DIVISION ONE
FILED: 06/19/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0211
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
ALEX ANDREW SERNAS,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR201000207

The Honorable Cele Hancock, Judge

AFFIRMED

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

Law Office of Nicole Farnum — Phoenix
By Nicole T. Farnum
Attorneys for Appellant

H A L L, Judge

¶1 Defendant Alex Andrew Sernas appeals from his convictions and sentences for two methamphetamine-related offenses: transportation for sale and possession of

paraphernalia. Defendant argues that the drug and paraphernalia evidence should not have been admitted at trial because the warrantless police search that led to the discovery of the evidence violated the Fourth Amendment. He also raises arguments related to the court's reliance on his prior felony convictions and other aggravating circumstances for sentencing purposes. Finally, defendant challenges the court's final instructions to the jury. For the reasons that follow, we affirm.

BACKGROUND

¶2 The evidence at trial revealed the following.[1] Based on information from a material informant (MI) and a subsequent investigation, Yavapai County Sheriff's officers learned defendant was going to sell methamphetamine to the MI at the Sunset Point rest area located on Interstate 17 north of Black Canyon City. Officers confronted defendant and the driver of the truck in which defendant was a passenger at the rest stop late in the evening of February 10, 2010. A warrantless strip search of defendant revealed two baggies of methamphetamine weighing a total of 11.8 grams in his sock.

[1] We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against defendant. *State v. Manzanedo,* 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

¶3 The state charged defendant with one count each of transportation of a dangerous drug for sale, a class 2 felony, and possession of drug paraphernalia, a class 6 felony. Defendant moved pre-trial to suppress evidence of the drugs arguing the warrantless search violated his rights under the Fourth Amendment. The court held an evidentiary hearing and denied defendant's motion. The court reasoned that the inevitable discovery exception to the warrant requirement applied because law enforcement would have found the drugs when defendant was booked into jail after his arrest. *See State v. Paxton*, 186 Ariz. 580, 584, 925 P.2d 721, 725 (App. 1996) ("Evidence obtained in violation of the Fourth Amendment need not be suppressed when that evidence would inevitably have been discovered by lawful means.").

¶4 Defendant stipulated to the factual bases of the charged offenses' elements and raised entrapment as his defense at trial. The jury found defendant guilty as charged, and, for sentencing purposes, the court found defendant had two prior felony convictions in addition to other aggravating factors as charged by the state. The court imposed slightly aggravated concurrent terms of twenty years' imprisonment for the transportation of a dangerous drug for sale conviction and four years for the possession of drug paraphernalia conviction. Defendant appealed, and we have jurisdiction pursuant to Article

6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1) (2003), 13-4031 and -4033(A)(1) (2010).

DISCUSSION

I. Fourth Amendment

¶5 Defendant first argues the court erred in denying his motion to suppress. Specifically, he contends he was not under arrest when the police searched him and discovered the methamphetamine; consequently, "the police would not have inevitably found the packages at the jail because [defendant] would not have been booked." We disagree with defendant's premise that he was not under arrest at the time he was searched. Without deciding whether the trial court's reasoning was correct, we conclude the search was conducted incident to defendant's arrest and therefore was exempted from the Fourth Amendment's warrant requirement. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) ("The fact that the trial judge came to the proper conclusion for the wrong reason is irrelevant. We are obliged to affirm the trial court's ruling if the result was legally correct for any reason.").

¶6 In reviewing the denial of a motion to suppress, we review only the evidence submitted at the suppression hearing, and we view those facts in the manner most favorable to upholding the trial court's ruling. *State v. Blackmore*, 186

Ariz. 630, 631, 925 P.2d 1347, 1348 (1996); *State v. Box*, 205 Ariz. 492, 493, ¶ 2, 73 P.3d 623, 624 (App. 2003). Although we defer to the trial court's factual determinations, we review de novo its ultimate legal conclusion. *Box*, 205 Ariz. at 495, ¶ 7, 73 P.3d at 626. A trial court's ruling on a motion to suppress should not be reversed on appeal absent clear and manifest error. *State v. Gulbrandson*, 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995).

¶7 The Fourth Amendment protects people from unreasonable searches and seizures. *Scott v. United States,* 436 U.S. 128, 137 (1978). Generally, a warrantless search is per se unreasonable under the Fourth Amendment. *State v. Branham,* 191 Ariz. 94, 95, 952 P.2d 332, 333 (App. 1997) (citing *State v. Castaneda,* 150 Ariz. 382, 389, 724 P.2d 1, 8 (1986)). However, such searches of an arrestee are generally upheld if conducted incident to a valid arrest. *See Davis v. United States*, ___ U.S. ___, 131 S. Ct. 2419 (2011).

¶8 A police officer may, without a warrant, arrest someone whom the officer has probable cause to believe has committed a felony. A.R.S. § 13-3883(A)(1) (Supp. 2011); *State v. Keener*, 206 Ariz. 29, 32, ¶ 15, 75 P.3d 119, 122 (App. 2003). "Probable cause" exists when "reasonably trustworthy information and circumstance[s] would lead a person of reasonable caution to believe that a suspect has committed an offense." *State v.*

Hoskins, 199 Ariz. 127, 137-38, ¶ 30, 14 P.3d 997, 1007-08 (2000), *opinion supplemented by* 204 Ariz. 572, 65 P.3d 953 (2003). Further, whether probable cause exists depends on all of the facts and circumstances known at the time of the arrest. *Keener*, 206 Ariz. at 32, ¶ 15, 75 P.3d at 122.

¶9 "[A]n arrest is complete when the suspect's liberty of movement is interrupted and restricted by the police[.]" *State v. Ault*, 150 Ariz. 459, 464, 724 P.2d 545, 550 (1986), (quoting *State v. Winegar,* 147 Ariz. 440, 447-48, 711 P.2d 579, 586-87 (1985) and *State v. Leslie,* 147 Ariz. 38, 43, 708 P.2d 719, 724 (1985)). Similar to determining the existence of probable cause to make an arrest, whether an arrest has been effectuated depends "upon an evaluation of all the surrounding circumstances to determine whether a reasonable man innocent of any crime would have thought he was being arrested if he had been in defendant's shoes." *Ault*, 150 Ariz. at 464, 724 P.2d at 550. Important factors to consider in such an evaluation include the extent to which freedom of movement is restricted, the amount and character of the force used, and "the display of official authority." *Id.*

¶10 With these principles in mind, we conclude that the evidence at the suppression hearing clearly indicates defendant was under valid arrest at the time he was searched, and therefore, the drug evidence was admissible under the search-

incident-to-arrest exception to the Fourth Amendment's warrant requirement.

¶11 At the hearing, Detective Direen from the Yavapai County Sheriff's Office testified that he received a call on February 10, 2010, from the MI whom he had previously relied upon in successful drug investigations. The MI stated she could procure in Yavapai County a large amount of methamphetamine from defendant, who lived in Avondale and had previously provided her with methamphetamine. The MI knew where defendant lived and provided Direen with defendant's general physical description.

¶12 Direen drove with the MI to conduct surveillance at defendant's residence while she negotiated details of the transaction with defendant by cell phone. During one of those phone calls while outside defendant's home, defendant told the MI that he was going to his neighbor's house to seek a ride to Sunset Point, the agreed-upon location for the transaction to take place.[2] As this conversation transpired, Direen observed defendant walk to his neighbor's home.

¶13 Eventually, Direen and the MI saw defendant get into a pickup truck with another individual who was driving. Direen and other officers involved in the surveillance followed the truck, which began to employ "very obvious" driving maneuvers to

[2] Defendant apparently agreed to deliver the drugs to Sunset Point because the MI's personal vehicle was mechanically unreliable.

ensure no one was following.[3] Direen ceased following the truck and ordered the surveillance team to proceed to Sunset Point.

¶14 Direen and the team arrived at the rest area before defendant. When defendant arrived, officers positioned their vehicles to "block in" the truck where it parked. Direen, wearing a ballistic vest with "SHERIFF" emblazoned across the chest, proceeded to the front of the truck, drew his gun, and ordered defendant and the truck's driver out of the vehicle. Other officers also had their weapons drawn. Defendant did not comply and had to be dragged out of the truck. Direen explained to the suspects he was detaining them for a narcotics investigation. A canine unit conducted an exterior sniff of the truck and alerted officers to the driver side. A pat-down of the suspects was conducted and revealed only a methamphetamine pipe in the driver's pocket. Police then searched the truck and found no methamphetamine, but they did discover in the truck's glove box a digital scale commonly used during drug sales. The scale had "residue" on it. Believing the driver or defendant had concealed methamphetamine on themselves, Direen and his partner led defendant, who was handcuffed, to the public restroom to conduct a strip search. Defendant begged not to be searched. Direen discovered the two bindles of methamphetamine

[3] Direen described these maneuvers as "heat runs."

in defendant's sock, whereupon defendant was formally placed under arrest and placed in a patrol car.

¶15 Despite defendant's argument to the contrary, we conclude the circumstances prior to his strip search constituted probable cause to arrest him for narcotics offenses, and that he was under arrest prior to the search. The factors supporting probable cause include the information Direen received from the MI and during the surveillance regarding defendant's agreement to sell the methamphetamine, the "heat runs" conducted by the truck, the dog sniff, the pipe found on the driver, and the scale and its residue found in the glove box. These factors, in conjunction with the lack of drugs found in the vehicle, support a reasonable belief that defendant was possessing on his person methamphetamine for sale at the time he was searched. Furthermore, based on the presence of multiple police officers with drawn weapons at the rest area——and the fact that defendant was handcuffed——no reasonable person would have felt free to leave the scene once Direen and the other law enforcement personnel made contact with defendant.

¶16 As a result, defendant was under valid arrest before and during the search. Consequently, Direen conducted the search incident to defendant's arrest, thereby rendering the warrantless search permissible under the Fourth Amendment. *See Chimel v. California*, 395 U.S. 752, 762-63 (1969) (describing

the "search incident to arrest" principle, in part: "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to . . . search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction."). The court did not err in denying defendant's motion to suppress.

II. Fundamental Error

¶17 Defendant raises three issues that he concedes we review for fundamental error. To obtain relief under fundamental error review, defendant has the burden to show that error occurred, the error was fundamental and that he was prejudiced thereby. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 20-22, 115 P.3d 601, 607-08 (2005). Fundamental error is error that "goes to the foundation of his case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id*. at 568, ¶ 24, 115 P.3d at 608. The showing required to establish prejudice "differs from case to case." *Id.* at ¶ 26. A defendant "must show that a reasonable jury, applying the appropriate standard of proof, could have reached a different result." *Id.* at 569, ¶ 27, 115 P.3d at 609.

A. Waiver of Trial on Prior Convictions

¶18 Defendant contends the trial court impermissibly imposed enhanced sentences based on his two historical prior

felony convictions. Prior to trial, the state alleged that defendant was convicted of the following prior felony convictions: driving under the influence while license was suspended, canceled, revoked or refused in 1987, aggravated assault in 1992, possession of marijuana in 1992, resisting officer/arrest in 1998, possession of marijuana in 1999, forgery in 2000, and aggravated assault of a minor and possession of dangerous drugs in 2005. Although the trial court did not specify which two of defendant's historical prior felony convictions it was using to enhance his sentence, the record reflects that the state submitted certified copies of defendant's prior convictions (including his two most recent convictions in 2005) along with extensive supporting documentation.

¶19 Defendant argues a remand is necessary for resentencing because the court found the existence of the priors based solely on defense counsel's stipulation without addressing defendant directly to determine whether his waiver of a trial on the priors was voluntary. *See* Ariz. R. Crim. P. 17; *State v. Carter*, 216 Ariz. 286, 289, ¶ 15, 165 P.3d 687, 690 (App. 2007) ("a superior court may not accept defense counsel's stipulation to a prior conviction without following the procedures in Rule 17"). Although the record appears to support defendant's contention that the trial court did not engage in the requisite

Rule 17 colloquy directly with defendant, he cannot prove the prejudice necessary for remand because the record contains documentary evidence of his prior convictions. *See State v. Morales*, 215 Ariz. 59, 62, ¶¶ 11-14, 157 P.3d 479, 482 (2007). Accordingly, we find no reversible error.

B. Trial on Aggravators

¶20 Defendant contends the trial court erred at sentencing when it, instead of the jury, found aggravating circumstances in addition to the prior convictions. The additional aggravating circumstances found by the court were presence of an accomplice and defendant's commission of the crimes in the expectation of the receipt of anything of pecuniary value.

¶21 Defendant's claim lacks any merit. Once the trial court found as an aggravating circumstance that defendant was previously convicted of a felony within ten years preceding the date of the current offense, *see* A.R.S. § 13-701(C)(11) (2010), it was then permitted to consider and find other alleged aggravating circumstances. *See State v. Martinez*, 210 Ariz. 578, 584, ¶ 21, 115 P.3d 618, 624 (2005).

C. Jury Instruction on Stipulation

¶22 Finally, defendant argues the court fundamentally erred in not instructing the jurors that defendant's stipulation to the elements of the charged offenses "was not binding on them[.]"

¶23 We discern no error. Defendant points to no authority requiring such an instruction. His reliance on *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900, *opinion supplemented by*, 211 Ariz. 32, 116 P.3d 1192 (2005), is misplaced. In that case, the Arizona Supreme Court determined the trial court "should not have instructed the jury that the stipulation satisfied the state's burden of proving an element of the crime." *Id.* at 64, ¶ 47, 107 P.3d at 910. Here, the court did not instruct the jury that defendant's stipulation satisfied the state's burden of proof. Indeed, the court properly instructed on the state's burden and the presumption of innocence.

¶24 Finally, even if the court's failure to instruct the jury that it could disregard defendant's stipulation was error, it was not fundamental error. Defendant further failed to meet his burden to establish prejudice because the trial evidence, aside from the stipulation, overwhelmingly established defendant's guilt on the charged offenses.

CONCLUSION

¶25 Defendant's convictions and sentences are affirmed.

_/s/_____
PHILIP HALL, Judge

CONCURRING:

_/s/_____
PATRICIA A. OROZCO, Presiding Judge

_/s/_____
JOHN C. GEMMILL, Judge