DIVISION ONE
FILED: 08/17/2010
RUTH WILLINGHAM,
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0135
	)	
Appellee,	)	DEPARTMENT D
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
DWIGHT DEWAYNE MURRAY,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-118947-001 SE

The Honorable Helene F. Abrams, 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 Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Dwight Dewayne Murray (Defendant) appeals his convictions and sentences for sale or transportation of marijuana and possession of drug paraphernalia.

¶2 Counsel for Defendant 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 record, he found no arguable question of law that was not frivolous. Defense counsel, however, advises this Court that Defendant wishes us to address two specific issues. Defendant was afforded the 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, and -4033.A.1 (2010).[1] Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶4 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

[1] We cite to the current version of the applicable statutes when no revisions material to this decision have since occurred.

¶5 Defendant was charged with multiple counts of sale or transportation of marijuana, possession of marijuana for sale, and possession of drug paraphernalia. The offenses involved Defendant's attempts to ship packages containing marijuana on two separate dates. The marijuana totaled about eighty pounds.

¶6 On February 16, 2007, at approximately 2:25 p.m., Defendant arrived at a shipping store (Higley Store) carrying two large packages. The employee (Employee) at the Higley Store asked Defendant about the contents of the packages, and Defendant said that it was clothing. Employee estimated that the packages weighed about fifty pounds. Due to the excessive weight of the packages, Employee became suspicious, and after Defendant left the store, opened the packages to ensure nothing dangerous was being shipped. Higley Store's policy allows employees to open any package being shipped that they suspect might contain hazardous materials or contraband. A large printed sign posted next to the Higley Store cash register advises store customers of this policy.

¶7 Employee found both packages to be glued shut and heavily sealed with plastic containers inside that smelled of soap, coffee and chemicals. After opening the plastic containers, Employee found marijuana at the core of each.

¶8 Upon finding the marijuana, Employee contacted the mail interdiction division of the Mesa Police Department to report her findings. Mesa Police Department Detective R. responded to the call and Employee gave a detailed account of the contents of the packages and a description of Defendant. Employee wrote a description of the Defendant on a shipping label describing him as a black male, five feet and seven inches tall, weighing about 165 pounds. She also identified Defendant as "Jamaican." Marijuana found in both packages weighed 31.24 pounds.

¶9 Employee testified that Defendant returned to the Higley Store three days later to purchase boxes. On this visit, Employee wrote down a partial license plate number and a description of Defendant's vehicle. Employee again called Detective R. After Employee identified Defendant from a photo lineup, Detective R. placed Defendant on his surveillance unit.

¶10 On March 28, 2007, Detective R. and his surveillance unit observed Defendant purchase two rolls of packaging tape at a Wal-Mart. The owner (Owner) of another shipping store (the Avondale Store[2]) testified that Defendant and another black

[2] This second shipping store is referred to as two different business names throughout parts of the trial. Hereinafter, and for purposes of consistency, the second shipping store will be referred to as "the Avondale Store."

male, who Defendant identified as E.C., walked into his store with a package. Defendant and E.C. told Owner that they were shipping "some kind of electronic items." Owner told Defendant and E.C. that the package weighed over seventy pounds and was too heavy to ship. Prior to leaving the store, Defendant purchased a cardboard box and packaging peanuts. Owner testified that Defendant returned alone the next day to ship the same package with the materials purchased the previous day.

¶11 Detective R. took possession of the package shortly after Defendant left the Avondale Store. Upon opening the package, Detective R. found white shipping peanuts, expanding foam, three large wrapped bundles, and three large bales of marijuana wrapped in green-colored cellophane taped in black bags with dryer sheets. The marijuana weighed 24.3 kilograms, or 53.46 pounds.[3]

¶12 At trial, Employee testified she previously worked with Detective R. on thirty-five other occasions under similar circumstances. Detective R. testified that he previously asked Employee and the Higley Store owner to not open suspicious boxes, but rather allow him to develop probable cause from shipping labels and obtain a search warrant for any suspicious

[3] At trial, a forensic scientist testified as to the weight of the marijuana in kilograms. Herein, we have converted the weight to pounds using a standard conversion table.

packages. Detective R. also testified the owner of the Higley Store advised him that it was store policy to open suspicious packages received for shipping. Detective R. testified that as private citizens it was within the Higley Store's right to open suspicious packages received for shipping.

¶13 Defendant testified that at the time of the first alleged visit to the Higley Store, he was on a construction site between 7:00 a.m. and 3:00 p.m. Defendant testified that during this time, one of his employees, E.C., used his truck. According to Defendant, E.C. is Defendant's height, weighs approximately 190 pounds, is from Jamaica, and speaks with an accent. On February 19, 2007, Defendant claimed he was preparing to return excess construction material to Home Depot or his storage facility. Defendant claims he ran out of boxes to place the excess material. E.C. suggested Defendant purchase the boxes from the Higley Store, which Defendant did.

¶14 As to the March 28 and March 29, 2007 dates, Defendant testified that he and E.C. were also in the business of shipping cars, trucks and parts to Jamaica. Defendant stated that E.C. told Defendant he was shipping an electronic control module to Jamaica. On March 28, 2007, Defendant agreed to take E.C. to the Avondale Store to ship the package. Defendant and E.C. took the package back to E.C.'s home after Owner explained it was too

heavy to ship. Defendant testified that the following day, both he and E.C. went back to the Avondale Store to ship the package.

¶15 Defendant was charged by direct complaint and entered a plea of not guilty. After a jury trial, Defendant was found guilty of two counts of sale or transportation of marijuana in violation of A.R.S. § 13-3405.A.4 (2010), both class 2 felonies, and two counts of possession of drug paraphernalia in violation of A.R.S. § 13-3415.A (2010), both class 6 felonies. The possession of marijuana charges were dismissed.

¶16 Defendant was sentenced to three years in prison as to each count of sale or transportation of marijuana, to be served concurrently with credit for 243 days of presentence incarceration. The trial court also imposed fines of $40,000 as to the sale or transportation of marijuana convictions. The court designated the possession of drug paraphernalia convictions as misdemeanors and sentenced Defendant to 180 days' imprisonment with credit for 180 days of presentence incarceration.

DISCUSSION

¶17 Defendant alleges through counsel that the photo lineup, the surveillance, and the entire investigation were based on illegally obtained and seized evidence in violation of the Fourth Amendment to the United States Constitution. U.S.

Const. amend. IV. Defendant also alleges that Employee was a confidential informant and was acting as an agent for police. He argues that as a confidential informant, Employee illegally seized and opened the boxes, and therefore the evidence should have been suppressed.

Motion to Suppress

¶18 At trial, Detective R. testified he told Employee that he himself could not open the boxes because he needed a warrant, but Employee did not need a warrant to open the boxes. After this evidence was elicited, counsel for Defendant made an oral motion to suppress exhibits six and seven. These exhibits were the boxes in which Employee from the Higley Store found marijuana on February 16, 2007 and resulted in the surveillance and investigation of Defendant. Counsel for Defendant stated, "I interviewed [Employee] previously and she didn't tell me that . . . Detective R. indicated that he needed a warrant and she didn't . . . She knew he needed a warrant and [was] acting on his behalf."

¶19 Defendant argued Employee acted as Detective R.'s agent, and she illegally seized and opened the packages that Defendant attempted to ship. The trial court denied Defendant's motion to suppress. We review a trial court's denial of a motion to suppress for an abuse of discretion. *State v. Zamora,*

220 Ariz. 63, 67, ¶ 7, 202 P.3d 528, 532 (App. 2009). "We defer to the superior court's factual determinations; however, to the extent its ultimate ruling is a conclusion of law, we review de novo." *Id*.

¶20 Arizona Rule of Criminal Procedure 16.1.b states that "[a]ll motions shall be made no later than 20 days prior to trial, or at such other time as the court may direct." Under Rule 16.1.c, an untimely motion under Rule 16.1.b is precluded unless the basis for the motion "was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it."

¶21 Defendant's oral motion was untimely, as it was made at trial and not within the twenty-day period as required under Rule 16.1.b. Furthermore, we cannot conclude on this record that the exception provided by Rule 16.1.c applied here. Counsel for Defendant advised the court only that when he had interviewed the witness and the witness had not told him about Detective R.'s remark. Defense counsel did not provide the court with facts from which it necessarily had to conclude that his interview with the witness had been reasonably diligent. He did not contend, for example, that the witness had lied to him or that the witness otherwise had withheld information he had sought from her. For this reason, under Rule 16.1.c,

Defendant's motion to suppress was untimely and no exception applied. Therefore, the trial court did not abuse its discretion by denying Defendant's motion.

Employee not an agent of police

¶22 Even assuming Defendant's motion was not barred by Rule 16.1.c, the court had discretion to deny the motion on substantive grounds. Defendant cites no authority to the contrary, but this Court's research has shown that:

> [A] certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state [and] de minimus or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to [F]ourth [A]mendment scrutiny. The government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem the citizen to be an instrument of the state. The requisite degree of governmental participation involves some degree of knowledge and acquiescence in the search.

United States v. Walther, 652 F.2d 788, 791-792 (9th Cir. 1981) (citations omitted). The *Walther* court stated that the two critical factors in determining whether a private citizen is a *de facto* agent of the State are: (1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search. *Id*. at 792.

¶23 With regards to the government's knowledge and acquiescence, Defendant argues Detective R. knew Employee had opened suspicious packages in the past and reported illegal substances found therein to the police; therefore, the police acknowledged and acquiesced to the search. However, Detective R. testified that in the past he specifically asked Employee not to open suspicious packages. Detective R. was aware of the Higley Store's policy to inspect packages believed to contain hazardous materials or contraband, and that store policy allowed employees to conduct such inspections. Even so, Detective R. was neither directly participating in Employee's actions nor indirectly encouraging them. In fact, his testimony was that he tried to discourage Employee from opening any package. As such, the requisite knowledge and acquiescence requirement is not met.

¶24 Employee's acts on February 16, 2007 also fail to meet the second factor. The trial court reasonably could have concluded that Employee's intent in opening the boxes was not to assist law enforcement officers, but, as Employee testified, to do her job to inspect suspicious packages presented for shipping. This argument is strengthened by the store's policy of opening suspicious packages and by the existence of a very large sign next to the cash register notifying customers that employees are permitted to open every box they handle. The

trial court could reasonably believe that Employee was merely doing her job and not assisting Detective R. *See State v. Olson*, 134 Ariz. 114, 116, 654 P.2d 48, 50 (App. 1982) (on appeal from the denial of a motion to suppress, all reasonable inferences resolved in favor of the State).

¶25 The court reasonably could have concluded that because neither of the factors under the *Walther* test were satisfied, Employee was not acting as an agent of the State. As such, the packages were legally obtained from the Higley Store. *See Walter v. United States,* 447 U.S. 649, 656 (1980) ("[A private party's] wrongdoing does not deprive the government of the right to use evidence that it has acquired lawfully." (citations omitted)).

Sufficiency of the evidence

¶26 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).

¶27 To convict Defendant of sale or transportation of marijuana, the State had to prove Defendant knowingly transferred marijuana. A.R.S. § 13-3405.A.4. To convict Defendant for possession of drug paraphernalia, the State had to prove Defendant knowingly used or possessed "with intent to use,

drug paraphernalia to . . . pack, repack, store, contain, [or] conceal . . . a drug." A.R.S. § 13-3415.A.

¶28 Substantial evidence supported the jury's finding of the elements necessary to convict Defendant. Employee testified that she found marijuana in the packages Defendant intended to ship and that the marijuana was heavily wrapped in materials that were used to conceal its presence. The material used to wrap the marijuana constituted drug paraphernalia, defined in part as, "[c]ontainers and other objects used, intended for use or designed for use in storing or concealing drugs." A.R.S. § 13-3415.F.2.(j). A reasonable jury could conclude from this testimony that Defendant transferred the marijuana to the Higley Store and that he was in possession of drug paraphernalia.

¶29 Furthermore, Detective R.'s testimony as to Defendant's activities at the Avondale Store could lead a reasonable jury to conclude that Defendant was guilty of the sale or transportation of marijuana and possession of drug paraphernalia. Detective R.'s surveillance unit observed Defendant purchase two rolls of packaging tape on March 28, 2007, and Owner testified that Defendant purchased a cardboard box and packaging peanuts from him. The following day, marijuana was found in the package wrapped in the same materials Owner sold to Defendant, as well as other materials which were

intended to seal and protect marijuana inside the box. These materials are within the definition of drug paraphernalia as defined by A.R.S. § 13-3415.F.2.(j). From this information, a jury could conclude that Defendant transferred marijuana to the Avondale Store and that he was in possession of drug paraphernalia.

¶30 "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.* Based on the testimony and evidence presented, the jury could have reasonably found Defendant guilty of the charged crimes. Accordingly, we hold there was substantial evidence to support the jury's guilty verdicts and we affirm the convictions.

CONCLUSION

¶31 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 findings 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 legal sentences.

¶32 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 or petition for review.[4]

¶33 For the foregoing reasons, Defendant's convictions and sentences are affirmed.

/S/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:
/S/
_____
DIANE M. JOHNSEN, Judge
/S/
_____
JON W. THOMPSON, Judge

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[4] Pursuant to Arizona Rule of Criminal Procedure 31.18.b, Defendant or his counsel have 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.