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APR 28 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA,<br><br>Appellee,<br><br>v.<br><br>MIKEL THOMAS DILLON,<br><br>Appellant. | 2 CA-CR 2008-0091<br>DEPARTMENT B<br><br>MEMORANDUM DECISION<br>Not for Publication<br>Rule 111, Rules of<br>the Supreme Court |

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20071285

Honorable Nanette M. Warner, Judge

AFFIRMED AS CORRECTED

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Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Alan L. Amann
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Rose Weston
Tucson
Attorneys for Appellant

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

**¶1** After a jury trial, appellant Mikel Dillon was convicted of three counts of theft of a means of transportation; two counts of third-degree burglary; and one count each of criminal damage, aggravated assault, possession of a prohibited weapon, theft by control of stolen property worth between $1,000 and $2,000, theft of a credit card, conducting a chop shop, and possession of burglary tools. The jury found count five of the indictment—the aggravated assault charge—was committed against a law enforcement officer, was of a dangerous nature, and involved the use of a dangerous instrument (a car). After a bench trial, the court found Dillon had two historical prior felony convictions and had been on probation when he had committed the offenses. The trial court sentenced Dillon to a combination of concurrent and consecutive, presumptive prison terms totaling 22.5 years.

**¶2** Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Based on our review of the transcript of the sentencing hearing, this court found what appeared to be sentencing error on count three of the indictment, which charged criminal damage as a class five felony based on property damage valued at $2,000 or more but less than $10,000. *See* A.R.S. § 13-1602(B)(2). The jury answered a special interrogatory and found the value of the damage to the property on that count to be $10,000 or more, which would have made the offense a class four felony. *See* § 13-1602(B)(1). At sentencing, however, the trial court advised Dillon he had been found guilty of a class five felony on that count, based on property damage of $2,000 or more but less than $10,000,

consistent with the indictment, but then sentenced Dillon to the presumptive, ten-year term for a class four, nondangerous, repetitive offense, enhanced with two historical prior felony convictions. *See* 2005 Ariz. Sess. Laws, ch. 188, § 1 (former A.R.S. § 13-604(C)). This court directed Dillon's counsel to file a supplemental brief addressing the issue and permitted the state to file an answering brief.

**¶3** Counsel for both parties agree the oral pronouncement of sentence was erroneous but note correctly that the final page of the sentencing minute entry reflects that, "later in chambers," the trial court corrected the sentence imposed on count three to the presumptive, five-year term for a class five felony. Although the court did not explicitly state it intended to correct the sentence previously imposed, Dillon's counsel contends this was, in fact, the court's intent. The state essentially concedes in its answering brief that the appropriate sentence for the class five criminal damage offense charged in count three was the five-year term, not the ten-year term pronounced at sentencing and set forth on page three of the sentencing minute entry.

**¶4** Generally, "[w]here there is a discrepancy between the oral sentence and the written judgment, the oral pronouncement of sentence controls." *State v. Hanson*, 138 Ariz. 296, 304-05, 674 P.2d 850, 858-59 (App. 1983). But here, because the court had erred by sentencing Dillon for a class four felony on count three, after telling him he had been convicted of a class five felony, and because, as the state concedes, the trial court appears to have intended to correct that sentence, we regard the five-year term as the actual sentence

imposed on count three. *See State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992) ("Upon finding a discrepancy between the oral pronouncement of sentence and a minute entry, a reviewing court must try to ascertain the trial court's intent by reference to the record."); *see also* Ariz. R. Crim. P. 24.3 (permitting trial court to correct unlawful sentence).

**¶5** In reviewing the remainder of the record for fundamental, reversible error, we find none. There was sufficient evidence to support the convictions, and the sentences imposed were within statutory parameters. Therefore, we affirm Dillon's convictions and sentences as corrected.

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PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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J. WILLIAM BRAMMER, JR., Judge

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GARYE L. VÁSQUEZ, Judge