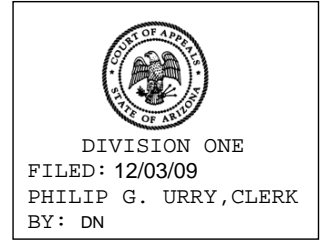


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, )  
 ) No. 1 CA-CR 08-1125  
Appellee, )  
 ) DEPARTMENT D  
v. )  
 ) **MEMORANDUM DECISION**  
CHARLIE BYRD, JR. )  
 ) (Not for Publication -  
Appellant. ) Rule 111, Rules of the  
 ) Arizona Supreme Court)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2008-123436-001 DT

The Honorable Cari A. Harrison, Judge

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel,  
Criminal Appeals Section  
Attorney for Appellee

Maricopa County Public Defender's Office Phoenix  
By Joel M. Glynn, Deputy Public Defender  
Attorneys for Appellant

Charlie Byrd, Jr. Phoenix  
Appellant *In Propria Persona*

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G E M M I L L, Judge

¶1 Charlie Byrd, Jr. appeals his convictions and sentences for possession or use of narcotic drugs, a class four

felony, and possession or use of marijuana, a class six felony, committed April 15, 2008. Byrd's counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. See *Smith v. Robbins*, 528 U.S. 259 (2000). Byrd was afforded the opportunity to file a supplemental brief *in propria persona* and has done so. For the following reasons, after reviewing the record, we affirm.

#### **FACTS AND PROCEDURAL HISTORY<sup>1</sup>**

¶2 In 2008, a Phoenix Police surveillance unit focused its attention on Andre House, a faith-based organization which provides food, shelter, and necessities of life to homeless persons in Phoenix. The purpose of the surveillance was to identify and reduce known criminal behavior in and around the facility.

¶3 On the morning of April 15, police observed Byrd and several others obstructing a sidewalk on the south side of Andre House for about ten minutes in violation of the Phoenix City Code. To walk past the group, pedestrians had to walk from the

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<sup>1</sup> The applicable standard of appellate review mandates that we view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the jury verdict and any trial court factual findings. See *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

sidewalk onto the street, and back onto the sidewalk.

¶14 During this time, police observed Byrd possessing and using what appeared to be crack cocaine. A police officer in the surveillance vehicle took several pictures of this event with a digital camera.

¶15 Byrd was arrested for obstructing a city sidewalk. A search of Byrd's pants pockets revealed an envelope addressed to him. The envelope contained what was later confirmed to be usable quantities of crack cocaine and marijuana.

¶16 Byrd was charged by information with one count of possession or use of narcotic drugs, a class four felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-3408 (Supp. 2008), and possession or use of marijuana, a class six felony, in violation of A.R.S. § 13-3405. Following a jury trial, he was found guilty as charged. The court suspended imposition of prison sentences and imposed concurrent three year probation terms for each count. Byrd was also fined \$1000 on count one and \$750 on count two. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2001), and 13-4033(A)(3) (Supp. 2008), and Article 6, Section 9, of the Arizona Constitution.

#### **DISCUSSION**

¶17 Byrd filed a supplemental brief raising three issues: (1) structural error occurred as to the entire trial because, on

one day, trial started later than scheduled; (2) the surveillance officers' photographs of Byrd constitute an invasion of privacy; and (3) insufficiency of the evidence as to the drug convictions. We review questions of law de novo, *Arizona Water Co. v. Arizona Corp. Com'n*, 217 Ariz. 652, 655, ¶ 10, 177 P.3d 1224, 1227 (App. 2008), and we review evidentiary issues for an abuse of discretion. *State v. Blakley*, 204 Ariz. 429, 437, ¶ 34, 65 P.3d 77, 85 (2003).

#### **I. Structural Error as to the Entire Trial**

¶8 Byrd argues that structural error occurred when trial started late on one of the two days of trial and that the delay affected "the entire conduct of the trial from beginning to end." The superior court opened proceedings by apologizing for the inconvenience: "[L]et me apologize for getting started so much later than we planned. We had something occur on our calendar, including the lights going out."

¶9 Structural error is so serious that it "deprive[s] defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence." *State v. Valverde*, 220 Ariz. 582, 584, ¶ 10, 208 P.3d 233, 235 (2009). Structural error is prejudicial per se and requires reversal regardless of whether it was objected to at trial. *Id.* at 585, ¶ 10, 208 P.3d at 286.

¶10 Our supreme court, citing the United States Supreme Court, has defined relatively few instances in which structural error occurs. See *State v. Ring*, 204 Ariz. 534, 552, ¶ 46, 65 P.3d 915, 933 (2003). Examples include a biased trial judge, complete denial of criminal defense counsel, denial of self-representation in criminal cases, and exclusion of jurors of the defendant's race. *Id.*

¶11 We disagree that structural error occurred in this case. It is unclear from the record exactly how late trial began, but it occurred on the scheduled day and neither party was prejudiced by being unable to present all of their evidence. We discern no structural error from the mere fact of starting late on a particular day.

## **II. Police Photographs as an Invasion of Privacy**

¶12 Byrd argues the police officers' act of taking photographs of him using crack cocaine constitutes an invasion of privacy.

¶13 The Fourth Amendment to the United States Constitution states in pertinent part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . ." Its corollary in the Arizona Constitution, Article 2, Section 8, ensures that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." A

search under the Fourth Amendment occurs "when an expectation of privacy that society is prepared to consider reasonable is infringed." *State v. Allen*, 216 Ariz. 320, 323, ¶ 13, 166 P.3d 111, 114 (App. 2007) (quoting *U.S. v. Jacobsen*, 466 U.S. 109, 113 (1984)). To have a legitimate expectation of privacy, a person must show both an actual, subjective expectation of privacy and that the expectation is one society is prepared to recognize as justifiable under the circumstances. *Id.* (citing *Smith v. Maryland*, 442 U.S. 735, 740 (1979)).

¶14 Here, the photographs were taken while Byrd was socializing with several other people on a public sidewalk at approximately eight o'clock in the morning. We cannot say that, under the circumstances, Byrd had a reasonable subjective expectation of privacy that society is prepared to recognize as justifiable. Furthermore, police officers only took photographs after they recognized what appeared to be criminal behavior. And indeed, "police cannot reasonably be expected to avert their eyes from evidence of criminal activity that could have been observed by any member of the public." *California v. Greenwood*, 486 U.S. 35, 41 (1988). We find no invasion of privacy and no reversible error in regard to the photographs taken by the police.

### **III. Insufficiency of the Evidence**

¶15 Byrd argues the evidence does not support his

convictions. We disagree.

¶16 Police officers testified that, from their undercover surveillance vehicle, they witnessed Byrd violating a city ordinance while using crack cocaine. The record on appeal contains several color photographs of Byrd taken at that time. When Byrd was arrested, police searched his pockets and found what appeared to them to be crack cocaine and marijuana. A criminalist from the City of Phoenix Crime Lab testified that the substances found in Byrd's pockets tested positive for usable quantities of crack cocaine and marijuana, respectively. Accordingly, the jury had adequate evidence to find Byrd guilty as charged. The jurors were polled following the reading of the verdict and all agreed it was their true verdict.

¶17 Having considered defense counsel's brief and Byrd's supplemental brief, and having examined the record for reversible error, *see Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. The sentence imposed falls within the range permitted by law, and the evidence presented supports the conviction. As far as the record reveals, Byrd knowingly, voluntarily, and intelligently waived his right to counsel at trial, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶18 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85,

684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Byrd of the disposition 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. Byrd has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

**CONCLUSION**

¶19 Byrd's convictions and sentences are affirmed.

\_\_\_\_\_/s/\_\_\_\_\_  
JOHN C. GEMMILL, Judge

CONCURRING:

\_\_\_\_\_/s/\_\_\_\_\_  
PETER B. SWANN, Presiding Judge

\_\_\_\_\_/s/\_\_\_\_\_  
DIANE M. JOHNSEN, Judge