

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Petitioner/Cross-Respondent,*

*v.*

JOSE ROBLES-GARCIA,  
*Respondent/Cross-Petitioner.*

No. 2 CA-CR 2017-0224-PR  
Filed September 15, 2017

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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NOT FOR PUBLICATION  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.*

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Petition for Review from the Superior Court in Maricopa County  
No. CR2014145066001DT  
The Honorable Jose S. Padilla, Judge

**REVIEW GRANTED; RELIEF GRANTED; CROSS-REVIEW  
GRANTED; RELIEF DENIED IN PART AND  
GRANTED IN PART**

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COUNSEL

William G. Montgomery, Maricopa County Attorney  
By Amanda M. Parker, Deputy County Attorney, Phoenix  
*Counsel for Petitioner/Cross-Respondent*

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Maricopa County Office of the Legal Advocate, Phoenix  
By Frances J. Gray, Deputy Legal Advocate  
*Counsel for Respondent/Cross-Petitioner*

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**MEMORANDUM DECISION**

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Kelly<sup>1</sup> concurred.

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ESPINOSA, Judge:

¶1 The State of Arizona seeks review of the trial court's order granting Jose Robles-Garcia's of-right petition for post-conviction relief by vacating the fine imposed for his conviction of possession of methamphetamine for sale. Robles-Garcia cross-petitions this court for review of, inter alia, the trial court's determination that he waived his right to a jury trial of facts related to the amount of the fine and that his guilty plea was knowing, voluntary, and intelligent. We grant the state's petition for review and grant relief. We grant Robles-Garcia's petition for review and deny relief in part and grant relief in part.

¶2 Robles-Garcia pled guilty to possession of methamphetamine for sale. During his plea colloquy, he admitted having possessed fifteen pounds of methamphetamine. At sentencing, the state asserted the statutory fine would be \$144,400 – based on Robles-Garcia having possessed sixteen pounds of methamphetamine valued at \$3,000 per pound according to a “price list” published by the United States Drug Enforcement Administration (DEA). See A.R.S. § 13-3407(H) (prescribing fine “of not less than one thousand dollars or three times the value as determined by the court of the dangerous drugs involved in or giving

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<sup>1</sup>The Hon. Virginia C. Kelly, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

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rise to the charge, whichever is greater”). Robles-Garcia responded that, because he received only \$500 for “holding the [drugs] at his house,” the value of the drugs was only \$500. The court imposed a nine-year prison term and a fine of \$134,000 for sixteen pounds of methamphetamine valued at \$2,800 per pound – the lowest end of the price range identified in the DEA list.

¶3 Robles-Garcia sought post-conviction relief, arguing that the fine violated his right to a jury trial because it exceeded the “statutory maximum” and that he did not waive that right because “he did not receive notice the State intended to seek an enhanced financial penalty.” He further asserted his plea was not voluntary, knowing, and intelligent because he was unaware he could be required to pay a large fine and would not have pled guilty had he known. Finally, he claimed his trial counsel was ineffective for failing to “recognize her client’s potential exposure to a huge fine and to clarify the issue during plea negotiations,” and for failing to assert Robles-Garcia’s right to a jury trial regarding the fine amount or “object to the admissibility of the information the State asserted as a basis to calculate the fine.”

¶4 After oral argument, the trial court first raised the issue whether, as a matter of contract law, the plea agreement included the fine. It determined that the imposition of a fine was not mandatory and that the state, not having included the fine in the second paragraph of the plea agreement describing the stipulated sentence and factual basis, had “negotiated out a fine” from the plea agreement. Thus, the court vacated the fine.

¶5 The trial court further determined Robles-Garcia had waived the right to have a jury determine the value or amount of drugs for the purposes of calculating the correct fine amount and rejected his claim that his plea was not knowing, voluntary, and intelligent. The court also rejected his argument that the value of the drugs as contemplated by § 13-3407(H) was something other than the street value, and determined that, if a fine had been appropriate, it would be based on fifteen pounds of methamphetamine because that was the amount Robles-Garcia had admitted to possessing. It did not address Robles-Garcia’s claim of ineffective assistance of counsel.

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The state filed a petition for review, and Robles-Garcia filed a cross-petition.

¶6 On review, the state first asserts the plea agreement included imposition of a fine pursuant to § 13-3407(H). We agree. The plea agreement unambiguously provided Robles-Garcia would “pay a fine of \$1,000 or three times the value of the drugs, whichever is greater.”<sup>2</sup> And Robles-Garcia was again informed of the fine and its potential amount during the plea colloquy. We have found no authority supporting the trial court’s conclusion that, to be part of the negotiated plea, the statutory fine had to appear in the paragraph describing the parties’ stipulations. Although the court was correct that contract law principles may be relevant to plea agreements, *see Coy v. Fields*, 200 Ariz. 442, ¶ 9, 27 P.3d 799, 802 (App. 2001), “[w]e construe a contract ‘in its entirety and in such a way that every part is given effect,’” *State v. R.J. Reynolds Tobacco Co.*, 206 Ariz. 117, ¶ 12, 75 P.3d 1075, 1078 (App. 2003), *quoting Cardon v. Cotton Lane Holdings, Inc.*, 173 Ariz. 203, 207, 841 P.2d 198, 202 (1992).

¶7 In response, Robles-Garcia argues the state acted in bad faith during plea negotiations by “insert[ing] a stipulation to 15 pounds of methamphetamine into the plea agreement” to cause “an enormous fine” to be imposed, misleading “both the trial court and Robles-Garcia” into believing the purpose of the stipulation was to ensure a calendar-year sentence pursuant to § 13-3407(D). However, even if there were legal support for the proposition that the state is required during plea negotiations to calculate a mandatory fine for the defendant, we need not address this argument. Robles-Garcia did not raise it until his reply to the state’s response below, and the trial court did not address it. *See State v. Lopez*, 223 Ariz. 238, ¶¶ 7-8, 221 P.3d 1052, 1054 (App. 2009) (trial court need not consider issues first raised in petitioner’s reply); *see also* Ariz. R. Crim. P. 32.9(c) (permitting petition “for review of the actions of the trial court”).

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<sup>2</sup> The state is also correct that imposition of the fine is mandatory. Section 13-3407(H) states the sentencing court “shall” impose the fine and “shall not suspend any part or all of the imposition of any fine required by this subsection.”

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¶8 We turn now to the issues raised by Robles-Garcia in his cross-petition. He first argues, as he did below, that the imposition of a fine “in excess of the statutory maximum” violated his right to a jury trial. *See S. Union Co. v. United States*, 567 U.S. 343, 348, 360 (2012) (defendant entitled to jury trial on fact other than prior conviction that increases sentence, including fine, above statutory maximum); *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (“Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). But we need not decide whether Robles-Garcia is entitled to a jury trial on facts related to the amount of the fine because he waived that right in the plea agreement. Robles-Garcia’s plea agreement stated that he “consents to judicial fact finding by preponderance of the evidence as to any aspect or enhancement of sentence.” A fine is part of a defendant’s sentence. *State v. Payne*, 223 Ariz. 555, ¶ 31, 225 P.3d 1131, 1140 (App. 2009). The agreement further provided that he had waived his right “to a trial by jury to determine guilt and to determine any fact used to impose a sentence within the range stated above in paragraph one.” Paragraph one of the plea agreement states the maximum fine that could be imposed is \$150,000. Robles-Garcia has cited no authority suggesting he is entitled to a separate advisement that the waiver of rights related to his sentence also waived rights related to the imposition of a fine.

¶9 Robles-Garcia further asserts he “could not waive his right to jury fact-finding . . . because he did not receive notice that the State intended to seek an enhanced financial penalty.” But, as we noted above, Robles-Garcia was informed he could be fined up to \$150,000. And he has not developed any argument that the state was required to provide some additional or separate notification. *See State v. Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d 679, 683 (App. 2013) (insufficient argument waives claim on review).

¶10 We also reject Robles-Garcia’s related claim that his stipulation to having possessed fifteen pounds of methamphetamine was “not made knowingly, intelligently and voluntarily because he did not know it would be used to calculate a fine above \$1000.”

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Robles-Garcia was advised he would be fined up to \$150,000 based on the value of the drugs, and he has identified no ground for believing the value of the drugs would be unrelated to the amount of drugs he had admitted possessing. Thus, Robles-Garcia has not explained how the plea agreement and colloquy were insufficient to ensure “he ha[d] a full understanding of what the plea connotes and of its consequence.” *Boykin v. Alabama*, 395 U.S. 238, 243-44 (1969) (defendant must be aware of the direct consequences of a guilty plea); *see also* Ariz. R. Crim. P. 17.2(b) (before accepting plea, court must determine defendant understands “[t]he nature and range of possible sentences for the offense”). Robles-Garcia has not established the trial court erred in concluding his plea was voluntary, knowing, and intelligent.

¶11 Robles-Garcia additionally asserts the trial court erred by finding the “street-sale value of the drugs” should be used to calculate the fine, pointing out that § 13-3407(H) does not define the term “value.” But he has not developed this argument in any meaningful way and, accordingly, we do not address it further. *See Stefanovich*, 232 Ariz. 154, ¶ 16, 302 P.3d at 683.

¶12 Robles-Garcia further argues the trial court could not rely on his admission that he had possessed fifteen pounds of methamphetamine in calculating the fine. He correctly observes that facts admitted during a change-of-plea colloquy “that go beyond the elements of the offense” are not considered “established” for *Apprendi* purposes and, thus, do not obviate the need for a jury trial to determine those facts. *See State v. Brown*, 210 Ariz. 534, ¶ 21, 115 P.3d 128, 136 (App. 2005). But, as we have observed, Robles-Garcia agreed the trial court could find facts related to sentencing by a preponderance of the evidence. Thus, *Southern Union Co.*, *Apprendi*, and the rule described in *Brown* do not apply.

¶13 Robles-Garcia next reasserts his claim of ineffective assistance of counsel. Because the trial court did not address this claim below, we decline to address it for the first time on review. *See* Ariz. R. Crim. P. 32.9(c). We grant review of Robles-Garcia’s cross-petition, however, and grant partial relief by remanding the case to the trial court to address Robles-Garcia’s claim of ineffective

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assistance of counsel. We otherwise deny relief on his claims. And, we grant the state's petition for review and grant relief; the trial court's order vacating the fine imposed at sentencing is reversed.