

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JAMAR ROSHAUN ATKINS,
Appellant.

No. 2 CA-CR 2013-0186
Filed July 28, 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NOT FOR PUBLICATION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. CR20123329001
The Honorable Deborah Bernini, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Brammer¹ concurred.

M I L L E R, Presiding Judge:

¶1 Jamar Atkins was convicted after a jury trial of theft and sentenced to an enhanced, maximum prison term of 4.5 years. On appeal, he contends the trial court erred by imposing an aggravated prison term based on prior felony convictions because he had no notice from the state of its intent to use those prior convictions as an aggravating circumstance. For the following reasons, we affirm the sentence but vacate the criminal restitution order (CRO) entered at sentencing.

Factual and Procedural Background

¶2 Because Atkins only objects to the imposition of an aggravated prison term, we focus primarily on the facts relevant to sentencing.² In August 2012, Atkins entered a convenience store

¹The Hon. J. William Brammer, Jr., a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and the supreme court.

²Atkins's opening brief contained a second argument—that his conviction for felony theft was in error because “theft from a person” was not a lesser-included offense of aggravated robbery, which does not require taking “from the person.” See A.R.S. §§ 13-1802; 13-1902(A). He withdrew the argument in his reply brief, on the basis of *State v. Tramble*, 144 Ariz. 48, 52, 695 P.2d 737, 741 (1985), in which the Arizona Supreme Court concluded that the primary difference between theft and robbery was “the use or threat of force, and not . . . whether the taking was from the person’s body or from his or her immediate area of control.”

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with another person and demanded the clerk fill a bag with packs of cigarettes. After Atkins was charged by indictment with aggravated robbery with an accomplice, the state filed an allegation of prior convictions, alleging Atkins previously had been convicted of seven felonies, and stating, “[I]n the event any of the above-listed convictions are not ‘historical prior convictions’ as defined in [A.R.S. §] 13-105, such convictions will enhance the defendant’s sentence pursuant to [A.R.S. §] 13-703 and *Ariz. ex rel. Romley v. Hauser*, 209 Ariz. 539, 105 P.3d 1158 (2005) or A.R.S. § 13-3419.”

¶3 The jury found Atkins not guilty of aggravated robbery and the lesser-included offense of robbery, but guilty of the lesser-included offense of theft from the person of another. At the trial on the allegation of prior convictions held before sentencing, the state offered evidence of Atkins’s felony convictions and his release status at the time of the offense. The trial court concluded that two convictions fit the definition of “historic prior felony” and could be used to enhance the sentence, while the other five could be used by the state “for purposes of arguing for an aggravated sentence.”³ In its pronouncement of sentence, the court stated it had considered several mitigating factors and found the following constituted aggravating circumstances: the five other felony convictions, presence of an accomplice, and that Atkins was on community supervised release at the time of the offense. He was sentenced as described above, and this appeal followed.

Notice of Aggravating Factors

¶4 Atkins contends his sentence was illegal because the trial court imposed an aggravated sentence without the state providing notice of intent to use his prior felony convictions as aggravating factors. Because he did not raise this issue below, we review for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). Imposition of an illegal

³The state also proved Atkins was on community supervised release at the time of the offense.

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sentence constitutes fundamental error. *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007).

¶5 Atkins primarily contends that Rule 13.5(a), Ariz. R. Crim. P., “requires all sentencing allegations to be noticed by the prosecutor” twenty days before trial, “regardless of whether the allegation involves prior convictions or a fact that must be found by a jury.” See Ariz. R. Crim. P. 16.1(b) (all motions shall be made no later than twenty days before trial). We interpret criminal procedure rules de novo, see *State v. Roque*, 213 Ariz. 193, ¶ 21, 141 P.3d 368, 380 (2006), first looking to the plain language because that is “the best and most reliable index of [the rule’s] meaning,” *State v. Hansen*, 215 Ariz. 287, 289, ¶ 7, 160 P.3d 166, 168 (2007), quoting *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 214 Ariz. 293, ¶ 8, 152 P.3d 490, 493 (2007).

¶6 Rule 13.5(a) permits the state to “amend an indictment, information or complaint 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.]” Rule 16.1(b) further requires all motions be made no later than twenty days before trial. The plain language of the rules permits the state to amend an indictment to include sentencing allegations if the allegations must be found by a jury and limits the time in which the amendment can be made. See Ariz. R. Crim. P. 13.5(a), 16.1(b). Nothing in the rule’s language suggests notice is mandated.

¶7 Additionally, the aggravating factors here were not included in the indictment, information, or complaint. Nor was the state required to charge aggravating circumstances in the indictment. *State v. Aleman*, 210 Ariz. 232, n.7, 109 P.3d 571, 578 n.7 (App. 2005) (reviewing case law and noting indictment need not specify aggravating factors). The rules would not have applied under the facts of this case.

¶8 Atkins lists several Arizona cases in support of his argument that the rules require that “notice of intent to seek aggravating factors or sentence enhancement must be provided prior to commencement of trial.” Those cases largely involve notice

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requirements for sentence enhancement, not aggravating factors. See *State v. Waggoner*, 144 Ariz. 237, 238-39, 697 P.2d 320, 321-22 (1985) (allegation of release status); *State v. Nichols*, 201 Ariz. 234, ¶ 15, 33 P.3d 1172, 1176 (App. 2001) (serious drug offense enhancement); *State v. Benak*, 199 Ariz. 333, ¶¶ 13-17, 18 P.3d 127, 130-31 (App. 2001) (prior violent offense enhancement); *State v. Guytan*, 192 Ariz. 514, ¶¶ 28-32, 968 P.2d 587, 595 (App. 1998) (gang motivation enhancement). Finally, Atkins relies on *State ex rel. Smith v. Conn ex rel. Cnty. of Mohave*, 209 Ariz. 195, ¶ 10, 98 P.3d 881, 884 (App. 2004), which is related to aggravating factors, but only stands for the proposition that the state may add an allegation of aggravating factors to an indictment before trial, not that it must. The cases do not support Atkins's argument, and he provides no further support for his contention that Rules 13.5 and 16.1 require notice of prior felony convictions as aggravating factors. The plain language of the rules does not require such notice.⁴

¶9 Arizona's case law supports this conclusion. Our supreme court held in *State v. Scott*, 177 Ariz. 131, 141-42, 865 P.2d 792, 802-03 (1993), that pre-trial notice of aggravating factors is not required in non-capital cases. Additionally, we have found notice of aggravating factors after trial but before sentencing to be sufficient. *State v. Jenkins*, 193 Ariz. 115, ¶ 21, 970 P.2d 947, 953 (App. 1998); *State v. Marquez*, 127 Ariz. 3, 6, 617 P.2d 787, 790 (App. 1980) (aggravating circumstances in presentence report provide sufficient notice). Atkins contends these cases no longer apply in light of the United States Supreme Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002). We disagree with Atkins's conclusion.

⁴Atkins also notes that *Chronis v. Steinle*, 220 Ariz. 559, 208 P.3d 210 (2009), "permits pre-trial challenge of aggravating factors under Rule 13.5(c), and the language of Rule 13.5(d) is identical but for the reference to non-capital sentencing allegations." Although Rule 13.5(d) appears to allow a non-capital defendant to challenge alleged aggravating factors by motion, it does not require the state to formally allege those factors. Ariz. R. Crim. P. 13.5(d).

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¶10 In *Ring*, the Supreme Court held the Sixth Amendment precluded a sentencing judge, instead of a jury, from finding aggravating circumstances necessary to impose the death penalty. 536 U.S. at 609. *Ring*, however, focused on a capital defendant's right to have all aggravating circumstances determined by a jury. *Id.* *Ring* does not apply in noncapital cases. See *State v. Estrada*, 210 Ariz. 111, ¶¶ 17-19, 108 P.3d 261, 266-67 (App. 2005) (post *Ring*, judges in non-capital cases may make findings of additional aggravating factors after one found by jury, admitted by defendant, or if prior conviction); see also *State v. Martinez*, 210 Ariz. 578, ¶ 26, 115 P.3d 618, 625 (2005). Additionally, *Ring* did not address a non-capital defendant's right to pretrial notice of aggravating factors, and *Atkins* provides no explanation or analysis that would compel such a conclusion. We reject *Atkins*'s argument that *Ring* has imposed a notice requirement for aggravating factors in non-capital cases.

¶11 Even if the rules required formal notice, the record shows *Atkins* received notice of the aggravating factors before trial. Six months before trial, the state filed a notice of intent to use his prior convictions to enhance his sentence. Additionally, at a hearing three weeks before trial, *Atkins* rejected a plea agreement offered by the state confirming he had discussed his potential sentencing range with his attorney, and the longest prison term the court possibly could impose was twenty-five years. Twenty-five years is the aggravated, enhanced term for aggravated robbery, the charge *Atkins* was facing, see A.R.S. §§ 13-703(J), 13-1903(B), of which *Atkins* was aware at the time the state sought to aggravate his sentence. We conclude *Atkins* has not shown that formal pre-trial notice of aggravating factors was required in this case, nor has he shown prejudice based on the notice he actually received. *Atkins*'s sentence was not illegal.

Criminal Restitution Order

¶12 Although *Atkins* has not raised the issue on appeal, we find fundamental error associated with the CRO, and we will correct such error when it is apparent. See A.R.S. § 13-805; *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). In its

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sentencing minute entry, the trial court ordered attorney fees and an assessment fee, and further, that “all fines, fees, assessments are reduced to a Criminal Restitution Order, with no interest, penalties or collection fees to accrue while [Atkins] is in the Department of Corrections.” For the reasons set forth in *State v. Cota*, 234 Ariz. 180, ¶¶ 15-17, 319 P.3d 242, 246-47 (App. 2014), the CRO is illegal and unauthorized.

Disposition

¶13 For the foregoing reasons, we affirm Atkins’s sentence, but vacate the CRO.