IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DONALD JOSEPH THORNTON, *Appellant*.

No. 1 CA-CR 15-0173
FILED 6-29-2017

Appeal from the Superior Court in Mohave County
No. S8015CR201400667
The Honorable Steven F. Conn, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Jillian Francis
Counsel for Appellee

Mohave County Legal Advocate, Kingman
By Jill L. Evans
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Donn Kessler delivered the decision of the Court, in which Chief Judge Michael J. Brown and Judge Patricia K. Norris joined.

K E S S L E R, Judge:

¶1 Appellant Donald Joseph Thornton was tried and convicted of possession of drug paraphernalia. Counsel for Thornton filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969). Thornton was given an opportunity to file a pro per supplemental brief, but did not do so. Finding no arguable issues to raise, counsel requested that this Court search the record for fundamental error. After reviewing the record and receiving supplemental briefing from the parties pursuant to *Penson v. Ohio*, 488 U.S. 75 (1988), we affirm Thornton's conviction and sentence for the following reasons.

FACTUAL AND PROCEDURAL HISTORY

¶2 In May 2014, Lake Havasu Police executed a search warrant on two adjacent properties, 991 and 1001 Red Rock Road, along with several homes and trailers on the properties. Police found several suspects throughout the premises, including Thornton and his girlfriend in the north bedroom of 1001. Police took Thornton and his girlfriend outside, then moved them to 991 where they were interviewed along with other individuals found on the properties. A search of 1001 revealed several baggies in the kitchen area and multiple broken pipes with burned white residue in a trash can in the bedroom where Thornton was staying.

¶3 Two officers, Officers BS and KS, spoke with Thornton during the search of the properties. Before Thornton was placed in the holding area, Officer BS had a short conversation with him during which they discussed some remodeling Thornton claimed to be doing in the north bedroom of 1001. Officer KS interviewed Thornton after the police had moved Thornton to 991, and Thornton also told Officer KS he was remodeling the north bedroom. In addition, he told Officer KS he had been living in the north bedroom of 1001 on and off for about three months and had been staying there for the past four days with his girlfriend. Officer KS testified the room's appearance corroborated Thornton's statements

because it looked like it was being remodeled, the floors were torn up, and it did not look like someone had been living there for very long.

¶4 Officer KS confronted Thornton with the two broken pipes that had been found in the room's trash can, and Thornton denied knowing to whom the pipes belonged. Thornton said he found the pipes as he was cleaning the property and threw them away into dumpsters, and he did not know whether his fingerprints would be found on the pipes. Thornton acknowledged he had used pipes in the past to occasionally smoke marijuana and methamphetamine, but he was not sure whether it was those pipes. The police arrested Thornton along with several other suspects found on the properties. Officer BS denied reading Thornton his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), and Officer KS did not indicate whether he read Thornton his *Miranda* rights.

¶5 The State indicted Thornton for possession of drug paraphernalia, a class 6 felony. Before trial, Thornton moved to suppress his statements to police about his prior drug use as impermissible other-acts evidence, but the superior court denied the motion. *See* Ariz. R. Evid. 404(b). After a four-day trial in which the State presented Thornton's statements to police, a jury found Thornton guilty as charged. The court suspended the imposition of sentence for a period of two years and placed Thornton on probation for that period. *See* Ariz. Rev. Stat. ("A.R.S.") § 13-604(A) (2009) (allowing a trial court to place a defendant convicted of a class 6 felony on probation and refrain from designating an offense as a felony or misdemeanor until probation completed).[1]

¶6 Thornton timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2017), 13-4031 (2017), and 13-4033(A)(1) (2008).

DISCUSSION

¶7 In an *Anders* appeal, this Court must review the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19 (2005) (citations omitted); *State v. Gendron*, 168 Ariz. 153, 155 (1991) (citations omitted). To prevail under this standard of review, the defendant must establish that

[1] We cite to the current version of statutes unless changes material to this decision have since occurred.

fundamental error exists and that the error caused him prejudice. *Henderson*, 210 Ariz. at 567, ¶ 20 (citations omitted).

¶8 Although Thornton did not request that the superior court hold a voluntariness hearing, the court had a duty to hold a hearing if a question about the voluntariness of the statement is presented by the evidence. *State v. Goodyear*, 100 Ariz. 244, 248-49 (1966). A statement taken in violation of *Miranda* is inadmissible against the defendant at trial "even though the statement may in fact be wholly voluntary." *Michigan v. Mosley*, 423 U.S. 96, 100 (1975) (citation omitted). We find Thornton's statements made to Officer KS were taken in violation of *Miranda*. However, because we can say beyond a reasonable doubt the jury would have found Thornton guilty without evidence of his statements, we affirm his conviction. *See State v. Montes*, 136 Ariz. 491, 497 (1983) (citations omitted).

I. *Miranda*

¶9 To protect the Fifth Amendment privilege against compulsory self-incrimination, police officers must provide *Miranda* warnings before interrogating a person in custody. *State v. Maciel*, 240 Ariz. 46, 49, ¶ 10 (2016) (citing *Miranda*, 384 U.S. at 478-79). Whether a person is in "custody" for *Miranda* purposes depends on whether there is a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *Id.* at ¶ 11 (citation and quotation omitted). "Custody" requires "not only curtailment of an individual's freedom of action, but also an environment that presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* at ¶ 12 (quotation omitted). We consider three factors when determining whether a person is in custody for *Miranda* purposes: the site of the questioning, the presence of objective indicia of arrest, and the length and form of the interrogation. *Id.* at ¶ 11 (citation omitted).

¶10 The record is insufficient to show Thornton was in custody when he spoke briefly with Officer BS. Rather, Officer BS testified he did not interview Thornton but merely had a brief discussion with him about the remodeling of the bedroom. There was no objective indicia that Thornton at that time was under arrest and no evidence of an environment "that presents the same inherently coercive pressures as the type of station house questioning at issue in *Miranda*." *Id.* at ¶ 12.

¶11 However, we conclude Thornton was in custody when interviewed by Officer KS. Before interviewing Thornton, the Lake Havasu SWAT team surrounded the properties, forming a large perimeter so

"nobody [could] escape." The SWAT officers went from property to property, breaching doors with a large metal ram, giving commands, and announcing their presence. They removed all individuals they found, some of whom were only partially dressed, and placed them in a central holding area. A "stack" of SWAT officers entered 1001 and removed Thornton, placing him with the others in a makeshift holding area in 991. Although the record is unclear as to whether Thornton was handcuffed when questioned by Officer KS after he was moved to the holding area, we find sufficient evidence indicates Thornton was in custody when questioned by Officer KS.

¶12 Because the State concedes no evidence shows police read Thornton the *Miranda* warnings before interrogating him, Thornton's statements to Officer KS were inadmissible.

II. Harmless Error

¶13 Having concluded Thornton's statements to Officer KS were obtained in violation of *Miranda*, we consider whether their admission into evidence requires reversal. *Montes*, 136 Ariz. at 497. "Statements obtained without the benefit of *Miranda* warnings, unlawful but not involuntary, are subject to the harmless error rule." *Id.* (citation omitted). "A constitutional error is harmless if it can be said beyond a reasonable doubt that the error had no influence on the verdict of the jury." *Id.*

¶14 Thornton asserts that, aside from the statements, there was insufficient evidence of the elements of possession or constructive possession and intent to use the items as paraphernalia. We disagree and conclude admission of Thornton's statements was harmless error.

¶15 To convict a defendant of possession of drug paraphernalia, the State must prove the defendant possessed drug paraphernalia with the intent to use it as such. A.R.S. § 13-3415(A) (2010). "Drug paraphernalia" includes all equipment "used, intended for use or designed for use in . . . storing, . . . ingesting, inhaling or otherwise introducing [an illegal drug] into the human body." A.R.S. § 13-3415(F)(2). Existence of drug residue on an object is a factor that indicates an object is paraphernalia. A.R.S. § 13-3415(E)(5). Methamphetamine is a dangerous drug pursuant to A.R.S. § 13-3401(6)(c)(xxxviii) (Supp. 2015).

¶16 Possession of drug paraphernalia may be actual or constructive, *State v. Barreras*, 112 Ariz. 421, 423 (1975) (citation omitted); *see* A.R.S. § 13-105(34), (35) (Supp. 2015), and "[c]onstructive possession may

be proven by direct or circumstantial evidence," *State v. Gonsalves*, 231 Ariz. 521, 523, ¶ 10 (App. 2013) (citation omitted). Furthermore,

> [c]onstructive possession is generally applied to those circumstances where the drug is not found on the person of the defendant nor in his presence, but is found in a place under his dominion and control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the narcotics. Exclusive control of the place in which the narcotics are found is not necessary.

State v. Villavicencio, 108 Ariz. 518, 520 (1972) (finding sufficient dominion and control for possession of narcotics discovered in an open back porch accessible to anyone using the area between two rows of apartments). In contrast, mere presence at a location where a prohibited item is located is insufficient to show that a defendant knowingly exercised dominion or control over it, and police must show specific facts or circumstances of dominion or control. *See id.* (citation omitted); *Carroll v. State*, 90 Ariz. 411, 413-14 (1962). "[T]he evidentiary chain must so link defendant to the narcotic that the inference he knew of its existence and its presence where found may be fairly drawn." *Carroll*, 90 Ariz. at 413 (citations omitted).

¶17 Excluding Thornton's statements to Officer KS that he had seen the pipes and thrown them away and generally used pipes, marijuana, and methamphetamine in the past, the jury would only have been able to consider Thornton's statements to Officer BS that he was remodeling the north bedroom of 1001, and the police discovering Thornton in the bedroom where the pipes were found during the raid. Here, even without Thornton's statements to Officer KS, both the pipes and the bedroom in which they were found were under Thornton's dominion and control, thereby presenting circumstances from which the jury could reasonably draw the inference that Thornton knew of the existence of the pipes. *See Villavicencio*, 108 Ariz. at 520. We therefore find the superior court's error in admitting Thornton's statements was harmless and affirm Thornton's conviction and sentence.

CONCLUSION

¶18 After careful review of the record, we find the court erred in admitting statements Thornton made while in custody. However, we find this error was harmless. For the foregoing reasons, we affirm Thornton's conviction and sentence.

AMY M. WOOD • Clerk of the Court
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