

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK
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COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Appellee,)	2 CA-CR 2007-0119
)	DEPARTMENT B
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
MORAN G. THINKA, JR.,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20040500

Honorable Robert Duber II, Judge

AFFIRMED

Emily Danies

Tucson
Attorney for Appellant

V Á S Q U E Z, Judge.

¶1 Appellant Moran Thinka was charged with aggravated driving under the influence of an intoxicant while his license was suspended or revoked or in violation of a restriction and aggravated driving with a blood alcohol concentration (BAC) of .08 or greater, also while his license was suspended or revoked or in violation of a restriction. Although initially he requested a jury trial, he subsequently agreed to submit the case to the trial court based on the extended record, which included the grand jury transcript, police

reports, and records comprising his driving record and establishing that his BAC within two hours of driving was .139. Based on the record, the court found Thinka guilty on both counts and sentenced him to concurrent, mitigated prison terms of 1.5 years.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). As an arguable issue, counsel asks us to consider whether the trial court erred when it granted the state's request to amend the indictment to reflect the offenses were committed on January 30, 2003, rather than on January 31 as the indictment alleged. Thinka purportedly had pled not guilty based on the January 31 date initially set forth in the indictment, believing he had a defense for such offenses because he was in jail at the time. After the indictment was amended over his objection, he decided to waive his right to a jury trial and submit the charges to the court for decision based on the extended record.

¶3 The state filed its motion to amend the indictment on July 7, 2006. It sought to correct a technical error by amending the date of the offense alleged in the indictment from January 31, 2003, to January 30, 2003. The court held a hearing on the motion and objections on July 11, 2006. At the hearing, defense counsel explained that Thinka had insisted at the pretrial conference that he could not have committed the offenses alleged on January 31 "because he wasn't driving the vehicle on the date alleged in the indictment. In fact, he was in jail for this offense on that day that he's accused of having committed this offense." Granting the state's motion, the court noted that the indictment alleged the offense

had been committed “on or about January 31st.” The court added, “If the state offered evidence of it happening on the 30th, it still would be [a] sufficient allegation”

¶4 Rule 13.5(b), Ariz. R. Crim. P., provides that an indictment “may be amended only to correct mistakes of fact or remedy formal or technical defects.” It provides further that “[t]he charging document shall be deemed amended to conform to the evidence adduced at any court proceeding.” “The trial court has considerable discretion in resolving motions to amend an indictment.” *State v. Delgado*, 174 Ariz. 252, 254, 848 P.2d 337, 339 (App. 1993). And “[a]n error as to the date of the offense alleged in the indictment does not change the nature of the offense, and therefore may be remedied by amendment.” *State v. Jones*, 188 Ariz. 534, 544, 937 P.2d 1182, 1192 (App. 1996). On this record, we cannot say the court abused its discretion, particularly given counsel’s statements at the hearing on the motion to amend the indictment. There was no doubt that the charges arose out of one incident that occurred on or about January 30, 2003, and that it could not have occurred on January 31 because Thinka was by then in jail on the charged offenses.

¶5 We have reviewed the entire record for fundamental error as requested and have found none. Therefore, we affirm the convictions and the sentences imposed.

GARYE L. VÁSQUEZ, Judge

CONCURRING:

PETER J. ECKERSTROM, Presiding Judge

PHILIP G. ESPINOSA, Judge