

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DENNIS LEE JOHNSON,
Appellant.

No. 2 CA-CR 2012-0504
Filed February 18, 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NOT FOR PUBLICATION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. CR20073173

The Honorable Scott Rash, Judge

The Honorable Clark W. Munger, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Barton & Storts, P.C., Tucson

By Brick P. Storts, III

Counsel for Appellant

STATE v. JOHNSON
Decision of the Court

MEMORANDUM DECISION

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

MILLER, Judge:

¶1 After a jury trial was held in his absence in November 2010, appellant Dennis Johnson was convicted of aggravated driving under the influence of an intoxicant (DUI) while his driver license was suspended or revoked, aggravated driving with an alcohol concentration (AC) of .08 or greater while his license was suspended or revoked, and one count each of aggravated DUI and driving with an AC of .08 or higher having committed or been convicted of two or more prior DUI violations within the preceding eighty-four months. He was sentenced in December 2012 to concurrent, presumptive prison terms of ten years. Appellate counsel has filed a brief in compliance with *Smith v. Robbins*, 528 U.S. 259 (2000), *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 2000), avowing he has found no arguably meritorious issues to raise. Johnson has filed a supplemental brief.

¶2 In his pro se supplemental brief, Johnson first contends the indictment was multiplicitous because the charges were based on the same crime or offense, resulting in a violation of the Fifth Amendment prohibition against double jeopardy. He asserts the state had a duty to charge only one offense: aggravated driving with an AC of .08 or greater and having two or more DUI violations, as alleged in count four of the indictment. He additionally asserts that the reading of the indictment, with its repetitive offenses, had the effect of “prejudicing [him] before the jurors . . . at the beginning of the trial” and violated his Sixth Amendment right to a fair trial.

¶3 It appears Johnson is raising this argument for the first time on appeal, waiving the right to relief for all but fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 26, 115 P.3d 601, 607-08 (2005). A violation of the prohibition against

STATE v. JOHNSON
Decision of the Court

double jeopardy, however, is fundamental error. *See State v. McGill*, 213 Ariz. 147, ¶ 21, 140 P.3d 930, 936 (2006); *State v. Price*, 218 Ariz. 311, ¶ 4, 183 P.3d 1279, 1281 (App. 2008). We review this legal issue de novo. *See State v. Ramsey*, 211 Ariz. 529, ¶ 5, 124 P.3d 756, 759 (App. 2005).

¶4 “The Double Jeopardy Clauses of the United States and Arizona Constitutions protect criminal defendants from multiple convictions and punishments for the same offense.” *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 772 (App. 2008); *see also* U.S. Const. amend. V; Ariz. Const. art. II, § 10. “Distinct statutory provisions constitute the same offense if they are comprised of the same elements.” *State v. Siddle*, 202 Ariz. 512, ¶ 10, 47 P.3d 1150, 1154 (App. 2002). If statutory provisions require proof of one or more different facts, they are not the same offense. *Id.*, *citing Brown v. Ohio*, 432 U.S. 161, 166 (1977), and *Blockburger v. United States*, 284 U.S. 299, 304 (1932). The prohibition against double jeopardy also protects a defendant convicted of an offense from being punished for a lesser-included offense of that crime. *State v. Moran*, 232 Ariz. 528, ¶ 22, 307 P.3d 95, 103 (App. 2013). For example, the offense of driving with an AC of .08 or more is a lesser-included offense of extreme DUI (driving with an AC of .15 or more) and it would violate double jeopardy principles to charge a defendant for both. *See Merlina v. Jejna*, 208 Ariz. 1, ¶ 12, 90 P.3d 202, 205 (App. 2004); A.R.S. §§ 28-1381(A)(2), 28-1382(A)(1).

¶5 None of the charges here, however, was a lesser-included offense of another and all were based on different elements. *State v. Celaya*, 135 Ariz. 248, 251, 660 P.2d 849, 852 (1983) (lesser-included offense is one “composed solely of some but not all of the elements of the greater crime so that it is impossible to have committed the crime charged without having committed the lesser one”). *See also State v. Nereim*, No. 2 CA-CR 2012-0501, ¶¶ 24-25, 2014 WL 309529 (Ariz. Ct. App. Jan. 28, 2014) (identifying kinds of DUI-related offenses that violate double jeopardy principles); *Anderjeski v. City Court*, 135 Ariz. 549, 550-51, 663 P.2d 233, 234-35 (1983) (finding defendant arrested for DUI and elevated AC did not violate double jeopardy, each being “separate and distinct offense[]”).

STATE v. JOHNSON
Decision of the Court

¶6 Johnson was charged with four distinct offenses, based on different elements that constituted separate violations; the first two DUI counts, distinct between themselves, were aggravated because Johnson had been driving while his license was suspended or revoked and the other two, also distinct as between them, were aggravated because Johnson had two or more prior DUI violations and convictions within the period prescribed by statute. *See* A.R.S. § 28-1383(A)(1), (2). There was no violation of double jeopardy principles here, nor were his rights to a fair trial violated based on the reading of a proper indictment at the beginning and end of the trial, apprising the jury of the offenses with which Johnson had been charged. The court twice instructed the jury not to “think the defendant is guilty just because” he was charged with the offenses, telling them the state was required to prove “every part of the charge[s]” beyond a reasonable doubt.

¶7 Johnson also contends the trial court erred when it allowed the state to present additional evidence after the close of evidence to support the state’s allegation that he had prior felony convictions, which was a request that the court take judicial notice of a minute entry from the trial in the primary proceeding. Johnson maintains the court failed to follow the requisite protocol for a trial on allegations of prior felony convictions and he was thereby prejudiced. He also seems to be challenging the sufficiency of the evidence to support the court’s finding the state had proved its allegations.

¶8 A Tucson Police officer testified at the trial on the prior convictions, which was before a different trial judge than the judge who had presided over the primary trial. The officer, who had testified in the primary trial, testified at the prior-convictions trial that he had investigated a person by the name of Dennis Lee Johnson in August of 2007, identifying Johnson in court as that person. When asked whether he had testified about his role in “that case here in a jury trial on November 16th of 2010,” he stated he had. The officer was then shown two exhibits that he referred to while testifying further: a copy of Johnson’s Motor Vehicle Abstract and a copy of what is referred to as a “PenPak,” a record from the Arizona

STATE v. JOHNSON
Decision of the Court

Department of Corrections. The officer identified the person in photographs from each exhibit that related to the documents that were part of each exhibit as the very same Johnson he had investigated. The exhibits were admitted without objection. The prosecutor then argued, relying on these exhibits, that based on the photographs and the descriptions of the Johnson referred to in each, the records related to the defendant Johnson who was before the court at that time.

¶9 The prosecutor continued to connect the defendant Johnson with the person whose records were introduced with two other exhibits that were admitted without objection: court records in two cases. At that point the state rested, “unless the Court has questions.” Although the trial court was about to rule, defense counsel interjected he would like to make an argument, which the court then permitted.

¶10 Counsel argued that the officer had not adequately connected the person whose felony convictions had been established with the person the officer had investigated in August 2007, and had not shown the person the officer had investigated was the person found guilty of the four aggravated DUI offenses in this cause. Counsel argued the officer had simply stated he had investigated Johnson, “but he didn’t say what it was about. He didn’t say that it resulted in charges before this Court or anything connecting my client’s current case to the priors.” The prosecutor, arguing in rebuttal, then stated the court could take judicial notice of the fact that the minute entry from this case established the officer had testified at the primary trial. Over defense counsel’s objection that it was improper to ask the court to take judicial notice of the minute entry after the close of evidence, the court considered the minute entry from November 16, 2010, and found the state had sustained its burden of proving the historical prior felony convictions.

¶11 “The superior court may properly take judicial notice of its own records.” *State v. Camino*, 118 Ariz. 89, 90, 574 P.2d 1308, 1309 (App. 1977). Additionally, a trial court has discretion to reopen a case for the presentation of additional evidence. *State v. Favors*, 92 Ariz. 147, 149, 375 P.2d 260, 260-61 (1962). “[T]he trial court will not

STATE v. JOHNSON
Decision of the Court

be considered to have abused its discretion unless the defendant has been prejudiced and . . . to constitute prejudice it must appear that the defendant was deprived of a substantial right." *State v. Cota*, 99 Ariz. 237, 241, 408 P.2d 27, 29 (1965).

¶12 Assuming the trial court reopened the presentation of evidence by taking judicial notice of a minute entry in the same case, the court did not abuse its discretion. Johnson, like the defendant in *Cota*, could not have been surprised or otherwise prejudiced by the state's introduction of the minute entry. *See id.* The minute entry simply provided a further link between the person convicted of the felonies in this cause and the person whose prior felony convictions had been established. That connection was already established by the police officer's testimony and the inferences the court was free to draw from that testimony. Moreover, the court could have drawn that inference from the officer's testimony without the minute entry, particularly when the officer stated he had investigated a person named Johnson and testified at the trial in November 2010.

¶13 Similarly, we reject Johnson's related argument that there was insufficient evidence establishing the person whose convictions had been established was the person convicted of the four aggravated DUI cases in this cause. We view the evidence and all permissible inferences in the light most favorable to sustaining the court's findings. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). The court noted that, in addition to the November 16, 2010, minute entry, which showed the police officer had testified in the primary case, the exhibits supported the fact that the Johnson the officer had referred to was the same person whose prior convictions had been established; the court specifically noted that the person's birthdates matched. Thus, although the court did not err in considering the minute entry, even without it there was sufficient evidence before the court to sustain its finding that the state had established beyond a reasonable doubt that Johnson had two historical prior felony convictions.

¶14 We have reviewed the record for fundamental, reversible error but have found none with respect to the trial and the sentences imposed. However, we note that in its sentencing minute

STATE v. JOHNSON
Decision of the Court

entry, the trial court ordered that all “fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order.” This court has found that A.R.S. § 13-805, as it existed before its 2012 amendment, effective in April 2013, *see* 2012 Ariz. Sess. Laws, Ch. 269, § 1, did not permit such an order, the entry of which is fundamental, reversible error. *See State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013). We therefore affirm the convictions and the sentences imposed in all respects except with regard to criminal restitution order, which is vacated.