IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

AALBERT F. WIJERS,
Appellant.

No. 2 CA-CR 2021-0120
Filed June 15, 2022

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NOT FOR PUBLICATION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. CR20162693001
The Honorable Laurie B. San Angelo, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Law Offices of Thomas Jacobs, Tucson
By Thomas Jacobs
Counsel for Appellant

MEMORANDUM DECISION

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

E C K E R S T R O M, Presiding Judge:

¶1 Aalbert Wijers appeals from the trial court's order in his November 2021 resentencing. Wijers obtained partial relief in a proceeding pursuant to Rule 32, Ariz. R. Crim. P., in which the court determined that fines and fees had been unlawfully imposed, leading to his resentencing. Wijers challenges the court's ruling that resentencing was limited to those fines, fees, and assessments. Finding no error, we affirm the sentences imposed.

¶2 After a jury trial, Wijers was convicted of two counts of aggravated driving under the influence of an intoxicant (DUI), specifically: DUI having had two or more DUI violations in the preceding eighty-four months, and driving with a blood alcohol concentration (BAC) of .08 or greater having two or more DUI violations in the previous eighty-four months. The trial court sentenced him to concurrent, ten-year prison terms for each offense. This court affirmed his convictions and sentences on appeal. *State v. Wijers*, No. 2 CA-CR 2018-0221 (Ariz. App. July 17, 2019) (mem. decision).

¶3 Wijers thereafter sought post-conviction relief, and, after a hearing, the trial court granted relief in part. It concluded that Wijers's "sentence was illegal as the trial court failed to orally pronounce all statutory fees and/or assessments." The court therefore ordered Wijers was "entitled to re-sentencing" and ordered an amended presentence report.

¶4 At the Rule 32 evidentiary hearing in September 2021, Wijers requested that the trial court "vacate[]" the fines and fees, but if it were to resentence him that it "be a full resentencing regarding the sentence." However, at the November resentencing, the court noted it had been "clear that the resentencing was on fines, fees and assessments only as they were not pronounced in open court at the time of the original sentencing."[1] The

[1]In its ruling on the petition for post-conviction relief, the trial court noted that Wijers had argued "the court should vacate the fees and

court therefore affirmed Wijers's previous prison sentences and orally pronounced the fines and fees.

¶5 On appeal, Wijers contends the trial court erred by failing "to conduct a complete resentencing" after granting relief on his sentencing claim. We review sentencing determinations for an abuse of discretion. *State v. Vermuele*, 226 Ariz. 399, ¶ 15 (App. 2011). But to the extent Wijers's argument requires the interpretation of rules and statutes, we review the court's decision de novo. *See State v. Godoy*, 244 Ariz. 327, ¶ 7 (App. 2017). In so doing, we "seek[] to follow the intent of the drafters, looking first 'to the plain language of the statute or rule as the best indicator of that intent.'" *Id.* (quoting *Fragoso v. Fell*, 210 Ariz. 427, ¶ 7 (App. 2005)). "If the language is clear and unambiguous, we give effect to that language and do not employ other methods of statutory construction." *Id.* (quoting *Fragoso*, 210 Ariz. 427, ¶ 7).

¶6 As described above, the trial court granted Wijers relief based on its failure to pronounce Wijers's fines and fees in his presence at sentencing. *See State v. Powers*, 154 Ariz. 291, 295 (1987). The court therefore vacated those fines and fees, but not the remainder of Wijers's sentences, and ordered resentencing. Citing *State v. Thomas*, 142 Ariz. 201, 204 (App. 1984), Wijers contends, however, that "[u]nder Arizona law, the only way for the court to change an illegal sentence after the time limits of Rule 24[, Ariz. R. Crim. P.,] have expired is to vacate the entire sentencing judgment and redo the sentencing in its entirety."

¶7 Wijers, however, reads *Thomas* too broadly. Thomas appealed his convictions and sentences, and this court affirmed his convictions, but found errors in sentencing as to each sentence imposed. *Id.*

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assessments that were not pronounced during sentencing." After discussing why Wijers was correct that the fines and fees had been illegally imposed, the court determined "the only remedy to correct an illegal sentence related to the oral pronouncement of the sentence, is to re-sentence the Defendant." It further found that the "oral pronouncement of his sentence was illegal" and that Wijers was "entitled to re-sentencing." Viewing the court's orders in context, it correctly characterized its order as encompassing only the illegally imposed fines and fees. In any event, Wijers challenges the court's ability to limit the resentencing after remand, not its having vacated only particular sentences in the first instance. This decision does not address a court's power to vacate sentencing in whole or in part on appeal. *See State v. MacGillivray*, 162 Ariz. 539, 545 (App. 1989).

at 202. We vacated the sentences and remanded the matter to the trial court. *Id.* at 202-03. On remand, the trial court imposed sentences amounting to an increased term of incarceration, and Thomas appealed, arguing "such a resentencing is improper." *Id.* at 203. Thomas's arguments included that the sentences could not be changed, despite the trial court having previously mistaken the length of the maximum term, because "the increased sentences" were "merely an attempt to modify previously imposed legal sentences," which could not be done outside the provision of Rule 24.3, Ariz. R. Crim. P. *Id.* Noting that we had "vacated all the sentences imposed against the defendant and remanded for resentencing on all counts," we rejected this argument. *Id.* at 204. We determined the court "was not modifying previously imposed sentences (as those sentences had been vacated), but rather was sentencing anew." *Id.*

¶8 Wijers reads this language essentially to require that all of a defendant's sentences be vacated before any individual sentence may be reconsidered on remand. In other words, he argues that any reconsideration of an individual sentence, or part thereof, is merely a prohibited modification unless all sentences have been vacated. But this is not what Arizona law provides. Our courts have routinely remanded criminal matters for partial resentencing. *See, e.g.*, *State v. Greene*, 182 Ariz. 576, 584 (1995) (remanding for resentencing on only two counts); *State v. Healer*, 246 Ariz. 441, ¶ 19 (App. 2019) (noting supreme court had only remanded as to natural life sentence, not remaining sentences); *State v. Payne*, 223 Ariz. 555, ¶ 50 (App. 2009) (affirming probationary terms and vacating prosecution fee); *State v. Alvarez*, 205 Ariz. 110, ¶ 19 (App. 2003) (vacating sentences on certain counts and remanding for resentencing on those counts); *State v. West*, 173 Ariz. 602, 610, 612 (App. 1992) (vacating and remanding only as to restitution); *State v. Barrs*, 172 Ariz. 42, 43 (App. 1992) (same); *State v. Marquez-Sosa*, 161 Ariz. 500, 504 (App. 1989) (voiding only fine pursuant to A.R.S. § 13-4037(B)); *State v. Stewart*, 118 Ariz. 281, 283 (App. 1978) (affirming sentence of imprisonment and remanding "to clarify the sentence as to the amount of the fine").

¶9 This practice is consistent with the principle that "[w]hen a trial court exceeds its sentencing authority, the sentence is void as to the excess portion." *Jackson v. Schneider*, 207 Ariz. 325, ¶ 10 (App. 2004) (citing *United States v. Green*, 735 F.2d 1203, 1205–06 (9th Cir. 1984) (determining trial court exceeded authority by conditioning probation upon payment of taxes and concluding excess sentence imposed was void)). The remaining sentences, and parts thereof, "are complete and valid at the time the court orally pronounces them in open court." Ariz. R. Crim. P. 26.16(a).

¶10 Indeed, in *State v. Anderson*, our supreme court considered a felony assessment that had been imposed by minute entry rather than at sentencing. 171 Ariz. 34, 35 (1992). The court determined that such an error could be corrected on remand in the absence of a cross-appeal by the state. It concluded that "[w]hen the improperly imposed portion of the sentence was successfully challenged on defendant's appeal, the court . . . clearly had jurisdiction to remand to the trial court for a partial resentencing." *Id.* at 36. Wijers asserts that because *Anderson* "failed to directly address" whether "the trial court has authority to, or is required to, readdress all aspects of the sentence on remand," its statement about partial resentencing was merely dicta. But, although the court's legal analysis focused on the question of the need for a cross-appeal by the state, the court made clear that the trial court had the authority to conduct a "partial resentencing." *Id.* And we cannot say that its statement as to the scope of remand was "unnecessary to the decision in the case." *Obiter Dictum*, Black's Law Dictionary (11th ed. 2019). Nor can we ignore this clear direction from our supreme court. *See State v. Sullivan*, 205 Ariz. 285, ¶ 15 (App. 2003); *see also State v. Yazzie*, 232 Ariz. 615, ¶ 8 (App. 2013) ("[S]tatements that are arguably dicta 'nevertheless . . . are statements by our supreme court which we believe cannot be ignored[.]'" (quoting *Cline v. Ticor Title Ins. Co.*, 154 Ariz. 343, 348 (App. 1987))).

¶11 A contrary conclusion would conflict with the clear principles on which Wijers himself relies. Generally, a trial court may only modify an illegal sentence under Rule 24.3. It is only when a sentence has been vacated that the court may act beyond the limits of Rule 24.3. *See State v. Serrano*, 234 Ariz. 491, ¶ 9 (App. 2014). Thus, when less than all of a defendant's sentences have been vacated, the sentences that have not been vacated must stand, and a trial court may resentence the defendant on only those sentences that have been vacated. *See Healer*, 246 Ariz. 441, ¶ 19 ("trial court correctly concluded it did not have authority . . . to change the consecutive nature of Healer's sentences" after limited remand vacating only natural life sentence).

¶12 Wijers further asserts that fines and fees are not "a sentence separate and apart from incarceration." As the state points out, however, this court has determined that fines and fees that constitute a penalty are sentences and are therefore subject to the limitation of A.R.S. § 13-116. *State v. McDonagh*, 232 Ariz. 247, ¶ 11 (App. 2013). Wijers contends that because we viewed the question in the context of § 13-116, *McDonagh* does not stand for the proposition that fines and fees are sentences separate from those imposing incarceration. Consideration of the authority on which we relied, however, makes clear that a fine or fee is a separate sentence and that our

conclusion was not limited to § 13-116. Instead, our decision as to the applicability of § 13-116 arose from the determination that fines and fees may themselves constitute a sentence under our statutes. *McDonagh*, 232 Ariz. 247, ¶ 11.

¶13 In concluding the DUI assessments at issue in *McDonagh* would be subject to the limitation of § 13-116, we relied on *State v. Sheaves*, 155 Ariz. 538 (App. 1987). *McDonagh*, 232 Ariz. 247, ¶ 9. In *Sheaves*, the court relied on the definition of "sentence" set forth in Rule 26.1, Ariz. R. Crim. P. *Sheaves*, 155 Ariz. at 541. Under that rule, the term "'[s]entence' means the court's pronouncement of the penalty imposed on the defendant after a judgment of guilty." Ariz. R. Crim. P. 26.1(c). It has long been the law in Arizona that "[a] 'fine' is a criminal penalty, and clearly constitutes a 'sentence,'" as defined in Rule 26.1. *State v. Pitts*, 26 Ariz. App. 390, 391 (1976) (citation omitted).

¶14 Additionally, various sentencing statutes make clear that our legislature intended for a fine to be imposed as a sentence in its own right. Section 13-801, A.R.S., sets a limit on the amount of "[a] sentence to pay a fine for a felony." And, under A.R.S. § 13-808, when "a defendant is sentenced to pay a fine alone or in addition to any other sentence," the court may permit payment over time. This language demonstrates that the legislature anticipated a defendant being "sentenced" to a fine and provided that a fine existed among "other sentence[s]." *Cf. State v. Nguyen*, 208 Ariz. 316, ¶ 9 (App. 2004) (phrase "any other sentence" in dangerous crimes against children statute "is based on two sentences, not one"). And, in the context of aggravated DUI, A.R.S. § 28-1383 provides that a person convicted of the offense defined therein is required to serve a minimum term of imprisonment, § 28-1383(D), and must be ordered, "[i]n addition to any other penalty prescribed by law," to pay certain assessments, as well as a fine, § 28-1383(J). The legislature thus separately enumerated such fees and fine as penalties for the offense and has expressly denominated a fine as a sentence. *See Godoy*, 244 Ariz. 327, ¶ 7 (plain language of statute best indicator of legislative intent).

¶15 Finally, Wijers contends that the trial court "acknowledged" he was entitled to resentencing as to all of his sentence when it ordered an amended presentence report. He maintains that because the original report included the fines and fees, "it would have been proper to request amendment" so the court could consider his behavior in prison in mitigation. The addendum to the presentence report provided to the court, however, included information that does not appear to have been included in the original presentence report. This includes information as to

"additional collateral" Wijers had provided, including payments he had made, and a time credit computation. The addendum indicated that the court had "requested a time credit computation and a list of all fines, fees, and assessments imposed at sentencing." Thus, the content of the report and the reasons provided to the probation department for its production do not support Wijers's implicit assertion that the court could only have requested the addendum for purposes of reconsidering all of the sentences in view of Wijers's prison behavior. For all these reasons, we cannot say the court erred in limiting Wijers's resentencing to the fines and fees it had vacated in his Rule 32 proceeding.

¶16 We affirm the sentences imposed by the trial court.