DIVISION ONE
FILED: 06/28/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0194
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
TOMMY LEE PINKINS, JR.,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-122320-001 DT

The Honorable John R. Hannah, Jr., Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

Tommy Lee Pinkins, Jr. — Tucson
Appellant

W I N T H R O P, Chief Judge

¶1 Tommy Lee Pinkins, Jr. ("Appellant") appeals his convictions and sentences for illegally conducting an enterprise and transportation of marijuana for sale in an amount over the statutory threshold. Appellant's counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record on appeal and found no arguable question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). Additionally, this court granted Appellant the opportunity to file a supplemental brief *in propria persona*, and he has done so.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012),[1] 13-4031, and 13-4033(A). Finding no reversible error, we affirm.

[1] We cite the current Westlaw version of the applicable statutes because no revisions material to this decision have since occurred.

I. FACTS AND PROCEDURAL HISTORY[2]

¶3 On May 10, 2010, a grand jury issued an indictment, charging Appellant with Count I, illegally conducting an enterprise, a class three felony, in violation of A.R.S. § 13-2312(B), and Count II, transportation of marijuana for sale in an amount over the statutory threshold, a class two felony, in violation of A.R.S. § 13-3405. The State later alleged that Appellant had prior convictions in Georgia for perjury and possession of cocaine with the intent to distribute, and that Appellant committed the charged offenses while on release from confinement. The State also alleged the presence of three aggravating circumstances, including that Appellant had committed the crimes with the expectation that he would receive anything of pecuniary value.

¶4 Before trial, Appellant advised the court that he wished to represent himself, and the court granted his motion after finding that he had knowingly, intelligently, and voluntarily waived his right to an attorney. The court also appointed advisory counsel to assist Appellant.

¶5 At trial, the State presented the following testimony: At approximately midnight on April 29, 2010, Department of

[2] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

Public Safety ("D.P.S.") Officer Mitchell, who was on patrol in his capacity as a commercial vehicle inspector, parked near Pioneer Road and the I-17 highway in Maricopa County. As Appellant's semi-truck passed by, the officer noticed sailing mud flaps on Appellant's semi-trailer. Officer Mitchell stopped Appellant's vehicle for the sailing mud flaps and also to conduct a safety inspection. As the officer approached the passenger side of the cab of the semi-truck, he smelled a strong odor of air freshener. He requested that Appellant open the cab door. Appellant complied with the officer's request.

¶6 Officer Mitchell informed Appellant why he had stopped Appellant's vehicle and indicated he would conduct a safety inspection of the semi-truck. The officer requested Appellant's identification and inquired about the purpose of Appellant's trip. Appellant responded to Officer Mitchell's questions, but the officer noted Appellant's voice shook. Appellant explained that he had picked up a load of produce in Nogales, Arizona, to transport to Brooklyn, New York. Officer Mitchell thought this seemed unusual because the most efficient route from Nogales to New York was the I-10 east from Tucson and not the I-17 through Phoenix. He also noted that Appellant's hands shook as he produced his vehicle registration, driver's license, bill of lading, and log book. When asked for the registration, Appellant initially gave the officer a car wash receipt.

¶7 Officer Mitchell also observed Appellant had multiple cell phones, which the officer considered an indicator of criminal activity. At the officer's request, Appellant opened the sleeper curtains in the cab of the semi-truck. The officer saw several large suitcases with the price tags still attached in the sleeper area. Officer Mitchell advised Appellant that he was going to conduct a more thorough inspection of Appellant's semi-truck. With the assistance of another D.P.S. officer, Officer Mitchell inspected the truck and discovered no other violations. Officer Mitchell issued a "need to repair" order for the sailing mud flaps. After finishing the necessary paperwork, Officer Mitchell told Appellant he could leave.

¶8 As Appellant walked toward the truck cab, Officer Mitchell asked Appellant if he would answer a few more questions. Appellant agreed to do so. Officer Mitchell also provided Appellant a "consent form on the ticket that [Appellant] signed" to search the semi-trailer and he verbally consented to a search.[3] When asked if he had any illegal drugs in the truck or trailer, Appellant replied that he did not. When Officer Mitchell asked if he had cocaine, Appellant replied, "No." Appellant gave the same response when asked if he had a large amount of cash. When asked specifically whether

[3] Appellant stated several times at trial that he also gave verbal "consensual agreement" to the officer to search the truck.

he had marijuana, however, Appellant replied, "I've never smoked it." Based on the difference of this response from the others, coupled with his previous observations, Officer Mitchell decided to call for a drug-sniffing dog. While waiting for the dog to arrive, Officer Mitchell noticed Appellant using a third cell phone, rather than one of the two he saw earlier in the semi-truck cab. In response to a question by the officer, Appellant stated that the suitcases in the cab contained his dirty laundry.

¶9 The police dog alerted on the passenger door of Appellant's vehicle. Based on Appellant's verbal and signed consent, his varying responses to the officer's drug possession inquiries, the third cell phone, and the dog's alert, officers searched the cab of the truck.[4] Officer Mitchell found seven

[4] We note that the facts in this case are similar to those we encountered in *State v. Sweeney*, 224 Ariz. 107, 227 P.3d 868 (App. 2010), but we conclude that the two cases are distinguishable. In *Sweeney*, we concluded that after the defendant had been detained and then released, a subsequent detention and search of the defendant's vehicle without his consent was unlawful because no new circumstances had occurred to "form a particularized and objective basis for the second seizure." *Id*. at 114-15, ¶¶ 31-32, 227 P.3d at 875-76. In this case, however, Appellant concededly provided both verbal and written consent for the officer to further detain him and conduct a search. Although we reiterate that the "catch and release" tactic employed both here and in *Sweeney* does not trump the Fourth Amendment, Appellant's further detention was not unlawful in this case because the record clearly indicates, and he has acknowledged, that he voluntarily consented to the further detention and search.

suitcases in the cab, each containing three bales of marijuana.[5] The marijuana was wrapped in green cellophane and vacuum sealed. Officers also found dryer sheets, commonly used to mask marijuana odor, in the suitcases. Officer Mitchell opined that, based on the condition and packaging, the marijuana originated in Mexico. Officer Mitchell arrested Appellant and discovered that Appellant had smashed the third cell phone he had recently used; accordingly, no information could be extracted from it.

¶10 The total weight of the seized marijuana was 482.1 pounds. Officer Mitchell testified that, based on his experience and training, the marijuana seized was worth $500 per pound in Arizona and approximately $2,000 per pound in New York. He stated that this particular type of marijuana is commonly grown in Mexico, brought across the border to stash houses in Tucson and Phoenix, and then distributed to the rest of the United States.

¶11 The jury found Appellant guilty on both counts and found the amount of marijuana possessed by Appellant was more than two pounds. The jury also found the State had proved one aggravating factor — that Appellant had committed the crimes with the "expectation of the receipt of anything of pecuniary value." The trial court sentenced Appellant to concurrent,

[5] A D.P.S. criminalist testified that thirteen core samples taken from the plant material found in Appellant's suitcases contained marijuana.

maximum terms of seven years' incarceration in the Arizona Department of Corrections for Count I and ten years' incarceration for Count II, with 325 days of credit for pre-sentence incarceration.

II. ANALYSIS

¶12 Appellant filed a *pro per* brief, in which he does not specifically raise any issues for appeal, except that he appears to maintain that the State failed to present sufficient proof in support of his convictions. After reviewing the entire record, we conclude that Appellant's claim is without merit. The evidence presented at trial was substantial and supports the verdict. Further, we have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. Appellant's sentences were within the statutory limits, he was represented by counsel at all stages of the pre-trial proceedings and assisted by advisory counsel at trial, and he was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶13 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform

Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant has thirty days from the date of this decision to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

III. CONCLUSION

¶14 Appellant's convictions and sentences are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
PATRICIA K. NORRIS, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge