

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ZACHARY M. WHITE,
Appellant.

No. 2 CA-CR 2014-0135
Filed June 5, 2015

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR200701923
The Honorable Robert C. Brown, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Lynn T. Hamilton, Mesa
Counsel for Appellant

STATE v. WHITE
Decision of the Court

MEMORANDUM DECISION

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

M I L L E R, Presiding Judge:

¶1 Appellant Zachary White appeals from the trial court's order granting the state's motion "to amend sentencing minute entry *nunc pro tunc*." For the reasons that follow, we affirm the order.

¶2 After his first jury trial, White was convicted of second-degree murder and weapons misconduct. We vacated the second-degree murder conviction, affirmed the weapons misconduct conviction, and remanded for further proceedings. *State v. White*, No. 2 CA-CR 2009-0173 (memorandum decision filed Apr. 19, 2010). Following a second trial, a jury found White guilty of the lesser-included offense of manslaughter, and the trial court imposed a maximum twenty-one-year prison sentence. This court affirmed the conviction and sentence. *State v. White*, No. 2 CA-CR 2011-0333 (memorandum decision filed Jan. 7, 2013).

¶3 White thereafter sought post-conviction relief, and appointed counsel filed a notice stating she had reviewed the record and "found no claims which could be raised under Rule 32." During the pendency of the Rule 32 proceeding, the state filed a motion to amend White's sentencing minute entry *nunc pro tunc*, arguing that the three-year term of community supervision included in the trial court's minute entry should be deleted as his manslaughter sentence was a "flat-time sentence," to be served "day-for-day," and therefore the language providing for community supervision was unnecessary.

¶4 White filed a pro se response to the state's motion, arguing that the motion was untimely as this court had affirmed his

STATE v. WHITE
Decision of the Court

sentence, including the enhancement of that sentence under A.R.S. § 13-708. The trial court determined, however, that no term of community supervision had been imposed, but rather that the term's inclusion in the minute entry had been simply "a clerical mistake." The court ordered the minute entry corrected. White appealed from the trial court's ruling on the state's motion to amend the sentencing minute entry.

¶5 This court appointed appellate counsel, who filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). In our subsequent review of the appeal, however, we determined this case presented a non-frivolous issue relating to our jurisdiction and ordered supplemental briefing. *See State v. Wynn*, 114 Ariz. 561, 562, 562 P.2d 734, 735 (App. 1977) (court has obligation to examine its jurisdiction).

¶6 This court has jurisdiction to consider only those direct appeals authorized by statute. *See* Ariz. Const. art. 6, § 9; A.R.S. § 12-120.21(A). Pursuant to A.R.S. §§ 13-4031 to 13-4033, certain rulings on post-trial motions such as those made under Rules 24.2 and 24.3, Ariz. R. Crim. P., "are separately appealable orders." *Wynn*, 114 Ariz. at 563, 562 P.3d at 736. Those rulings may be appealed by a defendant pursuant to § 13-4033(A)(3), which provides that an appeal may be had from "[a]n order made after judgment affecting the substantial rights of the party."

¶7 However, this court has determined that when such a motion is denied, and the court's order therefore does not "actually change[] or modif[y] the judgment or sentence originally imposed," this court lacks jurisdiction over an appeal from that ruling. *State v. Jimenez*, 188 Ariz. 342, 345, 935 P.2d 920, 923 (App. 1996). This is so because in the absence of a change to the defendant's sentence, his or her "substantial rights" are not affected, and § 13-4033(A)(3) does not provide a statutory basis for an appeal.

¶8 In this case, unlike *Jimenez*, the trial court granted the state's motion to amend the minute entry. Pursuant to Rule 24.3, a court may "correct any unlawful sentence or one imposed in an

STATE v. WHITE
Decision of the Court

unlawful manner within 60 days of the entry of judgment and sentence but before the defendant's appeal, if any, is perfected." Rule 24.4 allows a court to correct clerical mistakes "arising from oversight or omission" in its judgments at any time. Clearly the grant of a motion pursuant to Rule 24.3 will affect a defendant's substantial rights, and such a ruling is therefore appealable. But even in the case of a clerical correction to a sentencing minute entry, a defendant's rights may be affected. This is particularly so as it appears that the Department of Corrections relies in substantial part on such minute entries in determining how it will administer a defendant's sentence. Unlike the situation presented in *Jimenez*, wherein a defendant's rights cannot be affected, 188 Ariz. at 345, 935 P.2d at 923, we cannot say categorically that a defendant's rights will not be affected by the grant of a motion made pursuant to Rule 24.4. We conclude that the order here is subject to appeal, and we thus have jurisdiction over this matter.

¶9 As noted above, counsel filed a brief pursuant to *Anders* in this matter; but we also consider White's supplemental brief, improperly filed as a petition for review. White argues the state's motion to amend the sentencing minute entry was "untimely," the trial court's grant of that motion "overturn[ed]" our decision on appeal, and the flat-time provision violated the prohibition against ex post facto application of laws. We disagree. As noted above, a court may make clerical corrections to its minute entry at any time, so the motion was not untimely.

¶10 Additionally, the correction here—removal of a statement indicating a term of community supervision was to follow White's prison term—was clerical in nature and did not change the sentence imposed. The sentencing transcript makes clear that the trial court imposed a flat-time sentence. The trial court's later order striking language that cast doubt on the flat-time nature of the sentence did not change the sentence imposed, but merely corrected a clearly clerical error made in the preparation of the minute entry.

¶11 Our decision on appeal likewise made clear that such a sentence was imposed and affirmed. *White*, No. 2 CA-CR 2011-0333, ¶¶ 16-19. The trial court's subsequent grant of the motion to correct

STATE v. WHITE
Decision of the Court

the clerical error did not “overturn” our decision as White contends; indeed we expressly rejected the ex post facto argument he makes again in this appeal. *See id.*

¶12 In sum, we find no fundamental, reversible error in relation to the trial court’s ruling on the Rule 24.4 motion. Therefore, White’s flat-time sentence is affirmed.