

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LILLIAN AGUILAR,
Appellant.

No. 2 CA-CR 2019-0153
Filed March 31, 2020

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NOT FOR PUBLICATION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 Cochise County
No. CR201800183
The Honorable Timothy Dickerson, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Karen Moody, Assistant Attorney General, Tucson
Counsel for Appellee

Cochise County Office of the Legal Advocate
By Xochitl Orozco, Legal Advocate, Bisbee
Counsel for Appellant

MEMORANDUM DECISION

Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Eppich and Judge Espinosa concurred.

ECKERSTROM, Judge:

¶1 Lillian Aguilar appeals from her convictions and sentences for various drug-related offenses, arguing she was denied her constitutional right to a twelve-person jury. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 A grand jury charged Aguilar with eight criminal counts: (1) transportation of methamphetamine for sale; (2) possession of methamphetamine for sale; (3) conspiracy to transport methamphetamine for sale; (4) conspiracy to possess methamphetamine for sale; (5) conspiracy to possess heroin for sale; (6) unlawful wire communications; (7) possession of marijuana; and (8) possession of drug paraphernalia. As the state's pretrial sentencing exposure chart illustrated, these charges carried a presumptive maximum of 29.5 years if run consecutively.¹ See A.R.S. §§ 13-702(D), 13-1003(D), 13-3401(20)(ttt), (21)(m), 13-3405(A)(1), (B)(1), 13-3407(A)(2), (A)(7), (E), 13-3408(A)(2), (B)(2), 13-3415(A), 13-3417(C). If aggravated with one statutory aggravating factor, the possible maximum term was forty-six years.² See A.R.S. §§ 13-702(D), 13-3407(E).

¶3 However, before trial, the prosecution stated: "Based on the charges, it is possible that Ms. Aguilar could receive a sentence in excess of 30 years, but the State will stipulate that it will not be seeking anything in excess of 29.99." On the first day of trial, with no objection from

¹Because count two was a lesser-included offense of count one, and count four was likewise a lesser-included offense of count three, Aguilar's actual presumptive exposure was only one ten-year prison term for counts one and two, and one ten-year prison term for counts three and four.

²For the same reasons explained above, Aguilar's actual maximum exposure was only one fifteen-year prison term for counts one and two, and one fifteen-year prison term for counts three and four.

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Aguilar, the court empaneled an eight-person jury. Three days later, that jury found Aguilar guilty as charged. The state then presented an aggravating factor of pecuniary gain to the jury on counts one through six, which the jury found proven beyond a reasonable doubt. However, at sentencing, the state recommended that Aguilar be sentenced to presumptive prison terms, indicating its position that ten years' incarceration would be appropriate in the circumstances. After dismissing count two as a lesser-included offense of count one, the trial court sentenced Aguilar to concurrent, presumptive prison terms, the longest of which is a "flat time" ten-year term. We have jurisdiction over her appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Discussion

¶4 Aguilar seeks reversal of her convictions on the ground that she was improperly tried by a jury of eight when she was entitled to a jury of twelve. Such entitlement is a question of law, which we review de novo. See *State v. Maldonado*, 206 Ariz. 339, ¶ 10 (App. 2003).

¶5 The Arizona Constitution guarantees criminal defendants a twelve-person jury in cases where "imprisonment for thirty years or more is authorized by law." Ariz. Const. art. II, § 23. Aguilar contends that, because the state pursued the aggravating factor, "a sentence of thirty years or more was authorized by law," triggering the constitutional protection of twelve jurors. We disagree.

¶6 In 2009, our supreme court abrogated prior jurisprudence on this topic, stating as follows:

By failing to request a jury of twelve, the State effectively waived its ability to obtain a sentence of thirty years or more. The trial judge affirmed this by failing to empanel a jury of twelve. In such circumstances, as long as a lesser sentence may legally be imposed for the crime alleged, we hold that a sentence of thirty years or more is no longer permitted and that the twelve-person guarantee of Article 2, Section 23 is not triggered.

State v. Soliz, 223 Ariz. 116, ¶ 16 (2009).

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¶7 This holding by our state’s highest court, which we are bound to apply, resolves the present case.³ The state did not request a jury of twelve, the trial court empaneled a jury of eight, and a sentence under thirty years was possible under the law (and, ultimately, imposed). Thus, a prison sentence for Aguilar of thirty years or more was “no longer permitted” and the twelve-person guarantee of our state constitution was “not triggered.” Put otherwise, once the state and the court proceeded with the eight-person jury, Aguilar “could not, as a matter of law, [have] receive[d] a sentence of thirty years or more.” *Id.* ¶ 18. The state’s decision to prove the aggravator does not change this conclusion because, by then, a prison term of thirty years or more had already become a legal impossibility. “As a result, no error occurred in this case.” *Id.*

Disposition

¶8 We affirm Aguilar’s convictions and sentences.

³We need not address Aguilar’s argument that *Soliz* was wrongly decided, as we do not have the authority to modify or disregard the rulings of our supreme court. *State v. Smyers*, 207 Ariz. 314, n.4 (2004).