

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

THOMAS ANTHONY KIRCHNER, *Petitioner,*

v.

THE HONORABLE RICK A. WILLIAMS, Judge of the SUPERIOR
COURT OF THE STATE OF ARIZONA, in and for the County of
MOHAVE, *Respondent Judge,*

STATE OF ARIZONA, *Real Party in Interest.*

No. 1 CA-SA 16-0188
FILED 11-3-2016

Appeal from the Superior Court in Mohave County
No. CR-2012-00547
The Honorable Rick A. Williams, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

COUNSEL

Thomas Anthony Kirchner
Petitioner

Mohave County Attorney's Office, Kingman
By Matthew J. Smith
Counsel for Real Party in Interest

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MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Diane M. Johnsen and Judge Jon W. Thompson joined.

NORRIS, Judge:

¶1 This special action arises out of an order entered by the superior court denying petitioner Thomas Anthony Kirchner’s motion asking the court to clarify that it had not sentenced him to a term of community supervision following his release from prison. Although we agree with Kirchner that the superior court did not sentence him to community supervision, Kirchner is not yet entitled to the relief he has requested in his petition. Thus, although we accept jurisdiction of this special action, *see* Ariz. R.P. Spec. Act. 3(c), we deny relief.¹

¶2 A jury found Kirchner guilty of possession of dangerous drugs for sale, a class 2 felony, transportation of dangerous drugs for sale, a class 2 felony, and possession of drug paraphernalia, a class 6 felony. The superior court sentenced Kirchner to five years’ imprisonment on the possession for sale and the transportation for sale counts, with 264 days of presentence incarceration credit on each count, with each sentence to run concurrently with a concurrent term of six months’ imprisonment on the possession of drug paraphernalia count, with six months of presentence incarceration credit on that count. Although required by Arizona Revised Statutes (“A.R.S.”) section 13-603(I) (2010), the superior court did not sentence Kirchner to a term of community supervision following his release from prison.² Thus, the superior court imposed an illegally lenient sentence.

¶3 Although Kirchner appealed his conviction and sentence – which this court affirmed, *State v. Kirchner*, 1 CA-CR 13-0043, 2014 WL

¹The Mohave County Attorney did not respond to this petition for special action and, although we may treat the failure to respond as a confession of reversible error, in our discretion we choose to reach the merits of this matter. *See Nydam v. Crawford*, 181 Ariz. 101, 101, 887 P.2d 631, 631 (App. 1994) (exercising discretion to review alleged error despite party’s failure to file answering brief) (citation omitted).

²Neither the sentencing minute entry nor the transcript of the judgment and sentencing hearing mention community supervision.

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250706, at *1, ¶ 1 (Ariz. App. Jan. 23, 2014) (mem. decision), the State did not cross-appeal to challenge the illegally lenient sentence imposed by the superior court. For that reason, Kirchner's "sentence, right or wrong, becomes subsumed into the final judgment." *State v. Dawson*, 164 Ariz. 278, 283-84, 792 P.2d 741, 746-47 (1990) (citations omitted).

¶4 In his motion requesting clarification Kirchner stated that the Arizona Department of Corrections ("ADOC") was calculating a period of community supervision after his release from prison as if the superior court had imposed community supervision, when it had not. The superior court denied his motion and stated – incorrectly – that it had ordered him to serve community supervision when, as discussed above, it had not. Although we agree with Kirchner that the superior court should have clarified that he had not been sentenced to community supervision, he is not yet entitled to the relief he seeks.

¶5 In his petition for special action Kirchner asks that we enjoin the ADOC from requiring him to serve a term of community supervision after his release from prison. We cannot grant this relief for several reasons. First, he did not ask the superior court for injunctive relief in his motion for clarification. Second, the ADOC's calculation of community supervision is still "tentative" and, in light of this decision, the ADOC may reconsider whether Kirchner is subject to community supervision.

¶6 Third, Kirchner's request for injunctive relief is essentially a request for post-conviction relief under Arizona Rule of Criminal Procedure 32.1(d). Rule 32.1(d) allows relief when a "person is being held in custody after the sentence imposed has expired." *See Long v. Ariz. Bd. of Pardons and Parole*, 180 Ariz. 490, 494, 885 P.2d 178, 182 (App. 1994) ("Community release, like parole, is in legal effect imprisonment.") (quotations and citations omitted). Here, Kirchner is still serving his prison sentence and is not being held in custody after expiration of his sentence. Thus, his request for what is in effect relief under Rule 32.1(d) is premature. Finally, as noted above, given this decision, the ADOC may reconsider whether Kirchner is subject to community supervision.

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¶7 For these reasons, although we accept jurisdiction of this special action to clarify that the superior court did not sentence Kirchner to a term of community supervision following his release from prison, we deny the relief requested by Kirchner in his petition for special action.



AMY M. WOOD • Clerk of the Court
FILED: AA