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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JORGE RAYMAUNDO FLORES, Appellant.	2 CA-CR 2012-0211 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20094628003

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

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K E L L Y, Presiding Judge.

¶1 In this appeal from multiple convictions arising from a home invasion, Jorge Flores contends the trial court abused its discretion in denying his motion for a redetermination of competency to stand trial. Finding no error, we affirm.

¶2 After a bench trial in November 2011, Flores was convicted of one count of burglary, six counts each of kidnapping, armed robbery, and aggravated assault, and two counts of aggravated assault of a peace officer. The trial court imposed presumptive and minimum, concurrent and consecutive sentences totaling 30.5 years' imprisonment.

¶3 Before his trial, in September 2010 Flores moved for a hearing pursuant to Rule 11, Ariz. R. Crim. P., to determine his competency to stand trial. After receiving psychologists' reports indicating Flores had mild mental retardation, the court determined he was not competent to stand trial and committed him to the Pima County Restoration to Competency Program (RTC). In February 2011, a psychologist from the RTC issued a "Final Competency Report," in which she stated that testing suggested Flores was malingering and "noted poor effort and exaggeration of cognitive impairment" and that he had been recorded on telephone calls from the jail talking knowledgeably about his case. She concluded he was competent to stand trial. At a competency hearing in May 2011, however, a defense psychologist testified that he did not believe the competency report to be accurate. The trial court found Flores competent and set a trial date.

¶4 In November 2011, Flores moved for a "redetermination of competency" based on an assessment by Dr. Stephen Greenspan, a clinical professor of psychiatry specializing in mental retardation. Therein, Greenspan concluded the RTC assessment

had been flawed and that Flores continued "to have significant mental retardation" and "continues to be incompetent." The trial court denied the motion.

¶5 On appeal, Flores contends the court abused its discretion in denying his motion for a redetermination of his competency because "any objective reading of Dr. Greenspan's report, which completely discredited the RTC final report that led to the original competency finding, at minimum provided a reasonable basis to believe [Flores] was incompetent, mandating another competency evaluation." We review the denial of the motion for an abuse of discretion. *See State v. Lynch*, 225 Ariz. 27, ¶ 16, 234 P.3d 595, 601 (2010).

¶6 Pursuant to Rule 11.1, "[a] person shall not be tried, convicted, sentenced or punished for a public offense . . . while, as a result of a mental illness, defect, or disability, the person is unable to understand the proceedings against him or her or to assist in his or her own defense." Flores does not contend the trial court abused its discretion in its initial determination that he had been restored to competency. Rather, as noted above, he contends that Greenspan's report was new evidence of his incompetence that required the court to grant a new hearing. *See Lynch*, 225 Ariz. 27, ¶ 18, 234 P.3d at 602 (concluding court did not err in refusing second hearing when defendant "proffered no new information to call into question the court's previous finding of competency"); *see also State v. Contreras*, 112 Ariz. 358, 360-61, 542 P.2d 17, 19-20 (1975).

¶7 But, even assuming Greenspan's report constituted such new evidence—despite being based solely on past evaluations of Flores—Flores's argument on appeal essentially asks us to reweigh the evidence of his competence presented to the trial court.

"The trial court has broad discretion in considering all available information when determining the need for an additional competency examination." *State v. Amaya-Ruiz*, 166 Ariz. 152, 163, 800 P.2d 1260, 1271 (1990). As the state points out, and as described above, the court had several evaluations of Flores's mental state, evidence about Flores's communications about his case, and the RTC assessment that concluded Flores had been restored, in addition to its own observations. *See Bishop v. Superior Court*, 150 Ariz. 404, 409, 724 P.2d 23, 28 (1986) ("On questions of competency to stand trial, not only is the judge a finder of fact, he is also a de facto witness who may take into consideration his own observations of the defendant."). That Greenspan disagreed with the RTC assessment did not require the court to discount it; rather it was within the trial court's broad discretion to weigh Greenspan's expert opinion against all of the other evidence it had received. *See id.* ("[A]lthough the judge may appoint mental health experts to assist him in his determination, he is not bound by their opinions . . . ."). We will not reweigh that evidence on appeal, and because reasonable evidence supported the court's determination, we cannot say it abused its discretion in denying Flores's motion. *See State v. Arnoldi*, 176 Ariz. 236, 239, 860 P.2d 503, 506 (App. 1993).

¶8 Finally, although Flores does not raise the issue, the record shows the trial court reduced "all fines, fees and assessments" to a criminal restitution order (CRO), ordering that "no interest, penalties or collection fees [were] to accrue while [Flores] is in the Department of Corrections." "[T]he imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910

(App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This error is not made harmless by a court's delaying the accrual of interest, penalties, or fees. *Id.* ¶ 5. And we will not ignore fundamental error if we find it. *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007). Thus, the CRO is vacated. Flores's convictions and sentences are otherwise affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge