

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

JUL 15 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2012-0036
)	DEPARTMENT A
Respondent,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
TONY EUGENE STITH,)	the Supreme Court
)	
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20101809002

Honorable Deborah Bernini, Judge

AFFIRMED IN PART; VACATED IN PART

Lori J. Lefferts, Pima County Public Defender
By Abigail Jensen

Tucson
Attorneys for Petitioner

H O W A R D, Chief Judge.

¶1 Following a jury trial, appellant Toney Stith was convicted of felony murder and two counts each of attempted armed robbery, attempted aggravated robbery, and kidnapping. The trial court sentenced Stith to life in prison with the possibility of release after twenty-five years on the murder charge and to enhanced, presumptive, concurrent sentences on the remaining charges, the longest of which was 15.75 years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738, 744 (1967), and *State v. Clark*, 196 Ariz. 530, ¶ 30, 2 P.3d 89, 96 (App. 1999), stating she has reviewed the record and “has been unable to find any arguably meritorious issue to raise on appeal.” Counsel has asked us to search the record for fundamental error. Stith has filed a supplemental brief, claiming the trial court “erred in denying [his] Rule 20 motion for judgment of acquittal” and in entering “a criminal restitution order at sentencing.”

¶2 We reject Stith’s claim that the trial court should have granted his Rule 20 motion. Such a motion may be granted only when “there is no substantial evidence to warrant a conviction.” Ariz. R. Crim. P. 20(a). We review de novo whether there is a lack of evidence to support the conviction. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). “[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Id.* ¶ 16, quoting *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990) (alteration in *West*). “Both direct and circumstantial evidence should be considered in determining whether substantial evidence supports a conviction.” *Id.*

¶3 Here, the evidence presented at trial showed that in May 2010, Stith had been seen with a man named Carlos Peyron and two other Hispanic males. The victims testified that later on the same day a “black gentleman” and three Hispanic males entered their business; held the owner and his employee at gunpoint; told them to give them the contents of their pockets, money, and stereo equipment; and shot the store owner. The employee victim testified it was “[t]he black guy” who had held a gun to his back and that “the black man” had threatened him. The owner and his employee ultimately broke away from the men, reached their own guns, and shot at them, killing one of them. After police officers arrived, the remaining men were taken into custody in the victim’s store and two of them were later identified as Carlos Peyron and Stith, who is African-American. Although largely circumstantial, this was sufficient evidence from which a rational juror could find Stith guilty beyond a reasonable doubt, and the trial court therefore did not err in denying Stith’s Rule 20 motion. *See West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191. Stith’s arguments rely largely on conflicting testimony by the victims and essentially ask us to reweigh the evidence against him; this we will not do. *See State v. Haas*, 138 Ariz. 413, 419, 675 P.2d 673, 679 (1983).

¶4 As noted above, Stith also challenges the criminal restitution order (CRO) entered by the trial court. The court reduced “all fines, fees, assessments and/or restitution” to a CRO, ordering that “no interest, penalties or collection fees [were] to accrue while [Stith] is in the Department of Corrections.” “[T]he imposition of a CRO before the defendant’s probation or sentence has expired ‘constitutes an illegal sentence, which is necessarily fundamental, reversible error.’” *State v. Lopez*, 231 Ariz. 561, ¶ 2,

298 P.3d 909, 909 (App. 2013), quoting *State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This error is not made harmless by a court's delaying the accrual of interest, penalties, or fees. *Id.* ¶ 5. Thus, the CRO is vacated. The terms of imprisonment imposed by the trial court are within the statutory limit. See A.R.S. §§ 13-704(B), (D); 13-1001(C); 13-1105(A)(2), (D); 13-1304(B); 13-1903(B); 13-1904(B). Having found no other fundamental, reversible error in our review pursuant to *Anders*, Stith's convictions and sentences are otherwise affirmed.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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

/s/ Michael Miller
MICHAEL MILLER, Judge