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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. STEVEN MARTINEZ NIETOS, Appellant.	)	2 CA-CR 2012-0496 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20112872001

Honorable Deborah Bernini, Judge

AFFIRMED IN PART; VACATED IN PART AND REMANDED

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H O W A R D, Chief Judge.

¶1 Steven Nietos appeals from the sentence imposed pursuant to his conviction of sale and/or transfer of a narcotic drug. He argues the trial court improperly added two

years to his sentence, erroneously concluding the addition was mandatory based on Nietos having been on parole at the time of his offense. Nietos further argues the sentence was excessive. We vacate Nietos's sentence and remand the case to the trial court for further resentencing.

¶2 Nietos was convicted after a jury trial of sale and/or transfer of a narcotic drug after he sold crack cocaine to an undercover police officer. The trial court further determined Nietos had been on "parole"[1] at the time of the offense and had four historical prior felony convictions. The court sentenced Nietos to the presumptive prison term of 15.75 years "plus the two years mandated under Arizona law" because Nietos had been on parole, for a total prison term of 17.75 years.[2] *See* A.R.S. §§ 13-703(C), (J); 13-3408(A)(7), (B)(7).[3]

¶3 Nietos argues, and the state agrees, that the trial court erred in concluding that Nietos's parole status at the time of his offense required the court to add two years to

[1]Although the trial court found Nietos had been on "parole," the record shows he instead was under community supervision pursuant to A.R.S. § 13-603(I). Although the distinction is not relevant to our decision here, we observe that the legislature has eliminated the possibility of parole for crimes committed after January 1, 1994. *State v. Rosario*, 195 Ariz. 264, ¶ 26, 987 P.2d 226, 230 (App. 1999).

[2]The sentencing minute entry stated the trial court was imposing an "aggravated" sentence of 15.75 years. The court stated at sentencing, however, that it was imposing the presumptive term "plus the two years mandated under Arizona law." The court's oral pronouncement of sentence controls here. *See State v. Leon*, 197 Ariz. 48, 49 n.3, 3 P.3d 968, 969 n.3 (App. 1999).

[3]We refer to the versions of the sentencing statutes in effect at the time of Nietos's offense. *See* 2010 Ariz. Sess. Laws, ch. 194, § 2 (§ 13-703); 2009 Ariz. Sess. Laws, ch. 82, § 5 (§ 13-708).

his sentence. Section 13-708(D), A.R.S., requires a trial court to add an additional two years to any sentence if the person is convicted of a felony committed "while the person is released on bond or on the person's own recognizance on a separate felony offense or while the person is escaped from preconviction custody for a separate felony offense." But the parties are correct that the court did not find that Nietos had been on preconviction release for a separate felony at the time he committed the instant offense—only that he had been on parole for a previous offense. Thus, his sentence was subject to enhancement pursuant to § 13-708(A) or (C), not (D). Those subsections require the trial court impose no less than the presumptive sentence, but do not require or permit the trial court to impose an increased sentence. § 13-708(A), (C).

¶4 Although Nietos did not raise this issue below, we agree with the parties that the error here was fundamental and prejudicial. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (arguments raised for first time on appeal subject only to fundamental error review). Nietos's sentence did not exceed the maximum permitted by statute, but the sentencing process nonetheless was "fundamentally flawed because the trial court used sentencing ranges other than those mandated for the offenses in question" by erroneously adding two years to the presumptive sentence. *State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002); *see also State v. Thurlow*, 148 Ariz. 16, 20, 712 P.2d 929, 933 (1986) (remanding for resentencing when record unclear whether court would enter same sentence absent error). Accordingly, because "[a]n illegal sentence constitutes fundamental error that will be

reversed on appeal despite a lack of objection in the trial court," we vacate Nietos's sentence.[4] *Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d at 441 (citation omitted).

¶5 Nietos next argues his 17.75-year sentence is grossly disproportionate and thus violates the Eighth Amendment prohibition against cruel and unusual punishment, as well as his due process rights. Because we have vacated that sentence, this issue is moot, and we do not address it further.[5] *See State v. Prince*, 206 Ariz. 24, ¶ 4, 75 P.3d 114, 116 (2003); *State v. Henry*, 176 Ariz. 569, 588-89, 863 P.2d 861, 880-81 (1993).

¶6 For the reasons stated, Nietos's sentence is vacated. His conviction is affirmed. We remand the case to the trial court for resentencing.

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

CONCURRING:

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

/s/ Michael Miller
MICHAEL MILLER, Judge

[4]In doing so, we additionally vacate the criminal restitution order entered at sentencing in violation of *State v. Lopez*, 231 Ariz. 561, ¶¶ 2-5, 298 P.3d 909, 910 (App. 2013), and *State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009).

[5]Nietos does not argue the presumptive term, absent the incorrect two-year addition, would constitute cruel and unusual punishment.