DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee v. LARRY GENE SAINZ, Appellant.	)	1 CA-CR 08-0971 DEPARTMENT E **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-162880-001 DT

The Honorable David K. Udall, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix

K E S S L E R, Presiding Judge

¶1 Appellant Larry Gene Sainz ("Sainz") filed an *Anders* appeal from his conviction and sentence for one count of

possession of marijuana in violation of Arizona Revised Statutes ("A.R.S.") section 13-3405(A)(1) (Supp. 2009). *See Anders v. California*, 386 U.S. 738, 744 (1967). Sainz was given an opportunity to file a supplemental brief *in propia persona* but did not do so. Our review of the record revealed a nonfrivolous argument that the superior court may have fundamentally erred by admitting evidence of an inculpatory statement Sainz made to a police officer during a custodial interview without determining its voluntariness outside the presence of the jury. Pursuant to *Penson v. Ohio*, we ordered the parties to file supplemental briefs on the issue. 488 U.S. 75, 83 (1988). For the following reasons, we affirm Sainz's conviction and sentence.

FACTUAL AND PROCEDURAL HISTORY

¶2 The State indicted Sainz by direct complaint for possession of marijuana. Sainz pleaded not guilty. At trial, two Phoenix Police officers, J. and K. testified that they first encountered Sainz by discovering his vehicle obstructing traffic in July, 2006. The officers noticed that the vehicle was blocking westbound traffic and began an investigation. They stopped their vehicle approximately five to six feet behind the defendant's vehicle and activated their red and blue emergency lights.

¶3 Two individuals exited the vehicle at approximately the same time. Officer J. pursued the passenger, Sainz. Sainz

ran approximately fifty feet towards his mother's house. During the chase, both officers saw Sainz remove a baggie from his pants and drop it on the ground. J. noticed that the baggie contained a green substance and K. observed the baggie's final resting place. Sainz reached the house and attempted to shut the door behind him. J. placed his foot in the door to avoid losing sight of the defendant and maintained visual contact with him until he surrendered, approximately thirty seconds later.

¶4 Soon after taking Sainz into custody, Officer J. conducted a brief custodial interview of Sainz. J. began by reading Sainz the *Miranda*[1] warnings from a card he regularly keeps in his pocket. J. asked Sainz why he ran from the police. Sainz stated that he ran because he did not want to go to jail and the officer could figure out the rest.

¶5 By that time K. had taken possession of the baggie. The officers forwarded the baggie to the Phoenix Crime lab where M., a forensic scientist, tested the substance in the baggie and determined that it contained 2.5 grams of marijuana. M. testified that marijuana is usable in quantities as small as fifty to one hundred milligrams.

¶6 Antonia H., Sainz's mother, testified that Sainz was in their home on the night of the incident when someone came to the door for him. Sainz left the house with that person and

[1] *See Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

sometime later she heard a commotion. She came to the front of the house and saw her son handcuffed at the house next door with the police kicking him. Both officers denied kicking Sainz, stating that J. merely placed his knee in Sainz's back while he was prone in order to handcuff him.

¶7 The jury convicted Sainz. The court, after finding Sainz had four prior felonies, sentenced him to the presumptive term of 3.75 years of incarceration.[2] Sainz filed a timely notice of appeal. This Court has jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. § 12-120.21(A)(1)(2003) and § 13-4033(A)(1)(Supp. 2009).

ANALYSIS

I. Need for Voluntariness Hearing

¶8 The State argues that the superior court had no duty to enforce the due process clause's prohibition on the use of coerced confessions absent a motion from a party. We disagree. "Before [a] confession is received in evidence, the trial judge shall, out of the presence of the jury, determine any issue as to voluntariness." A.R.S. § 13-3988(A) (Supp. 2009). "Where an officer is allowed to testify to confessions, 'it [is] the duty of the court to require a proper foundation to determine whether they were voluntary . . . .'" *State v. McGilbry*, 96 Ariz. 84,

[2] While the court found Sainz had four prior historical felonies, it based its sentence on two prior historical felonies.

87, 392 P.2d 297, 299 (1964) (quoting *State v. Kellington*, 93 Ariz. 396, 399, 381 P.2d 215, 217 (1963)). "[W]hen it appears at any stage of the proceedings that a confession is involuntary, it is the trial judge's duty to exclude it from evidence." *State v. Strayhand*, 184 Ariz. 571, 583 n.3, 911 P.2d 577, 589 n.3 (App. 1995).

¶9 The superior court's duty to conduct a voluntariness hearing may be triggered by a motion or objection from the defendant or by evidence indicating that the confession may have been involuntary. *State v. Fassler*, 103 Ariz. 511, 513, 446 P.2d 454, 456 (1968); *State v. Goodyear*, 100 Ariz. 244, 248, 413 P.2d 566, 569 (1966). The superior court must hold a hearing outside the jury's presence and rule upon the issue of voluntariness when the evidence presents even a "slight suggestion" that a confession may not be voluntary. *State v. Simoneau*, 98 Ariz. 2, 7, 401 P.2d 404, 408 (1965).

¶10 The fact that an interrogation takes place while the defendant is in custody creates a presumption of involuntariness. *State v. Huerstel*, 206 Ariz. 93, 105, ¶ 50, 75 P.3d 698, 710 (2003) (citing *State v. Jimenez*, 165 Ariz. 444, 448-49, 799 P.2d 785, 789-90 (1990)). In addition, any aspect of the totality of the circumstances surrounding a confession could suggest its involuntariness and prompt the superior court's duty to conduct a hearing. *State v. Stanley,* 167 Ariz.

519, 524, 809 P.2d 944, 949 (1991). Arizona courts determining voluntariness have considered factors such as whether the interrogation is conducted by the same officer who had violently arrested the defendant, the length of time between the violent confrontation and the interrogation, and whether the defendant was wearing handcuffs. *See State v. Tom*, 126 Ariz. 178, 180, 613 P.2d 842, 844 (App. 1980) (holding that the superior court clearly and manifestly erred by finding a confession voluntary when the confessing defendant was handcuffed, had his face covered with a towel and being interviewed by officers who had violently arrested him only minutes before).

¶11 The evidence raised more than a slight suggestion that the confession was involuntary. It reveals that Officer J. took Sainz into custody in a physical confrontation. The physical confrontation included officers allegedly kicking Sainz while he was handcuffed on the ground, although the officers denied kicking him and testified that because he struggled with Officer J., the officer put Sainz in a prone position, placed his knee in Sainz's back and handcuffed him. Soon after taking Sainz into custody, Officer J. conducted a brief custodial interview with Sainz. After giving Sainz *Miranda* warnings, J. asked Sainz why he ran from the police. Sainz stated that he ran because he did not want to go to jail and the officer could figure out the rest.

¶12 The State argues that a case[3] applying Arizona Rule of Criminal Procedure 16.1 precludes our finding that the superior court had a duty to raise the issue of voluntariness because Sainz failed to make a procedurally proper motion or objection. We disagree. Rule 16.1 is a broad general procedure for raising issues and objections in criminal cases. Arizona courts have never construed Rule 16.1 to limit the superior court's specific statutory and constitutional duty to decide the issue of voluntariness when it is raised by the evidence. *See Simoneau*, 98 Ariz. at 7, 401 P.2d at 408.

¶13 Prior to Rule 16.1 becoming effective, Arizona courts consistently held that the superior court must consider the voluntariness of a confession when it is put in issue by the evidence. *E.g. Fassler*, 103 Ariz. at 513, 446 P.2d at 456; *Goodyear*, 100 Ariz. at 248, 413 P.2d at 569; *Simoneau*, 98 Ariz. at 7, 401 P.2d at 408. Rule 16.1 took effect in 1973, and the very next year the Supreme Court reaffirmed the superior court's duty to inquire into the voluntariness of a confession when raised by the evidence. *State v. Finn*, 111 Ariz. 271, 275, 528 P.2d 615, 619 (1974) (citing *State v. Armstrong*, 103 Ariz. 280, 281, 440 P.2d 307, 308 (1968)). The Supreme Court then interpreted Rule 16.1 in reliance on cases requiring the superior court to conduct a voluntariness hearing when the

[3] *State v. Alvarado*, 121 Ariz. 485, 591 P.2d 973 (1979).

evidence raises the issue. *State v. Sutton*, 115 Ariz. 417, 420, 565 P.2d 1278, 1281 (1977) (citing *State v. Stevenson*, 101 Ariz. 254, 256, 418 P.2d 591, 593 (1966) (holding that issue of voluntariness is raised by "implication" when the evidence indicates that the defendant felt scared and sick when he confessed and that he did so only after being threatened and brought to a crime scene against his will)).

¶14 *State v. Alvarado* recognized the tension between the language of Rule 16.1 and the holdings of the cases applying it and held that the superior court has discretion to entertain procedurally improper motions for voluntariness hearings, regardless of the rule's unequivocal waiver language. 121 Ariz. at 488, 591 P.2d at 976. Moreover, *Alvarado* holds that *Jackson*, as interpreted by *Wainwright v. Sykes*, 433 U.S. 72 (1977), requires a voluntariness hearing when a defendant raises the issue by introducing evidence of coercive circumstances surrounding the confession. *Id.* at 487 n.2, 591 P.2d at 975 n.2. This supports the need for a voluntariness hearing in this case and means that *Alvarado* ended the odd situation of the superior court being required to raise an issue that a party could not. The state of the law after *Alvarado* is that the superior court must *sua sponte* decide the issue of voluntariness when the evidence presents it, and parties are permitted to remind the superior court of that duty.

II. Fundamental Error

¶15 The need for a voluntariness hearing does not end our inquiry, however. Because this is an *Anders* appeal, we will grant relief to Sainz only if he can show fundamental error. Error is fundamental when it goes to the foundation of the case, takes from the defendant a right essential to his defense, and is of such magnitude that the defendant could not possibly have received a fair trial. *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) Sainz has the burden of proof to show that the error was fundamental. *Id.* Moreover, Sainz must show that the error caused him prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607. In this context, prejudice depends on whether a reasonable jury could have reached a different result. *Id.* at 569, ¶ 27, 115 P.3d at 609. This is, in effect, the same standard used for harmless error except that the defendant must show the error was not harmless. *Id*. at 570-71, ¶¶ 38-39, 115 P.3d at 610-11 (Hurwitz, J., concurring).

¶16 We need not decide whether the error in this case was fundamental because we conclude that there was no prejudice. A coerced confession is subject to harmless error analysis and admission of such a confession is harmless if there is sufficient other evidence that we can determine the verdict rendered in this case was surely unattributable to the error. *Arizona v. Fulminante*, 499 U.S. 279, 284-85 (1991) (coerced

confession subject to harmless error analysis); *State v. Eastlack*, 180 Ariz. 243, 251-52, 883 P.2d 999, 1007-08 (1994) (same; on review, court will determine whether the verdict actually rendered was unattributable to the error; error harmless based on other incriminating statements and weak defense); *State v. Ross*, 180 Ariz. 598, 604, 886 P.2d 1354, 1360 (1994) (even if confession should not have been admitted, admission was harmless error given that the physical and circumstantial evidence overwhelmingly supported the conviction). *Compare Strayhand,* 184 Ariz. at 585-86, 911 P.2d at 592-93 (State failed to prove harmless error from involuntary statement in merits appeal when other evidence against the defendant was weak and State did not argue harmless error).

¶17 The evidence against Sainz was overwhelming. Both police officers positively identified Sainz as the passenger who fled the vehicle and testified that they saw him drop the baggie on his way to his mother's front door. Both officers also testified to Sainz and J. struggling at the door of the house, J. testified that he never lost sight of Sainz, and K. testified that the baggie he picked up was the only one in the area in which he saw Sainz drop the baggie. The State's evidence also positively identified the baggie's contents as a usable amount of marijuana. The only other evidence was that of Sainz's mother who merely testified that Sainz left the house when

someone came to get him and shortly thereafter she saw Sainz being kicked by police officers next door. Her testimony is consistent with the State's case that Sainz was in the vehicle in front of his mother's house when the police pulled up behind the vehicle.

III. No Other Fundamental Error

¶18 We have read and considered counsel's brief and have searched the entire record for reversible error. *See State v. Leon*, 104 Ariz. 297, 300, 451 P.2d 878, 881 (1969). We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Sainz was represented by counsel at all stages of the proceedings, Sainz was present at all stages of the proceedings except the trial on priors,[4] the evidence was sufficient for the jury to convict Sainz, and the sentence imposed was within the statutory limits. Sainz was present at sentencing and given the opportunity to address the court.

¶19 Sainz requested his counsel raise the following issues for review: 1) the failure of the Phoenix Police Department to preserve DNA and fingerprint evidence on a baggie of marijuana admitted as evidence; 2) defense counsel's failure to investigate fingerprint evidence on the baggie; 3) defense

[4] At the beginning of the trial, the superior court warned Sainz that failure to appear may result in the proceeding continuing in his absence.

counsel's interference with Sainz's right to testify; 4) defense counsel's failure to develop and present evidence in favor of a mitigated sentence; and 5) that evidence should have been suppressed because police entered Sainz's home. We have considered these claims and find them without merit or not reviewable on direct appeal.

¶20 The alleged police failure to preserve evidence is not reversible error. In order to obtain relief because of a police failure to preserve evidence, the defendant must show that material exculpatory, as opposed to potentially useful, evidence was lost and the police acted in bad faith by failing to preserve the evidence. *State v. Speer*, 221 Ariz. 449, 457, ¶¶ 36-38, 212 P.3d 787, 795 (2009). The record does not reveal that the failure of the police to collect and preserve any potential fingerprint or DNA evidence on the baggie resulted in the destruction of exculpatory evidence or resulted from bad faith. Further, nothing in the record reveals that the DNA or fingerprint evidence on the baggie is in any different condition than at the time the police collected the baggie.

¶21 Defense counsel's alleged failure to develop fingerprint evidence is not reversible error. Defense counsel's failure to develop potential evidence implicates the claim of ineffective assistance of counsel. *State v. Schultz*, 140 Ariz. 222, 225, 681 P.2d 374, 377 (1984). This Court does not address

ineffective assistance claims on direct appeal from a criminal conviction. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Such claims should be brought under Arizona Rule of Criminal Procedure 32. *Id.*

¶22 Defense counsel's alleged interference with Sainz's right to testify is not reversible error because it implicates a claim for ineffective assistance of counsel. *See Miller v. State*, 1 So.3d 1073, 1082 (Ala. Crim. App. 2007). This claim must be raised via Rule 32 rather than a direct appeal. *Spreitz*, 202 Ariz. at 3, ¶ 9, 39 P.3d at 527. Further, the Court notes that Sainz expressed a lack of desire to testify after an unfavorable ruling at his Rule 609 hearing. The court then advised Sainz that he had the right to chose whether or not to testify and that he did not have to make a final decision immediately. Sainz said "I better not testify" and his counsel indicated that she would advise him later on whether to testify.

¶23 Defense counsel's alleged failure to present mitigation evidence implicates ineffective assistance and must be raised via Rule 32 rather than a direct appeal. *See State v. Glassel*, 211 Ariz. 33, 51 n.9, ¶ 64, 116 P.3d 1193, 1211 n.9 (2005); *Spreitz*, 202 Ariz. at 3, ¶ 9, 39 P.3d at 527.

¶24 The alleged illegal entry of Sainz's home is not reversible error. Sainz argues that the police searched his home without a warrant and therefore all evidence found should

be suppressed. The record does not reveal whether or not the police actually entered Sainz's home. Further, the baggie was found outside the home, so the exclusionary rule would not apply to it even if the police later entered Sainz's home illegally. *See State v. Schinzel*, 202 Ariz. 375, 382, ¶ 28, 45 P.3d 1224, 1231 (App. 2002).

¶25 After the filing of this decision, counsel's obligations pertaining to Sainz's representation in this appeal have ended. Counsel need do no more than inform Sainz of the status of the appeal and of Sainz's future options, unless counsel's review reveals 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, Sainz has thirty days from the date of this decision to proceed, if he desires, with a motion for reconsideration or petition for review *in propia persona*.

CONCLUSION

¶26 For the forgoing reasons we affirm Sainz's conviction and sentence.

/s/
DONN KESSLER, Presiding Judge

CONCURRING:

/s/
LAWRENCE F. WINTHROP, Judge

/s/
SHELDON H. WEISBERG, Judge