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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  
FILED: 02/02/2010  
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BY: GH

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 08-1013  
)  
Appellee, ) DEPARTMENT E  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
JOE ANTHONY SAENZ, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
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Appeal from the Superior Court in Maricopa County

Cause No. CR2008-005318-001 DT

The Honorable Susan M. Brnovich, Judge

**AFFIRMED**

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Terry Goddard, 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 Margaret M. Green, Deputy Public Defender  
Attorneys for Appellant

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O R O Z C O, Judge

¶1 Joe Anthony Saenz (Defendant), appeals his conviction and sentence for one count of possession of narcotic drugs, a class four felony.

¶2 Defendant'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, she found no arguable question of law that was not frivolous. Defendant was afforded an opportunity to file a supplemental brief in propria persona, but he did not do so.

¶3 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 (2001), and -4033.A.1 (Supp. 2009).<sup>1</sup> Finding no reversible error, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶4 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996). The following facts were elicited at trial.

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<sup>1</sup> We cite to the current version of the applicable statutes because no revisions material to this decision have since occurred.

¶15 On December 4, 2007, the City of Phoenix Special Assignments Unit (S.A.U.) executed a search warrant at Defendant's residence. City of Phoenix Police Officer Hector G. (Officer G.), a member of S.A.U., participated in executing the search warrant. After entering the residence, Officer G. discovered Defendant inside a hallway bathroom standing behind the door.

¶16 Officer G. observed Defendant drop something from one of his hands, however, Officer G. could not tell what Defendant dropped. After Defendant was handcuffed and detained, Officer G. entered the bathroom and discovered a woman, Nathalie Caballero (Ms. Caballero), hiding behind the shower curtain. Ms. Caballero was also handcuffed and detained. Officer G. informed Phoenix Police Department Detective M. that he had seen Defendant drop something prior to being handcuffed. After the residence was cleared, the investigation was turned over to drug enforcement detectives.

¶17 Detective Kevin K. (Detective K.) of the Phoenix Police Department's Drug Enforcement Bureau testified that he found, in addition to other items: a quantity of crack cocaine and a small digital pocket scale in the living room; another quantity of crack cocaine on the floor in the hallway; and, Defendant's wallet and approximately eighty U.S. dollars next to the wallet in the hallway. Detective K. also found three other

quantities of crack cocaine in the same bathroom where Defendant was discovered, including one quantity on the bathroom's floor. Additionally, Detective K. found a glass smoking pipe on the bathroom floor.

¶18 Edwin C. (Mr. C.), a Forensic Scientist at the Phoenix Police Department Crime Lab, analyzed the crack cocaine samples. Mr. C. determined that, in the aggregate, 1.33 grams of usable crack cocaine were found in Defendant's residence. Another Phoenix Police Department Detective testified that this quantity of crack cocaine was valued at less than \$100. Under a grant of immunity, Ms. Caballero testified that on the day in question, she went to Defendant's residence to purchase crack cocaine.

¶19 Defendant was charged with one count of possession of narcotic drugs for sale in violation of A.R.S. § 13-3408 (Supp. 2009), a class two felony. The State alleged aggravating factors and prior felony convictions, including prior drug convictions. On September 19, 2008, five days before trial was to begin, Defendant filed a motion for change of counsel. On September 24, 2008, the day trial was to begin, the trial court heard Defendant's argument in support of the motion for change of counsel. Defendant argued that his counsel was not ready for trial because he had been on the case for only three weeks. Additionally, Defendant stated that because his counsel thought he would lose at trial, he no longer had any faith in his

representation. After Defendant's counsel confirmed that he was ready for trial, the court denied Defendant's motion.

¶10 A jury of twelve and one alternate was empanelled. The jury was "unable to agree"<sup>2</sup> on the charge of possession of narcotic drugs for sale, but found Defendant guilty of the lesser included offense of possession of narcotic drugs. Before sentencing, the trial court found the State had proven six prior felony convictions. On November 3, 2008, the trial court sentenced Defendant to a presumptive term of ten years in prison, with 219 days of pre-sentence incarceration credit.<sup>3</sup> Defendant subsequently filed a timely notice of appeal on November 20, 2008.

#### DISCUSSION

¶11 In preparing the *Anders* brief, Defendant's counsel spoke with Defendant to determine Defendant's appellate

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<sup>2</sup> On the charge of possession of narcotic drugs for sale, the verdict form gave the jury three options: (1) not guilty; (2) unable to agree; and (3) guilty.

<sup>3</sup> The record is unclear as to how the trial court arrived at 219 days of pre-sentence incarceration credit. However, neither Defendant nor the State raised this issue on appeal. Accordingly, we will not disturb the trial court's ruling regarding pre-sentence incarceration credit. See *State v. Scott*, 187 Ariz. 474, 476, 930 P.2d 551, 553 (App. 1996) (stating that if a trial record is incomplete, we must assume the missing portions of the record support the trial court's ruling); see also *State v. Dawson*, 164 Ariz. 278, 281-82, 792 P.2d 741, 744-45 (1990) (refusing to correct an alleged sentencing error in the absence of a cross appeal).

concerns. Defendant's only concern regarded post-conviction relief.

### **Sufficiency of the Evidence**

¶12 "The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses." *State v. Cid*, 181 Ariz. 496, 500, 892 P.2d 216, 220 (App. 1995). We will not disturb the fact finder's "decision if there is substantial evidence to support its verdict." *Id.*

¶13 To uphold the verdict, we must find substantial evidence that Defendant knowingly possessed a narcotic drug. A.R.S. § 13-3408.A.2. In this case, the record contains substantial evidence to support the jury's verdict. Pursuant to A.R.S. § 13-3401.5 and 20(z) (Supp. 2009), "narcotic drugs" include "coca leaves," which "means cocaine, . . . or substances from which cocaine . . . may be synthesized or made." On direct examination, Mr. C. testified that after analyzing the evidence gathered at Defendant's residence, he determined the material was "usable cocaine base."<sup>4</sup>

¶14 Additionally, testimony from Officer G. and Detective K. indicated the crack cocaine was found in Defendant's residence. Furthermore, most of the drug evidence was found in and around the bathroom where Defendant was discovered. Based

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<sup>4</sup> "Cocaine base" is also known as crack cocaine.

on the evidence presented at trial, we find there was substantial evidence to support the jury's verdict.

### **Motion for Change of Counsel**

¶15 Although a criminal defendant has a Sixth Amendment right to representation by competent counsel, a defendant is not entitled to counsel of choice or to a meaningful relationship with counsel. U.S. Const. amend. VI; Ariz. Const. art. 2, § 24; A.R.S. § 13-114.2 (2001); *State v. Cromwell*, 211 Ariz. 181, 186, ¶ 28, 119 P.3d 448, 453 (2005).

¶16 We review a trial court's denial of a motion for change of counsel for an abuse of discretion. *Cromwell*, 211 Ariz. at 186, ¶ 27, 119 P.3d at 453. When ruling on a motion for change of counsel, trial courts should keep in mind "the rights and interest of the defendant . . . tempered by exigencies of judicial economy." *State v. LaGrand*, 152 Ariz. 483, 486, 733 P.2d 1066, 1069 (1987). In making its determination, a trial court should consider the following:

[W]hether an irreconcilable conflict exists between counsel and the accused, and whether new counsel would be confronted with the same conflict; the timing of the motion; inconvenience to witnesses; the time period already elapsed between the alleged offense and trial; the proclivity of the defendant to change counsel; and quality of counsel.

*Id.* at 486-87, 733 P.2d at 1069-70. Moreover, only a genuine irreconcilable conflict requires the appointment of new counsel.

*See State v. Bible*, 175 Ariz. 549, 591, 858 P.2d 1152, 1194 (1993).

¶17 In this case, Defendant filed his Motion for Change of Counsel only five days before trial and approximately ten months after Defendant allegedly committed the charged offense. In his motion, Defendant indicated he was concerned about whether his counsel was prepared for trial. However, Defendant's counsel informed the trial court that he was in fact prepared for trial. Defendant also stated that because his counsel thought he would lose at trial, he no longer had any faith in his representation. Nevertheless, Defendant failed to argue, and we find no evidence, that Defendant's lack of faith in his counsel created an irreconcilable conflict. We hold the trial court did not abuse its discretion in denying Defendant's Motion for Change of Counsel.

#### **Post-Conviction Relief**

¶18 Defendant's counsel has informed this court of Defendant's concern regarding post-conviction relief. The record indicates Defendant has not filed a notice of post-conviction relief. However, pursuant to Arizona Rule of Criminal Procedure 32.4.a, Defendant may file a notice of post-conviction relief if he does so "within thirty days after the issuance of the final order or mandate by the appellate court."



## CONCLUSION

¶19 We have read and considered counsel's brief, carefully searched the entire record for reversible error and found none. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's finding of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to speak and the court imposed a legal sentence.

¶20 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant 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). Defendant shall have thirty days from the date of this decision to proceed, if he so desires, with an in propria persona motion for reconsideration<sup>5</sup> or petition for review.

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<sup>5</sup> 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.

¶21 For the foregoing reasons, Defendant's conviction and sentence are affirmed.

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

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PHILIP HALL, Presiding Judge

/S/

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DONN KESSLER, Judge