

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Respondent,

v.

DAVID MICHAEL GROSSMAN,
Petitioner.

No. 2 CA-CR 2014-0380-PR
Filed March 4, 2015

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Petition for Review from the Superior Court in Pima County

No. CR20133897001

The Honorable Howard Fell, Judge Pro Tempore

REVIEW GRANTED; RELIEF DENIED

COUNSEL

Law Office of Paul S. Banales, Tucson

By Paul S. Banales

Counsel for Petitioner

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MEMORANDUM DECISION

Judge Howard authored the decision of the Court, in which Presiding Judge Kelly and Judge Vásquez concurred.

H O W A R D, Judge:

¶1 Petitioner David Grossman seeks review of the trial court's order denying his petition for post-conviction relief, filed pursuant to Rule 32, Ariz. R. Crim. P. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). For the reasons that follow, we grant review but deny relief.

¶2 Pursuant to three plea agreements, Grossman was convicted in three separate causes for endangerment, driving under the influence (DUI), and two counts of aggravated DUI while his license was suspended, revoked or in violation of a restriction. The trial court imposed concurrent and consecutive sentences totaling seven years' imprisonment. The longest term, 4.5 years for the aggravated DUI count in CR20133897001, was enhanced based on the court's finding that Grossman had "One Historical, Nondangerous Prior Felony Conviction," specifically the aggravated DUI he had pled guilty to in CR20130451001. Grossman agreed to this arrangement at his change of plea hearing.

¶3 Grossman initiated a proceeding for post-conviction relief, arguing in his petition that because he had "pleaded guilty to all of the offenses at the same time, none of the resulting convictions preceded any others" and therefore should not have been used as historical prior convictions. *See State v. Ofstedahl*, 208 Ariz. 406, ¶ 4, 93 P.3d 1122, 1123 (App. 2004). The trial court summarily denied relief.

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¶4 On review, Grossman makes the same argument based on *Ofstedahl* and maintains the trial court “misapplied” that case and erred in denying his petition. We agree.

¶5 In *Ofstedahl*, this court determined that, just as a sentence could not be enhanced by a conviction obtained at the same trial as that on which the defendant was sentenced, a trial court could not enhance a sentence with a felony “resulting from the trial court’s acceptance of guilty pleas to multiple felonies at the same hearing.” *Id.* Thus, we concluded,

Because the trial court accepted *Ofstedahl*’s guilty pleas in all four cases at the same time, none of the resulting convictions preceded any others. Accordingly, they could not be used as historical prior convictions to enhance the sentences for any of the other convictions encompassed by the same plea agreement.

Id. On that basis, and concluding the use of the convictions as historical prior convictions had been a critical element of the plea agreement, we vacated that agreement. *Id.* ¶¶ 7-8.

¶6 In this case, the trial court concluded *Ofstedahl* was distinguishable because the state had made three separate agreements with Grossman and because “the intent of the parties and the Court to accept Grossman’s guilty plea in [one cause], before accepting Grossman’s guilty plea in [another cause], such that his conviction . . . would qualify as a historical prior felony conviction for enhancement . . . is clear from the record.” The record is also clear, however, and the court acknowledged in its ruling, that the court in fact accepted all of Grossman’s guilty pleas and plea agreements at the same time. The court asked Grossman for his plea as to each count and heard the factual basis of each count individually and successively, but did not accept any of those pleas until each had been heard, at which time the court stated, “All three cases, the Court finds the defendant’s pleas are knowingly,

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intelligently, and voluntarily made, there's a factual basis for all of them. The pleas are accepted[;] they're entered of record."

¶7 Thus, because the trial court accepted all of Grossman's guilty pleas at the same hearing, at the same time, none could be used as a historical prior to enhance the other. *See id.* ¶ 4. That the pleas were made pursuant to separate agreements does not change the fact that Grossman's convictions were all entered at the same time and is insufficient to comply with the rule set forth in *Ofstedahl*. *See id.*

¶8 The state conditioned each of Grossman's plea agreements on acceptance of the others and included sentencing ranges that anticipated Grossman being sentenced as a Category Two repetitive offender. *See* A.R.S. § 13-703(B), (I). At the change of plea hearing, the trial court questioned how that sentencing range applied and, upon a brief discussion with the parties, determined that a historical prior felony finding was appropriate. But because Grossman was convicted of three felonies which were not committed on the same occasion and were not, as discussed above, historical prior felonies, the court could appropriately have sentenced him as a Category Two repetitive offender under § 13-703(B)(1) instead of § 13-703(B)(2). We therefore cannot say the court's error "tainted the comprehensive plea arrangement as a whole." *Ofstedahl*, 208 Ariz. 406, ¶ 7, 93 P.3d at 1124. And, unlike the situation in *Ofstedahl*, we need not vacate the agreement as a whole.

¶9 Therefore, although we grant the petition for review, we deny relief.