

**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.

FILED BY CLERK

OCT -9 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
)	2 CA-CR 2012-0428
Appellee,)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
GUADALUPE MARRUFFO ONTIVEROS,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20110508001

Honorable Jose H. Robles, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Nicholas Klingerman

Tucson
Attorneys for Appellee

Roach Law Firm, L.L.C.
By Brad Roach

Tucson
Attorney for Appellant

V Á S Q U E Z, Presiding Judge.

¶1 Following a jury trial, Guadalupe Ontiveros was convicted of three counts of armed robbery, one count of attempted armed robbery, and nine counts of aggravated assault. The trial court sentenced him to enhanced, concurrent prison terms, the longest of which is life imprisonment. On appeal, Ontiveros argues the court erred by denying his motion to suppress the statements he made to a detective after his arrest. For the reasons that follow, we vacate the criminal restitution order but otherwise affirm Ontiveros’s convictions and sentences.

Factual Background and Procedural History

¶2 We view the evidence in the light most favorable to sustaining the convictions. *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 2, 185 P.3d 135, 137 (App. 2008). Between December 16, 2010, and January 31, 2011, a series of robberies were committed in Tucson. The police investigation led to Ontiveros, and he was arrested on February 2. During a subsequent interview with a police detective, Ontiveros told the detective that he was experiencing symptoms of heroin withdrawal, including seizures and bleeding from the ears. He made several incriminating statements during the interview, and, after being questioned for about fifteen minutes, requested an attorney. The detective ended the interview and left the room. When he returned a short time later, he saw Ontiveros “topple off of his chair and hit the ground,” apparently having a seizure.

¶3 Before trial, Ontiveros moved to suppress his statements to the detective, arguing they were involuntary. The trial court denied the motion. After a five-day trial, the jury found Ontiveros guilty of all charges alleged in the indictment, and the court

sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Motion to Suppress

¶4 Ontiveros argues the trial court erred in denying his motion to suppress the incriminating statements he made to the detective. He maintains his statements were involuntary because the detective was aware of his heroin withdrawal but nevertheless chose to continue the interrogation. “In reviewing the denial of a motion to suppress evidence, we view the facts in the light most favorable to upholding the trial court’s ruling and consider only the evidence presented at the suppression hearing.” *State v. Zinsmeyer*, 222 Ariz. 612, ¶ 4, 218 P.3d 1069, 1074 (App. 2009), *overruled on other grounds by State v. Bonfiglio*, 231 Ariz. 371, ¶ 15, 295 P.3d 948, 951 (2013). However, we review the court’s ultimate legal conclusions de novo. *State v. Gay*, 214 Ariz. 214, ¶ 30, 150 P.3d 787, 796 (App. 2007).

¶5 The state contends Ontiveros “has no remedy on appeal” because his “post-arrest statements were not introduced at trial or discussed during opening statements and closing arguments.” We have reviewed the record on appeal and agree that the statements were not admitted. If the trial court determines a confession is involuntary, the remedy is to exclude it from evidence. *See State v. Strayhand*, 184 Ariz. 571, 582 n.3, 911 P.2d 577, 588 n.3 (App. 1995). This ensures that such evidence is not considered by the jury and thus cannot “contribute to or affect the verdict.” *State v. Ross*, 180 Ariz. 598, 604, 886 P.2d 1354, 1360 (1994), *quoting State v. Bible*, 175 Ariz.

549, 588, 858 P.2d 1152, 1191 (1993). It necessarily follows that, when the state elects not to introduce a defendant's confession at trial, the defendant cannot be prejudiced by that evidence. *See id.* Consequently, the issue of whether the court erred by denying Ontiveros's motion to suppress is moot, and we need not consider it further. *See State ex rel. McDougall v. Mun. Ct. of City of Phx.*, 155 Ariz. 186, 188, 745 P.2d 634, 636 (App. 1987) ("Generally courts will refrain from considering moot or abstract questions.").

Criminal Restitution Order

¶6 Although Ontiveros has not raised the issue on appeal, we find fundamental error in the sentencing minute entry, which states that "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order [CRO], with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it). "[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 is so even where, as here, the trial court delayed the accrual of interest. Nothing in A.R.S. § 13-805, which governs the imposition of CROs, "permits a court to delay or alter the accrual of interest when a CRO is 'recorded and enforced as any civil judgment' pursuant to § 13-805(C)." *Lopez*, 231 Ariz. 561, ¶ 5, 298 P.3d at 910.

Disposition

¶7 For the foregoing reasons, we vacate the CRO but otherwise affirm Ontiveros's convictions and sentences.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Administrative Order No. 2012-101 filed December 12, 2012.