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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 08-0336
)
) DEPARTMENT C
Appellee,)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
ERNEST LEE COLEMAN,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-012528-001 DT

The Honorable Arthur T. Anderson, Judge

CONVICTIONS AND SENTENCES AFFIRMED

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

Kessler Law Offices Mesa
By Eric W. Kessler
Attorneys for Appellant

Ernest Lee Coleman Buckeye
Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following Ernest Coleman's convictions on two counts of trafficking in stolen property. Coleman's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Coleman was given the opportunity to file a supplemental brief and did so. In addition, counsel asks this court to search the record for fundamental error. After reviewing the entire record, we affirm Coleman's convictions and sentences.

FACTUAL AND PROCEDURAL HISTORY

¶2 On April 12, 2006, Coleman approached an undercover officer and asked if he would like to buy a "G-Ride," also known as a stolen vehicle. The officer expressed interest, and an exchange was arranged. At the appointed time and place, Coleman directed the officer toward a 1993 Nissan Sentra that had been reported stolen two days before. Coleman showed the officer how to use a screwdriver to manipulate the lock in the cracked steering wheel column in order to start the car. Coleman accepted \$300 from the officer in exchange for the car. A police undercover team videotaped the entire transaction.

¶13 On April 20, the same undercover officer arranged a meeting to buy another vehicle. Coleman was present at the meeting and declared his desire to be the middleman. A Ford Escort was produced; it too had been reported stolen. The officer gave Coleman \$200; he also gave the other person \$100 in exchange for the car. This transaction also was videotaped by an undercover team.

¶14 Coleman was indicted and arraigned on December 11, 2006, on two counts of trafficking in stolen property in the second degree. On January 9, 2007, the superior court granted a motion to determine competency. At a hearing on February 8, 2007, Coleman was found competent for trial, and the court excluded all time since January 9 (30 days), thereby extending the "last day" to June 9, 2007. At a status conference on March 7, the last day for trial was pushed back 27 days to July 6, 2007. Trial was set for June 16.

¶15 On June 7, the State moved to continue the trial because the prosecutor was proceeding to trial in another matter. At a hearing on June 12, having determined that counsel for the defense also was proceeding to trial in another matter, the court continued the trial to July 23, and ordered all time from June 12 to July 23 (41 days) excluded. This resulted in a new last day of August 16, 2007.

¶16 On July 11, the court appointed new defense counsel and vacated the July 23 trial date. At the next status conference on August 7, Coleman waived the applicable time limits, and trial was set for October 16. The superior court ordered all time from August 7 to October 16 excluded.

¶17 After multiple continuances granted thereafter at the request of Coleman's new defense counsel, trial began on December 17, 2007. The following day, after the jury was selected but before the preliminary instructions, the court noted it had received Coleman's handwritten pro per motion "asking for a change in counsel to designate Defendant as *pro per* with [appointed counsel] remaining as advisory counsel." Coleman explained to the court, "I believe with both of us representing this and questioning the witness, both of us questioning the witness, it would be to the best benefit and the truth can come out, and I can get a fair trial." The court did not grant Coleman's motion, but suggested that as each witness was examined, Coleman give his counsel a list of questions to ask the witness.

¶18 At trial, the undercover officer testified, and the jury watched the videotapes of both the events described above. The defense rested without calling any witnesses. The jury found Coleman guilty of two counts of trafficking in stolen

property in the second degree. In a later proceeding, after the State offered evidence to establish Coleman had at least two historical prior felony convictions, the court sentenced him to two concurrent presumptive prison terms of 11.25 years, with 506 days of presentence incarceration credit.

¶9 Coleman timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes sections 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033 (2010).

DISCUSSION

A. Speedy Trial.

¶10 In his supplemental brief, Coleman argues the superior court denied him his right to a speedy trial under Arizona Rule of Criminal Procedure 8 ("Rule 8"), thereby violating his right to equal protection and due process under the Arizona and United States Constitutions. Coleman argues the superior court erred when it failed to commence trial by July 11, 2007 (he does not complain about any delay that occurred after the court appointed him new counsel on that date).

¶11 Rule 8.2 requires the superior court to grant a defendant in custody a trial within 150 days of his arraignment. Ariz. R. Crim. P. 8.2(a)(1). That time limit may be extended pursuant to Rule 8.4 (excluded periods) or 8.5 (continuances).

See also Ariz. R. Crim. P. 8.2(d) ("These time limits may be extended pursuant to Rule 8.5."). A defendant who contends his right to a speedy trial under Rule 8 was violated must establish that his defense was harmed by the delay. *State v. Wassenaar*, 215 Ariz. 565, 571, ¶ 16, 161 P.3d 608, 614 (App. 2007).

¶12 Absent any extensions or exclusions, the 150-day time period from the date of Coleman's arraignment pursuant to Rule 8.2 would have run on May 10, 2007. Pursuant to Rule 8.4(a), the court properly excluded the time occasioned by Coleman's request to determine competency. With that time excluded, and with the 27-day exclusion ordered on March 7, the new last day was July 6, 2007. As noted, the State moved on June 7 to continue the June 16 trial because the prosecutor was proceeding to trial in another matter. The superior court granted the continuance, based in part on the fact that Coleman's own counsel also was proceeding to trial in another matter. The court continued the trial to July 23 and excluded all time from June 12 through July 23.

¶13 Coleman does not contest the extension of the time limit required by the competency proceeding. Otherwise, his argument fails to acknowledge Rule 8.2(d), which allows the last day to be extended when a continuance has been granted pursuant to Rule 8.5. Coleman cannot reasonably complain about the

court's decision on June 12 to continue trial, and extend the last day, when his own counsel was set to be in another trial on the day previously set for his trial.¹ We note Coleman offers no argument that the continuance the court granted on June 12 prejudiced his defense. Moreover, Coleman waived his Rule 8 rights by seeking or stipulating to several continuances after the court appointed new counsel on July 11, and by failing to object prior to the trial. See *State v. Spreitz*, 190 Ariz. 129, 138, 945 P.2d 1260, 1269 (1997) ("We have held that once a defendant has let a Rule 8 speedy trial time limit pass without objection, he cannot later claim a violation that requires reversal.").

B. Request for Hybrid Representation.

¶14 Coleman additionally argues the superior court erred by denying his request to participate with his counsel in his own representation at trial.

¹ Coleman takes issue with a 27-day extension of the last day the court ordered on March 7, 2007. In the minute entry order issued that date, the court did not expressly exclude time or extend the last day, but instead simply announced a new last day that was 27 days beyond the prior-stated last day. Although there is no explanation in the record, the 27-day exclusion did not delay Coleman's proceedings. As noted above, without the 27-day exclusion, Coleman's last day would have been June 9, and the court acted within its discretion in extending the last day beyond that date when both the prosecutor and Coleman's own counsel were scheduled to be in other trials.

¶15 A criminal defendant has the right to either represent himself or be represented by an attorney. *State v. Stone*, 122 Ariz. 304, 307, 594 P.2d 558, 561 (App. 1979); see also *Faretta v. California*, 422 U.S. 806 (1975). A defendant, however, does not have a right to hybrid representation, in which he concurrently represents himself and is represented by an attorney. *Stone*, 122 Ariz. at 307, 594 P.2d at 561.²

¶16 Because Coleman's pro per motion is not in the record, our understanding of his request comes from his oral exchange with the court. As noted, when the court asked him if he wanted a change of counsel, Colman responded, "I didn't want a change of counsel," and continued, "I believe with both of us representing this . . . both of us questioning the witnesses" The court did not abuse its discretion in denying Coleman's request. A defendant has no constitutional right to hybrid representation. *Id.* If Coleman meant to ask instead to represent himself, assisted by advisory counsel, his request was equivocal and thus was reasonably denied. See *State v. Henry*, 189 Ariz. 542, 548, 944 P.2d 57, 63 (1997) (defendant must make "unequivocal request to represent himself").

² "When a defendant concurrently has self-representation and representation by counsel, hybrid representation results." *State v. Roscoe*, 184 Ariz. 484, 498, 910 P.2d 635, 649 (1996).

C. Fundamental Error Review.

¶17 The record reflects Coleman received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court held appropriate pretrial hearings.

¶18 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of twelve members with two alternates. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned unanimous verdicts, which were confirmed by juror polling. The court received and considered a presentence report and addressed its contents during the sentencing hearing and imposed legal sentences on the crimes of which Coleman was convicted.

CONCLUSION

¶19 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. After the filing of this decision, defense counsel's obligations pertaining to Coleman's representation in this appeal have ended. Defense counsel need do no more than inform Coleman of the outcome of this appeal and his future options, unless, upon review, counsel finds "an issue appropriate for

submission" to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, Coleman has 30 days from the date of this decision to proceed, if he wishes, with a pro per motion for reconsideration. Coleman has 30 days from the date of this decision to proceed, if he wishes, with a pro per petition for review.

/s/ _____
DIANE M. JOHNSEN, Judge

CONCURRING:

/s/ _____
MICHAEL J. BROWN, Presiding Judge

/s/ _____
DONN KESSLER, Judge