DIVISION ONE
FILED: 07-29-2010
PHILIP G. URRY, CLERK
BY: DN

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-1067
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
JONATHAN MCALLISTER, SR.,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR2008-120957-001 DT

The Honorable Michael D. Jones, Judge

AFFIRMED

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 Cory Engle, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Judge

¶1 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969). Counsel for Jonathan McAllister Sr. (defendant) has advised that, after searching the entire record, she has been unable to discover any arguable questions of law and has filed a brief requesting this court to conduct an *Anders* review of the record. Defendant has been afforded an opportunity to file a supplemental brief *in propria persona*, and he has not done so.[1] At defendant's request, however, his counsel asks this court to search the record for error with regard to six issues: 1) the trial court's denial of defendant's motion for a mitigation specialist, 2) the trial court's denial of defendant's motion for state funding, 3) the denial of defendant's motion to continue, 4) the denial of defendant's motion to preclude the state's untimely filed allegation of prior felony convictions, 5) the ineffective assistance of defendant's advisory counsel,[2] and, 6) the trial court's failure

[1] Defendant has been granted several extensions of time in which to file a supplemental brief. By order dated May 7, 2010, we advised defendant that if he did not file a supplemental brief by June 9, 2010, we would consider only the brief submitted by defendant's counsel.

[2] Defendant suggests that he was prejudiced because of ineffective assistance of his advisory counsel. Ineffective assistance of counsel claims are not properly before us. *State ex rel. Thomas v. Rayes,* 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007) ("a defendant may bring ineffective assistance of counsel claims *only* in a Rule 32 post-conviction proceeding — not before trial, at trial, or on direct review."). Therefore, we decline to consider this issue.

to rule on defendant's motion to vacate judgment.[3] For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 In April 2008, defendant was charged by direct complaint with two counts of sale or transportation of marijuana, class 3 felonies. The state then filed a supervening indictment that did not alter the prior complaint. The following evidence was presented at trial.[4]

¶3 On August 24, 2007 and August 29, 2007, defendant sold marijuana to undercover Phoenix police officer A.D. On these two occasions, officer A.D. purchased $40 worth of a substance that the Phoenix Crime Laboratory later determined to be marijuana. Officer A.D. spent nearly two hours total with defendant and he was "100 percent sure" that the man who sold him the marijuana was defendant.

¶4 After a jury trial, defendant was found guilty of both counts. The court conducted a hearing before the same jury to

---

[3] Defendant contends that the trial court erred in failing to rule on his motion to vacate judgment. However, because we note that the trial court denied defendant's motion on April 28, 2009, this issue is moot.

[4] On appeal, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against defendant. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

determine if defendant was on probation at the time of offense. Defendant's probation officer, T.L., testified that she was employed as a probation officer and that defendant was assigned to her as a probationer. T.L. further testified that defendant was on probation for a previous felony when he committed the current offenses. The jury found that defendant had been on probation at the time of both offenses. Additionally, the trial court found that defendant had one historical prior felony conviction. Defendant was sentenced to 6.5 years in prison for both count 1 and count 2, to be served concurrently, and received 92 days of presentence incarceration credit.[5]

¶5 Defendant timely appealed his convictions and sentences. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 and -4033(A)(1) (2010).

DISCUSSION

¶6 In *Anders* appeals, we review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

1. Denial of Defendant's Motion for a Mitigation Specialist

[5] Defendant was sentenced under former Arizona Revised Statutes (A.R.S.) § 13-702 and § 13-702.01 which were repealed by Ariz. Sess. Laws 2008, Ch. 301, § 24 and § 25 respectively, effective January 1, 2009, and the substantive provisions placed in other statutory sections. This does not affect defendant's sentence.

¶7 Defendant contends that the trial court erred when it denied his request to appoint him a mitigation specialist. During the hearing on the motion, the trial court explained its ruling by stating, "[N]o less than the presumptive can be order[ed] because the crime was committed while you were on probation. So if I found 300 million mitigating circumstances, it could not affect the fact that the law requires me to sentence you to at least a presumptive term." A mitigation specialist was not necessary here for the simple fact that because the crimes were committed while defendant was on probation, mitigated sentences were not available.[6] The state alleged no aggravating factors. The trial court was statutorily bound to give defendant *at least* presumptive sentences, which it did. Thus, the defendant's argument is without merit.

2. Denial of Defendant's Motion for State Funding

¶8 Defendant argues that the trial court erred when it denied his motion for state funding so that he could obtain various office supplies, a legal dictionary, and a standard

[6] Former A.R.S. § 13-604.02(B)(2007)(renumbered as § 13-708(C)(2010)) states that if a person commits a felony while on probation, he/she can be sentenced to no less than the presumptive sentence. Here, the presumptive term for defendant was enhanced because of his historical prior felony conviction. Under Former A.R.S. § 13-604(B)(2007)(renumbered as § 13-703(B)(2) and § 13-703(I)(2010)) a defendant with one prior felony conviction who is convicted of a class 3 felony has a presumptive sentence of 6.5 years.

dictionary. A defendant's constitutional right to court access is met where the defendant is provided with either advisory counsel or counsel throughout the proceedings, regardless of whether he/she has personal access to legal materials. *State v. Murray*, 184 Ariz. 9, 28, 906 P.2d 542, 561 (1995). Here, defendant proceeded *pro per* but was provided with advisory counsel throughout the proceedings. Accordingly, this argument is without merit.

3. Denial of Defendant's Motions to Continue

¶9 Defendant alleges that the court erred when it denied his motions to continue trial. Defendant argued in his motion that a continuance was proper because at that time his contact with his court-appointed investigator had been minimal and a continuance was necessary to ensure a fair trial. Defendant's motion was set for hearing before the continuance panel. Defendant failed to appear at the oral argument on his motion to continue. The court denied his motion. He again unsuccessfully moved for a continuance on the first day of trial.

¶10 "A motion for continuance is addressed to the sound judicial discretion of the trial court; and, unless that discretion is abused it will not be interfered with by the appellate tribunal." *Merryman v.* Sears, 50 Ariz. 412, 415, 70 P.2d 943, 944 (1937) (quoting *Arnett v.* Peterson, 24 Ariz. 405,

408, 210 P. 683, 684 (1922)). We hold that the trial court did not abuse its discretion in denying defendant's motions to continue.

4. Denial of Defendant's Motion to Preclude State's Untimely Filed Allegation of Prior Felony Convictions

¶11 Finally, defendant raises as error the trial court's denial of his motion to preclude the state's untimely filed allegation of prior felony convictions. We review a trial court's decision to permit a prior-conviction allegation made fewer than twenty days before trial for an abuse of discretion. *State v. Williams,* 144 Ariz. 433, 442, 698 P.2d 678, 687 (1985). The trial transcript indicates that the state produced a copy of its allegation of historical priors, date-stamped July 23, 2008, well before the twenty day cutoff prior to trial. However, the allegation was apparently misfiled and never electronically received. The trial court found that the defendant was not prejudiced by the untimely filing because he had notice of the allegation at his settlement conference on August 15, 2008. Moreover, his advisory counsel received a copy of the allegations when they were filed on July 23, 2008. Therefore, defendant was aware that the state intended to enhance his sentence by alleging historical priors as it was discussed at length at his settlement conference. Defendant was not unjustly

prejudiced and the court did not abuse its discretion in denying the motion.

CONCLUSION

¶12 We have read and considered counsel's brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, defendant was adequately represented by advisory counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits. Pursuant to *State v. Shattuck,* 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), defendant's counsel's obligations in this appeal are at an end.

¶13 We affirm the convictions and sentences.

/s/
_____
JON W. THOMPSON, Judge

CONCURRING:

/s/
_____
MICHAEL J. BROWN, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge