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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. CHESTER LEON AXSOM, II, Petitioner.	2 CA-CR 2008-0268-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause Nos. CR-20022939 and CR-20023437 (Consolidated)

Honorable Paul E. Tang, Judge

REVIEW GRANTED; RELIEF GRANTED AND REMANDED

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Tucson
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Chester Axsom
Tucson
In Propria Persona

H O W A R D, Presiding Judge.

¶1 In this petition for review of the trial court's denial of a petition for post-conviction relief following a resentencing, petitioner Chester Leon Axsom II challenges his sentences. We conclude the petitioner's aggravated sentences were unlawfully imposed, the court abused its discretion in denying post-conviction relief, and the case must be remanded for a second resentencing.

Procedural History

¶2 Pursuant to a plea agreement encompassing two causes, Axsom was convicted of one count of sexual assault in CR-20022939 and one count of attempted sexual assault in CR-20023437. He was initially sentenced in April 2003 to an aggravated, fourteen-year prison term for the sexual assault and to a consecutive, substantially aggravated, 8.75-year term for the attempted sexual assault. Based on the Supreme Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004), Axsom successfully challenged his aggravated sentences in a previous post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P.[1] The trial court concluded it had improperly imposed aggravated sentences in reliance on "aggravating factors that were not found by a jury or admitted by [Axsom]" and thus ordered Axsom resentenced.

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[1]In light of *Blakely*, the trial court in January 2005 ordered a new jury trial "to determine aggravating factors" and a new bench trial to determine Axsom's prior convictions, but it stayed all further proceedings "pending the resolution of conflicting decisions by Divisions One and Two of this court and Axsom's seeking review of the trial court's ruling." In December 2005, this court granted Axsom's petition for review and remanded the case to the trial court to reconsider its ruling and possibly resentence Axsom in light of the various appellate decisions interpreting *Blakely* that had issued in the interim. *State v. Axsom*, No. 2 CA-CR 2005-0052-PR (decision order filed Dec. 15, 2005).

¶3 Before the resentencing hearing, the trial court first held a bench trial in July 2006 to determine the existence of the prior felony conviction being urged as an aggravating factor pursuant to A.R.S. § 13-702(C)(11).[2] The court found Axsom had been convicted in June 1992, in CR-33754, of kidnapping, aggravated assault, and seven sexual assaults committed in March 1991. It then resentenced him on August 28, 2006, to the same aggravated and substantially aggravated terms originally imposed in 2003, totaling 22.75 years' imprisonment.[3]

¶4 At the resentencing hearing, the court cited *State v. Martinez*, 210 Ariz. 578, 115 P.3d 618 (2005), for the proposition that its earlier finding that Axsom had prior felony convictions permitted it to consider and find additional relevant aggravators by a preponderance of the evidence. The court found two mitigating factors, Axsom's family support and his purported expression of remorse, but reimposed aggravated sentences based on the following aggravating factors:

> [T]hat the prior felony convictions were sexual assault, sexually related, in 33754; that in the cases before the court, the defendant used threats to the victims; each victim was the victim

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[2]Significant portions of the Arizona criminal sentencing code have since been renumbered, effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 8-120. Unless otherwise noted, we refer in this decision to the statutes as they were numbered and worded at the time of Axsom's resentencing in August 2006.

[3]Among other errors in the resentencing minute entry from August 28, 2006, the fourteen-year sentence reimposed in CR-20022939 is mistakenly characterized as "substantially aggravated"—terminology the court did not use in orally pronouncing the sentence. As provided in Axsom's plea agreement, no substantially aggravated term was available for that count; the minute entry from Axsom's original sentencing correctly designated the sentence as simply an aggravated term.

> of a physical assault with the use of a knife, that was a tile knife as to victim one, bread knife as to victim two; emotional and physical harm [to the victims] . . . . Victim one suffered for five hours in multiple assaults. Victim two was not only . . . raped, but also [subsequently] heard victim one being raped.[4] Given that victim number two had to experience the rape of another victim speaks of, once again, unspeakable [sic] brutality and depravity.

¶5 Axsom initiated the present proceeding by filing a new notice of post-conviction relief, and again the court appointed counsel to represent him. In September 2007, counsel filed a notice pursuant to Rule 32.4(c)(2), stating that, after thoroughly reviewing the record and consulting with Axsom, counsel could find no factual or legal basis

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[4]The resentencing minute entry inaccurately states as an aggravating factor in CR-20022939 that the "victim had to experience the rape of another victim." In fact, during his September attack on the victim in CR-20022939, Axsom telephoned the victim of his earlier attack in July, the offense charged in CR-20023437, and subjected her to the sounds of the other victim's screams. Because Axsom was indicted for the September offense before he was indicted for the July offense, the court's use of the terms "victim one" and "victim two" creates some ambiguity—as illustrated by the court's erroneous oral statement that "[v]ictim two was not only subsequently raped, but also heard victim one being raped."

Of further concern, the minute entry lists as a final aggravating factor with respect to both counts that "defendant has expressed no remorse." That statement appears to be at odds with the trial court's equivocal oral findings, purportedly in mitigation, reported in the transcript of the proceeding as follows:

> I have considered in mitigation the following in balancing all the factors: the defendant's family support, including his two children and his then parents. And I'll find, once again, that the defendant is, in his own way, expressing remorse. But to be candid with you, when you read the letters, if anything, there's a clear lack of remorse in his letters.
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> That said, in aggravation the Court has found as follows . . . .

for relief. Axsom then filed a pro se, supplemental petition for post-conviction relief, in which he challenged "the unconstitutional method by which Judge Tang aggravated his sentence," asserted ineffective assistance of trial counsel at sentencing, and asked to be resentenced to presumptive terms of imprisonment. Although he urged numerous separate claims of error, Axsom's chief complaint was that the prior felony convictions the trial court cited in aggravation had been entered more than ten years before Axsom committed either the attempted sexual assault in CR-20023437 in July 2002 or the sexual assault in CR-20022939 in September 2002.[5]

¶6 Without an evidentiary hearing and without explaining its ruling, the trial court denied post-conviction relief, giving rise to the present petition for review. We will not disturb the trial court's decision unless we find it has clearly abused its discretion. *State v. Bennett*, 213 Ariz. 562, ¶ 17, 146 P.3d 63, 67 (2006).

¶7 On review, Axsom has abandoned his claim of ineffective assistance of counsel. His petition for review identifies four issues, three of which were preserved below:

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[5]Although Axsom asserts "the conviction date in CR 33754 was May 12, 1992," the judgment of convictions—for kidnapping, aggravated assault, and seven counts of sexual assault—was actually entered on June 29, 1992. They thus preceded by ten years and eleven days the offense in CR-20023437, committed on July 10, 2002, and by ten years, two months, and twenty days the offense in CR-20022939, committed on September 18, 2002. Moreover, Axsom had spent most of the intervening time incarcerated. According to the presentence report prepared for his original sentencing in 2003, he had been sentenced in June 1992 to twelve years in prison for his multiple convictions in CR-33754, then had been "released on earned release credit on October 25, 2001." Thus, he committed the July 2002 attack in CR-20023437 less than nine months after his early release and committed the September attack in CR-20022939 approximately ten weeks later.

1. Whether A.R.S. § 13-702(C)(11) includes prior felony convictions outside of its intended legislative scope of ten years.

2. Whether the trial court abused its discretion by expanding the statutory language of A.R.S. § 13-702(C)(11).

3. Whether A.R.S. § 13-702.02 applies to Petitioner[']s sentence in CR-20022939.

4. Whether the trial court imposed illegal sentences causing fundamental error.

All but the third of these issues are variations on Axsom's central complaint—namely, that in resentencing him in 2006, after holding a bench trial on his prior convictions but no jury trial on the various other factors cited in aggravation, the court reimposed aggravated sentences based on a prior felony conviction in CR-33754 that was more than ten years old.

Law and Discussion

¶8 When Axsom committed his offenses in July and September 2002, A.R.S. § 13-702(C)(11) specified as a factor to be considered in aggravation that "[t]he defendant was previously convicted of a felony within the ten years immediately preceding the date of the offense."[6] *See* 2001 Ariz. Sess. Laws, ch. 51, § 1; 2003 Ariz. Sess. Laws, ch. 225, § 1. In contrast to former § 13-604(V)(2)(b) and (c)[7]—in the statute governing sentence

[6]Although its wording has not changed, the statute was renumbered as § 13-701(D)(11), effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 23, 120.

[7]*See* 2003 Ariz. Sess. Laws, ch. 11, § 1. Section 13-604(V)(2)(b) and (c) was renumbered as § 13-604(W)(2)(b) and (c) in 2005, *see* 2005 Ariz. Sess. Laws, ch. 188, § 1, and renumbered again as § 13-105(22)(b) and (c), effective December 31, 2008, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 10, 120. Current subsections (b) and (c) of § 13-105(22) retain the language excluding time spent incarcerated, as well as any time spent "on absconder

enhancement for repeat offenders, which specified that time spent incarcerated should be excluded when calculating the age of a historical prior felony conviction used for enhancement—§ 13-702(C)(11) contained no comparable exclusion for time spent incarcerated between a previous conviction and the present offense when the prior conviction is used for aggravation, rather than enhancement. *See* 2001 Ariz. Sess. Laws, ch. 51, § 1; 2003 Ariz. Sess. Laws, ch. 225, § 1. Consequently, Axsom claims, his convictions in CR-33754 could not properly be used to aggravate his sentences in these cases because they were over ten years old.

¶9 This issue was presented and argued to the trial court, which concluded, despite the absence of any reference in § 13-702(C)(11) to time spent incarcerated, that "the intention behind it is a period of time of which someone is basically outside of incarceration." By focusing on the legislature's presumed but unstated intent, rather than on its unambiguous language, the trial court misinterpreted the statute.

¶10 Statutory interpretation presents an issue of law, and our review is de novo. *State v. Gonzalez*, 216 Ariz. 11, ¶ 2, 162 P.3d 650, 651 (App. 2007); *see also State v. Getz*, 189 Ariz. 561, 563, 944 P.2d 503, 505 (1997). Our "'primary goal is to discern and give effect to the legislature's intent.'" *State v. Dixon*, 216 Ariz. 18, ¶ 7, 162 P.3d 657, 659 (App. 2007), *quoting State v. Tyszkiewicz*, 209 Ariz. 457, ¶ 5, 104 P.3d 188, 190 (App. 2005). "Arizona courts 'follow fundamental principles of statutory construction, the cornerstone of

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status" or "on escape status," when calculating the recency of a historical prior felony conviction.

which is the rule that the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction.'" *In re MH 2004-001987*, 211 Ariz. 255, ¶ 14, 120 P.3d 210, 213 (App. 2005), *quoting Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991).

¶11 The legislature's express exclusion of time spent incarcerated from the calculation described in § 13-604(V)(2)(b) and (c) makes the absence of comparable language in § 13-702(C)(11) significant. Had the legislature intended the phrase "previously convicted of a felony within the ten years immediately preceding the date of the offense," § 13-702(C)(11), to exclude any intervening time the defendant had spent in prison, we would expect the statute to explicitly so state. *See Aileen H. Char Life Interest v. Maricopa County*, 208 Ariz. 286, ¶ 44, 93 P.3d 486, 499 (2004) ("We think that, if the legislature had intended to limit the statute as the County urges, it would have used language making that limitation clear."); *MH 2004-001987*, 211 Ariz. 255, ¶ 14, 120 P.3d at 213 (declining to read into A.R.S. § 36-539(B) requirement that witnesses be present personally when statute specified only "patient and his attorney shall be present at all hearings") (emphasis omitted); *cf.* Ariz. R. Evid. 609(b) (evidence of conviction not admissible for impeachment "if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date").

¶12 Regardless how logical or compelling is the argument that § 13-702(C)(11) *should* contain such an exclusion, the fact is it does not, and we may not infer or supply additional language our legislature, for whatever reason, has chosen to omit from an oft-

amended statute.[8] "We are not at liberty to impose our view about the way we feel things should be 'simply because that's what must have been intended . . . .'" *Getz*, 189 Ariz. at 563, 944 P.2d at 505, *quoting Kilpatrick v. Superior Court*, 105 Ariz. 413, 422, 466 P.2d 18, 27 (1970). Even though Axsom had been in prison for all but nine months of the ten years following his convictions in CR-33754, the convictions were entered more than ten calendar years before he committed either of the present offenses. Consequently, the plain, unambiguous language of § 13-702(C)(11) did not permit the trial court to consider those convictions as a basis for aggravating Axsom's sentences.[9] And, because none of the other aggravating factors considered by the court were either *Blakely*-exempt or *Blakely*-compliant, *see State v. Lamar*, 210 Ariz. 571, ¶ 26, 115 P.3d 611, 617 (2005), Axsom's aggravated sentences were unlawfully imposed.[10]

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[8]Since its enactment in 1977, § 13-702 appears to have been renumbered or amended twenty-six times between 1978 and 2006.

[9]The trial court's reimposition of aggravated sentences in August 2006 was improper for another reason as well, although one that is unlikely to recur on remand. For the window of time between August 12, 2005, and September 21, 2006, § 13-702(B) and (C) required all aggravating circumstances, including the fact of a prior conviction, to be found by the trier of fact. The statute did not yet contain the exception, permitted by *Apprendi*, 530 U.S. at 490, and later added by the legislature, that allows the court, rather than a jury, to find the existence of prior felony convictions. *Compare* 2005 Ariz. Sess. Laws, ch. 20, § 1, effective August 12, 2005, *and* 2006 Ariz. Sess. Laws, ch. 148, § 1, effective September 21, 2006. The legislature remedied that apparent oversight with the 2006 amendment and, in the current version of the statute, § 13-701(C), (D), and (D)(11) expressly authorize the court to "determine an aggravating circumstance under paragraph 11 of this subsection." § 13-701(D).

[10]According to the presentence report prepared for Axsom's 2003 sentencing, he had used a knife in committing both of these 2002 offenses, and the trial court referred to those knives in its recitation of aggravating factors at Axsom's resentencing. The use of a deadly

¶13 We have specifically considered whether Axsom's sentences might nonetheless have been aggravated appropriately under the so-called "catch-all" provision of former § 13-702(C). That provision, subsection (C)(18) when Axsom committed the July 2002 offenses and renumbered as subsection (C)(19) when he reoffended in September,[11] allowed the court to consider in aggravation "[a]ny other factor," besides those enumerated in the other subsections, "that the court deems appropriate to the ends of justice."[12] However, the catch-all provision was unavailing in this case, as the trial court correctly recognized and the state orally acknowledged, because, when Axsom was resentenced in August 2006, § 13-702(B) and (C) provided for a jury determination of all aggravating factors listed in subsection (C). 2005 Ariz. Sess. Laws, ch. 20, § 1. Barring further amendments to the statute in the interim,

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weapon or dangerous instrument during the commission of a crime can be a discrete aggravating factor pursuant to § 13-702(C)(2), provided it is not "an essential element of the offense of conviction or . . . utilized to enhance the range of punishment under [§] 13-604." § 13-702(C)(2); *see* 2005 Ariz. Sess. Laws, ch. 20, § 1. But, pursuant to *Blakely*, and the language of § 13-702(B) when Axsom was resentenced in August 2006, Axsom's use of a knife in these cases could not properly be considered by the court in aggravation because in neither case had that fact been "found to be true by the trier of fact beyond a reasonable doubt." § 13-702(B); *see* 2005 Ariz. Sess. Laws, ch. 20, § 1; 2006 Ariz. Sess. Laws, ch. 148, § 1.

[11]*See* 2002 Ariz. Sess. Laws, ch. 267, § 3, effective August 22, 2002.

[12]By the time Axsom was resentenced in August 2006, the subsection had been renumbered as § 13-702(C)(21) and had been amended to read: "Any other factor that the state alleges is relevant to the defendant's character or background or to the nature of the circumstances of the crime." *See* 2005 Ariz. Sess. Laws, ch. 20, § 1, effective August 12, 2005. The 2008 amendments renumbered the statute to § 13-701(D)(24). *See* 2008 Ariz. Sess. Laws, ch. 301, § 23.

a similar provision in the current statute will govern the procedure applicable when Axsom is resentenced.[13]

¶14 To forestall the possibility that Axsom might in a future proceeding seek to reassert the remaining issue raised in his present petition for review concerning the applicability of former § 13-702.02 to his plea agreement, we elect, in the exercise of our discretion and in the interest of judicial economy, to address and dispose of it here. Although Axsom's sentences, both as imposed originally in 2003 and as reimposed in 2006, have been within the sentencing ranges specified in his plea agreement, he now contends that the "sentencing range in his plea [agreement] must be readjusted" to comport with former § 13-702.02. 1999 Ariz. Sess. Laws, ch. 261, § 10.[14] That statute specified the sentencing ranges applicable to "the second or subsequent offense" when a person "is convicted of two or more felony offenses that were not committed on the same occasion but . . . either are consolidated for trial purposes or are not historical prior felony convictions as defined in [A.R.S.] § 13-604." Citing *State v. Ofstedahl*, 208 Ariz. 406, 93 P.3d 1122 (App. 2004), Axsom contends § 13-702.02 "applies to plea agreements," including his, and renders the sentencing ranges provided in his plea agreement excessive and unlawful.

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[13]Pursuant to subsection (D) of current § 13-701, "the trier of fact shall determine and the court shall consider the . . . aggravating circumstances [enumerated in subsections (D)(1) through (D)(24)], except that the court shall determine an aggravating circumstance under paragraph 11 of this subsection."

[14]Section 13-702.02 was repealed, effective December 31, 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 25, 119, 120.

¶15 Axsom's reading of *Ofstedahl* is only partially correct. Although § 13-702.02 may indeed have application to convictions secured through plea agreements, the statute only applies in such situations if one or more of the offenses covered by a plea agreement is used to enhance the defendant's sentence on another offense covered by the same agreement. This is because the statute applies to sentence enhancement, not to aggravation. *See generally State v. Christian*, 205 Ariz. 64, n.11, 66 P.3d 1241, 1246 n.11 (2003) ("[P]reviously, under [*State v.*] *Hannah*, [126 Ariz. 575, 617 P.2d 527 (1980),] when a defendant was convicted of three felony counts that were tried together, the state could allege two of the convictions as priors for the other conviction, thus subjecting a defendant who came to court without a prior conviction to a lengthy prison term."); *State v. Thompson*, 200 Ariz. 439, ¶¶ 1, 9, 27 P.3d 796, 797, 798 (2001) (effective January 1, 1994, legislature enacted § 13-702.02, creating less severe sentence-enhancement schedule for multiple offenses not committed on the same occasion).

¶16 In short, Axsom has overlooked the central, distinguishing feature of *Ofstedahl*:

> A critical element of Ofstedahl's plea agreement was this provision permitting some of the resulting convictions to be used as historical prior convictions under § 13-604 to enhance her sentence for other offenses to which she was pleading guilty.

208 Ariz. 406, ¶ 7, 93 P.3d at 1124. In contrast to Ofstedahl's, Axsom's sentences were not enhanced, they were aggravated—a point Axsom himself acknowledges in his petition for review. *See generally State v. Alvarez*, 205 Ariz. 110, n.1, 67 P.3d 706, 708, n.1 (App. 2003) (aggravation is different from enhancement). Section 13-702.02 would only have applied

in Axsom's case if his conviction on one of the two charges covered by his plea agreement had been used to enhance his sentence on the other. His argument, therefore, is meritless.

Conclusion

¶17 Because we find Axsom's sentences were aggravated under § 13-702(C)(11) on the basis of a felony conviction that was more than ten years old and other improper factors, we conclude the trial court abused its discretion in denying his petition for post-conviction relief. We therefore grant the petition for review, grant relief, and remand the case for resentencing in accordance with this decision and with the substantive law in effect when Axsom committed the offenses in 2002 and the procedural law applicable when he is resentenced.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge