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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



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

STATE OF ARIZONA,) No. 1 CA-CR 09-0334
)
Appellee,) DEPARTMENT C
)
v.) MEMORANDUM DECISION
)
CARRIE ANNE FOGARTY,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. LC2006-000739-001 DT

The Honorable Eartha K. Washington, Judge *Pro Tempore*

AFFIRMED

Lynn Arouh, Gilbert Town Prosecutor) Gilbert
By Courtney E. Barclay, Assistant Town Prosecutor)
Attorneys for Appellee)

Pajerski Law P.C.) Phoenix
By Chad Pajerski)
and)
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By Neal W. Bassett)
Attorneys for Appellant)

B R O W N, Judge

¶1 Carrie Anne Fogarty appeals her conviction and sentence on one count of extreme Driving under the Influence ("extreme DUI"), with one prior conviction. She argues that (1) the municipal court lacked jurisdiction over the offense because the minimum fine exceeded the court's jurisdictional limits, and Arizona Revised Statutes ("A.R.S.") section 13-808(C) (2001), which provides otherwise, is unconstitutional; (2) the statutes imposing the financial sanctions for extreme DUI violate due process because they fail to provide adequate notice and are unconstitutionally vague; and (3) the higher jail fee at resentencing after appeal violated her rights to appeal, due process, and protection against an *ex post facto* law. For the reasons that follow, we find no constitutional infirmity and affirm.

BACKGROUND

¶2 In March 2006, in the Gilbert Municipal Court, a jury found Fogarty guilty, *inter alia*, of extreme DUI, a class 1 misdemeanor, in violation of A.R.S. § 28-1382(A) (2004). See A.R.S. § 28-1382(J). The judge sentenced Fogarty for a second-offense extreme DUI after her counsel stipulated to a prior conviction, and ordered her to pay jail costs in the amount of \$3,441. Fogarty successfully challenged the validity of the admission of the prior conviction in a petition for post-conviction relief, and the case was set for trial on the prior

conviction. Before the trial began, Fogarty filed a motion to dismiss the allegation of the prior conviction. She argued that the court lacked jurisdiction over the offense because the minimum fine exceeded the court's jurisdictional limits. She also argued that A.R.S. § 13-808(C) was unconstitutional. The judge denied the motion, found the existence of the prior conviction, and sentenced Fogarty accordingly. The judge ordered Fogarty to pay a fine of \$930, which included a surcharge, an extreme DUI abatement fee of \$250, a prison construction assessment of \$1,250, and an assessment to the general fund of \$1,250, all as required by A.R.S. § 28-1382. The judge also imposed \$4,452 in jail costs, which reflected the increased cost for jail at the time of this sentencing.

¶13 Fogarty appealed to the superior court, arguing that: (1) the municipal court had no jurisdiction over the offense of extreme DUI; (2) A.R.S. § 13-808(C) was unconstitutional; and (3) the sentencing judge's imposition of increased jail costs illegally penalized Fogarty's exercise of her right to appeal, violated due process, and also violated her right not to be subjected to *ex post facto* laws. The court found no error and affirmed. Fogarty filed a timely notice of appeal.¹ We have

¹ We note, however, that nothing in the record indicates that Fogarty has complied with A.R.S. § 12-1841 (Supp. 2008) ("In any proceeding in which a state statute, ordinance, franchise or rule is alleged to be unconstitutional, the attorney general and

jurisdiction pursuant to A.R.S. § 22-375(A) (2002). Our jurisdiction, however, is limited to determining the facial validity of the statutes at issue. See *id.*; *State v. Russo*, 219 Ariz. 223, 225, ¶ 4, 196 P.3d 826, 828 (App. 2008) (citation omitted).

DISCUSSION

I. Municipal Court's Jurisdiction

¶4 Fogarty argues that the municipal court had no jurisdiction to try her for extreme DUI, because the minimum mandatory fine, surcharge, abatement fee, and assessments imposed pursuant to A.R.S. § 28-1382(F) (2005) exceed the maximum \$2,500 in fines that may be imposed for a misdemeanor under A.R.S. § 13-802(A) (2001), and accordingly, exceed the municipal court's jurisdiction under A.R.S. §§ 22-301(A)(1) (2002) and 22-402(B) (2002). Fogarty also argues that A.R.S. § 13-808(C), which provides that the amount of surcharges and assessments are not limited by the maximum fine that may be imposed pursuant to section A.R.S. § 13-802, is unconstitutional and violates "a variety of constitutional rights," including her right pursuant to A.R.S. § 21-102(B) (2002) to an eight-person

the speaker of the house of representatives and the president of the senate shall be served with a copy of the pleading, motion or document containing the allegation at the same time the other parties in the action are served and shall be entitled to be heard."). Because we reject Fogarty's constitutional challenge, we need not address the consequences of her failure to comply with the mandatory notice requirements.

jury "because the penalty is a felony penalty" and the right to due process "because it purports to permit the government to impose fines higher than permitted by law."

¶5 We recently rejected a similar jurisdictional challenge on an appeal from a special action brought in superior court, and for the reasons outlined in that opinion, we also reject Fogarty's challenge. We reasoned in that case that under the Arizona Constitution, the legislature has the power to create and determine the jurisdiction of courts "inferior to the superior court," including municipal courts. *Rogers v. Cota*, ___ Ariz. Adv. Rep. ___, ___, ¶ 5, 2009 WL 3460313, *1 (citation omitted). We further reasoned that in defining the inferior courts' jurisdiction, the legislature provided under A.R.S. § 22-301(A)(1) (2008) that "any penalty or other added assessments" shall not be considered part of the fine for purposes of determining jurisdiction, and in A.R.S. § 13-808(C) that "[t]he amount of restitution, assessments, incarceration costs and surcharges is not limited by the maximum fine that may be imposed under . . . [§] 13-802." *Rogers*, ___ Ariz. Adv. Rep. at ___, ¶ 8, 2009 WL 3460313, *2. Accordingly, we held as follows: "Because it is the legislature's prerogative to set the jurisdictional limits of inferior courts, and the legislature has unambiguously decreed that the assessments in A.R.S. § 28-1382 do not count toward the \$2,500 maximum fine

imposable for class [1] misdemeanors, the municipal court has jurisdiction over [defendant's] case." *Rogers*, ___ Ariz. Adv. Rep. ___, ¶ 11, 2009 WL 3460313, *3. Accordingly, we hold that the municipal court in this case had jurisdiction to try Fogarty for extreme DUI. *See id.*

¶6 Fogarty's argument that A.R.S. § 13-808(C) violates her constitutional rights fails, because it relies on inapplicable case law and the faulty premise that the legislature has no authority to exclude surcharges and other assessments from the \$2,500 limit on fines for misdemeanors. We presume that the statute is constitutional, and Fogarty therefore bears the burden of persuading us to the contrary. *See Russo*, 219 Ariz. at 225, ¶ 4, 196 P.3d at 828 (citation omitted). Fogarty has failed to do so. She relies at the start on case law that has no bearing on the issue presented. The cases on which she relies interpret the meaning and impact of sanctions in the context of the analysis of whether the sanctions violated *ex post facto* laws,² the Illinois statutory scheme,³ the constitutional right to counsel,⁴ the prohibition

² *See People v. High*, 15 Cal.Rptr.3d 148, 149-50 (App. 2004); *State v. Beltran*, 170 Ariz. 406, 407-08, 825 P.2d 27, 28-29 (App. 1992).

³ *See People v. Jones*, 861 N.E.2d 967, 975-80 (Ill. 2006).

⁴ *See Irvin v. State*, 203 So.2d 283, 290 (Ala. App. 1967).

against cruel and unusual punishment,⁵ and the prohibition against double punishment,⁶ frameworks that are simply not applicable here. Her only specific argument with respect to this statute's constitutionality is that it violates her right to an eight-person jury under A.R.S. § 21-102(B) and due process because it improperly allows the municipal court to impose a "felony penalty" and "to impose fines higher than permitted by law." Because these arguments rely on a finding that the legislature had no authority to exclude the surcharges and assessments from the jurisdictional limit of the municipal court, we reject them. As outlined in *Rogers*, the legislature has the express power under the Arizona Constitution to set the limits of the municipal courts. Ariz. Adv. Rep. at ___, ¶ 5, 2009 WL 3460313, *1. The legislature has provided that the surcharges and assessments imposed for extreme DUI may not be included in the jurisdictional limit of the municipal courts, and that the offense is a class 1 misdemeanor. We decline to find the statute unconstitutional on this basis.

¶7 We also reject Fogarty's summary argument that A.R.S. § 13-808(C) "violates Article III of the Arizona Constitution, the distribution of powers clause, because the legislature

⁵ See *Trop v. Dulles*, 356 U.S. 86, 94-104 (1958).

⁶ See generally, *State v. Sheaves*, 155 Ariz. 538, 747 P.2d 1237 (App. 1987).

enacted the statute in an attempt to avoid *Beltran*, the case which held that 'the surcharge on a fine is a criminal penalty.'" *Beltran*, 170 Ariz. 406, 825 P.2d 27. *Beltran*, however, did not address the jurisdictional issue that is the focus of A.R.S. § 13-808(C). Instead, it addressed an *ex post facto* claim arising from imposition of a surcharge amount that had been statutorily increased after the date of the offense, but before sentencing. See *id.* at 407, 825 P.2d at 28. We held in *Beltran* only that the surcharge was intended to be a criminal penalty for purposes of such analysis. See *id.* at 408, 825 P.2d at 29. It is not at all apparent that the legislature enacted A.R.S. § 13-803(C) to "avoid *Beltran*." In any case, Fogarty has offered no authority for the more general proposition that the legislature cannot legitimately change statutory language to more precisely comport with its intention, in reaction to an adverse interpretation by the courts, absent a constitutional impediment. We decline to find any constitutional infirmity on this basis.

II. Unconstitutional Vagueness

¶18 Fogarty also argues that the fines and financial sanctions imposed for the offense of extreme DUI are unconstitutionally vague, because A.R.S. § 13-802(A) providing a maximum fine of \$2,500 for a first class misdemeanor fails to provide sufficient notice of the maximum financial penalty. We

disagree. It is well-established that a criminal statute is invalid if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden." *United States v. Batchelder*, 442 U.S. 114, 123 (1979) (citations omitted). "So too, vague sentencing provisions may pose constitutional questions if they do not state with sufficient clarity the consequences of violating a given criminal statute." *Id.* (citations omitted). We find that the provisions of A.R.S. § 28-1382, outlining the sanctions for a second offense extreme DUI, however, clearly and unambiguously impose a \$250 DUI abatement fee, and two \$1,250 assessments, and accordingly, cannot be considered unconstitutionally vague. *See id.*

¶19 Fogarty argues that the statutory provisions imposing surcharges on the \$500 fine, amounting in this case to \$430, fail to provide adequate notice because they cannot be found in the traffic code, but rather are "hidden" in other provisions of the code.⁷ She cites no authority for her argument that the legislature is constitutionally required to identify all potential surcharges on fines in the title governing the conduct of offense, and we know of none. We decline to find the statute unconstitutionally vague on this basis.

⁷ Specifically, Fogarty cites to A.R.S. §§ 12-116.01 and -116.02 (2003) (title governing courts and civil proceedings, sections governing assessments and penalty assessments), and 16-954(C) (2006) (title governing elections and electors, section governing clean elections tax reduction).

III. Post-Appeal Increase in Jail Costs

¶10 Fogarty finally argues that the court's imposition of an increased fee for jail costs after she successfully appealed violated her constitutional rights to appeal, due process, and to protection against *ex post facto* laws. The authority for imposition of fees for jail costs is found in A.R.S. § 13-804.01, which provides as follows:

A. The court shall order a person who is convicted of a misdemeanor offense and who is sentenced to a term of incarceration to reimburse the political subdivision that is responsible for the costs of the person's incarceration for the incarceration costs.

B. The court may determine the amount of incarceration costs to be paid based on the following factors:

1. The per diem per person cost of incarceration incurred by the political subdivision that incarcerates the person.

2. The person's ability to pay part or all of the incarceration costs.

A.R.S. § 13-804.01 (Supp. 2008). Fogarty's challenge by its terms addresses the court's application of this statute, not its facial validity. We have no jurisdiction to consider such a challenge on this appeal. Our jurisdiction is limited to determining the facial validity of the challenged statute. See A.R.S. § 22-375(A) (limiting jurisdiction in appeal from superior court's ruling on appeal from municipal court to "validity of a tax, impost, assessment, toll, municipal fine or

statute"); *Russo*, 219 Ariz. at 225, ¶ 4, 196 P.3d at 828 (recognizing this court's jurisdiction is limited to determining the facial validity of a statute). We thus have no jurisdiction in this appeal to address Fogarty's claim that the court's imposition of a higher fee for jail costs after her successful appeal, than had originally been imposed, violated her constitutional rights. *See id.*

CONCLUSION

¶11 For the foregoing reasons, we affirm Fogarty's conviction and sentence.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

LAWRENCE F. WINTHROP, Judge