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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. TIARON GERMAIN ROSS, Appellant.	2 CA-CR 2007-0392 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20070112

Honorable Barbara Sattler, Judge Pro Tempore

VACATED AND REMANDED

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V Á S Q U E Z, Judge.

¶1 After a jury trial conducted in his absence, appellant Tiaron Ross was convicted of four counts of sale of a narcotic drug, each arising from the sale of cocaine to the same undercover police officer. At sentencing, the state recommended enhanced, presumptive prison terms for each count. Ross requested "the absolute minimum [sentence] permitted by law" in light of the "minimal" nature of the offenses. The trial court found Ross had historical prior felony convictions for third-degree burglary and aggravated robbery, weighed the aggravating and mitigating factors, and sentenced him to concurrent, enhanced, presumptive prison terms of 15.75 years for each count. On appeal, Ross does not challenge his convictions. He contends only that we should vacate his sentences and remand for resentencing because the trial court relied on inaccurate information about his criminal history in imposing his sentences.

¶2 At sentencing, the court found Ross's "remorse" and "family support" to be mitigating factors, and "20 prior misdemeanors, [and] two prior felony convictions; one of them for a violent felony" to be aggravating factors. The court further commented that it agreed with defense counsel that the presumptive sentence was "really a whole lot of time" but that given the aggravating factors, it was "difficult . . . under the law to justify other than the presumptive." However, ten of the twenty misdemeanor convictions and the characterization of the felony conviction as violent have no basis in fact and were the result of error or ambiguity in Ross's presentence report.[1]

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[1]The state does not dispute that this information was erroneous. And we are not persuaded by its argument that although Ross was not convicted of a violent felony, there was no error because records not before the trial court apparently indicated that he had been charged with a violent crime before pleading to a nonviolent offense. Although the court

¶3 Because Ross failed to object below, we review only for fundamental error.[2] *State v. Smith*, 219 Ariz. 132, ¶ 21, 194 P.3d 399, 403 (2008). And, "[t]o prevail under this standard of review, a defendant must establish both that fundamental error exists and that the error in his case caused him prejudice." *State v. Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d 601, 607 (2005). However, "[w]here a defendant has been denied an essential component of due process, such denial constitutes fundamental error." *State v. Flowers*, 159 Ariz. 469, 472, 768 P.2d 201, 204 (App. 1989). And, "[c]onvicted defendants have a due process right to a fair sentencing procedure which includes the right to be sentenced on the basis of accurate information." *State v. Grier*, 146 Ariz. 511, 515, 707 P.2d 309, 313 (1985); *see State v. Conn*, 137 Ariz. 148, 150, 669 P.2d 581, 583 (1983) ("sentencing process . . . must satisfy the requirements of the Due Process Clause"); *State v. Meador*, 132 Ariz. 343, 346-47, 645 P.2d 1257, 1260-61 (App. 1982) (aggravating circumstance must be true and supported by reasonable evidence in record); *see also Townsend v. Burke*, 334 U.S. 736, 741 (1948) (denial of due process to base sentence on "materially untrue" assumptions about defendant's criminal record).

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could theoretically have taken judicial notice of such records, the state cites no authority that expressly supports its contention that we may retrospectively uphold a trial court's finding of an aggravating factor based on information it neither actually considered nor upon which it relied. In any event, because any such records are not part of the record on appeal, we do not consider them. *See State v. Schackart*, 190 Ariz. 238, 247, 947 P.2d 315, 324 (1997).

[2]We are not persuaded by Ross's argument that he was required to "interrupt [the] trial judge in the midst of pronouncing sentence" to preserve the issue. In fact, Ross had an opportunity to object to any inaccuracies in the presentence report prior to the presentencing hearing, pursuant to Rule 26.8(a), Ariz. R. Crim. P.

¶4 In *Conn*, our supreme court found the trial court's use as aggravating factors of five sexual assaults to which the defendant had confessed in return for immunity from prosecution violated due process and constituted fundamental error. 137 Ariz. at 149-51, 669 P.2d at 582-84. It can be no less a violation of due process for a court to use nonexistent and mischaracterized convictions as aggravating factors. The trial court's use of such convictions as aggravating factors in the present case was therefore fundamental error. *See Flowers*, 159 Ariz. at 472, 768 P.2d at 204.

¶5 However, "simply considering an improper aggravating factor is not reversible error under *Henderson*"; the defendant must also show prejudice. *State v. Munninger*, 213 Ariz. 393, ¶ 15, 142 P.3d 701, 705-06 (App. 2006). In *Munninger*, Division One of this court found the trial court had used an improper aggravating factor. *Id.* ¶ 9. It nevertheless denied relief on the ground that the defendant "had not met his burden of showing that he was prejudiced by the use of [an] improper aggravating factor," because there was "no support in the record" for his contention that "the sentencing judge might have sentenced him to [fewer years in prison] if the aggravator was not considered." *Id.* ¶ 14. Here, however, there is such support in the record. As we noted above, the court expressly stated that the sentence it imposed was "really a whole lot of time," but because Ross had "20 prior misdemeanors, two prior felony convictions[,] one of them for a violent felony[,] . . . it[wa]s difficult for [it] under the law to justify other than the presumptive."

¶6 Furthermore, "[b]ecause the trial court was not required to specify either aggravating factors or mitigating factors in imposing [the] presumptive sentences, we can only conclude that the court believed the analysis of both factors was integral to its ultimate

conclusion." *State v. Johnson*, 210 Ariz. 438, n.1, 111 P.3d 1038, 1041 n.1 (App. 2005). Consequently, we must also conclude that the absence of the two erroneously based aggravating factors—the only aggravating factors found by the court—would necessarily have changed the court's "sentencing calculus." *State v. Lehr*, 205 Ariz. 107, ¶ 8, 67 P.3d 703, 705 (2003). Under these circumstances, Ross has met his burden of showing he was prejudiced by the court's reliance on those factors in imposing a presumptive sentence. *See Munninger*, 213 Ariz. 393, ¶ 15, 142 P.3d at 705-06. And when a sentence was based on the consideration of improper aggravating factors, we may remand for resentencing, even if the court did not impose an aggravated sentence. *See State v. Pena*, 209 Ariz. 503, ¶¶ 22-26, 104 P.3d 873, 879 (App. 2005).

Disposition

¶7 For the reasons discussed, we vacate Ross's sentence and remand this matter to the trial court for resentencing consistent with this decision.

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GARYE L. VÁSQUEZ, Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge