

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DANNY SALVADOR GOMEZ,
Appellant.

No. 2 CA-CR 2017-0418
Filed April 3, 2019

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20143477001
The Honorable Danelle B. Liwski, Judge

VACATED AND REMANDED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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Counsel for Appellee

Joel Feinman, Pima County Public Defender
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MEMORANDUM DECISION

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

STARING, Presiding Judge:

¶1 In this appeal arising from his convictions and sentences for two counts of aggravated driving under the influence, Danny Salvador Gomez argues the trial court erred by resentencing him more than sixty days after his original sentence, in violation of Rule 24.3, Ariz. R. Crim. P. For the reasons that follow, we vacate Gomez's sentence and remand for proceedings consistent with this decision.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Gomez. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In 2016, after a jury trial, Gomez was convicted of one count of aggravated driving with a blood alcohol concentration (BAC) of .08 or more and one count of aggravated driving under the influence, both of which occurred while his license was suspended. The jury found he committed the offenses while on probation for a prior conviction for solicitation to unlawfully possess a narcotic.

¶3 Before sentencing, Gomez moved to designate the prior conviction as a misdemeanor. The state did not respond to the motion, which the trial court subsequently granted. Later, the state moved for reconsideration of the misdemeanor designation; the court denied reconsideration.

¶4 On September 15, 2017, the trial court sentenced Gomez to two mitigated, concurrent, one-year terms of imprisonment. On September 26, the state moved to correct Gomez's sentence under Rule 24.3, arguing that although the court had designated the prior conviction as a misdemeanor, it was a felony at the time Gomez committed the offenses at issue here and, therefore, he should have been sentenced to a presumptive

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term pursuant to A.R.S. § 13-708(C). The state also filed a timely notice of appeal.¹

¶5 On October 27, the trial court held a hearing on the state's motion to correct Gomez's sentence, but it reset the matter for December 1, because neither Gomez nor his attorney were able to attend. On November 17, Gomez filed his opposition to the state's motion, arguing A.R.S. § 13-708(C) did not apply because a class six undesignated offense is not a "conviction of a felony offense" unless and until it is designated as such and, here, the court designated his prior conviction as a misdemeanor before sentencing. At the December 1 hearing, the court granted the state's motion, finding "a contingent possibility that the offense may ultimately be designated a misdemeanor at some future date, does not detract from the reality that the person has been convicted of a Class 6 Felony." The court also stated: "Since [the state's motion] was filed within a timely manner, under the rules I believe the Court has the right, as well as the obligation to resentence if it is inappropriate, and I believe the sentence is inappropriate under the statute." The court then resentenced Gomez to a presumptive term of 2.5 years. This appeal followed and we have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶6 Relying on *State v. Bryant*, 219 Ariz. 514 (App. 2008), Gomez argues the trial court did not have jurisdiction to resentence him under Rule 24.3, because more than sixty days had passed since his initial sentence and, therefore, his corrected sentence should be vacated and his original sentence reinstated.² "Subject matter jurisdiction is a question of law, which we review *de novo*." *Id.* ¶ 4. "We review the interpretation of statutes and court rules *de novo*." *State v. Godoy*, 244 Ariz. 327, ¶ 7

¹Subsequently, at the state's request, the appeal was dismissed.

²Initially, Gomez also argued: (1) the trial court erred by denying his motion to suppress evidence; (2) his conviction for aggravated driving under the influence due to his license being suspended violated his equal protection and due process rights; and (3) his consent to a blood draw was coerced. Gomez, however, concedes that we lack jurisdiction to address these arguments because he did not file a timely notice of appeal after entry of judgment on September 15, 2017. *See State v. Pacheco*, 152 Ariz. 85, 86-87 (App. 1986) (addressing only issues raised with regard to resentencing where no notice of appeal filed for underlying judgment of guilt).

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(App. 2017) (quoting *Fragoso v. Fell*, 210 Ariz. 427, ¶ 7 (App. 2005)). “We interpret court rules ‘using principles of statutory construction,’ seeking to follow the intent of the drafters, looking first ‘to the plain language of the . . . rule as the best indicator of that intent.’” *Id.* “If the language is clear and unambiguous, we give effect to that language and do not employ other methods of . . . construction.” *Id.*

¶7 “In criminal proceedings, the judgment and sentence are ‘complete and valid’ upon oral pronouncement, Ariz. R. Crim. P. 26.16(a), and cannot be modified thereafter except as provided by [Rule 24.3].” *State v. Serrano*, 234 Ariz. 491, ¶ 9 (App. 2014); *see also State v. Falkner*, 112 Ariz. 372, 374 (1975) (trial court lacks inherent power to modify sentence). The version of Rule 24.3 in effect at the time provided in relevant part: “The court may correct any unlawful sentence or one imposed in an unlawful manner within 60 days of the entry of judgment and sentence but before the defendant’s appeal, if any, is perfected.” 207 Ariz. LI (2004). Thus, the rule plainly grants trial courts discretion to correct unlawful sentences, but with equal clarity limits the exercise of that discretion to sixty days after the initial sentence is entered.³

¶8 *Bryant* involved an appeal from an order granting the Arizona Department of Public Safety’s (DPS) “motion to vacate a prior order expunging Bryant’s [DNA] profile from the state DNA database.” 219 Ariz. 514, ¶ 1. The trial court had terminated Bryant’s probation and expunged his DNA profile pursuant to the expungement statute, A.R.S. § 13-610. *Id.* ¶ 3. Unbeknownst to the court, however, § 13-610 had been amended before the issuance of the expungement order. *Id.*; *see* 2007 Ariz. Sess. Laws, ch. 261, § 2. Four weeks after the court ordered the expungement, DPS moved for reconsideration, noting the amendment and arguing that, under the version in effect at the time of the expungement order, the court could not expunge Bryant’s profile from the database. *Bryant*, 219 Ariz. 514, ¶ 3. The court granted DPS’s motion 115 days after entering the expungement order and, in the appeal that followed, Bryant argued it had lacked jurisdiction to do so. *Id.* ¶¶ 3-4. We agreed. *Id.* ¶ 1.

¶9 In *Bryant*, we looked to the plain language of Rule 24.3 and concluded that, because the trial court did not enter its corrective order within sixty days of the initial sentence, Rule 24.3 “[did] not provide the

³ The disposition of this matter does not require us to address whether the trial court erroneously concluded Rule 24.3 imposed the “obligation” to resentence Gomez.

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trial court the authority to modify its initial" expungement order. *Id.* ¶ 8. And we rejected the state's argument that the court was able to correct Bryant's sentence based on the filing date of DPS's motion, explaining:

But Rule 24.3 requires the court actually to correct the illegal sentence within sixty days of sentencing. In contrast, Rule 24.2, Ariz. R. Crim. P., allows the court to vacate a judgment, on other grounds not pertinent here, based on a motion filed no later than sixty days after sentencing. We presume the supreme court understood the difference in drafting the rule and intended that the trial court enter its order under Rule 24.3 within the sixty-day period.

Id. ¶ 9.

¶10 In *Bryant*, we also considered the state's argument that the timely motion put the trial court on notice of its sentencing error and thus was "sufficient to preserve a challenge to the trial court's sentence." *Id.* ¶ 11. But we concluded that Rule 24.3 requires more than the state simply notifying the court of its error. *Id.* "Under Rule 24.3, the trial court itself must act within sixty days to correct an unlawful sentence, or the sentence will stand." *Id.* We interpreted the plain language of the rule to require the court to actually enter an order correcting the sentence within sixty days of the initial sentence. *Id.* ¶ 9. We find *Bryant* controlling in this instance.⁴

Disposition

¶11 For the foregoing reasons, we vacate the trial court's resentencing order and remand for proceedings consistent with this decision.

⁴Nor do we see any reason to overturn *Bryant*, as the state urges. See *State v. Dungan*, 149 Ariz. 357, 361 (App. 1985) ("The principle of stare decisis dictates that previous decisions of this court are considered highly persuasive and binding, unless we are convinced that the prior decision is clearly erroneous or conditions have changed so as to render the prior decision inapplicable.").