

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

LEONARD MICHAEL DIGENO,
Petitioner.

No. 2 CA-CR 2020-0192-PR
Filed June 29, 2021

Petition for Review from the Superior Court in Gila County
Nos. S0400CR201800521 and S0400CR201900391
The Honorable Michael Latham, Judge

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Bradley D. Beauchamp, Gila County Attorney
By Diana L. Kanon, Deputy County Attorney, Globe
Counsel for Respondent

Harriette P. Levitt, Tucson
Counsel for Petitioner

OPINION

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

E P P I C H, Presiding Judge:

STATE v. DIGENO
Opinion of the Court

¶1 Leonard Digeno seeks review of the trial court’s order summarily dismissing his petitions for post-conviction relief filed pursuant to Rule 33, Ariz. R. Crim. P. We will not disturb that order unless the court abused its discretion. *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015). Digeno has not met his burden of establishing such abuse here.

Factual and Procedural Background

¶2 In October 1994, the presiding judge of Gila County Superior Court signed Administrative Order No. 94-ELD16. The order provides: “A Cost of Prosecution Fund has been established wherein persons who have admitted or been found guilty of violating the laws in Gila County, may be ordered to contribute to the cost incurred by both the County Attorney’s Office and the Superior Court in resolving these matters.” It then lists the potential costs to the county attorney and to the court. And it orders that “upon receipt of monies for Costs of Prosecution, the Clerk of the Superior Court” must transfer sixty percent to the County Attorney’s Cost of Prosecution Fund and forty percent to the superior court, with thirty percent going to Superior Court Cost of Prosecution Fund and ten percent going to the Clerk of the Court Cost of Prosecution Fund. It also identifies the account numbers of each fund.

¶3 Almost twenty-five years later, pursuant to a plea agreement in CR201800521, Digeno was convicted of attempted aggravated assault. The plea agreement provided that, subject to the trial court’s approval, the parties stipulated Digeno “must pay \$750 to the Cost of Prosecution Fund.” The court suspended the imposition of sentence, placed Digeno on thirty-six months’ probation, and ordered Digeno to pay the “Cost of Prosecution” assessment consistent with the plea agreement.

¶4 Less than a year later, pursuant to a plea agreement in CR201900391, Digeno was convicted of possession of drug paraphernalia. The plea agreement again provided that subject to the trial court’s approval, the parties stipulated Digeno “must pay \$750 to the Cost of Prosecution Fund.” Based on the plea agreement in CR201900391, the court also found Digeno had violated the conditions of his probation in CR201800521. For the two cases, the court sentenced Digeno to concurrent prison terms, the longer of which was 2.5 years. In CR201900391, the court additionally ordered that Digeno pay the “Cost of Prosecution” assessment consistent with the plea agreement.

¶5 Digeno sought post-conviction relief in both cases, and the trial court appointed counsel. In his petition in CR201900391, Digeno

STATE v. DIGENO
Opinion of the Court

argued that “[t]he imposition of a cost of prosecution fee is illegal, and has been since 2009.” He relied on *State v. Payne*, 223 Ariz. 555 (App. 2009), and asked the court to vacate the \$750 “prosecution fee.” Digeno further requested that the court “direct the Gila County Attorney’s Office to delete from its plea agreements any provision requiring payment of a prosecution fee.” In his petition in CR201800521, Digeno made the same “prosecution fee” argument, and he also raised a claim of ineffective assistance of counsel.¹

¶6 In response to Digeno’s “prosecution fee” argument, the state asserted that *Payne* was inapplicable because it “dealt solely with a County’s ability to impose a cost of prosecution through a county ordinance.” The state pointed out that “[t]he cost of prosecution in these cases . . . stems from an administrative order issued by the Gila County Superior Court.” The state further reasoned that the cost-of-prosecution assessment was “a voluntary undertaking made by [Digeno in] resolving his case through a plea agreement,” was only imposed in practice “when it ha[d] been voluntarily agreed to by the Defendant as part of a negotiated plea agreement,” and was “not illegal.”

¶7 The trial court summarily dismissed Digeno’s petitions.² It determined that “the \$750 prosecution fee imposed as part of the negotiated plea agreement does not violate the holding” in *Payne*. With regard to CR201800521, the court also concluded that Digeno had failed to establish that his counsel’s conduct “fell below prevailing norms” for his claim of ineffective assistance.³ This consolidated petition for review followed.

¹ Digeno also argued that his plea was not made knowingly, intelligently, and voluntarily. However, he later withdrew that argument.

² The Gila County Superior Court presiding judge determined there was “a conflict of interest for all Judges in Gila County” and therefore reassigned the cases to an Apache County Superior Court judge.

³ Digeno does not reiterate his claim of ineffective assistance on review. Accordingly, we do not address it. *See* Ariz. R. Crim. P. 32.16(c)(4) (“A party’s failure to raise any issue that could be raised in the petition for review or cross-petition for review constitutes a waiver of appellate review of that issue.”).

STATE v. DIGENO
Opinion of the Court

Discussion

¶8 As he did below, Digeno relies on *Payne* to argue that the “prosecution fee” imposed in both of his cases was illegal. He recognizes that trial courts are “authorized to collect fees and assessments pursuant to statute,” but he argues they do not “have the authority to issue an administrative order for the creation[,] collection and distribution of a prosecution fee.” And because there is “no constitutional or statutory authority” for the “prosecution fee,” Digeno reasons that it is illegal, regardless of his agreement to it as part of his plea.

¶9 As a preliminary matter, we agree with Digeno that an illegal sentence – even one stipulated to in a plea agreement – must be corrected if timely raised. See *State v. Robertson*, 249 Ariz. 256, ¶¶ 22–24 (2020). An unauthorized prosecution fee constitutes an illegal sentence. *Payne*, 223 Ariz. 555, ¶ 14. And a claim that a sentence is not authorized by law may be raised in a post-conviction proceeding. See Ariz. R. Crim. P. 33.1(c), 33.2(b), 33.4(b)(3)(B). Accordingly, if the “prosecution fee” at issue here is unauthorized, it is illegal and cannot become legal because it was contained in the plea agreements that Digeno had signed. To the extent the trial court’s dismissal of Digeno’s petitions rested on this basis, the court erred. See *State v. Pandeli*, 242 Ariz. 175, ¶ 4 (2017) (court abuses discretion if it makes error of law).

¶10 In *Payne*, the trial court imposed on several convicted defendants at sentencing a \$1,000 “prosecution fee,” pursuant to a Pinal County Ordinance, that was payable to the county and deposited into a fund benefitting the Pinal County Attorney’s Office. 223 Ariz. 555, ¶ 1. The ordinance directed, “Upon a defendant’s conviction at trial, the Justice Court shall, and the Superior Court is requested, to impose and collect a Prosecution Fee pursuant to the Prosecution and Supervision Fee Schedule.” *Id.* ¶ 3 (emphasis omitted). It also provided that it was “adopted pursuant to A.R.S. § 11-251.05 and A.R.S. § 11-251.08.” *Id.*

¶11 On appeal, this court noted, “If the prosecution fee was unauthorized and amounts to an illegal sentence, the trial court fundamentally erred in imposing it.” *Id.* ¶ 14. We then turned to the question of “whether § 11-251.05 or § 11-251.08 expressly provides or necessarily implies that a county is empowered to impose by ordinance a prosecution fee on convicted defendants in felony cases.” *Id.* ¶ 20. After reviewing the relevant legislative history, we recognized “a potential conflict . . . between the ordinance and Arizona’s statutory scheme addressing punishment for felonies.” *Id.* ¶¶ 21–28. We next examined the

STATE v. DIGENO
Opinion of the Court

“prosecution fee” to determine whether it was a “fee,” which would be permissible, or a “fine,” which would not. *Id.* ¶ 30. We concluded that the “prosecution fee” was “more akin to a punitive fine than a compensatory fee.” *Id.* ¶¶ 33–38. Accordingly, we determined that “neither § 11-251.05 nor § 11-251.08 clearly authorize[d] the type of county prosecution fee imposed,” and we vacated the prosecution fees. *Id.* ¶¶ 47, 50.

¶12 As the state points out, this case is distinguishable from *Payne* insofar as it involved a county ordinance, while here we are concerned with a Gila County Superior Court administrative order. However, *Payne* is instructive.

¶13 Digeno first seems to differentiate between the trial court’s power to impose fees and assessments and its power to enact an administrative order regarding the same, suggesting that although the former may be permissible, the latter is not. But he fails to meaningfully develop this argument or to cite any specific authority about the court’s authority to issue administrative orders. *See* Ariz. R. Crim. P. 32.16(c)(2)(D) (petition for review must contain reasons why we should grant relief, including citations to legal authority); *State v. Stefanovich*, 232 Ariz. 154, ¶ 16 (App. 2013) (failure to cite relevant authority and meaningfully develop argument waives claim on review). In any event, we find any distinction immaterial in this context.

¶14 Unlike the county ordinance in *Payne*, Administrative Order No. 94-ELD16 does not request, let alone require, the imposition of costs of prosecution in any case. Rather, it provides that if such costs are imposed, they shall be distributed among the county attorney, the superior court, and the clerk of the court, identifying the specific percentages and account numbers of each. Thus, the presiding judge’s purpose in issuing the order appears to have been purely administrative—detailing the distribution of costs of prosecution once imposed. *See* Ariz. Const. VI, § 11 (presiding judges exercise administrative supervision); Ariz. R. Sup. Ct. 92(a) (same); *Acker v. CSO Chevira*, 188 Ariz. 252, 254 (App. 1997) (court’s inherent authority includes such powers as necessary for ordinary and efficient exercise of jurisdiction).

¶15 We must next determine what authority, if any, the presiding judge of Gila County Superior Court relied on in issuing Administrative Order No. 94-ELD16 and whether that authority “expressly provides or necessarily implies” that trial courts can impose costs of prosecution on convicted defendants. *Payne*, 223 Ariz. 555, ¶ 20. This is an issue of law we review de novo. *See State v. Soria*, 217 Ariz. 101, ¶ 5 (App. 2007).

STATE v. DIGENO
Opinion of the Court

¶16 “The power of the court is limited by statute.” *State v. Stocks*, 227 Ariz. 390, ¶ 21 (App. 2011). The legislature, not the judiciary, “determines what is a crime and what punishment may be exacted for its breach.” *State v. Prentiss*, 163 Ariz. 81, 85 (1989). “Thus, ‘[c]ourts have the power to impose sentences only as authorized by statute and within the limits set down by the legislature.’” *Stocks*, 227 Ariz. 390, ¶ 21 (quoting *State v. Harris*, 133 Ariz. 30, 31 (App. 1982)); *see also State v. Bradley*, 99 Ariz. 328, 331 (1965) (sentencing left to discretion of trial court so long as court stays within statutory limits).

¶17 The plain language of Administrative Order No. 94-ELD16 identifies no statutory basis or other authority to impose costs of prosecution on convicted defendants. However, the state maintains that “the Legislature has granted trial courts authority to order defendants to pay costs of prosecution.” Specifically, the state points to A.R.S. §§ 13-804, 13-806, and 13-901. Our resolution of this issue is somewhat broader.

¶18 As our starting point, A.R.S. § 13-603(E) enumerates the “sentences [that] may be imposed” when “a person is convicted of an offense and not granted a period of probation, or when probation is revoked.” Those sentences include:

1. A term of imprisonment authorized by this chapter or chapter 7 of this title.
2. A fine authorized by chapter 8 of this title
....
3. Both imprisonment and a fine.

§ 13-603(E). Similarly, § 13-603(D) provides, “If the court imposes probation it may also impose a fine as authorized by chapter 8 of this title.” And, in chapter 8, A.R.S. § 13-801(A) limits “[a] sentence to pay a fine for a felony” to a fixed amount of “not more than one hundred fifty thousand dollars.” *See also* § 13-901(A) (“If the court imposes probation, it may also impose a fine as authorized by chapter 8 of this title.”). These statutes thus allowed the trial court to impose a fine of \$150,000 or less on Digeno, in addition to imprisonment or probation, upon his conviction of the offenses in the plea agreements.

¶19 With that background in mind, we turn to § 13-804(A), which provides:

STATE v. DIGENO
Opinion of the Court

On a defendant's conviction for an offense causing economic loss to any person, the court, in its sole discretion, may order that all or any portion of the fine imposed be allocated as restitution to be paid by the defendant to any person who suffered an economic loss caused by the defendant's conduct.

¶20 As the state points out, in *State v. Maupin*, 166 Ariz. 250, 252 (App. 1990), this court explained that the legislative history behind § 13-804 "reflects an intent to allow a trial court to require a defendant, as part of a sentence, to reimburse the state for the costs of prosecution." Although *Maupin* is thirty years old, we are not aware of any authority overruling it or any statute superseding it. In reaching our conclusion in *Maupin*, 166 Ariz. at 252, we also relied on § 13-806(I),⁴ which provides:

Following the entry of the judgment and sentence in the criminal case, if the trial court sentences the defendant to pay a fine or awards costs of investigation or prosecution, the state may file a restitution lien pursuant to this section for the amount of the fine or costs, except that a lien may not be perfected against a titled motor vehicle.

Although this statute does not expressly provide that trial courts have authority to impose costs of prosecution on convicted defendants, it necessarily implies as much by allowing the state to request restitution liens for such costs. See *Payne*, 223 Ariz. 555, ¶ 20. We are required to give effect to all parts of a statute, and the legislature would not have provided for restitution liens if the corresponding costs could not be ordered. See *State v. Windsor*, 224 Ariz. 103, ¶ 6 (App. 2010) (when interpreting statutes, we give "meaning to each word and phrase 'so that no part is rendered void, superfluous, contradictory or insignificant'" (quoting *State v. Larson*, 222 Ariz. 341, ¶ 14 (App. 2009))); *State v. Seyrafi*, 201 Ariz. 147, ¶ 13 (App. 2001) (we read statutes as whole).

¶21 Digeno nevertheless contends, "[T]here is no statutory authority for the court to allocate payment of a prosecution fee between

⁴Section 13-806(I) was previously numbered § 13-806(H). See 2017 Ariz. Sess. Laws, ch. 229, § 9.

STATE v. DIGENO
Opinion of the Court

itself and the County Attorney.” *Maupin* does not define what “costs of prosecution” are, but it nonetheless determined that they include extradition costs—the amount expended to send an officer to the place where the defendant was arrested and bring him back for prosecution. 166 Ariz. at 252; *see also State v. Balsam*, 130 Ariz. 452, 453 (App. 1981). *Maupin*, therefore, suggests that costs of prosecution include more than costs incurred directly by the county attorney. In addition, the language of § 13-804(A) broadly provides that “any portion of the fine imposed [may] be allocated as restitution . . . to any person who suffered an economic loss,” suggesting that costs of prosecution could extend to costs incurred by the court. *See* A.R.S. § 13-105(30) (“[p]erson” includes “government” or “governmental authority”), 13-105(20) (“[g]overnment” includes “the state, any political subdivision of the state or any department, agency, board, commission, institution or governmental instrumentality of or within the state or political subdivision”).

¶22 In sum, based on the interplay of various statutes in chapters six, eight, and nine of the criminal code, in particular §§ 13-804(A) and 13-806(I), as interpreted in *Maupin*, we agree with the state that the legislature has granted trial courts authority to impose costs of prosecution on convicted defendants. No conflict therefore exists between Administrative Order No. 94-ELD16 and Arizona’s statutory scheme addressing punishment for felonies. *See Payne*, 223 Ariz. 555, ¶ 28. Notably, the administrative order was issued in 1994, a few years after *Maupin*. Because the trial court’s orders that Digeno pay a \$750 “Cost of Prosecution” assessment in each of his cases are consistent with the statutory authority, they are not illegal. Accordingly, the court did not abuse its discretion in dismissing Digeno’s petitions. *See Roseberry*, 237 Ariz. 507, ¶ 7; *see also State v. Lopez*, 234 Ariz. 513, ¶ 10 (App. 2014) (reviewing court will uphold trial court’s order if correct for any reason).

Disposition

¶23 For the foregoing reasons, we grant review but deny relief.