

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA, ex rel., RICHARD M.))	1 CA-SA 02-0125
ROMLEY, Maricopa County Attorney,))	1 CA-SA 02-0126
))	(Consolidated)
Petitioner,))	
))	DEPARTMENT D
))	
v.))	
))	
THE HONORABLE GREGORY MARTIN and THE))	
HONORABLE JONATHAN H. SCHWARTZ, Judges))	
of the SUPERIOR COURT OF THE STATE OF))	
ARIZONA, in and for the County of))	
MARICOPA,))	
))	O P I N I O N
Respondent Judges,))	
))	Filed 7-23-02
CRUZ OLIVAS LANDEROS and STEVEN P.))	
STEADMAN,))	
))	
Real Parties in Interest.))	
))	
))	

Petition for Special Action
from the Maricopa County Superior Court

Cause Nos. CR 02-003676 and CR 01-018779

The Honorable Gregory Martin, Judge
The Honorable Jonathan H. Schwartz, Judge

JURISDICTION ACCEPTED; RELIEF DENIED

Richard M. Romley, Maricopa County Attorney
by Diane Gunnels Rowley
Attorneys for Petitioner

James Haas, Maricopa County Public Defender
by Christopher V. Johns
Attorneys for Cruz Olivias Landeros

James T. Myres
Attorney for Steven P. Steadman

P A T T E R S O N, Judge

¶1 The state asks this court for special action relief to reverse the trial courts' orders ruling that prior felony convictions for first and second time offenders sentenced under Arizona Revised Statutes ("A.R.S.") section 13-901.01 (2001)¹ are non-felonies for impeachment purposes under Arizona Rule of Evidence 609. We deny relief.

BACKGROUND

¶2 This is a consolidation of two cases that raise the same issue. The state charged Steven P. Steadman with theft of a means of transportation, a class 3 felony, and Cruz Olivás Landeros with knowingly possessing narcotic drugs for sale, a class 2 felony. Subsequently, the state filed allegations against Steadman and Landeros (collectively "defendants") for prior felony convictions, which were sentenced under A.R.S. § 13-901.01. Defendants moved to preclude the state from using the prior felony convictions for impeachment purposes, and the trial courts granted the motions ruling that convictions sentenced under § 13-901.01 are not felonies, and therefore, not proper for impeachment purposes. The state timely filed these special action petitions.

¹A.R.S. § 13-901.01 is a voter approved initiative proposal more commonly known as Proposition 200, the Drug Medicalization, Prevention, and Control Act. Section 13-901.01 requires courts to suspend sentencing and impose probation with drug treatment for first and second time offenders of personal possession or use of a controlled substance. *Calik v. Kongable*, 195 Ariz. 496, 497, ¶ 2, 990 P.2d 1055, 1056 (1999).

ISSUE

¶3 Under Arizona Rule of Evidence 609(a)(1), can the state impeach a defendant with a prior felony conviction sentenced under A.R.S. § 13-901.01?

SPECIAL ACTION JURISDICTION

¶4 Our special action jurisdiction is discretionary. *State ex rel. Romley v. Hutt*, 195 Ariz. 256, 259, ¶ 5, 987 P.2d 218, 221 (App. 1999). Special action jurisdiction is proper when the party has no plain, adequate or speedy remedy by appeal. Ariz. R.P. Spec. Act. 1(a); *Luis A. v. Bayham-Lesselyong*, 197 Ariz. 451, 453, ¶ 2, 4 P.3d 994, 996 (App. 2000). Special action jurisdiction is appropriate in matters of statewide importance, issues of first impression, cases involving purely legal questions, or issues that are likely to arise again. *Luis A.*, 197 Ariz. at 452-53, ¶ 2, 4 P.3d at 995-96.

¶5 Whether prior felony convictions sentenced under § 13-901.01 may be used to impeach defendants presents a purely legal question involving statutory interpretation. There is no adequate remedy by appeal, because the state's request involves using the prior felony convictions during trial for impeachment. Moreover, the issue is one of first impression, of statewide importance and likely to recur because of variances in superior court rulings. We, therefore, accept jurisdiction.

DISCUSSION

¶6 The state argues that our decision in *State v. Christian*, ___ Ariz. ___, 47 P.3d 666 (2002), applies here, and therefore, felony convictions sentenced under § 13-901.01 are proper impeachment evidence under Rule 609. Defendants assert that Rule 609 prohibits the use of felony convictions sentenced under § 13-901.01 for impeachment purposes because the offense must “result” in punishment by death or imprisonment in excess of one year. We decline to read the rule as narrowly as defendants suggest, but agree that convictions under § 13-901.01 cannot be used for impeachment purposes.

¶7 In *Christian*, this court ruled that a conviction sentenced under § 13-901.01 meets the requirements of a “historical prior felony conviction” for sentence enhancement purposes under A.R.S. § 13-604. ___ Ariz. at ___, ¶ 13, 47 P.3d at 669-70. In accordance with *Christian*, we find nothing in § 13-901.01 to indicate that the resulting conviction remains anything but a felony conviction. Under Rule 609, however, a felony conviction alone is not dispositive for impeachment purposes. See Ariz. R. Evid. 609.

¶8 We begin with the presumption that all felony convictions are relevant to the credibility of the witness. See *State v. Malloy*, 131 Ariz. 125, 127, 639 P.2d 315, 317 (1981). The fact that a witness has a prior conviction calls into question the

witness's credibility. *State v. Tucker*, 157 Ariz. 433, 448, 759 P.2d 579, 594 (1988). All felony convictions, however, may not be used for impeachment. Rule 609 limits which felony convictions may be used for impeachment purposes. It states in pertinent part that prior felony convictions may be used for impeachment purposes if the probative value outweighs the prejudicial effect and if the crime "was punishable by death or imprisonment in excess of one year."² Ariz. R. Evid. 609(a)(1). Although convictions sentenced under § 13-901.01 are felony convictions, and therefore go to the credibility of the witness, the requirements in Rule 609 must be met before the felony conviction may be used for impeachment purposes. Defendants' prior felony convictions cannot be used for impeachment in this matter because they do not meet Rule 609(a)(1) requirements; no imprisonment³ potential existed here.

¶9 The state asserts that courts have allowed impeachment with prior felony convictions when the defendant received probation or was given an undesignated felony conviction; therefore, the actual punishment given is irrelevant. See *State v. Tyler*, 149

²We only address the limitations set out in Rule 609(a)(1) because that is the issue presented on special action. Rule 609 expresses other limitations which are not addressed in this special action.

³Although imprisonment in general means incarceration in jail or prison, *State v. Sanchez*, 191 Ariz. 418, 420, 956 P.2d 1240, 1242 (App. 1997), we use the term "imprisonment" here to mean "imprisonment in excess of one year." Under § 13-901.01(F), the court may impose jail time as an additional condition of probation pursuant to § 13-901(F), but a jail sentence is not "imprisonment in excess of one year" as required under Rule 609.

Ariz. 312, 315, 718 P.2d 214, 217 (App. 1986) (impeachment allowed even though defendant placed on probation for the prior offenses); see also *State v. Tuzon*, 118 Ariz. 205, 209, 575 P.2d 1231, 1235 (1978) (impeachment by a prior conviction of open-ended second-degree burglary was proper); *State v. Soule*, 121 Ariz. 505, 507-08, 591 P.2d 993, 995-96 (App. 1979) (open-ended conviction considered a felony for purposes of impeachment). We find this argument unpersuasive. In the cases cited by the state, imprisonment in the department of corrections was a possible sentence, which the trial court, in its discretion, chose not to impose. Under § 13-901.01, however, imprisonment is not available because probation is mandatory for the first two convictions. See A.R.S. § 13-901.01. Therefore, because felony convictions sentenced under § 13-901.01 fail to meet the requirements of Rule 609(a)(1), we find that the trial court properly denied the state's request to use felony convictions sentenced under § 13-901.01 for impeachment purposes.

CONCLUSION

¶10 For the foregoing reasons, we deny the state's request for special action relief.

CECIL B. PATTERSON, JR., Judge

CONCURRING:

WILLIAM F. GARBARINO, Presiding Judge

JOHN C. GEMMILL, Judge