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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STATE OF ARIZONA, Appellee, v. HAMONI VOLE VEAMATAHAU, Appellant.	2 CA-CR 2008-0092 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20063136

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED AS MODIFIED

Terry Goddard, Arizona Attorney General
By Kent A. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

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E S P I N O S A, Judge.

¶1 After appellant Hamoni Veamatahau voluntarily waived his right to a jury trial, and following a bench trial, the trial court found him guilty of three counts of armed robbery; three counts of aggravated robbery; four counts of aggravated assault; and one count each

of kidnapping, possession of a deadly weapon by a prohibited possessor, and fleeing from a law enforcement vehicle. The court further found Veamatahau had one historical prior felony conviction and was on probation when he committed these crimes, some of which were found to be dangerous-nature offenses. He was sentenced to enhanced terms of imprisonment, some concurrent and some consecutive, totaling 27.75 years.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing she has reviewed the entire record and found no meritorious issue to raise on appeal. Counsel has also complied with *Clark* by "setting forth a detailed factual and procedural history of the case with citations to the record, [so] this court can satisfy itself that counsel has in fact thoroughly reviewed the record." *Id*. ¶ 32. Veamatahau has not filed a supplemental brief. We have viewed the evidence in the light most favorable to upholding his convictions, *State v. Ossana*, 199 Ariz. 459, ¶ 2, 18 P.3d 1258, 1259 (App. 2001), and we are satisfied the record supports counsel's recitation of the facts.

¶3 During our review pursuant to *Anders*, however, we identified the trial court's application of former A.R.S. § 13-702.02[1] and its imposition of consecutive sentences as possible sentencing errors and requested further briefing by the parties. For the following reasons, we modify the court's sentencing order to resolve a discrepancy.

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[1]Significant portions of the Arizona criminal sentencing code have been renumbered, effective January 1, 2009. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference, we refer in this decision to the section numbers in effect when Veamatahau committed these offenses.

¶4 In summary, the evidence and reasonable inferences from the evidence established Veamatahau had been armed with a gun when he and an accomplice robbed a convenience store and restrained and robbed one of its customers, then, less than fifteen minutes later, robbed a second convenience store and assaulted that store's clerk and customer. Later that night, Veamatahau sped away from police officers, who had ordered him to turn off his vehicle's engine and step out, and threw a gun from the vehicle's window during the pursuit that followed. Veamatahau was on probation for a felony conviction when he committed these offenses.

¶5 On Veamatahau's convictions for the armed robbery and two aggravated assaults committed at the second convenience store, the trial court sentenced him pursuant to former § 13-702.02, for dangerous, nonrepetitive "multiple offenses not committed on the same occasion" and imposed a sentence of twenty-one years for that armed robbery and fifteen years for each of those two aggravated assaults. The court's minute entry states the court imposed presumptive sentences for those convictions, but the terms of years the court imposed instead reflect aggravated sentences under § 13-702.02. *See* § 702.02(B)(1), (C). The presumptive term for a second-occasion offense of armed robbery, a class two felony, is 10.5 years' imprisonment, and the presumptive term for the second-occasion aggravated assaults, class three felonies, is 7.5 years' imprisonment. *See id*. At the sentencing hearing, the court did not identify any aggravating circumstances pursuant to former A.R.S. § 13-702, as required to impose these aggravated terms. *See* §§ 13-702(B), 13-702.02(B); *see also*

State v. Harrison, 195 Ariz. 1, ¶ 12, 985 P.2d 486, 489 (1999) (court required to state aggravating factors on record when imposing aggravated sentence).

¶6 In the further briefing we requested, the state concedes these sentences are not authorized and were entered in error. The state surmises the court "apparently intended to impose presumptive, and not maximum, sentences on these counts." Because these terms are concurrent with other sentences imposed, correcting them will not alter the length of Veamatahau's aggregate term of imprisonment. But, a sentence not authorized by statute is unlawful. *See* Ariz. R. Crim. P. 24.3 cmt. And, "[i]mposition of an illegal sentence constitutes fundamental error." *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002); *see also State v. Smith*, 219 Ariz. 132, ¶ 22, 194 P.3d 399, 403 (2008) ("[I]mproper use of a prior . . . conviction to enhance a prison sentence goes to the foundation of a defendant's right to receive a valid and legal sentence and is 'of such magnitude that the defendant could not have possibly received' a fair sentencing," *quoting State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *State v. Archuleta*, 124 Ariz. 222, 224, 603 P.2d 114, 116 (App. 1979) ("[W]here the trial court specifically states that it finds no aggravating or mitigating circumstances and thus no reason to vary from a presumptive term, but then assesses a . . . [non]presumptive term, that sentence cannot stand.").

¶7 When a discrepancy exists between the oral pronouncement of sentences and the sentencing minute entry that cannot be resolved by reference to the record, remand for clarification is the appropriate remedy. *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209,

211 (App. 1992). Remand is unnecessary in this case, however, because the record reflects the court had intended to sentence Veamatahau to presumptive prison terms.

¶8 We also asked the parties to address whether imposition of a consecutive sentence for Veamatahau's conviction on the weapons charge violated A.R.S. § 13-116, in light of *State v. Carreon*, 210 Ariz. 54, ¶ 109, 107 P.3d 900, 921 (2005), in which our supreme court determined that the consecutive sentences imposed in that case for convictions of weapons misconduct and attempted murder were impermissible, because the defendant's prohibited possession of a firearm had not exposed the victim to "a risk that exceeded that inherent in the attempt on [the victim's] life." This kind of sentencing error, too, is fundamental. *State v. White*, 160 Ariz. 377, 379, 773 P.2d 482, 484 (App. 1989). We review de novo the question whether consecutive prison terms are unlawful based on the application of § 13-116. *State v. Urquidez*, 213 Ariz. 50, ¶ 6, 138 P.3d 1177, 1179 (App. 2006). After reviewing the briefs filed by the parties, we find no error in the trial court's imposition of consecutive sentences.

¶9 Section 13-116 "precludes the imposition of consecutive sentences for two offenses that are really a 'single act.'" *State v. Lee*, 185 Ariz. 549, 560, 917 P.2d 692, 703 (1996), *quoting State v. Gordon*, 161 Ariz. 308, 312, 778 P.2d 1204, 1208 (1989). As the state points out, Veamatahau's prohibited possession of a deadly weapon was a crime that continued before, during, and after the offenses he committed in the two convenience stores and during his later flight from a law enforcement vehicle. And, at sentencing, the court

ordered that Veamatahau's sentences for flight and prohibited possession "will run consecutively with one another and consecutive[ly] to all other counts."

¶10 We agree with the state that we need not determine whether Veamatahau's prohibited possession of a deadly weapon and his using that weapon to commit the crimes at each convenience store was the same act for purposes of § 13-116. Regardless of any such analysis, the trial court did not err in ordering that Veamatahau's sentence for prohibited possession be served consecutively to his sentence for fleeing from law enforcement, or in ordering his sentence for flight to be consecutive to all other charges.

¶11 Veamatahau's flight was a separate act from his possession of a firearm, it was factually possible for him to have committed either crime without necessarily committing the other, and the laws against flight and prohibited possession protect society from different risks of harm. *See Gordon*, 161 Ariz. at 315, 778 P.2d at 1211 (identifying factors to determine whether consecutive sentence violates § 13-116); *cf. State v. Roseberry*, 210 Ariz. 360, ¶ 62, 111 P.3d 402, 413 (2005) (conspiracy to transport marijuana subjects society, as victim, to additional risk of harm not inherent in crime of transportation of marijuana). Accordingly, the court's imposition of a term for prohibited possession consecutive to his sentence for flight was permissible under § 13-116.

¶12 Similarly, the trial court did not err in ordering Veamatahau's sentence for fleeing from law enforcement be served consecutively to all other sentences. That flight was a separate and dangerous act, involving none of the same conduct that resulted in his convictions for the robberies, assaults, and kidnapping.

¶13 We have found no arguable issue that would entitle Veamatahau to reversal of his convictions. For the foregoing reasons, we order that the sentence imposed on count six of the indictment be amended to 10.5 years' imprisonment, the presumptive term for a class two, dangerous, nonrepetitive, multiple offense not committed on the same occasion. We further order that the sencences imposed for Veamatahau's convictions on counts ten[2] and twelve each be amended to 7.5 years' imprisonment, the presumptive sentence for a class two, dangerous, nonrepetitive, multiple offense not committed on the same occasion. We affirm Veamatahau's convictions and, as modified, his sentences.

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PHILIP G. ESPINOSA, Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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JOSEPH W. HOWARD, Presiding Judge

[2]Veamatahau's conviction on count ten in the trial court's sentencing order, for the crime of aggravated assault, was originally alleged as count eleven in Veamatahau's indictment. The change in numbering resulted from the court's severance of the prohibited possessor charge.