



**ARIZONA SUPREME COURT
ORAL ARGUMENT CASE SUMMARY**



**STATE v. CHARLES EUGENE SMITH
CR-08-0033-PR**

PARTIES AND COUNSEL:

Petitioner: Charles E. Smith represented by Maricopa County Public Defender Stephen R. Collins.

Respondent: The State of Arizona, represented by Joseph Maziarz, Assistant Attorney General and Craig W. Soland, Assistant Attorney General

FACTS:

Smith was convicted in Maricopa County Superior Court of one count each of theft of means of transportation, a class 3 felony, and armed robbery, a class 2 dangerous felony. The State alleged he had five prior felony convictions. The trial court considered three of the five prior convictions at his final sentencing hearing: a 1988 California robbery, a 1992 Florida resisting arrest, and a 1992 Florida robbery.

With regard to the first felony, the California robbery, the judge asked Smith's attorney, "[y]ou agree that that would meet the robbery requirements ... of Arizona statutes[,] correct?" Smith's attorney replied "[t]hat's correct, Your Honor."

With regard to the second felony, the Florida resisting arrest, Smith's attorney said, "we are not disputing that that is a prior." The judge asked: "[s]o [] the defendant concedes this is, in fact, an alleageable prior felony conviction[,]" to which Smith's attorney replied, "[y]es, Your Honor." The State corrected the record by asserting that offense was too old to be alleageable so it would be categorized simply as a prior felony conviction.

As to the third felony, the Florida robbery, the judge asked Smith's attorney what Smith's position was and the attorney replied, "Your Honor, we don't dispute that."

Based on Smith's counsel's concessions, the court determined that Smith had three prior foreign felony convictions that would constitute felony offenses under Arizona law, but that only the third, the 1992 Florida robbery conviction, qualified as a third historical prior felony conviction. *See* A.R.S. §13-604(W)(2)(d)(stating that although historical prior felony convictions may not be used for sentence enhancements if they are too remote in time, there is an exception for any felony conviction that is a third or later prior felony conviction). The court sentenced Smith to 6.5 years on count 1. On count 2, the court sentenced him as a non-dangerous offender to a concurrent 9.25-year term, with 227 days credit for presentence incarceration for each count.

Smith appealed, arguing that his sentence was improperly enhanced and that a “third felony” sentence was illegally imposed because none of his three prior foreign convictions met the definition of historical felony conviction under A.R.S. §13-604 (N).

The court of appeals affirmed, ruling that where a defendant failed to preserve the argument in trial court he is barred on appeal from raising a claim that his sentence was improperly enhanced based on foreign felony convictions that would not constitute felonies in Arizona and the appellate court does not review for fundamental error. Op. at ¶17, concluding that *Song* and *Fagnant*, discussed below, are controlling.

However, the court noted the confused state of Arizona law in this arena which stems from a lack of clarity as to whether *State v. Song*, 176 Ariz. 215, 860 P.2d 482 (1993), and *State v. Fagnant*, 176 Ariz. 218, 220, 860 P.2d 485, 487 (1993) (*Song*’s companion case), can be harmonized with the policy given effect in *State v. Crawford*, 214 Ariz. 129, 149 P.3d 753 (2007), wherein this Court held “[W]hether a foreign conviction constitutes a felony in Arizona . . . raises an issue of law,” which the Court reviews *de novo*, and the “defendant’s admission of the prior conviction is of no consequence in that legal analysis.” See also *State v. Heath*, 198 Ariz. 83, 7 P.3d 92 (2000).

Accordingly, the Court is ask to clarify whether *Crawford* and *Heath* control and whether a defendant is required to preserve the issue of whether the sentencing court committed fundamental, prejudicial error by enhancing a sentence based upon foreign convictions that would not constitute felonies in Arizona. See *State v. Henderson*, 210 Ariz. 561, 567, ¶19, 115 P.3d 601, 607 (2005). Such error, if any, would stem from the principle that the use of invalid prior convictions for enhancement can raise due process and Sixth Amendment concerns. See *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348 (2000)(*Apprendi*’s holding that aggravating factors must be found by a jury beyond a reasonable doubt does not apply to the findings of prior felony convictions used for sentence enhancement because there are “substantial procedural safeguards” for finding the existence of prior convictions, thus assuring that a defendant is not prejudiced). See *Almendarez-Torres v. U.S.*, 523 U.S. 224, 118 S.Ct. 1219 (1998) (prior felony convictions used for sentence enhancement need not be found beyond a reasonable doubt by a jury). Here, the question is whether one or more of the three historical felonies used by the trial court for sentence enhancement are appropriately considered as historical prior felonies.

ISSUE PRESENTED:

“In *State v. Crawford*, 214 Ariz. 129, 149 P.3d 753 (2007), the Arizona Supreme Court held that whether a foreign conviction constitutes a felony in Arizona for sentence enhancement raises an issue of law and “the defendant’s admission of the prior conviction is of no consequence in that legal analysis.” Did the court of appeals err in holding Smith’s sentence could be enhanced with an invalid foreign conviction because he failed to object at sentencing?”

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