

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

NOV 29 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0217-PR
)	DEPARTMENT B
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
ANGELA MONTENEGRO,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090167001

Honorable Clark W. Munger, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin

Tucson
Attorneys for Petitioner

ECKERSTROM, Judge.

¶1 Petitioner Angela Montenegro seeks review of the trial court's May 24, 2010 order denying her of-right petition for post-conviction relief filed pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Pursuant to a plea agreement, Montenegro was convicted of aggravated driving under the influence with a suspended license. The trial court suspended the imposition of sentence and placed Montenegro on ten years' probation, which included as a condition a four-month prison term with an eight-month jail term to follow. The court also fined Montenegro \$750 with an additional surcharge of \$630, or eighty-four percent. It appears the trial court calculated this surcharge by combining the sixty-one percent surcharge under A.R.S. § 12-116.01(A), (B), and (C), the thirteen percent surcharge under A.R.S. § 12-116.02(A), and the ten percent surcharge under A.R.S. § 16-954(C).¹

¶3 Montenegro filed a petition for post-conviction relief, asserting she was entitled to thirty-two days of credit towards her jail term and that her jail and probation terms should be reduced. She also asserted the court had erred as a matter of law in finding the portion of the surcharge on her fine imposed pursuant to § 16-954(C) to be mandatory and, alternatively, that the court had miscalculated the amount of that surcharge. The court granted Montenegro relief on the first issue but summarily denied relief on the remaining issues.

¶4 On review, Montenegro argues only that the court erred in determining the fine surcharge had been properly imposed. Section 16-954(C) provides that “an additional surcharge of ten percent shall be imposed on all civil and criminal fines and penalties collected pursuant to § 12-116.01 and shall be deposited into the [clean

¹Although the trial court did not explain how it arrived at the \$630 surcharge, in its order denying Montenegro relief on this issue, it adopted the state's argument in response to Montenegro's petition for post-conviction relief. The state had argued an eighty-four percent surcharge was appropriate based on those statutes.

elections] fund.” Montenegro first contends the trial court incorrectly determined the surcharge could not be waived. We recently rejected an identical argument in *State v. Rogers*, No. 2 CA-CR 2009-0277, ¶ 6, 2010 WL ____ (Ariz. Ct. App. Nov. 19, 2010), determining the § 16-954(C) surcharge was mandatory and a trial court therefore lacks discretion to waive it.

¶5 Montenegro also reurges her alternative argument that the trial court miscalculated the amount of the surcharge. She reasons the additional ten percent surcharge under § 16-954(C) should be applied to the sixty-one percent surcharge assessed by § 12-116.01—not the amount of her fine—because § 16-954(C) applies only to surcharges “collected” pursuant to § 12-116.01. Thus, with the addition of the thirteen percent surcharge under § 12-116.02, Montenegro asserts her total surcharge should have been only approximately \$600. But we determined in *Rogers* that the statute’s plain language instead required the court to impose “the § 16-954(C) assessment against both the underlying fine and the surcharges imposed pursuant to § 12-116.01.” *Rogers*, No. 2 CA-CR 2009-0277, ¶ 9, 2010 WL ____.

¶6 Thus, the trial court should have assessed Montenegro a sixty-one percent surcharge of \$457.50 under § 12-116.01 and a thirteen percent surcharge of \$97.50 under § 12-116.02. And, pursuant to § 16-954(C), the court should have assessed an additional amount against Montenegro of \$120.75—ten percent of the § 12-116.01 surcharge plus ten percent of the underlying \$750 fine—for a total surcharge of \$675.75. *See Rogers*, No. 2 CA-CR 2009-0277, ¶ 9, 2010 WL ____.

But, because the court imposed only a \$630 surcharge, Montenegro was not prejudiced by the error. Nor will we correct the

error, which is to Montenegro's benefit, because the state has not sought review of the court's order. *See Id.* ¶ 10. Thus, although we grant review of Montenegro's petition, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge