

COURT OF APPEALS, DIVISION ONE

BRIEFS

SECTION 2

1 CA-CR 7112

STATE OF ARIZONA

Appellant

v.

MICHAEL SANDATE,

Appellee.

YUMA

COUNTY
SUPERIOR COURT

NO. CR 11485

TRANSMITTAL DATE

601062

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA,)	
)	
Appellant,)	1 CA-CR 7112 ⁷¹¹²
)	
vs.)	DEPARTMENT D
)	
MARK STEVEN BARKSDALE,)	Yuma County Superior No.
)	CR-11605 (Consolidated
Appellee,)	with CA-CR 7112 Yuma
)	County Superior Court
_____)	No. CR-11485)
STATE OF ARIZONA,)	
)	
Appellant,)	
)	
vs.)	
)	
MICHAEL SANDATE,)	
)	
Appellee.)	
_____)	

APPELLEE'S ANSWERING BRIEF

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED OCT 13 1983

GLEN D. CLARK, CLERK

By _____

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QUESTION

Does A.R.S. Section 13-604.01(B) require the sentence imposed upon a person, convicted of a felony, while on felony probation, to be consecutive to the sentence imposed or to be imposed for the violation of the probation.

STATEMENT OF CASE

The statement of the case in the Appellant's brief accurately presents the facts relevant to the issues raised.

ARGUMENT

A.R.S 13-604.01(B) provided that, in part:

B.a person convicted of any felony offense not included in subsection A of this section if committed while the person is on probation, parole, work furlough or any other release shall be sentenced to a term of not less than the presumptive sentence and the person is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by section 31-233, subsection A or B until the sentence imposed by the court has been served. A sentence imposed pursuant to this subsection shall be consecutive to any other sentence from which the convicted person had been temporarily released.

In each of the instant appeals neither of the defendants had received any other sentence, both having been placed on probation

and the imposition of sentence suspended, and neither had been temporarily released, since they had not been incarcerated, the sentences having been suspended.

The language of the statute is vague. Because it speaks of "temporarily released," it should not apply to a defendant who has never been incarcerated, and therefore never released.

CONCLUSION

A.R.S. 13-604.01(B) as it applies to consecutive sentencing provides that sentences shall be consecutive to any other sentence from which the person had been released. Neither BARKSDALE nor SANDATE were on release. Consecutive sentencing should not apply.

RESPECTFULLY SUBMITTED this 5 day of October, 1983.



JOHN HART
Attorney for MARK BARKSDALE



JOHN JONGEWARD
Attorney for MICHAEL SANDATE

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CERTIFICATE OF MAILING

STATE OF ARIZONA)
) ss.
County of Yuma)

I, CECILIA FURROW, a Notary Public in and for the County of Yuma, State of Arizona, do hereby certify that on the 5th day of October, 1983, I personally placed in the United States Post Office, at Yuma, Arizona, postage prepaid copies of the foregoing APPELLANT'S ANSWERRING BRIEF, Court of Appeals 1 CA-CR 7088, Yuma County Superior Court No. 11605 consolidated with CA-CR 7112 Yuma County Superior Court No. 11485, entitled STATE OF ARIZONA v. MARK STEVEN BARKSDALE and STATE OF ARIZONA v. MICHAEL SANDATE, addressed as follows:

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Notary Public

My Commission Expires: 9-17-87

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ORIGINAL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,
Appellant,
v.
MARK STEVEN BARKSDALE,
Appellee.

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1 CA-CR ~~7000~~

DEPARTMENT D

Yuma County Superior
Court No. CR-11605
(Consolidated with
1 CA-CR 7112, Yuma
County Superior Court
No. CA-11485)

STATE OF ARIZONA,
Appellant,
v.
MICHAEL SANDATE,
Appellee.

APPELLANT'S OPENING BRIEF

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DIVISION I
COURT OF APPEALS
STATE OF ARIZONA

FILED AUG 18 1983

GLEN D. CLARK, CLERK
By _____

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QUESTION PRESENTED FOR REVIEW

Does A.R.S. Section 13-604.01(B) require a sentence imposed upon a person convicted of committing a felony while on felony probation to be consecutive to any previous sentences?

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STATEMENT OF THE CASE

This is a consolidated appeal involving two cases that are factually unrelated but raise the same issue of law. In State v. Barksdale, Yuma County Superior Court No. 11605, the trial court sentenced Barksdale to serve two years in prison upon his conviction of driving while under the influence of intoxicating liquor while his license was suspended, a class five felony, in violation of A.R.S. Section 28-692.02. (R.T. of April 13, 1983, at 10-11). In State v. Sandate, Yuma County Superior Court No. 11485, the same trial judge sentenced Sandate to serve two years in prison following his conviction for third-degree burglary, a class five felony, in violation of A.R.S. Section 13-1506. (R.T. of April 13, 1983, at 146).

Because Barksdale and Sandate were on felony probation at the time they committed the offenses described above, the trial court applied the mandatory prison provisions of A.R.S. Section 13-604.01(B) in imposing sentence. However, the trial judge ruled that the consecutive sentence provision, set forth in the last sentence of A.R.S. Section 13-604.01(B), did not apply to persons on

probation.(Barksdale transcript of April 13, 1983, at 7-8; Sandate transcript of April 13, 1983, at 146). Consequently, Barksdale and Sandate were allowed to serve their new sentences concurrently with the sentences imposed as a result of the revocation of their respective probations.

(Barksdale transcript of April 13, 1983, at 11-12; Sandate transcript of April 13, 1983, at 146).

Pursuant to A.R.S. Section 13-4032(6), the State filed timely notices of appeal in both cases. This Court has jurisdiction pursuant to A.R.S. Section 12-120.21.

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ARGUMENT

A.R.S. SECTION 13-604.01(B) REQUIRES
CONSECUTIVE SENTENCES FOR PERSONS WHO
COMMIT A FELONY WHILE ON FELONY
PROBATION.

The issue presented by this consolidated appeal is whether the consecutive sentence provision of A.R.S. Section 13-604.01(B) applies to defendants who commit a felony while on felony probation. Appellant submits that it does and the trial court erred in failing to impose consecutive sentences upon appellees Barksdale and Sandate.

A.R.S. Section 13-604.01 became effective July 24, 1982. At that time, the statute read in part:

B. . . . a person convicted of any felony offense not included in subsection A of this section if committed while the person is on probation, parole, work furlough or any other release shall be sentenced to a term of not less than the presumptive sentence . . . and the person is not eligible for suspension or commutation of sentence, probation, pardon, parole, work furlough or release from confinement on any other basis except as specifically authorized by section 31-233, subsection A or B until the sentence imposed by the court has been served. A sentence imposed pursuant to this subsection shall be consecutive to any other sentence from which the convicted person had been temporarily released. (emphasis added).
Laws 1982, Ch. 322, Sec. 2.

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Subsequently, the legislature amended the statute to specify that it applied only to persons on probation for a felony conviction and not to misdemeanor probationers. Laws, 1983, Ch. 32, effective July 27, 1983. Subsection A of A.R.S. Section 13-604.01 provides enhanced punishment for those persons who commit offenses of a dangerous nature while on probation, parole, etc. Because appellees committed non-dangerous felonies while on felony probation, and those felonies were committed after the effective date of A.R.S. Section 13-604.01, the trial court properly applied the mandatory prison sentence provisions of subsection B.

At issue in this appeal is whether the trial court erred in refusing to apply the consecutive sentence provision contained in the last sentence of the statute. This issue appears to be one of first impression. Appellant submits that the proper resolution of the issue requires an analysis of the legislature's intent in adopting the statute.

Unfortunately, there is little or no legislative history that sheds light on the question before this Court. When first presented

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to the lawmakers, the statute (House Bill 2004) did not contain a consecutive sentence provision. Apparently, that provision was added by floor amendment.

The analysis of legislative intent must therefore focus on the statute itself.

"The language of a statute '[is] the most reliable evidence of its intent', and in the absence of a 'clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" State v. Pickrell, No. 16375-SA (July 21, 1983) (citations omitted).

Furthermore, criminal statutes must be construed according to the "fair meaning of their terms". A.R.S. Section 13-104; see also A.R.S. Section 1-211. With these principles in mind, appellant submits that the plain and unambiguous language of A.R.S. Section 13-604.01(B) mandates the conclusion that the legislature intended to require consecutive sentences for persons who commit felonies while on felony probation.

First, it is clear that the legislature intended to treat persons who commit felonies while on felony probation in the same manner as persons who commit felonies while on parole, work furlough,

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or some other release. Otherwise, the legislature would not have included the word probation in the statute at all. Second, nothing in the language of the statute suggests that the consecutive sentence requirement was intended to be restricted to only certain types of releases. If the legislature so intended, it could have said so by express language. Finally, the language of the statute clearly suggests a legislative intent to provide enhanced punishment for a class of offenders who, having been convicted of a felony and conditionally relieved of the duty to serve time in prison, commit a subsequent offense during that conditional period. Clearly, probationers fall within that class. It follows, that the trial court should have imposed consecutive sentences upon appellees.

CONCLUSION

The consecutive sentence provision of A.R.S. Section 13-604.01(B) applies to persons who commit felonies while on felony probation. Therefore, appellant respectfully requests this Court to remand the cases consolidated in this appeal for resentencing with directions to the trial court to require appellees to serve their

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newest sentences consecutively to the sentences
imposed as a result of the revocation of their
respective probations.

RESPECTFULLY SUBMITTED,

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