

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

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

KAI FELIX CIENFUEGOS,  
*Appellant.*

No. 2 CA-CR 2021-0017  
Filed October 19, 2021

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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NOT FOR PUBLICATION  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. 31.19(e).*

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Appeal from the Superior Court in Gila County  
Nos. S0400CR201700355, S0400CR201700356, S0400CR201700357  
The Honorable Gary V. Scales, Judge Pro Tempore  
The Honorable David E. Wolak, Judge Pro Tempore

**AFFIRMED IN PART; VACATED IN PART AND REMANDED**

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COUNSEL

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STATE v. CIENFUEGOS  
Decision of the Court

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**MEMORANDUM DECISION**

Presiding Judge Espinosa authored the decision of the Court, in which Vice Chief Judge Staring and Judge Eckerstrom concurred.

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ESPINOSA, Presiding Judge:

¶1 Kai Cienfuegos appeals from the trial court's orders designating his three drug offenses felonies. Because the court did not abuse its discretion in designating his solicitation to possession of a narcotic drug offense in Gila County cause number CR201700356 ("356") a felony, we affirm that order. The court, however, failed to accord Cienfuegos a hearing before designating the offenses in Gila County cause numbers CR201700355 ("355") and CR201700357 ("357"); we therefore vacate those orders and remand for further proceedings consistent with this decision.

**Procedural Background**

¶2 In May 2018, Cienfuegos pled guilty to three class-six felony offenses as follows: possession of marijuana in 355, solicitation to possession of a narcotic drug in 356, and possession of drug paraphernalia in 357. The trial court suspended the imposition of sentence for each conviction, placed Cienfuegos on concurrent three-year periods of probation, and left the offenses undesignated.

¶3 In July 2018, Cienfuegos's probation officer petitioned to terminate probation in 355 and requested the marijuana possession offense be designated a felony, which the trial court granted. In December 2019, shortly before Cienfuegos's terms of probation were set to expire, his probation officer petitioned to terminate the remaining terms of probation and have the offenses designated as felonies in 356 and 357, which the court also granted.<sup>1</sup> Cienfuegos separately appealed the designation orders, which were consolidated for purposes of appeal. We dismissed his appeals from the orders in 355 and 357 for lack of jurisdiction due to untimeliness. *State v. Cienfuegos*, Nos. 2 CA-CR 2020-0030, 2 CA-CR 2020-0031, 2 CA-CR 2020-0032, ¶ 10 (Ariz. App. Oct. 7, 2020) (consol. mem. decision). With regard to 356, however, we concluded Cienfuegos was deprived of due

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<sup>1</sup>Cienfuegos later filed requests to have the offenses in all three cases designated as misdemeanors, each of which the trial court denied.

STATE v. CIENFUEGOS  
Decision of the Court

process because “there was no hearing or opportunity for Cienfuegos to be heard” and vacated the felony designation, remanding to the trial court to conduct such a hearing. *Id.* ¶¶ 15-16.

¶4 Cienfuegos thereafter filed motions in the trial court requesting an evidentiary hearing on the designation of all three offenses. The state agreed the court should set a hearing for the offense in 356, but it argued that because this court dismissed the appeals in 355 and 357, a hearing was not warranted in those cases. Consistent with the state’s argument, the court denied Cienfuegos’s motions in 355 and 357 and set a designation hearing for 356. Cienfuegos then filed identical motions in 355 and 357, requesting the designation of the underlying offenses as misdemeanors or, alternatively, requesting permission to file delayed appeals. At a January 2021 hearing, the court granted Cienfuegos’s requests to file delayed appeals in 355 and 357 and heard testimony regarding the 356 solicitation offense, which it designated a felony at the conclusion of the hearing. Cienfuegos timely appealed the court’s designation order in 356 and filed delayed notices of appeal of the felony designation orders in 355 and 357. We have jurisdiction over these consolidated appeals pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(3).

**Felony Designation of Solicitation to Possess a Narcotic Drug in 356**

¶5 We review a trial court’s designation of a felony for an abuse of discretion. *See State v. Soriano*, 217 Ariz. 476, ¶ 15 (App. 2008). Section 13-604(A), A.R.S., provides that if the court finds a non-dangerous, class-six felony conviction “unduly harsh,” it may choose to designate the conviction as a class-one misdemeanor. *See State v. Russell*, 226 Ariz. 416, ¶¶ 7-8 (App. 2011). In making such a determination, the court should consider “the nature and circumstances of the crime and . . . the history and character of the defendant.” § 13-604(A).

¶6 At the January 2021 evidentiary hearing, the trial court stated it had “reviewed the file” and summarized Cienfuegos’s criminal history. The court then heard testimony from a probation officer, who recommended Cienfuegos’s solicitation offense be designated a felony because he had not regularly attended and participated in treatment, failed to complete treatment, missed several drug tests, and tested positive for alcohol despite his terms of probation prohibiting it. Cienfuegos’s father testified positively regarding Cienfuegos’s treatment and progress while on probation. Although Cienfuegos asserts the court failed to “properly take into account the circumstances surrounding [him]” and “consider all of the relevant circumstances” in designating the offense a felony, the court stated

STATE v. CIENFUEGOS  
Decision of the Court

it had reviewed the testimony, “tak[ing] [it] very seriously,” and had also considered all of Cienfuegos’s pleadings and attachments.

¶7 To the extent Cienfuegos asks us to consider the evidence cited in his brief as weighing in favor of a misdemeanor designation rather than a felony, we decline to do so. Such a determination is properly within the discretion of the trial court, *see* § 13-604(A), and while that “does not mean that the court is free to reach any conclusion it wishes, . . . [i]t does mean that where there are opposing equitable or factual considerations, we will not substitute our judgment for that of the trial court,” *State v. Smith*, 166 Ariz. 118, 120 (App. 1990) (quoting *State v. Chapple*, 135 Ariz. 281, 296 (1983)). The court here did not abuse its discretion, and we thus affirm its designation order. *See Soriano*, 217 Ariz. 476, ¶¶ 15-16.

**Felony Designations in 355 and 357**

¶8 Cienfuegos also argues the trial court’s felony designations in 355 and 357 must be vacated because the court failed to hold a hearing prior to those determinations, depriving him of due process. We review *de novo* constitutional issues and a court’s interpretation of a statute or rule. *State v. Gay*, 214 Ariz. 214, ¶ 4 (App. 2007); *State v. Hansen*, 215 Ariz. 287, ¶ 6 (2007).

¶9 A trial court must provide a defendant with actual notice and an opportunity to be heard before designating an offense a felony. *State v. Pinto*, 179 Ariz. 593, 597 (App. 1994) (prior to offense designation, defendant entitled to notice and opportunity to be heard); *State v. Benson*, 176 Ariz. 281, 283, 285 (App. 1993) (same). Such a hearing should comply with Rules 26.9 and 26.10(b)(1), Ariz. R. Crim. P.<sup>2</sup> *See Pinto*, 179 Ariz. at 598. In August 2018, Cienfuegos’s possession of marijuana offense in 355 was designated a felony upon his probation officer’s request, and his possession of drug paraphernalia offense in 357 was likewise designated a felony, again at his probation officer’s request, in December 2019. Both orders were entered without a hearing. Cienfuegos was thus denied the required opportunity to be heard before the offenses were designated felonies. The state, however, argues hearings with regard to 355 and 357 were unnecessary as “duplicative of the hearing held in . . . 356.” We disagree.

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<sup>2</sup>Rule 26.9 states that a “defendant has a right to be present at a presentencing hearing and must be present at sentencing.” Rule 26.10(b)(1) provides that the court must “give the defendant an opportunity to address the court.”

STATE v. CIENFUEGOS  
Decision of the Court

¶10 First, the hearing is required *before* the designation of an offense, at which the defendant is given “an opportunity to address the court.” *See* Ariz. R. Crim. P. 26.10(b)(1); *Pinto*, 179 Ariz. at 597. The only hearing here took place *after* Cienfuegos’s offenses in 355 and 357 had been designated felonies.<sup>3</sup> Second, and more importantly, the trial court is tasked with considering “the nature and circumstances of the crime” when making a designation determination. § 13-604(A); *cf. State v. Patton*, 120 Ariz. 386, 389 (1978) (when trial court has discretion to impose sentence, it considers “general character of both the offense charged and of the party convicted,” including defendant’s age, physical health, cooperative attitude, moral character, prior criminal record, non-violent nature of crime, depravity of offense, and degree of defendant’s participation in crime). While we agree with the state that evidence regarding Cienfuegos’s performance on probation was applicable to the court’s consideration of the designation for all three offenses, that is not the only consideration for the trial court at a designation hearing. *See* § 13-604(A). As noted above, the court should additionally consider the “nature and circumstances” of Cienfuegos’s crimes. *See id.* Cienfuegos pled guilty to three different offenses. Solicitation to possess a narcotic drug, the offense in 356, for which a hearing was held, is distinct from possession of marijuana and possession of paraphernalia, the offenses in the other cases. *See* A.R.S. §§ 13-1002, 13-3401(20)(ttt), (21)(m), 13-3405(A)(1), 13-3408(A)(1), 13-3415(A).

¶11 And the circumstances surrounding Cienfuegos’s commission of each offense were likewise unique.<sup>4</sup> The trial court here, considering the “nature and circumstances” of Cienfuegos’s crimes in 355 and 357 might or might not have determined “that it would be unduly

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<sup>3</sup>Although the trial court initially indicated it would be “considering information as it pertains to . . . Cienfuegos’s performance on probation as it relates to all three cases,” it ultimately stated it was “only going to consider [designation of] . . . 356.” Indeed, the court neither modified nor affirmed the designation orders in 355 and 357 at the conclusion of, or following, the hearing.

<sup>4</sup>For example, none of the three offenses were committed in the same year. And Cienfuegos’s possession of marijuana offense involved one gram of marijuana shared among him and four other people when he was a juvenile, while the paraphernalia offense concerned a plastic bag with methamphetamine residue, and the solicitation offense was for Cienfuegos having gone to a hotel room “in order to get some heroin.”

STATE v. CIENFUEGOS  
Decision of the Court

harsh to sentence [Cienfuegos] for a felony” as to one or both offenses. *See* § 13-604(A). But no hearing being held at which Cienfuegos could present evidence with regard to those crimes and address the court, Cienfuegos’s due process rights were violated. *See Pinto*, 179 Ariz. at 597; *Benson*, 176 Ariz. at 283, 285. Accordingly, we vacate the felony designations in 355 and 357.

**Disposition**

¶12 The trial court’s felony designation order in CR201700356 is affirmed, but the designation orders in CR201700355 and CR201700357 are vacated and those matters remanded to the court for further proceedings consistent with this decision.