NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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,	)	No. 1 CA-CR 11-0587
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
EUGENE SHELTON,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-153541-001

The Honorable Jay L. Davis, Commissioner

Affirmed

Thomas C. Horne, 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 Joel M. Glynn, Deputy Public Defender
Attorneys for Appellant

G O U L D, Judge

¶1 Eugene Shelton ("Shelton") appeals from his conviction and sentence for one count of possession of narcotic drugs, a class four felony. Shelton was sentenced on August 17, 2011 and

timely filed a notice of appeal on August 19, 2011. Shelton's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this Court that after a search of the entire appellate record, he finds no arguable ground for reversal. Shelton was granted leave to file a supplemental brief *in propria persona* on or before February 6, 2012, and did not do so.

¶2 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). 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).[1] Finding no reversible error, we affirm.

Facts and Procedural History[2]

¶3 On October 2, 2010 Officers Rosky and Mullen contacted Shelton as the driver of a vehicle that fled from the scene of an accident. The officers observed open beer containers in the

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[1] Unless otherwise specified, we cite to the current version of the applicable statutes because no revisions material to this decision have occurred.

[2] We view the evidence in the light most favorable to sustaining the convictions and resulting sentences. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

center console of Shelton's vehicle and Shelton admitted to drinking from the containers. The officers placed Shelton under arrest for possessing an open container of alcohol inside a vehicle. Officer Rosky conducted a search incident to Shelton's arrest, and discovered a plastic baggy containing what appeared to be crack cocaine inside Shelton's sock.

¶4 At trial, Officers Rosky and Mullen testified that Shelton said, "[T]hat crack is not mine. I was just holding it for a friend." The officers seized the suspected crack cocaine and placed it into evidence. Testing determined the substance was in fact cocaine.

¶5 At the preliminary hearing the trial court informed Shelton he would be tried in his absence if he failed to appear at trial. Shelton was absent for part of the first day of trial and the entire second day of trial. The trial court proceeded without Shelton and instructed the jurors not to consider his absence when determining their verdict.

¶6 The jury instructions explained that to prove use or possession of a narcotic drug the State must show the defendant knowingly possessed or used a narcotic drug and the substance was actually a narcotic drug. The State used Shelton's statement that the cocaine was not his to prove that he knowingly possessed cocaine. The State also presented evidence

establishing that substance was in fact cocaine, a narcotic drug.

¶7 Shelton's counsel filed a Rule 20 motion for judgment of acquittal, arguing that the State had failed to present sufficient evidence showing possession because it had not tested the baggy for Shelton's finger prints. The court denied this motion. The jury returned a guilty verdict for one count of possession of narcotic drugs.

¶8 At sentencing Shelton stipulated to having three prior felony convictions for purposes of sentence enhancement. When given an opportunity to speak at sentencing, Shelton claimed Officer Rosky's search violated his rights, an issue that he had not raised previously.

¶9 The trial court ordered a mitigated sentence of three years and imposed a $2,000 fine. Shelton filed a timely notice of appeal.

Discussion

¶10 We have read and considered the entire record and have found no meritorious grounds for reversal of Shelton's conviction or for modification of the sentence imposed. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. Shelton was present, or waived his presence, at all critical stages of the proceedings and was represented by counsel. All proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and

substantial evidence supported the finding of guilt. Accordingly, we affirm.

¶11 The trial court did not abuse its discretion by denying Shelton's Rule 20 motion on the basis of insufficient evidence. "We review the sufficiency of evidence presented at trial only to determine if substantial evidence exists to support the jury verdict," and we review the evidence in the "light most favorable to sustaining the jury verdict." *State v. Stroud*, 209 Ariz. 410, 411, ¶ 6, 103 P.3d 912, 913 (2005); *see also State v. Greene*, 192 Ariz. 431, 436, ¶12, 967 P.2d 106, 11 (1998). Our review of the record shows the State produced sufficient evidence to prove each element of Shelton's crime; accordingly, the trial court properly denied Shelton's Rule 20 motion.

¶12 Contrary to Shelton's claim, Officer Rosky's post-arrest search did not violate his constitutional rights. The open intoxicants in Shelton's vehicle provided probable cause to arrest Shelton and the pat-down of his person was a search incident to arrest. *Arizona v. Grant*, 556 U.S. 332, 338 (2009) ("Among the exceptions to the warrant requirement is a search incident to a lawful arrest."). Furthermore, because the issue was not raised in the trial court, we review only for fundamental error. *State v. Holder*, 155 Ariz. 83, 85, 745 P.2d 141, 143 (1987) ("Absent fundamental error, error is usually

considered to be waived on appeal unless it was objected to at trial.").

¶13 Shelton also claims that the court committed reversible error by failing to conduct a voluntariness hearing. Shelton argues that the statement he made when arrested regarding the crack cocaine was not made voluntarily. However, the lack of a voluntariness hearing does not constitute reversible error because Shelton failed to object to the State's use of this statement as involuntary. As mentioned earlier, we review only for fundamental error because the issue was not raised in the trial court. *Id.* Furthermore, the statement was spontaneous and not in response to questioning by the law enforcement officers. There was no evidence of physical threats, coercion, or promises. *State v. Carter*, 145 Ariz. 101, 106, 700 P.2d 488, 493 (1985) ("[A]dmission of an accused's spontaneous, voluntary statement that is not made in response to police interrogation does not violate the defendant's *Miranda* rights."). Moreover, any error in failing to have a voluntariness hearing was rendered harmless because the jury instructions advised the jury that any statements made by Shelton to the police should not be considered unless the jury determined beyond a reasonable doubt that the statements were made voluntarily.

Conclusion

¶14 Counsel's obligations pertaining to Shelton's representation in this appeal have ended. Counsel need do nothing more than inform Shelton of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Shelton shall have thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.[3]

/S/
_____
ANDREW W. GOULD, Judge

CONCURRING:

/S/
_____
MAURICE PORTLEY, Presiding Judge

/S/
_____
ANN A. SCOTT TIMMER, Judge

[3] Pursuant to Arizona Rule of Criminal Procedure 31.18(b), Defendant or his counsel has fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days from the date of this decision.