IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellant/Cross-Appellee,

v.

PAUL JAMES LOPEZ,
Appellee/Cross-Appellant.

Nos. 2 CA-CR 2016-0076 and
2 CA-CR 2016-0122 (Consolidated)
Filed July 27, 2017

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NOT FOR PUBLICATION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.

Appeal from the Superior Court in Pima County
No. CR20153109001
The Honorable Christopher C. Browning, Judge

VACATED AND REMANDED; CROSS-APPEAL DISMISSED

COUNSEL

Barbara LaWall, Pima County Attorney
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Counsel for Appellant/Cross-Appellee

Joel Feinman, Pima County Public Defender
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Counsel for Appellee/Cross-Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Vásquez concurred.

E S P I N O S A, Judge:

¶1 The State of Arizona appeals the trial court's dismissal of its indictment charging Paul Lopez with violating reporting requirements imposed on registered sex offenders. Although Lopez concedes the court's dismissal order relied on a case that is no longer good law, he contends the dismissal order was proper for other reasons. But Lopez's alternative bases for upholding the order were not raised below and, lacking support in the record, are not properly raised for the first time on appeal. As more fully explained in this decision, we vacate the dismissal order and remand for further proceedings. Lopez has also cross-appealed, arguing the court erred in denying his request for an order directing his removal from the sex offender registration lists. Because we lack jurisdiction over the cross-appeal, we dismiss it without considering its merits.

Factual and Procedural Background

¶2 In 2004, a criminal complaint filed in the Judicial Court of the Tohono O'odham Nation charged Lopez with "Child Molesting" in violation of section 9.6A1 of the Tohono O'odham criminal code. Lopez pled guilty and was sentenced to 360 days in the tribal jail. Although indigent, Lopez was not represented by counsel in the tribal court.

¶3 Sometime after his release from the Tohono O'odham jail, Lopez was charged in Pima County for failing to register as a sex offender. He pled guilty to the offense in 2012, and did not challenge the validity of his uncounseled tribal court conviction. In 2015, Lopez was again cited in Pima County for failing to comply with sex offender requirements. This time, however, he contested the legitimacy of the predicate offense, arguing his tribal court conviction was constitutionally infirm because he was not afforded an attorney, and thus he had no duty to register as a sex offender.[1] The state countered that any infirmity of the uncounseled tribal conviction was of no consequence under Arizona law, but acknowledged a "federal circuit split on the use of uncounseled tribal convictions" as predicate offenses.

¶4 Relying on *United States v. Bryant*, 769 F.3d 671 (9th Cir. 2014), as the "most analogous to the facts of the instant case," the trial court concluded Lopez's tribal court conviction was facially unconstitutional, and thus the state "ha[d] failed to satisfy an element of the pending charges against [him]."[2] The state appealed, and during the pendency of the appeal the United States Supreme Court reversed the Ninth Circuit's opinion. *United States v. Bryant*, ___ U.S. ___, ___, 136 S. Ct. 1954, 1964 (2016).

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[1]Lopez also relied on *State v. Watson*, 120 Ariz. 441, 448, 586 P.2d 1253, 1260 (1978), in which our supreme court observed that the state "may not use a prior conviction to enhance punishment for a later conviction if the prior conviction was obtained in a constitutionally infirm manner." *See also Burgett v. Texas*, 389 U.S. 109, 115 (1967) ("To permit a conviction obtained in violation of Gideon v. Wainwright to be used against a person . . . to support guilt . . . for another offense . . . is to erode the principle of that case.").

[2]The state has the burden of proving a prior conviction was constitutionally obtained. *State v. McCann*, 200 Ariz. 27, ¶ 15, 21 P.3d 845, 849 (2001).

¶5 In light of the Supreme Court's reversal in *Bryant*, the state requests that we vacate the trial court's dismissal order. Lopez acknowledges that the reversal is dispositive of his constitutional claim, but offers an alternative basis for affirming the dismissal, which was not raised or developed before the trial court. He also cross-appeals, contending the court erred in denying his request for an order purging him from the registration databases. We have jurisdiction over the state's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4032(1), but lack jurisdiction over Lopez's cross-appeal.

Discussion

¶6 The state argues the Supreme Court's decision in *Bryant* controls the outcome here. In that case, an indigent member of the Northern Cheyenne Tribe in Montana was convicted of domestic abuse in the federal district court. *Bryant*, ___ U.S. at ___, 136 S. Ct. at 1963-64. At the time of his federal conviction, he had pled guilty, without the aid of counsel, to at least five domestic abuse charges in tribal court, and was sentenced to an enhanced term as a habitual offender under a provision of the Violence Against Women and Department of Justice Reauthorization Act of 2005. ___ U.S. at ___, ___, 136 S. Ct. at 1958, 1963-64. The Ninth Circuit reversed the conviction, concluding that uncounseled tribal court misdemeanor convictions could not satisfy the statute's predicate-offense element. *Bryant*, 769 F.3d at 677, 679. The Supreme Court granted review and subsequently reversed, concluding that the convictions were proper predicate offenses in Bryant's subsequent prosecution. ___ U.S. at ___, 136 S. Ct. at 1964-66. The Court, citing the Indian Civil Rights Act (ICRA), reasoned:

> "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). The Bill of Rights, including the Sixth Amendment right to counsel,

therefore, does not apply in tribal-court proceedings. See *Plains Commerce Bank,* 554 U.S., at 337, 128 S.Ct. 2709.

In ICRA, however, Congress accorded a range of procedural safeguards to tribal-court defendants "similar, but not identical, to those contained in the Bill of Rights and the Fourteenth Amendment." *Martinez,* 436 U.S., at 57, 98 S.Ct. 1670; see *id.* at 62–63, 98 S.Ct. 1670 (ICRA "modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments"). In addition to other enumerated protections, ICRA guarantees "due process of law," 25 U.S.C. § 1302(a)(8), and allows tribal-court defendants to seek habeas corpus review in federal court to test the legality of their imprisonment, § 1303.

The right to counsel under ICRA is not coextensive with the Sixth Amendment right. If a tribal court imposes a sentence in excess of one year, ICRA requires the court to accord the defendant "the right to effective assistance of counsel at least equal to that guaranteed by the United States Constitution," including appointment of counsel for an indigent defendant at the tribe's expense. § 1302(c)(1), (2). If the sentence imposed is no greater than one year, however, the tribal court must allow a defendant only the opportunity to obtain counsel "at his own expense." § 1302(a)(6). In tribal court, therefore, unlike in federal or state court, a sentence of imprisonment up to one year may be imposed without

> according indigent defendants the right to appointed counsel.

___ U.S. at ___, 136 S. Ct. at 1962.

¶7 As noted above, Lopez concedes "*Bryant* is dispositive of . . . the trial court's ruling" with regard to the constitutionality of his uncounseled conviction. That case makes clear that an otherwise valid but uncounseled tribal court conviction, where a defendant is sentenced to a term of less than one year, comports with both the Constitution and ICRA. *See Bryant*, ___ U.S. at ___, 136 S. Ct. at 1962. Because Lopez was sentenced to a 360-day term of incarceration, the trial court's conclusion that Lopez's tribal court conviction was "facially unconstitutional" because it was uncounseled is incorrect and the court's ruling must be vacated.

¶8 Lopez further contends, however, "this court must affirm the ruling on any alternative basis supported by the record," and argues his tribal court conviction violated ICRA for other reasons. To the extent we understand Lopez's new argument, he asserts his guilty plea violated his due process rights because it was involuntary. And although he acknowledges that appellate courts ordinarily do not reach issues not raised below, Lopez urges us to decide the issue given the "atypical posture" of this appeal and because "[j]udicial economy is best served by addressing these issues only once" and "the facts are fully developed."

¶9 The state disagrees with Lopez's assertion that the facts are fully developed, and argues it would be improper for us to address this claim raised for the first time on appeal. As a general rule, appellate courts avoid considering issues first raised on appeal. *See State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988). This is particularly true when the resolution of previously unaddressed issues involves a fact-intensive inquiry. *Id*. The state correctly notes that due process considerations under ICRA are not necessarily coextensive with those under the United States Constitution. *See* 25 U.S.C. § 1302(a)(8) (no Indian tribe exercising powers of self-government shall deprive any person of liberty or property without due process of law); *Tom v. Sutton*, 533 F.2d 1101, 1104 n.5 (9th Cir. 1976) (noting "due process," as used in § 1302(a)(8), interpreted with

"due regard for the historical, governmental and cultural values of an Indian tribe"). The state further points out it did not have an opportunity to develop facts "relevant to show what procedures and due process protections may have been present" in the tribal court.

¶10 Although we will affirm a trial court's ruling on new grounds when supported by the record, *see State v. Boteo-Flores*, 230 Ariz. 551, ¶¶ 7-9, 288 P.3d 111, 113-14 (App. 2012), that is not the case here. Lopez's argument that "the facts are fully developed" is conclusory, and his suggestion that the state is required to make an offer of proof as to what it would establish at an evidentiary hearing is unsupported. Accordingly, we decline Lopez's request to entertain his alternate basis for upholding the dismissal order, vacate that order, and remand to the trial court with instructions to reinstate the indictment.[3]

Cross-Appeal

¶11 Section 13-4033(A)(3), A.R.S., which Lopez cites as the jurisdictional basis for his cross-appeal, provides that an appeal may be taken from "[a]n order made after judgment affecting the substantial rights of the party." The rules of criminal procedure, however, define a "judgment" as "the adjudication of the court based upon the verdict of the jury, upon the plea of the defendant, or upon its own finding following a non-jury trial, that the defendant is guilty or not guilty." Ariz. R. Crim. P. 26.1(a). An order dismissing an indictment is not a "judgment," and we therefore lack jurisdiction to consider Lopez's claim. *Cf.* Ariz. R. Civ. App. P. 13(a)(4) (appellant must state "the basis of the appellate court's jurisdiction"); *James v. State*, 215 Ariz. 182, n.5, 158 P.3d 905,

[3]Our procedural resolution of this issue does not preclude Lopez from attempting to raise it, or any others if appropriate, after remand and upon further proceedings. *See* Ariz. R. Crim. P. 16(b) (pretrial motions may be made up to twenty days before trial). We do not, however, express any opinion of the merits of such argument or the state's position that it is not cognizable in state court proceedings.

908 n.5 (App. 2007) (court of appeals has duty to independently examine its jurisdiction); *State v. Celaya*, 213 Ariz. 282, ¶ 3, 141 P.3d 762, 762 (App. 2006) (appellate court has jurisdiction only as conferred by statute). And, even if we had jurisdiction to consider the argument, our resolution of the state's appeal would render Lopez's cross-appeal moot.

Disposition

¶12 For the foregoing reasons, the trial court's order dismissing Lopez's indictment is vacated, Lopez's cross-appeal is dismissed, and the case is remanded for further proceedings consistent with this decision.