . and who pled to a crime that was described as an “offense” and not a felony, should now be subject to criminal prosecution in light of the multiple failures of [the] legal system in providing notice and handling his case.

¶20 On appeal, the state contends Holmes had actual notice of his prohibited-possessor status based on the plea agreement, which explained the “undesignated offense” would “be treated as a felony for all purposes unless and until the Court enters an order designating the offense a misdemeanor.” Further, the state argues, Holmes had constructive notice that he had pled guilty to a felony based on § 13-604(A). The state also

STATE v. HOLMES  
Opinion of the Court

contends the trial court's reliance on *Smith* and *Benson* in support of its conclusion that Holmes needed to be advised of the loss of his civil rights in CR20174852 was "misplaced" because both cases "dealt with changing the status quo – designating an undesignated offense as a felony – not with simply enforcing the status quo – that an undesignated offense is treated as a felony unless and until it is designated a misdemeanor."<sup>6</sup>

¶21 Holmes counters the trial court properly dismissed the indictment because he "could not reasonably have known his status as a convicted felon and prohibited possessor occurred when [the court] accepted his guilty plea." Further, he claims, because the court did not inform him he was a prohibited possessor, "his actions did not lawfully constitute criminal conduct." Holmes also appears to suggest that because he was on pretrial release prior to the change-of-plea hearing in CR20174852, his conditions of release did not prohibit him from possessing a firearm, and the court affirmed those conditions post-plea, he was not a prohibited possessor.

¶22 A defendant cannot be convicted of a crime "consistently with due process" without notice. *Lambert v. California*, 355 U.S. 225, 228-30 (1957); see *Jackson v. Virginia*, 443 U.S. 307, 314 (1979). Contrary to the trial court's conclusion, however, Holmes had actual and constructive notice that he had been convicted of a felony in CR20174852 and, therefore, that he was a prohibited possessor. As noted, case law provides that a conviction occurs "when there has been a determination of guilt by . . . the

---

<sup>6</sup>Below, Holmes argued he received ineffective assistance of counsel based on his attorney's "failure to inform him of the direct consequence of the immediate relinquishment of his right to possess a firearm upon the trial [c]ourt's acceptance of his guilty plea." On appeal, the state contends Holmes's argument was not properly before the court because "a defendant may bring ineffective assistance of counsel claims only in a Rule 32 post-conviction proceeding – not before trial, at trial, or on direct review." *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, ¶ 20 (2007). Based on our disposition, and because the court does not appear to have relied on these claims in dismissing the indictment, we do not further address this argument. Moreover, even if Holmes were successful as to his ineffective-assistance claim, it would not change the result in this case. See *State v. Mangum*, 214 Ariz. 165, ¶¶ 4-5, 16 (App. 2007) (prohibited-possessor charge not subject to dismissal on ground conviction giving rise to prohibited-possessor status vacated).

STATE v. HOLMES  
Opinion of the Court

acceptance of a plea,” and “[s]entencing is not required.” *Thompson*, 200 Ariz. 439, ¶ 7. And, not only did the plea agreement in his previous case notify Holmes the class six undesignated offense would be treated as a felony for all purposes unless otherwise designated, under § 13-604(A), such an offense “shall be treated as a felony for all purposes until such time as the court may actually enter an order designating the offense a misdemeanor.” As previously noted, § 13-3101(A)(7)(b) provides that a “prohibited possessor” is any person “[w]ho has been convicted . . . of a felony . . . and whose civil right to possess or carry a gun or firearm has not been restored.” 2016 Ariz. Sess. Laws, ch. 297, § 1. Thus, despite the fact that neither the trial court nor defense counsel informed Holmes of his convicted-felon and prohibited-possessor status, Holmes had notice of both based on the language of the plea agreement and applicable law.<sup>7</sup> Further, the cases the court cited in its ruling are distinguishable. Both *Benson* and *Smith* involved the court’s designation of a previously undesignated offense after deferring designation until after the defendants had completed probation. *Benson*, 176 Ariz. at 282-83; *Smith*, 166 Ariz. at 118-19. The court in both cases concluded that notice and an opportunity to be heard are required before a court may designate a previously undesignated offense a felony, and that the language of § 13-604(A), previously § 13-702(H), did not satisfy that due process requirement. *Benson*, 176 Ariz. at 283-84; *Smith*, 166 Ariz. at 119-20.

¶23 However, the instant case does not involve permanent designation of Holmes’s conviction in CR20174852 as a felony. Instead, it involves treating the undesignated offense as a felony “for all purposes” as required by § 13-604(A) because the court had not yet designated the offense a misdemeanor. Indeed, *Benson* provides: “As long as the offense remains undesignated by a court order it is treated as a felony for all purposes.” 176 Ariz. at 285. Although “[e]ither the defendant or the state may request a hearing on the question of whether the court should designate the offense a misdemeanor” and “the defendant has the right to notice and the right to be present at such a hearing,” *id.*, the ultimate designation of Holmes’s class six undesignated offense was not at issue. And, holding a hearing to inform him the offense would be *treated* as a

---

<sup>7</sup>The state did not include in the record on appeal the transcript from the change-of-plea hearing in CR20174852. Therefore, we assume the transcript supports the trial court’s conclusions concerning its actions at the plea hearing. See *State v. Mendoza*, 181 Ariz. 472, 474 (App. 1995).

STATE v. HOLMES  
Opinion of the Court

felony until further notice was unnecessary; Holmes had notice based on the language of the plea agreement that it would be.<sup>8</sup>

**Disposition**

¶24 For the foregoing reasons, we reverse the trial court's order dismissing Holmes's indictment.

---

<sup>8</sup>Our disposition of this matter does not require us to address the irony that Holmes's claim he was deprived of notice that he was a convicted felon and a prohibited possessor stems at least in part from his repeated failure to appear at scheduled sentencing hearings.