

COURT OF APPEALS, DIVISION ONE

BRIEFS

SECTION 2

1 CA-CR 6696

STATE OF ARIZONA

v.

DONALD MARK PERRY

YUMA COUNTY  
SUPERIOR COURT  
NO. CR-11427

TRANSMITTAL DATE



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NATURE OF THE CASE

Donald Mark Perry plead guilty to the crime of Burglary, a class three felony, in violation of A.R.S. §13-1507 with one prior felony conviction for first degree burglary. He received a sentence of twelve (12) years imprisonment.

This brief is filed in accordance with Anders v. California, 386 U.S. 738, 87 S.Ct. 1936, 18 L.Ed.2d 493 (1967), and State v. Leon, 104 Ariz. 297, 451 P.2d 878 (1968).

STATEMENT OF FACTS

On March 5, 1981, an indictment was returned by the Yuma County Grand Jury charging the Defendant, Donald Mark Perry, with the crime of Theft, a class three felony, in violation of A.R.S. §13-1802, Superior Court Number 10555.

On September 30, 1982, three (3) indictments were returned by the Yuma County Grand Jury charging the Defendant, Donald Mark Perry, with the following crimes: Two (2) counts Forgery, class four felonies, in violation of A.R.S. §13-2002, as charged in Superior Court Number 11425; Two (2) counts Theft, class three felonies, in violation of A.R.S. §13-1802, Two (2) counts Burglary, class three felonies, in violation of A.R.S. §13-1507, and Criminal Damage, a class five felony, in violation of A.R.S. §13-1602, as charged in Superior Court Number 11426; and Theft, a class three felony, in violation of A.R.S. §13-1802, Burglary, a class three felony, in violation of A.R.S. §13-1507, as charged in Superior Court Number 11427.

The Defendant was arraigned on all indictments and entered pleas of not guilty to all counts of said indictments. The Defendant was represented by attorney Paul Hunter at said arraignments.

On October 26, 1982, the Defendant, Donald Mark Perry, appeared before the Honorable Douglas W. Keddie, Judge of the Superior Court, Yuma County, Division III and entered a plea of guilty to the crime of Burglary, a class three felony, with one

prior felony conviction for first degree burglary dated April 5, 1978, Yuma County Superior Court Number 9067. The change of plea was entered pursuant to a plea bargain agreement in Superior Court Number 11427. Pursuant to said plea agreement, the State agreed to dismiss the remaining Theft charge in Superior Court Number 11427 and all remaining charges in Superior Court Numbers 10555, 11425 and 11426. The Defendant was advised that his guilty plea would submit him to a possible presumptive sentence of 7.5 years which could be reduced to as low as five years if mitigating circumstances were found to be present and increased to as much as 15 years if aggravating circumstances were found to be present. The Court further advised the Defendant that he was not eligible for probation because of the prior felony conviction. The Defendant, Donald Mark Perry, was advised by the Court that he was giving up certain constitutional rights by entering a plea of guilty, including the right to trial by jury; the right to cross-examine witnesses against him during trial; the right to present evidence on his own behalf and his right to remain silent if he so chose. The Court asked the Defendant if he wished to give up those rights and enter a plea of guilty to which the Defendant stated he did. The Court determined that the plea was voluntarily made by the Defendant.

At the request of the Defendant, a mitigation hearing was held on November 29, 1982. The results of the polygraph test were made available to the Court by testimony of Sergeant Doyne Turner of the Yuma Police Department. The Defendant

himself testified. The State introduced evidence from the victim, Patricia Stanphill and another victim, Leona Joyce Paslay who was the victim in one of the counts dismissed by plea agreement in Superior Court Number 11426. The Court, having heard all of the testimony offered by both the defense and the State, set sentencing for November 30, 1982.

On November 30, 1982, the Defendant appeared before the Court for sentencing. The Court sentenced the Defendant, Donald Mark Perry, to a term of twelve (12) years imprisonment with credit for 72 days already served on the charge. The Court found no legal cause why judgment should not now be pronounced, and stated that it was the judgment of the Court that the Defendant was guilty of committing the crime of Burglary, a class three felony, with one prior conviction for first degree burglary. The Court stated:

Mr. Perry, you don't stand before me as a person with one simple prior conviction. You have been convicted on three previous occasions of felonies. The evidence is very strong that you committed three additional felonies in cases 11426, 10555 and 11425. And finally in case number 9677, you deliberately have failed to appear for your hearing on the petition for revocation of your probation. In addition yours is not simply one small burglary, but very substantial burglaries and the losses sustained by the victims obviously are never going to be recouped. (R/T p. 49, lns. 19-25; p. 50, lns. 1-3)

The Court then stated that for those reasons which it found to be aggravating, the presumptive sentence of 7.5 years was increased to a term of twelve (12) years and ordered the Defendant, Donald Mark Perry, to be imprisoned for said term of twelve (12) years commencing on the date of sentencing, November 30, 1982,

with credit for 72 days previously spent in custody on this charge; the Defendant not being eligible for release on any basis until he had served two-thirds of the twelve (12) year sentence.

The Defendant, Donald Mark Perry, was advised of his rights to appeal and on December 2, 1982, did, in fact, file a notice of appeal through his attorney, Paul Hunter.

ARGUABLE QUESTION PRESENTED

Counsel, after careful study of the transcript and records on appeal, is unable to find any arguable question.

*Paul Hunter*

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PAUL HUNTER  
Attorney for Appellant  
DONALD MARK PERRY

CERTIFICATE OF SERVICE BY MAIL

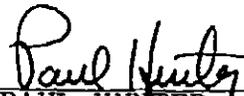
I, PAUL HUNTER, hereby certify that on the 4th day of March, 1983, I served Appellee in the foregoing case by personally placing in the United States Post Office, postage prepaid, copies of the foregoing APPELLANT'S OPENING BRIEF, addressed as follows:

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Court of Appeals - Division One  
1st Floor, Southwest Wing  
State Capitol Building  
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Phoenix, Arizona 85007  
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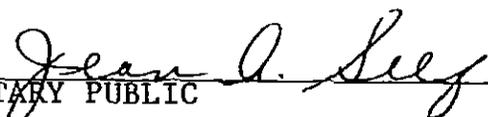
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\_\_\_\_\_  
PAUL HUNTER

SUBSCRIBED AND SWORN to before me this 4th  
day of March, 1983.

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:  
January 15, 1987

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,	)	
	)	
Appellee,	)	NO. 1 CA-CR 6696
	)	
-vs-	)	MARICOPA COUNTY
	)	SUPERIOR COURT
DONALD MARK PERRY,	)	NO. CR-11427
	)	
Appellant.	)	
_____	)	

APPELLEE'S ANSWERING BRIEF

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DIVISION I  
COURT OF APPEALS  
STATE OF ARIZONA

FILED JUN 6 1983

GLEN D. CLARK, CLERK  
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6-22-83

QUESTION PRESENTED FOR REVIEW

Is appellant's sentence to an aggravated term for his fifth felony conviction excessive?

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11

STATEMENT OF THE CASE

Appellant was charged with one count of theft, and one count of burglary, both class 3 felonies, occurring on or about the 13th day of November 1980. (Indictment, filed Sept. 30, 1982.)<sup>1</sup> Pursuant to a plea agreement with the state, appellant pled guilty to count two, burglary, a class 3 felony, with an allegation of a prior felony conviction to-wit, First Degree Burglary, Yuma County Superior Court Cause No. 9067, April 5, 1978. (Plea Agreement, filed Oct. 22, 1982.) Count one of the instant indictment was dismissed, as well as the charges in CR-11426, 10555, and 11425.

Prior to sentencing, appellant requested a mitigation hearing. (Request for Mitigation Hearing and Notice of Hearing, filed Nov. 10, 1982.) This hearing was held on November 29, 1982. The results of a stipulated polygraph examination were admitted, and testimony was received from appellant and two burglary victims. (R.T. of Nov. 29, 1982, Mitigation Hearing, at 11 et seq.) Appellant was sentenced on November 30, 1982, to an aggravated term of 12 years imprisonment with credit for 72 days presentence

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<sup>1</sup>Appellant's counsel references other charges in Yuma County Superior Court cause numbers CR-11425, 11426 and 10555 in the opening brief, but these causes only appear in the record on appeal of CR-11427 in reference to the plea agreement.

incarceration. (R.T. of Nov. 30, 1982, Sentencing, at 49.) The trial court cited as reasons for the aggravated term appellant's previous felony convictions; strong evidence that appellant committed the felony charges dismissed in 11426, 10555, and 11425; that in 9067<sup>2</sup> appellant failed to appear for the hearing on the revocation hearing, and finally, the substantial losses sustained by the victims. (Id. at 49-50.) Appellant filed a notice of appeal through counsel. (Notice of Appeal, filed Dec. 2, 1982.) Counsel filed an opening brief pursuant to Anders v. California, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), raising no arguable issues. Appellant then filed a supplemental opening brief raising the issues answered herein. Appellee's answer is filed pursuant to this Court's order dated May 5, 1983. This Court has jurisdiction pursuant to Ariz.Rev.Stat. Ann. §§ 12-120.21(A)(1), 13-4031, and -4033.

#### ARGUMENT

#### APPELLANT'S SENTENCE TO AN AGGRAVATED TERM FOR HIS FIFTH FELONY CONVICTION WAS NOT EXCESSIVE.

Appellant, in his supplemental opening brief, contends that his sentence to an aggravated 12 year term was excessive. He makes a number of claims, which are summarized as follows:

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2. The record incorrectly reflects the cause number as 9677 although in the rest of the record on appeal the cause is correctly designated as 9067.

1. The sentence should not have aggravated and enhanced with the same prior conviction;

2. The prior conviction to which appellant pled guilty as part of the plea agreement was never formally alleged;

3. Appellant's sentence was improperly aggravated by reference to other felony convictions;

4. The trial court failed to conduct an adequate investigation into the facts and circumstances of the case and appellant's position.

All of appellant's various complaints may be summed up as an attack on the length of his sentence, a claim that the sentence was excessive.

It is well established that the imposition of sentence is entirely within the discretion of the trial court, and, if the sentence is within statutory limits, the sentence will not be modified unless there are unusual circumstances, or it clearly appears from the record that there was abuse of discretion. State v. Ethington, 121 Ariz. 572, 592 P.2d 768 (1979); State v. Herro, 120 Ariz. 604, 587 P.2d 1181 (1978). An abuse of discretion in sentencing is characterized by capriciousness or arbitrariness, or the failure to conduct an investigation

into the facts necessary for an intelligent exercise of the sentencing decision. State v. Douglas, 87 Ariz. 182, 349 P.2d 622, cert. denied, 363 U.S. 815 (1960); State v. Mixon, 27 Ariz.App. 306, 554 P.2d 902 (1976).

Appellant, however, asks this Court to review all the factors present, and reduce his sentence. The power to reduce a sentence under Ariz.Rev.Stat. Ann. § 13-4037(B) [formerly § 13-1717(B)] is to be exercised with great caution. State v. O'Neill, 117 Ariz. 343, 572 P.2d 1181 (1977); State v. Malory, 113 Ariz. 480, 484, 557 P.2d 165, 169 (1976). One reason is given as follows:

Because a defendant appears in person before the trial judge, the trial judge is, in most instances, better able than we to evaluate the defendant and his circumstances and to determine what action will most likely rehabilitate him to constructive activity.

State v. Smith, 107 Ariz. 218, 219, 484 P.2d 1049, 1050 (1971); quoted with approval in State v. Reid, 114 Ariz. 16, 559 P.2d 136 (1976); accord, State v. Gonzales, 106 Ariz. 303, 475 P.2d 485 (1970) (personal observation versus cold record).

In order to discharge its sentencing function properly, the trial court must consider not only the circumstances of the offense, but also the moral character and past conduct of the defendant. State v. Smith, *supra*, 107 Ariz. at 220, 484 P.2d at 1051. In reviewing the propriety of the exercise of a trial

court's discretion, the appellate court must look to the same considerations. State v. Patton, 120 Ariz. 386, 389, 586 P.2d 635, 638 (1978).

(1) Use of prior conviction to enhance and aggravate sentence.

Appellant complains that the trial court erred in considering his prior conviction to aggravate his sentence, since by pleading to the charge with a prior, the prior conviction had already been taken into account in the legislative sentencing scheme. Ariz.Rev.Stat. Ann. § 13-604 provides sets forth a sentencing scheme for dangerous or repetitive offenders. Ariz.Rev.Stat. Ann. § 13-702 provides for the aggravation or mitigation of the presumptive term. Ariz.Rev.Stat. Ann. § 13-604 specifically allows for deviation from the presumptive terms outlined therein pursuant to the terms of § 13-702(C)(D) and (E). In making his argument, appellant misreads the trial judge's findings:

[THE COURT]: Mr. Perry, you don't stand before me as a person with one simple prior conviction. You have been convicted on three previous occasions of felonies. The evidence is very strong that you committed three additional felonies in cases 11426, 10555 and 11425. And finally in case number 9677, [sic] you deliberately have failed to appear for your hearing on the petition for revocation of your probation. In addition yours is not simply one small burglary, but very substantial burglaries and the losses sustained by the victims obviously are never going to be recouped.

For these reasons which I find to be aggravating the presumptive sentence will be increased to a term of 12 years and you will be imprisoned for a term of 12 years commencing this date.

(R.T. of Nov. 30, 1982, sentencing, at 49-50.) The trial judge properly considered appellant's significant prior criminal record in determining sentence. See State v. Patton, supra, 120 Ariz. at 389, 586 P.2d at 638.

At any rate, consideration of the prior conviction both in enhancing punishment under the recidivist statute and as an aggravating circumstance to enhance the punishment beyond the presumptive term does not violate the bar against double jeopardy or double punishment. State v. LeMaster, 1 CA-CR 5881, slip op. at 14 (Ariz.Ct.App., Apr. 12, 1983); State v. Martinez, 130 Ariz. 80, 81, 634 P.2d 7, 8 (Ct.App. 1981); cf. State v. Bly, 127 Ariz. 370, 621 P.2d 279 (1980) (use of deadly weapon to enhance and aggravate sentence). This is essentially appellant's complaint, in that he contends his prior conviction once used, should not be considered again. Like the situation in Martinez, supra, appellant's additional prior convictions, above and beyond those used under the recidivist statute to enhance his punishment, were properly considered as aggravating circumstances. Merely that the other charges were dismissed pursuant to the plea agreement does not make them inappropriate for consideration in aggravating the sentence. See State v. Jackson, 130 Ariz. 195, 635 P.2d 180 (Ct.App. 1981) (allegations of prior

convictions dismissed pursuant to plea agreement may be used to aggravate sentence).

2. Invalid Prior Conviction.

Appellant complains that the prior conviction, which formed a part of the plea agreement to which he pled guilty, was never properly alleged, and he was never provided with any information on the prior until the signing of the plea agreement. (Appellant's Opening Supplemental Brief, at 1.) He also appears to argue that the prior was somehow invalid since he was placed on probation, but not "sentenced." As to this point, appellant is incorrect, since this distinction has no legal effect on the issue of whether appellant has suffered a prior conviction. It is the conviction for the felony, not the sentence imposed that is significant.

Appellant was arraigned on October 5, 1982, and trial was set for November 23, 1982, to follow cases in CR-11419, 11421, and 11424. (R.T. of Oct. 5, 1982, at 3.) Under the provisions of Rules 16.1(b), 13.5(a), Ariz.Rev.Stat. Ann. § 13-604(K), and relevant case law, an allegation of prior conviction can be filed up to 20 days prior to trial at the sole discretion of the prosecutor. Thereafter, the court may exercise its discretion in granting the motion. State v. Birdsall, 116 Ariz. 112, 568 P.2d 419 (1977); State v. Hadd, 127 Ariz. 270, 619 P.2d 1047 (Ct.App. 1980); State v.

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Jones, 119 Ariz. 479, 581 P.2d 713 (Ct.App. 1978). Here, well within the time limits allowing the filing of an allegation of prior conviction, appellant entered a plea of guilty pursuant to an agreement with the state. The plea agreement form specifically notes the nature and date of the previous prior Yuma County conviction. Additionally, appellant specifically acknowledged his intent to plead to one count and the prior conviction. (R.T. of Oct. 26, 1982, at 4-5.) He made no complaint at that time regarding any lack of notice on the prior conviction. Further, appellant also signified his understanding that his plea, as specified, served as a waiver of any objections to the entry of judgment or imposition of sentence consistent with the agreement. (Plea Agreement Form, at paragraph 6, filed Oct. 22, 1982.)<sup>3</sup> It is well established that a plea of guilty constitutes a waiver of all nonjurisdictional defenses, defects and irregularities in the proceedings. State v. Flewellen, 127 Ariz. 342, 621 P.2d 29 (1980). Thus, appellant waived any challenge to the allegation of prior conviction herein, especially given the fact that he admitted it in his plea, and signed a plea agreement containing what has been interpreted as an express waiver to challenges in the charging document. See State v. Reed, 121 Ariz. 547, 592 P.2d 381 (Ct.App. 1979).

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<sup>3</sup>The plea agreement signed by appellant and his counsel was dated October 23, 1982, and the plea was entered on October 26, 1982.

By his plea, appellant has waived any objection on this point. Furthermore, the plea agreement served to amend the charging document, as noted in paragraph 4. (Plea Agreement, supra, at paragraph 4.) Appellant's complaints on this point have been waived and are meritless.

3. Use of other prior convictions to aggravate sentence.

Appellant also contends that the trial court improperly used three other felony convictions to aggravate his sentence, although they were not alleged as prior convictions. This appears to be the opposite side of appellant's previous argument that the prior convictions should not be used under the recidivist statute and to aggravate his sentence; here, he asserts that the previous convictions cannot be used to aggravate his sentence since the state did not allege these convictions as priors under the recidivist statute. Appellee submits that this argument affords appellant no relief either. The fact is, the decision not to allege the convictions as priors served to limit the potential sentence appellant faced. It is well established that the existence of prior convictions may properly be considered for purposes of deviating from the presumptive term. See State v. Fristoe, \_\_\_ Ariz. \_\_\_, 658 P.2d 825 (Ct.App. 1982). Appellant should not be heard to complain that the range of sentence was limited by the state's failure to charge him under the recidivist

statute. The priors were properly considered in aggravation of his sentence.

4. Abuse of Discretion in Sentencing.

Appellant next contends that the trial court failed to conduct an adequate investigation into the facts and circumstances of his case, and that certain portions of the presentence reports were inaccurate or incorrect. The trial court found that there was strong evidence that appellant had committed three additional felonies in CR-11425, 1055, and 11426. (R.T. of Nov. 30, 1982, Sentencing, at 49-50.)

Appellant attempts to dispute that finding by references to reports or documents on those charges not a part of the record herein.

Appellant's complaints regarding the alleged inadequacy of the facts in the presentence report were already before the trial court. First, appellant's complains that the presentence report did not contain information from a personal interview, and contained information from previous reports.<sup>4</sup> Reliance on previous presentence reports is not improper. See Rule 26.4, Ariz.R.Crim.P. The weight

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<sup>4</sup>This record on appeal does not contain the previous presentence reports, although the letter containing information from appellant's interview is included. This Court may wish to order that the entire presentence report or reports relied on by the trial court be forwarded for inclusion in the record on appeal.

to be given the presentence report is for the trial court and the appellate court need not assume that the judge was adversely influenced by any statement that may have been improper. State v. Dixon, 21 Ariz.App. 517, 519, 521 P.2d 148, 150 (1974). Appellant did have a personal interview with the probation officer. The results of that interview are contained in the report dated November 23, 1982, and submitted to the trial judge. (Letter, filed Nov. 23, 1982.) Appellant testified on his own behalf at a mitigation hearing held prior to sentencing. (R.T. of Nov. 29, 1982, Mitigation Hearing, at 16-27.) He admitted his prior convictions (fraud, burglary, forgery), this being his fifth one. (Id. at 17.) He detailed his previous convictions. (Id. at 17-18.) He offered his explanation on the charges that were dismissed pursuant to the plea. (Id. at 19.) He disagreed that he was a "habitual criminal," stating that it was not like he was "out robbing ladies and beating them and stuff like that," but that drugs were behind his crimes. He also informed the trial court of his version of the value of items taken in the burglary charges dismissed pursuant to the plea agreement. (Id. at 23-26.) The parties stipulated to a polygraph examination of appellant regarding items taken from the burglaries. According to the testimony of the examiner, appellant was not being truthful in making a list

of items allegedly taken from the burglary. In other words, he had apparently taken other items from the house than those contained on his list. (Id. at 15.) Appellant was deceptive on each question asked. (Id.)

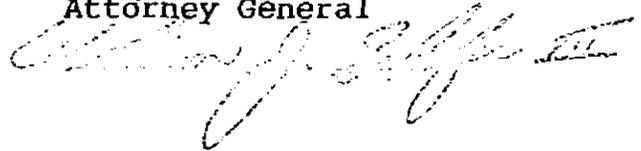
Under these circumstances, the trial court was hardly arbitrary or capricious in its decision to believe the sworn testimony of the victims instead appellant's self-serving statements. There is nothing before this Court indicating any sentence for codefendants, as referred to by appellant. Even so, with appellant's lengthy criminal record and inability to abide by previous probationary terms, his sentence is not excessive. This state of the record does not establish any failure on the part of the trial judge to adequately investigate the circumstances of appellant's case and determine an appropriate sentence accordingly.

CONCLUSION

Appellant was sentenced within the statutory limits and consistent with the terms of the plea agreement. His unhappiness with the length of his sentence does not make it an impermissibly excessive one. Appellant's complaints are without merit and this Court should affirm the judgment and sentence of the court below.

Respectfully submitted,

ROBERT K. CORBIN  
Attorney General



WILLIAM J. SCHAFER III  
Chief Counsel  
Criminal Division



GEORGIA B. ELLEXSON  
Assistant Attorney General

Attorneys for APPELLEE

A F F I D A V I T

STATE OF ARIZONA        )  
                                  )    ss.  
COUNTY OF MARICOPA    )

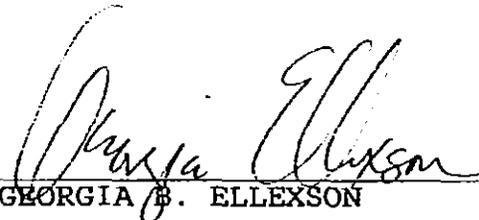
GEORGIA B. ELLEXSON, being first duly sworn upon oath,  
deposes and says:

That she served the attorney for the appellant in the  
foregoing case by forwarding two (2) copies of APPELLEE'S  
ANSWERING BRIEF, and (1) copy to appellant, in a sealed  
envelope, first class postage prepaid, and deposited same  
in the United States mail, addressed to:

PAUL HUNTER  
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10000 S. Wilmont Road  
Tucson, Arizona 85777

this 6th day of June, 1983.

  
\_\_\_\_\_  
GEORGIA B. ELLEXSON

SUBSCRIBED AND SWORN to before me this 6th day of  
June, 1983.

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:

July 17, 1986

CR39-067  
2116D:bb

ORIGINAL

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA,	)	
	)	
Appellee,	)	1 CA-CR 6696
	)	
VS.	)	
	)	YUMA County Superior
DONALD MARK PERRY,	)	Court No. CR-11427
	)	
Appellant.	)	
	)	
	)	

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APPELLANT'S SUPPLEMENTAL OPENING BRIEF

IN PRO PER

DIVISION 1  
COURT OF APPEALS  
STATE OF ARIZONA

DONALD MARK PERRY 35990  
ACTC-T Santa Rita, HU #4  
10000 S. Wilmont Road  
Tucson, Arizona 85777

APPELLANT/IN PRO PER

FILED APR 25 1983

GLEN D. CLARK, CLERK

By W.S. [Signature]

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CASES AND AUTHORITIES:

United States v. Oakes, 565 F.2d 55 (8th Cir. 1976)

A.R.S., Rule 16.1 id

United States v. Blackshear, 568 F.2d 1120 (5th Cir. 1978)

United States v. Bednarski, 445 F.2d 364 (1st Cir. 1971)

State v. Leckis, 79 N.J. Super., 479, 192 A2d 161 (1963)

REFERRED TO

(Transcripts of Sentencing Hearing, Pg.49-50  
(  
(Pre-Sentence Report, dated November 4, 1982  
(  
(Indictment No. 29-GJ-011 - #11426 Count II  
(  
(Indictment No. 24-GJ-61 - #10555  
(  
(Indictment No. 29-GJ-010 - #11425

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FACTS:

The prior conviction on plea bargain was a tool to enter defendant into plea bargain. It being a prescribed mandatory prison term with the aggravation being built in was just that--a mandatory prison term. The sentence should not have been enhanced beyond the presumptive term as the aggravation was already set in with the pleading to the prior conviction. Defendant was led into plea bargain with the idea that no other aggravations would be used to enhance sentence. Being that the plea bargain had the aggravation built in and mandatory prison time would serve the swift punishment rule, the defendant entered into the guilty plea. The purpose of a plea bargain is to serve relief to both accused and the state.

The prior conviction on the plea bargain was never formally alleged. Defendant was never arraigned on any alleged prior convictions. Defendant was never accused or provided any information as to what the prior on the plea bargain was to be until the time of signing the bargain. The legality of the prior presents an issue in itself. Defendant was never sentenced in case #9067. Sentencing was postponed for a period of three years with the terms of probation. This was case #9067 under the old code, pre-October 1978. The probation was terminated in May, 1981. No physical evidence or information other than the date was ever produced by trial court. The defendant plead guilty to something he was never charged with until it was time to plead guilty in Superior Court.

The court used three other felony convictions as aggravations to enhance sentence beyond presumptive term. Again, no allegations of prior convictions were ever brought forth before the plea bargain was executed. Defendant was never arraigned on them. If defendant had been, the plea bargain would have been rejected until a better remedy could be settled upon. The thought behind the plea bargain was that only the one prior was to be used in determining sentence. Plenty of time was allowed to the state to file allegation of prior convictions. It was a period of two months from the time the defendant turned himself in to the time of the change of plea.

Another aggravation used to enhance the presumptive term was "that there was strong evidence that defendant committed three additional felonies in cases 11425, 10555 and 11426". The court acted in a capricious and arbitrary way in failing to adequately investigate the facts involved in those cases. Defendant feels if the court would have investigated the cases, the court would not have accepted the plea bargain, as there were too many discrepancies involved. Reports clearly show that case #10555 is in fact the same exact charge as that of Count II of case #11426. Case #10555 would have been dismissed if plea bargain was signed or not. In case #11425, the indictment returned by the Grand Jury, a true bill, charged the defendant with committing acts while he was incarcerated awaiting disposition of present case. It produces one to wonder what kind of reports were presented to the Grand Jury for them to come out

with an indictment with wrong dates. Another aggravation used to enhance sentence was that defendant failed to appear for the petition for revocation of his probation, in case #9677. (P.49, ln.23-24 Transcripts) Case #9677 is not related to this defendant. If the court reviewed the information adequately, it would have brought to mind the right case number that he was supposed to have violated his probation in. The right case number was very clear throughout all the proceedings but still the court can not come up with it at the crucial time to pronounce judgment.

Where the discretion is vested in the trial judge as to the limits of a sentence, he should consider the general character of both the offense and the party convicted. He must look and take under consideration the defendant's age, physical health, cooperative attitude, moral character as well as the non-violent nature of the crime and sentences given to co-defendants. The court was not provided with sufficient information on the defendants behalf. State v. Leckis, 79 N.J. Super. 479, 192 A.2d 161 (1963). The probation officer failed to present a complete pre-sentence report. In this present case there was no personal interview conducted prior to the filing of the pre-sentence report to the trial court. The information for the officer's report was obtained from previous pre-sentence reports. One that was seven (7) years old and another that was five (5) years old and both were written by different probation officers. Other information was obtained from police reports. The pre-sentence report was one-sided and failed to relay any personal information about defendant. From reading the pre-sentence

report, one gets confused and misled about the incidents involved. The amounts are wrong, the dates are wrong but it was still submitted to the court without any personal interview with the defendant and an inadequate investigation with the issues involved. A psychological report would have been supportive due to the defendant's drug addiction before the crime was committed. His state of mind at the time he turned himself over to custody was never mentioned. There was a two year time span between. The probation officer showed prejudice and was determined to make an example of the defendant. No credit was given that the defendant turned himself in honorably to care for his wrongdoings. The probation officer stated the defendant turned himself in after the co-defendant was apprehended and that it was out of fear and not honorable. This is not the case. His intentions were honorable. Defendant turned himself in two days before the co-defendant was ever heard of. The defendant did not cause the state any cost and was just looking for a fair and just remedy. The co-defendant was extradited and then released on bond. Defendant was not afforded this opportunity as his bail was never lowered to a reasonable amount. The co-defendant was allowed a lenient bargain and the judge of his choosing. Defendant would not be allowed the same judge, although it was requested. Co-defendant, having a different bargain and different judge had a five year sentence imposed on him. The trial court did not enhance his sentence with any prior allegations so he is considered as a first offense and is eligible for parole after serving a little more than a year. Defendant's term calls for 2/3 of the sentence to be served before any release, which makes it eight (8) flat years. Defendant fails to see equal justice served here.

A mitigation hearing was held the day before sentence was pronounced. Witnesses on behalf of the state were called. One of the witnesses was that of a case that was dismissed in the plea bargain. Guilt was never proven in that case but still the witness was allowed to take the stand and express her aggravations against the defendant. The so-called mitigation hearing was, in fact, an aggravation hearing for the state.

ARGUMENTS:

THE ALLEGATION OF PRIOR CONVICTION AS THE  
MAJOR ELEMENT OF PLEA BARGAIN.

A defendant is entitled to explicit finding and disposition of the trial court in prior convictions, when it will be used to enhance sentence. See United States v. Oakes, 565 F.2d 55, (8th Cir. 1976), under Rule 16.1d1 of the ARS--the defendant sets forth a "good cause" for rehearing when the punitive measure of prior conviction was used for the obtainment of a plea bargain. Defendant on his own will entered custody and asked for adjudication. The trial court failed to examine all records before plea bargain was executed--discrepancy of case #9677--Pg.49, ln.23-24 of transcripts--that's not related to the defendant clearly indicates error in the part of the court. United States v. Blackshear, 568 F.2d 1120 (5th Cir. 1978) clearly points to the fact that the court must make explicit finding as to the admissibility of prior convictions. The trial court failed to take the mitigating circumstances under light before plea bargain was entered into. Before plea bargain can be obtained the defendant must be able to talk freely of all the details of his crime and be able to communicate intelligently about the facts surrounding the case and voluntarily. When this is denied to the defendant, the court must free defendant from the adverse consequences of the plea bargain. See United States v. Bednarski, 445 F.2d 364 (1st Cir. 1971) as in case above tendered proffered in such a manner as to be inconsistent with the administration of justice.

*Signed and Sworn to this  
18th day of April, 1983.  
[Signature]  
Notary Public*

*[Signature]*  
DONALD MARK PERRY  
APPELLANT - IN PRO PER

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Original

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,  
Appellee,

VS.

DONALD MARK PERRY,  
Appellant.

1 CA-CR 6696

YUMA County Superior  
Court No. CR-11427

*reply*  
APPELLANT'S ANSWERING BRIEF

IN PRO PER

DIVISION 1  
COURT OF APPEALS  
STATE OF ARIZONA

FILED JUN 27 1983

GL...RK  
By *[Signature]*

DONALD MARK PERRY  
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IN PRO PER

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A+ Issue 6-22-83

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ENCLOSURES

1. Pre-Sentence report filed November 4, 1982
2. Letter dated November 23, 1982
3. Letter dated February 9, 1983
4. Pre-sentence report of co-defendant

TABLE OF CASES AND AUTHORITIES

CASES:

United States v. Bednarski, 445 F.2d 364 (1st Cir. 1971)

State v. Ethington, 212 Ariz. 572, 592 P.2d 768 (1979)

State v. Flores, 108 Ariz. 231, 495 P.2d 461 (1972)

State v. Goodman, 110 Ariz. 524, 521 P.2d 611 (1974)

State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1961)

State v. Killian, 91 Ariz. 140, 370 P.2d 287 (1962)

State v. Lechis, 79 N.J. super. 479, 192 A.2d 161 (1971)

State v. Smith, 107 Ariz. 220, 484 P.2d 1051 (1971)

State v. Swafford, 21 Ariz.App. 474, 520 P.2d 1151 (1974)

United States v. Weston, 448 F.2d 626 (9th Cir. 1971)

AUTHORITIES:

Arizona Revised Statutes, §13-4037(B)

ARGUMENT: APPELLANT'S SENTENCE TO AN AGGRAVATED TERM WAS EXCESSIVE AND INCONSISTENT WITH THE ADMINISTRATION OF JUSTICE.

As in the supplemental brief and now, the Appellant addresses the fact that the Appellee failed to recognize: The punitive measure of prior conviction was used for the obtainment of the plea bargain. Trial court should not have aggravated sentence beyond the presumptive term as the plea bargain was entered into with the thought of five flat years being the punishment. The presumptive term of 7.5 years less good time makes the sentence five flat years. Appellant never would have entered into plea if the thought had been a sentence could be aggravated beyond the agreed upon five flat years. This sets forth an unusual circumstance for the sentence to be modified under Arizona Revised Statutes §13-4037(B). Had the Appellant been under the impression that the sentence was to be aggravated, in any way, beyond what was agreed upon, (the five flat years he was to receive), he would have introduced evidence of mitigating circumstances into the record. Every aggravation that was used to increase sentence has a mitigating circumstance to it, but the defendant understood he was to receive no more than the five flat years, therefore, he did not present the evidence.

Appellant turned himself over to custody, on his own will, seeking adjudication. He was under the impression the prosecuting attorney had taken this into consideration and was to stand behind the plea bargain agreed upon. The Appellant

relieved the State of the burden of proof, the cost of going to trial on the cases and felt he had to care for his wrongdoings of his past life of a drug addict. He was not seeking probation because he knew of his criminal record he would have to go to prison. Therefore, he sought a fair deal with a fixed amount of time of confinement. Is the prosecuting attorney to be allowed to enter into a plea bargain for the purpose of conviction only and not for the administration of justice? This is trickery.

The Appellant believed that the co-defendant was to receive a similar plea bargain. Co-defendant plead guilty to three felonies (two class 3 and one class 5), received a complete and accurate pre-sentence report, had the judge he requested and was sentenced to five years with no priors alleged making him eligible for parole in 18 months. The trial court in Appellant's case failed to review the sentence given to the co-defendant, State v. Flores, 108 Ariz. 231, 495 P.2d 461 (1972).

In order to discharge it's sentencing function properly, the court must not only consider the circumstances of the offense, but also the moral character and past conduct of the defendant, State v. Smith, 107 Ariz. 220, 484 P.2d 1051 (1971) also, the sentence can be held excessive despite the prsence of a criminal record, State v. Hutton, 87 Ariz. 176, 349 P.2d 187 (1961). Rehabilitation is also a valid objective of sentencing, State v. Swafford, 21 Ariz.App. 474, 520 P.2d 1151 (1974). Failure to conduct an investigation into the facts necessary for an intelligent exercise of sentencing power characterizes an abuse of

discretion, State v. Ethington, 121 Ariz. 572, 592 P.2d 768 (1979) (Pre-sentence report of record enclosed, dated November 4, 1982). Errors in presentence reports, <sup>AS UNDERLINED</sup> United States v. Weston, 448 F.2d 626 (9th Cir. 1971) are lack of and incorrect information. The court was not provided with accurate and complete information on defendants behalf, therefore, making it insufficient, State v. Lechis, 79 N.J. Super. 479, 192 A.2d 161 (1963). Appellant is not afforded the objective of rehabilitation, State v. Swafford, supra, due to probation officer's inadequate presentence report. A supplementary letter from the probation officer was submitted after the presentence report was filed, stating that it was concerning the second interview with defendant. This is not true as it was the only meeting whatsoever with the defendant. A short discussion, to no avail, was held only after defendant's attorney complained to the probation officer that I wanted to talk to him about what he had already filed.

No consideration was given to the fact of the Appellant's cooperative attitude and moral character, State v. Killian, 91 Ariz. 140, 370 P.2d 287 (1962), the non-violent nature of the crime, State v. Goodman, 110 Ariz. 524, 521 P.2d 611 (1974) or sentence given to co-defendants, State v. Flores, supra. (Also enclosed please find co-defendant's presentence report).

Before the plea bargain was obtained, Appellant should have been able to talk freely, intelligently and voluntarily. This was denied to defendant so this court should free defendant

from the adverse consequences of the plea bargain, United States  
v. Bednarski, 445 F.2d 364 (1st Cir. 1971).

CONCLUSION

(This Answering Brief is to coincide with original supplementary brief and issues raised in said brief.)

The Appellant seeks to be relieved of adverse consequence of plea bargain and have his sentence modified or a rehearing of sentencing granted to present mitigating circumstances. If rehearing is granted, the Appellant asks for a change of judge to have that of the co-defendant. A different judge would mean a different probation officer to investigate for a presentence report.

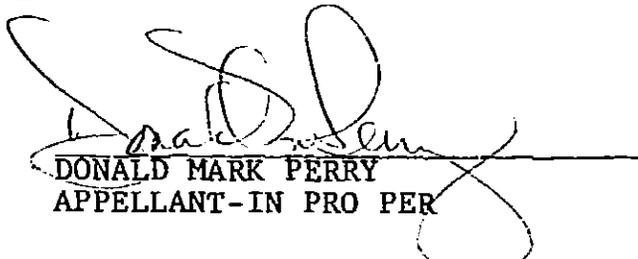
CERTIFICATE OF SERVICE

I, DONALD MARK PERRY, hereby certify that I have mailed, postage prepaid, copies of the Appellant's Opening Brief-In Pro Per, as follows:

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DATED this 23<sup>RD</sup> day of June, 1983.

  
DONALD MARK PERRY  
APPELLANT-IN PRO PER