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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STATE OF ARIZONA, Appellee, v. ROY JOSEPH TOMASZEWSKI, Appellant.	2 CA-CR 2009-0036 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700424

Honorable Stephen M. Desens, Judge

AFFIRMED IN PART; VACATED IN PART

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Joseph L. Parkhurst — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 Appellant Roy Tomaszewski was charged with possession for sale of methamphetamine having a weight of more than nine grams and transportation for sale of methamphetamine having a weight of more than nine grams. After a jury trial was held in

his absence, he was convicted of possession of methamphetamine, a lesser-included offense of the possession-for-sale charge in count one of the indictment, and transportation for sale of methamphetamine having a weight of more than nine grams. The trial court sentenced Tomaszewski to concurrent, aggravated prison terms for nonrepetitive offenses: a thirteen-year term for transportation of methamphetamine for sale and the maximum term of three years for possession.[1] 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). Tomaszewski has filed a supplemental brief.

¶2 In his supplemental brief, Tomaszewski asks this court to "review all circumstances involving conflict of interest or/and change of representation in this case." Additionally, under a heading entitled "mitigating factors," he requests that we "check all dates and time frames of all prior criminal history." We presume he is asking us to determine whether the trial court erred with respect to consideration of his prior felony convictions in sentencing him to aggravated prison terms. He also asks us to "review [for error] all court proceedings . . . [and] police procedures." Tomaszewski contended, too, that he had written a letter to the trial court before sentencing, and although the trial court had ordered the letter be made part of the record, he claimed it was missing from the record and that his appellate

[1]The thirteen-year term is the aggravated term based on former A.R.S. § 13-712, renumbered as A.R.S. § 13-709.03, 2008 Ariz. Sess. Laws, ch. 301, §§ 34, 36, which applies to a first such offense and prescribes a presumptive term of ten years' imprisonment, a minimum term of five years, and a maximum term of fifteen years. The prior convictions were the primary reason for the imposition of the aggravated term.

counsel had not had the opportunity to review it. He initially asked that this court obtain the letter but subsequently filed a supplement to his supplemental brief, attaching the letter and asking us to review it and, presumably, determine the propriety of the sentences.

¶3 We have reviewed the entire record, and we have found fundamental, prejudicial error. As previously stated, Tomaszewski was charged with possessing and transporting more than nine grams of methamphetamine for sale. In announcing the verdicts, the jury foreman stated the jury had found him guilty of transporting for sale more than nine grams of methamphetamine and simple possession of methamphetamine. But the record contains three guilty verdicts: for possession of methamphetamine, possession of methamphetamine for sale, and transportation of methamphetamine for sale. At sentencing, after the state had briefed the issue, the court dismissed count one of the indictment, possession of methamphetamine for sale, based on *State v. Chabolla-Hinojosa*, 192 Ariz. 360, 965 P.2d 94 (App. 1998), presumably finding that count was a lesser-included offense of transportation of methamphetamine for sale. The state agreed at the sentencing hearing that the remedy was appropriate, and we agree it is consistent with *Chabolla-Hinojosa*. However, based on the same principles enunciated in *Chabolla-Hinojosa*, simple possession is a lesser-included offense of both possession for sale and transportation for sale. And there was no independent basis for the verdict on simple possession of methamphetamine, which the parties, including appellate counsel, referred to as "Count III." Although Tomaszewski

had less than nine grams of methamphetamine in his pocket when he was arrested, that was never the basis of a separate charge in the indictment.

¶4 We ordered the parties to simultaneously submit briefs addressing the propriety of the conviction for simple possession of methamphetamine, a dangerous drug, or "Count III." The state has correctly noted that the jury was instructed on the offense of simple possession of methamphetamine as a lesser-included offense of possession of the drug for sale.[2] As the state has also correctly pointed out, the jury was instructed not to consider the offense of simple possession unless it first found Tomaszewski not guilty of the greater offense of possession for sale. The state concedes that the trial court should have vacated that conviction "as 'surplusage'" because it was a lesser-included offense of both possession for sale and transportation. *See State v. Cheramie*, 218 Ariz. 447, ¶ 22, 189 P.3d 374, 378 (2008). Tomaszewski's appellate counsel has joined in the state's supplemental brief, asserting "the State has correctly set forth the law regarding convictions for both greater and lesser offenses."

¶5 Whether the conviction for simple possession was based on an uncharged offense or a lesser-included offense, the error is fundamental and prejudicial. A conviction

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[2]It was defense counsel who requested the instruction "for a lesser included of possession, based on the stuff in his pocket." Presumably, counsel did not regard the drugs in Tomaszewski's pocket to be a proper basis for a separate offense but only a potential lesser-included offense of the greater charge of possession for sale of any methamphetamine Tomaszewski had possessed, whether in his pocket or in the "black case" an officer found in the car.

based on an uncharged offense violates the Sixth Amendment right to notice and Arizona's "constitutional guarantees that an accused stand trial with clear notice of the crime with which he is charged." *State v. Martin*, 139 Ariz. 466, 471, 679 P.2d 489, 494 (1984); *see also De Jonge v. Oregon*, 299 U.S. 353, 362 (1937). And violation of the prohibition against double jeopardy, which results when a defendant has been convicted of an offense and its lesser-included offense, is fundamental, prejudicial error. *State v. Price*, 218 Ariz. 311, ¶ 4, 183 P.3d 1279, 1281 (App. 2008). The conviction for simple possession of a dangerous drug must be vacated.

¶6 We find no other error that can be characterized as fundamental, prejudicial error. We have considered, in particular, those matters Tomaszewski has specified in his supplemental brief and the supplement thereto. We note, first, that Tomaszewski's first appointed counsel was James Glanville, a deputy Cochise County Public Defender. The public defender's office later filed a notice that the case had been reassigned to another attorney in the office, but that attorney subsequently moved to withdraw because he was resigning from the office. He requested that contract counsel be appointed to represent Tomaszewski because the public defender's office was understaffed and could not handle the representation. The court granted the motion and appointed another attorney to represent Tomaszewski. Tomaszewski also filed a motion to disqualify the Cochise County Attorney from prosecuting the case because Glanville joined the Cochise County Attorney's office upon leaving the public defender's office. He had represented Tomaszewski from July 2007

until he left the public defender's office in September 2007. After a hearing, the trial court granted the motion, and the Arizona Attorney General's Office prosecuted the case. Nothing in the record establishes any improprieties with regard to these matters.

¶7 Similarly, we have found no error, much less reversible error, related to "police procedures" and the admission of Tomaszewski's statements to police officers. The state filed a motion in limine seeking to admit statements Tomaszewski had made to officers. The state conceded Tomaszewski had been in custody when questioned but asserted the officers had given him the *Miranda* warning.[3] The state maintained Tomaszewski had voluntarily waived his constitutional rights and that the officers had neither coerced him nor otherwise acted improperly. The trial court granted the state's motion, and the record before us supports its ruling. Although the state also filed a motion in limine to admit evidence that had been seized from Tomaszewski's car, it withdrew that motion, and ultimately the parties stipulated to the admission of drugs seized from the vehicle.

¶8 Not only have we found no reversible error before or during trial, other than as described above, we have found none with respect to sentencing. The state alleged Tomaszewski had one historical prior felony conviction for sentence-enhancement purposes, although ultimately he was not sentenced to an enhanced term. *See* A.R.S. §§ 13-703(B)(2), 13-105(22).[4] The conviction was a federal conviction for the equivalent of a class two felony

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[3]*Miranda v. Arizona*, 384 U.S. 436 (1966).

[4]Significant portions of the Arizona criminal sentencing code have been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-

for which Tomaszewski had been placed on probation on March 6, 2000, and sentenced to prison on April 25, 2002, after probation was revoked. And as aggravating circumstances for the purposes of A.R.S. § 13-701(D)(11), the state alleged Tomaszewski had been convicted of two other felonies within the ten years immediately preceding the date of the offenses in this case—a Cochise County conviction for which he had been sentenced on May 26, 1998, and the previously mentioned federal conviction. The trial court found Tomaszewski's federal felony conviction within the preceding ten years and his history of criminal conduct "of like offenses to which the jury found him guilty in this matter," were aggravating circumstances. It found his willingness to cooperate with law enforcement officers was a mitigating circumstance. The court did not err or abuse its discretion, and its use of Tomaszewski's prior convictions in aggravation was proper. *See State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003) (appellate court will not disturb sentence within statutory range absent abuse of discretion).

¶9 Finally, as Tomaszewski requested, we have reviewed the letter he wrote to the trial court. However, that court has broad discretion in weighing aggravating and mitigating circumstances to determine the appropriate sentence. *See State v. Ross*, 166 Ariz. 579, 582, 804 P.2d 112, 115 (App. 1990). As we previously stated, this court will not disturb a sentence that is within statutory parameters unless the trial court has acted in an arbitrary or

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120. For ease of reference and because the renumbering included no substantive changes, *see* 2008 Ariz. Sess. Laws, ch. 301, § 119, we refer hereinafter to the current section numbers rather than those in effect at the time of the offenses in this case.

capricious manner, thereby abusing its discretion. *See State v. Fillmore*, 187 Ariz. 174, 184, 927 P.2d 1303, 1313 (App. 1996). It was for the trial court to consider Tomaszewski's letter and all other factors relevant to sentencing and determine how much weight to give each of those other factors in deciding what sentence to impose. Based on the record before us, we have no basis for interfering here.

¶10 We have reviewed the record and have considered the claims raised by Tomaszewski in his supplemental brief and its supplement. We vacate the conviction for simple possession of methamphetamine but affirm the conviction for transportation of methamphetamine and the sentence imposed for that conviction.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Presiding Judge

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GARYE A. VÁSQUEZ, Judge