

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ERIC SCOTT DIGGINS,
Appellant.

No. 2 CA-CR 2012-0212
Filed April 22, 2014

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.

NOT FOR PUBLICATION

See Ariz. R. Sup. Ct. 111(c); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20110290001
The Honorable Clark W. Munger, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Chief Judge Howard authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

H O W A R D, Chief Judge:

¶1 After a jury trial, appellant Eric Diggins was convicted of sale of a narcotic drug and sentenced to twenty-eight years' imprisonment. On appeal, he contends his sentence was illegal because the state failed to provide pretrial notice of its intent to allege aggravating factors. He additionally argues the trial court abused its discretion by imposing the maximum sentence. Because we find no error, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdict. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In January 2011, Diggins sold 2.5 grams of heroin to an undercover police officer. Diggins was charged with and convicted of sale of a narcotic drug. The trial court found the state had proven the existence of two historical prior felonies as well as a third prior felony conviction, which the court found to be an aggravating circumstance pursuant to A.R.S. § 13-701(D)(11). On that basis, the court sentenced Diggins to an enhanced, maximum prison term of twenty-eight years. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1) and 13-4033(A)(1).

Pretrial Notice

¶3 Diggins argues that "because the state gave no formal notice of aggravating factors prior to trial," the imposition of the maximum sentence was illegal. We review challenges to the legality

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of a sentence de novo. *State v. Johnson*, 210 Ariz. 438, ¶ 8, 111 P.3d 1038, 1040 (App. 2005).¹

¶4 Diggins concedes that Arizona courts have concluded that aggravating factors need not be included in the indictment in either non-capital or capital cases. *McKaney v. Foreman*, 209 Ariz. 268, ¶ 23, 100 P.3d 18, 23 (2004); *see also State v. Aleman*, 210 Ariz. 232, n.7, 109 P.3d 571, 578 n.7 (App. 2005). Diggins also points out that the court in *State v. Scott*, concluded that the state does not have to give any pretrial notice of aggravating factors, even in capital cases. 177 Ariz. 131, 141-42, 865 P.2d 792, 802-03 (1993). Diggins contends, however, that the United States Supreme Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002), changes the result of *Scott* and requires the state to provide pretrial notice of the aggravating factors upon which it intends to rely.

¶5 In *Ring*, the United States Supreme Court held that a capital defendant's Sixth Amendment right precludes a sentencing judge, sitting without a jury, from finding an aggravating factor necessary for imposition of the death penalty. 536 U.S. at 609. First, *Ring* was a capital case and does not apply in the non-capital context. *See State v. Estrada*, 210 Ariz. 111, ¶¶ 18-19, 108 P.3d 261, 266 (App. 2005) (*Ring* requirements are "inapplicable in the context of noncapital sentencing"). Second, *Ring* does not address a non-capital defendant's right to pretrial notice of aggravating factors, and Diggins provides no explanation or analysis that would compel such a conclusion. Accordingly, *Ring* has not changed this court's conclusion that, in non-capital cases, pre-trial notice of aggravating factors is not required, *Scott*, 177 Ariz. at 141-42, 865 P.2d at 802-03, and even notice of aggravating factors in the state's sentencing memorandum is sufficient, *State v. Jenkins*, 193 Ariz. 115, ¶ 21, 970 P.2d 947, 953 (App. 1998); *see also State v. Marquez*, 127 Ariz. 3, 6, 617

¹During sentencing, Diggins conceded that the trial court could use one of his prior felonies as an aggravating factor. Although that statement could be considered a forfeiture of this argument, it would not make any difference in the analysis, *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002), and the state has not argued waiver.

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P.2d 787, 790 (App. 1980) (aggravating circumstances in presentence report provide sufficient notice). We reject Diggins’s argument that *Ring* has imposed any notice requirement of aggravating factors in non-capital cases.

¶6 Diggins also argues that Rule 13.5(a), Ariz. R. Crim. P., requires the state to give notice of all sentencing allegations, including aggravating factors, within the time limits prescribed by Rule 16.1(b). We interpret criminal procedure rules de novo, *see State v. Roque*, 213 Ariz. 193, ¶ 21, 141 P.3d 368, 380 (2006), using principles of statutory construction, *State v. Hansen*, 215 Ariz. 287, ¶ 7, 160 P.3d 166, 168 (2007). We look first to the plain language of a rule because that is “the best and most reliable index of [the rule’s] meaning.” *Hansen*, 215 Ariz. 287, ¶ 7, 160 P.3d at 168, *quoting Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, ¶ 8, 152 P.3d 490, 493 (2007).

¶7 Rule 13.5(a) permits the state to “amend an indictment . . . to add an allegation of one or more prior convictions or other non-capital sentencing allegations that must be found by a jury within the time limits of Rule 16.1(b)[, Ariz. R. Crim. P.]” A prosecutor thus has discretion to add those allegations to the indictment up to twenty days before trial. *State v. Cons*, 208 Ariz. 409, ¶ 4, 94 P.3d 609, 611 (App. 2004). Diggins asserts that the plain language of these rules “mandates that the State provide notice of aggravating factors no less than twenty days prior to trial.” We disagree. Rule 13.5(a) merely provides the prosecutor an opportunity to amend the indictment to include sentencing allegations as other law might require. And, as Diggins has conceded, aggravating factors do not have to be included in the indictment. *See Aleman*, 210 Ariz. 232, n.7, 109 P.3d at 578 n.7. Diggins also has not challenged our cases concluding that, in non-capital cases, notice of aggravating factors before sentencing but after trial is sufficient. *See Jenkins*, 193 Ariz. 115, ¶ 21, 970 P.2d at 953; *Marquez*, 127 Ariz. at 6, 617 P.2d at 790. Because Diggins has not provided any legal authority for his position that Rule 13.5(a) imposes a requirement on the state to allege aggravating factors prior to trial, his reliance on this rule consequently fails.

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¶8 Diggins also argues that because *Chronis v. Steinle*, 220 Ariz. 559, 208 P.3d 210 (2009), a capital case, permits pretrial challenge to the “aggravating circumstances” under Rule 13.5(c), Ariz. R. Crim. P., and the language of Rule 13.5(d) is nearly identical, “it is clear that pretrial allegation of intent to use such factors in aggravation is required.” In capital cases, the state must file a notice of aggravating circumstances when it files its notice that it intends to seek the death penalty. Ariz. R. Crim. P. 15.1(i)(2). Rule 13.5(c) allows a defendant in a capital case to “challenge the legal sufficiency of an alleged aggravating circumstance by motion.” Both *Chronis* and Rule 13.5(c) specifically apply to sentencing in capital cases, which are subject to a distinct statutory scheme, and are therefore inapplicable here. See A.R.S. §§ 13-751 through 13-759. Indeed, Rule 13.5(d) specifically addresses non-capital cases, and permits a defendant to “challenge the legal sufficiency of an alleged prior conviction or non-capital sentencing allegation that must be found by a jury by motion.”

¶9 As Diggins has conceded, notice of aggravating factors is not required in the indictment and therefore subsection (d) cannot independently impose such a requirement. And, even if Rule 13.5(d) is intended to allow pretrial challenge to alleged aggravating factors in non-capital cases, the rule itself merely permits such challenges by motion. Nothing in the language of the rule requires the state to formally allege those factors.

¶10 Diggins, however, contends “the pretrial notice of intent to prove such aggravating factors must still comport with due process requirements.” But Diggins largely relies on cases involving notice requirements for sentence enhancement and aggravating factors in capital cases. See *State v. Nichols*, 201 Ariz. 234, ¶ 15, 33 P.3d 1172, 1176 (App. 2001) (allegation of serious drug offense); *McKaney*, 209 Ariz. 268, ¶ 16, 100 P.3d at 21-22 (allegation of aggravating factors supporting death penalty). Those cases are inapplicable here. And *State ex rel. Smith v. Conn*, 209 Ariz. 195, ¶ 14, 98 P.3d 881, 885 (App. 2004), on which Diggins also relies, concludes that the state may add an allegation of aggravating factors to an indictment prior to trial, not that it must. Although Diggins is correct that any allegation of prior convictions must comport with

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due process, he has not established that due process requires notice within a specific time period or with a particular element of formality.

¶11 Moreover, on the record before us, Diggins received sufficient notice of the state's intent to use his prior conviction as an aggravating factor. First, the state filed an allegation of prior convictions for enhancement purposes along with Diggins's indictment more than a year before trial. Second, his indictment refers to A.R.S. § 13-701, which lists prior convictions as an aggravating factor. This reference, along with the attached allegation of prior conviction, was sufficient to put Diggins on notice that his prior convictions could both enhance and aggravate his sentence. And, most importantly, before the jury was impaneled and sworn on the first day of the first trial, the state made it clear that it intended to use the prior conviction as an aggravating factor. That trial ended in a mistrial, and Diggins was retried forty-seven days later. Diggins thus had notice before trial that the state intended to use his prior conviction as an aggravating factor.

¶12 Additionally, Diggins has not pointed to any prejudice that resulted from the lack of formal notice. Nor has he argued that his decision to go to trial would have changed had he been formally notified his sentence could be aggravated based on his prior convictions. We therefore find no error that would require the reversal of Diggins's sentence.

¶13 Diggins also asserts that because the trial court's ability to rely on the same fact both for sentence enhancement and aggravation purposes must be explicitly authorized by statute, it necessarily follows that the state's intent to rely on the same fact for enhancement and aggravation must be explicit as well. *See State v. Alvarez*, 205 Ariz. 110, ¶¶ 6-8, 67 P.3d 706, 708-09 (App. 2003). But Diggins does not provide any legal authority to support his proposed interpretation, and extension of, the rule stated in *Alvarez*. The trial court's authorization to impose a sentence would not logically compel the state to notify a defendant of its intent to use multiple prior felony convictions to both enhance and aggravate a sentence. And, as already discussed, the state provided Diggins with sufficient notice that it intended to rely on his prior convictions

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for both enhancement and aggravation. We therefore reject Diggins's argument.

¶14 Lastly, contrary to Diggins's assertion, the state's failure to provide formal pretrial notice after the mistrial was declared and before the second trial began did not "indicate[] its intent to abandon the issue." Diggins provides no authority or explanation to support such a rule, and it accordingly fails. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include an argument stating party's contentions, "and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"). Furthermore, the first trial court impaneled a twelve-person jury based on the state's contention that Diggins could be sentenced up to the aggravated thirty-five-year prison term if the court found aggravating factors, even through the presumptive term was 15.75 years, which would only require an eight-person jury. *See* Ariz. Const. art. II, § 23; A.R.S. § 21-102(A), (B). The court at Diggins's second trial also impaneled a twelve-person jury, which Diggins did not object to, putting him on notice that both the state and trial court maintained their position that Diggins's prior convictions opened him up to the full range of sentencing.

¶15 We therefore conclude Diggins has not shown that formal pre-trial notice of aggravating factors was required in this case. We further conclude he has not shown any prejudice based on the notice he received. We consequently reject Diggins's argument that he received an illegal sentence and affirm the trial court's ruling.

Maximum Sentence

¶16 Diggins next argues that, given the mitigating circumstances he presented, the sentence imposed was excessive. "A trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003). An abuse of discretion occurs only "if the court acted arbitrarily or capriciously or failed to adequately investigate the facts relevant to sentencing." *Id.* "[W]e presume the

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court considered any evidence relevant to sentencing that was before it.” *Id.* ¶ 7.

¶17 The trial court has broad discretion in assigning weight to aggravating and mitigating circumstances. *State v. Harvey*, 193 Ariz. 472, ¶ 24, 974 P.2d 451, 456 (App. 1998). A single aggravating factor exposes a defendant to the maximum sentence. § 13-701(C); *see also State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). And although the court is required to consider mitigating evidence, it is not required to find that mitigating circumstances exist merely because such evidence is presented. *Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357; *see also* § 13-701(E).

¶18 Here, Diggins was convicted of sale of a narcotic drug, a class-two felony, and had at least two historical prior felonies, making him a category three repeat offender. § 13-3408(A)(7), (B)(7); § 13-703(C). The sentencing range Diggins faced was a mitigated sentence of 10.75 years, a minimum sentence of fourteen years, a presumptive sentence of 15.75 years, a maximum sentence of twenty-eight years, and an aggravated sentence of thirty-five years. § 13-703(J). The trial court considered one of Diggins’s historical prior felonies, the existence of which Diggins does not contest, as an aggravating factor, as well as Diggins’s criminal history. The court also considered Diggins’s argument that the small amount of drugs at issue and the fact that only one sale had occurred, despite the opportunity for more, were mitigating circumstances, along with a letter from Diggins’s mother and the presentence report. The court ultimately concluded that any mitigating circumstances did not “weigh anything compared to the criminal history,” and imposed a twenty-eight-year prison term.

¶19 Although the court found no mitigating circumstances existed, it was not required to do so. *See Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357. And Diggins’s prior conviction was an aggravating factor that exposed him to the maximum sentence. § 13-701(C). Having given the mitigating evidence due consideration, the court did not abuse its discretion in imposing the maximum sentence. *See Cazares*, 205 Ariz. 425, ¶ 8, 72 P.3d at 357.

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¶20 Diggins relies on *State v. Hutton*, 87 Ariz. 176, 349 P.2d 187 (1960), to support his position that the court abused its discretion. In that case, the supreme court concluded that a sentence of twenty-three to twenty-five years for burglary and stealing a saddle was excessive and that the interests of justice required that the maximum sentences imposed for burglary and grand theft run concurrently rather than consecutively. *Id.* at 178-79, 349 P.2d at 189. But the court ruled only that having the two sentences run consecutively, rather than concurrently, was excessive. *Id.* The court stated it had “no objection to the imposition of the maximum for each offense.” *Id.* *Hutton* is therefore inapposite to Diggins’s case and does not support his position.

Criminal Restitution Order

¶21 Although Diggins did not raise the issue, the state has pointed out that the trial court, in its sentencing minute entry, reduced the “fines, fees, assessments and/or restitution” it imposed “to a Criminal Restitution Order [CRO].” As this court has repeatedly determined, based on A.R.S. § 13-805(C),² “the 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, 910 (App. 2013), quoting *State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). Because this portion of the sentencing minute entry is not authorized by statute, we must vacate the CRO. See *Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d at 910.

Disposition

¶22 For the foregoing reasons, we vacate the CRO but otherwise affirm Diggins’s conviction and sentence.

²Section 13-805(C) has since been renumbered to § 13-805(E). See 2012 Ariz. Sess. Laws, ch. 269, § 1.