DIVISION ONE
FILED: 09/02/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 09-0231
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ALBERT ROBERT DUVAL,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-132425-001 DT

The Honorable Janet E. Barton, 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 Thomas K. Baird, Deputy Public Defender
Attorneys for Appellant

Albert Robert Duval — Tucson
Appellant

S W A N N, Judge

¶1 Albert Robert Duval ("Defendant") appeals his conviction of Possession or Use of Narcotic Drugs, a class 4 felony. His appeal was filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969).[1]

¶2 Counsel for Defendant has searched the record and can find no arguable question of law that is not frivolous, and requests that we search the record for fundamental error. At Defendant's request, however, Defendant's counsel asks this court to search the record for error with respect to the following issues: (1) the imposition of a probation fee at sentencing; (2) ineffective assistance of counsel; (3) evidence tampering; (4) probable cause for the stop and search; (5) prosecutorial misconduct; and (6) mental health procedures. Defendant also filed a supplemental brief raising three additional issues: (1) judicial bias; (2) transcript accuracy; and (3) his right to a speedy trial. After reviewing the entire record, we find no error and affirm Defendant's conviction and sentence.

[1] Defendant filed a request for oral argument. We deny the request.

FACTS[2] AND PROCEDURAL HISTORY

¶3 On May 24, 2008, Officers Brian Gentry and Carmina Banda observed Defendant pushing a shopping cart across Filiberto's parking lot, located near 229 East Dunlap in Phoenix, Arizona. When they approached Defendant, Officer Banda noticed that Defendant tightened up, with his hands clenched. Officer Gentry asked him what he was doing in the area. Defendant ignored the question and attempted to proceed past the officers. Noticing that Defendant's hands were clenched, Officer Gentry then asked Defendant what he had in his hands. Defendant stopped and stared at the officers, but he did not verbally respond. But when Officer Gentry repeated his question, Defendant responded, "Skin." Officer Gentry chuckled at Defendant's response, and again asked Defendant what was in his hands. Defendant responded by opening his hand, which held a rock of crack cocaine about the size of a small pebble. Thereafter, Officer Gentry took Defendant into custody, read him his *Miranda* warnings and placed him under arrest.[3]

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[2] "We view the evidence in the light most favorable to sustaining the verdict[] and resolve all inferences against [Defendant]." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

[3] Defendant remained in custody from the time of his arrest until sentencing.

¶4 On June 4, 2008, Defendant was charged with Possession or Use of Narcotic Drugs. A preliminary hearing and not guilty arraignment was also held the same day, with Defendant and his counsel present. After hearing the testimony of Officer Gentry, the court found probable cause to hold Defendant to stand trial on the charges set forth in the complaint, and entered a plea of not guilty on Defendant's behalf. At the initial pretrial conference on July 9, 2008, the court determined that the State failed to comply with all discovery pursuant to Ariz. R. Crim. P. ("Rule") 15.1(b). The court ordered the State to comply and produce the lab analysis and notes, as well as the calibration logs, by July 25, 2008. The court also determined that the State did not disclose the name of an expert and the results of any scientific tests, and required the State to disclose the name of the expert and any test results within 25 days after the initial pretrial conference. The court set trial for September 30, 2008.

¶5 On August 14, 2008, defense counsel submitted a motion for a Rule 11 competency hearing. Without objection from the State, the trial court granted Defendant's motion for a Rule 11 evaluation. Accordingly, the court vacated the September 30 trial date, and excluded the time from August 14, 2008, until such time as Defendant was determined competent to stand trial.

¶6 On August 19, 2008, two doctors were appointed to determine Defendant's competency to stand trial. Both doctors opined that he was competent to stand trial, with one doctor noting that Defendant "tended to describe the events in question in a rather circumstantial fashion, which at times made it difficult to discern the exact relevance of his narrative to the specific allegations." On September 23, 2008, the court found Defendant competent to stand trial, and set the new last day for December 11, 2008.

¶7 The court received Defendant's Motion to Withdraw Counsel on September 30, 2008. That same day, the court set trial for November 10, 2008. On October 22, 2008, Defendant was appointed new counsel. At the October 23, 2008 status conference, defense counsel raised the issue of Defendant proceeding *pro per*. At that time, however, Defendant advised the court that he had no objection to proceeding with the assistance of his current attorney.

¶8 But five days before trial, on November 5, 2008, defense counsel advised the court that he and Defendant "are not in agreement," and that Defendant would like to proceed *pro per*. After addressing Defendant, the court found that he knowingly, intelligently, and voluntarily waived his right to counsel. Defendant signed and the court accepted a Waiver of Counsel form, and the court appointed Defendant's most recent attorney

as his advisory attorney. Because Defendant elected to proceed *pro per*, the court excluded all time between November 10, 2008, and January 20, 2009, and set the new last day for February 20, 2009. Trial was continued from November 10, 2008, until January 20, 2009.

¶9 On January 5, 2009, Defendant filed a motion for continuance. The court granted the continuance, excluded time from January 20, 2009, until January 26, 2009, and set the new last day as February 26, 2009.

¶10 On January 15, 2009, Defendant filed a motion to suppress evidence. In his motion, Defendant appeared to argue that the crack rock should be suppressed because six individuals, including Officers Gentry and Banda, the prosecutor, a judge, and his first defense counsel acted together to participate in an "unlawful proceeding" to "extradite[e]" the true perpetrator of the crime. The thrust of his argument appeared to be that these individuals conspired to selectively prosecute him. The trial court denied the motion.

¶11 On February 3, 2009, trial commenced. After the State presented its case-in-chief, Defendant testified. On cross-examination, he admitted to having committed four prior felonies. Defendant also admitted that when he was confronted by Officers Banda and Gentry, he had in his hand a pipe, which "had substance in it." He denied that there was a crack rock in

his hand; instead, he stated that the narcotic was in the pipe. After his testimony, Defendant rested. Thereafter the jury found him guilty of Possession or Use of Narcotic Drugs.

¶12 On March 11, 2009, the court held a sentencing hearing. After considering Defendant's admissions of his prior convictions and finding no mitigating circumstances, the trial court sentenced Defendant to a presumptive term of ten years' imprisonment, crediting Defendant with 291 days of presentence incarceration. The court also imposed a $2,000 drug fine, plus an 84 percent surcharge, for a total fine of $3,680. It also imposed a $20 time payment fee and a $20 probation surcharge.

¶13 Defendant timely appeals. 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 (2010), and 13-4033(A)(1).

DISCUSSION

¶14 Defendant raises nine issues on appeal: (1) ineffective assistance of counsel; (2) prosecutorial misconduct; (3) judicial bias; (4) evidence tampering; (5) probable cause for the stop and search; (6) mental health procedures; (7) speedy trial rights; (8) transcript accuracy; and (9) the imposition of a probation fee at sentencing. We review claims of prosecutorial misconduct and judicial bias for abuse of discretion, as they were sufficiently preserved below. *See*

State v. Newell, 212 Ariz. 389, 402, ¶ 61, 132 P.3d 833, 846 (2006) (prosecutorial misconduct); *State v. Ramsey*, 211 Ariz. 529, 541, ¶ 37, 124 P.3d 756, 768 (App. 2005) (judicial bias). But because Defendant did not preserve the remaining issues, we review only for fundamental error as to those claims. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005).[4]

I. SELECTIVE PROSECUTION

¶15 Defendant appears to claim that the prosecutor, his first defense counsel and the court acted in concert to selectively prosecute his case. We understand Defendant to assert prosecutorial misconduct and judicial bias, and we address each below.

A. Prosecutorial Misconduct

¶16 "Prosecutorial misconduct sufficient to justify reversal must be so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Lee*, 189 Ariz. 608, 616, 944 P.2d 1222, 1230 (1997) (citation omitted) (internal quotation marks omitted). Prosecutorial misconduct "is not merely the result of legal error, negligence, mistake, or insignificant impropriety, but, taken as a whole, amounts to

[4] With respect to his claim of ineffective assistance of counsel, we do not address that issue on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). Ineffective assistance of counsel claims are properly brought under Rule 32.

intentional conduct which the prosecutor knows to be improper and prejudicial, and which he pursues for any improper purpose with indifference to a significant resulting danger of mistrial or reversal." *Pool v. Superior Court (State)*, 139 Ariz. 98, 108-09, 677 P.2d 261, 271-72 (1984) (footnote omitted). Defendant fails to specify how the prosecutor engaged in misconduct. Our review of the record reveals that the State initially failed to comply with discovery Rule 15.1(b). And pursuant to Rule 15.7(a), the court properly imposed remedies for the discovery violations. The State's failure in this regard does not amount to prosecutorial misconduct.

¶17 If we construe Defendant's argument to suggest that his equal protection rights were violated because the State selectively chose to prosecute him for Possession or Use of Narcotic Drugs, while declining to prosecute another individual purportedly at the scene, Defendant must show "(1) other similarly situated people were not charged with the crime he is accused of; and (2) the decision to charge him with that crime was made based on an impermissible ground, like race or religion." *State v. Montano*, 204 Ariz. 413, 428, ¶ 78, 65 P.3d 61, 76 (2003) (citation omitted). We find no evidence in the record to support his claim.

B. Judicial Bias

¶18 We presume a trial judge is free from prejudice and bias. *State v. Hurley*, 197 Ariz. 400, 404, ¶ 24, 4 P.3d 455, 459 (App. 2000). A party may rebut this presumption by demonstrating prejudice or bias by a preponderance of the evidence. *Id.* at 404-05, ¶ 24, 4 P.3d at 459-60. Defendant fails to support his claim of judicial bias by indicating where in the record the court's conduct exhibited such bias.[5] Our independent review of the record does not indicate bias.

II. EVIDENCE TAMPERING

¶19 We also conclude that Defendant's argument that the evidence was tampered with is without merit. "[U]nless a defendant can offer proof of actual change in the evidence, or show that the evidence has, indeed, been tampered with, such evidence will be admissible." *State v. Ritchey*, 107 Ariz. 552, 557, 490 P.2d 558, 563 (1971). Defendant has failed to provide any support for the proposition that evidence presented at trial was tampered with. Without such proof, the evidence was properly admissible.

III. PROBABLE CAUSE FOR THE STOP AND SEARCH

¶20 The Fourth Amendment is not implicated by every interaction between police officers and citizens. *State v.*

[5] It appears from his motion to suppress that Defendant's allegations of judicial bias may even be aimed at a judge not connected with this case.

Canales, 222 Ariz. 493, 494, ¶ 6, 217 P.3d 836, 837 (App. 2009). A Fourth Amendment "seizure" occurs only when an encounter between the police and a citizen is not voluntary and it results in the restraint of the individual's liberty. *Id.* at 495, ¶ 6, 217 P.3d at 838. Here, when Officer Gentry asked Defendant what he held in his hand, there was no show of force or intimidation -- the officer merely chuckled at Defendant's response that there was skin in his hands -- and therefore there was no seizure under the Fourth Amendment. *See United States v. Mendenhall*, 446 U.S. 544, 557-58 (1980) (no seizure where federal agents, without making a threat or show of force, simply asked defendant if she would accompany them). When Defendant voluntarily opened his fist to reveal a crack rock, the officers had sufficient probable cause to arrest Defendant and conduct a search incident to that arrest.

IV. MENTAL COMPENTENCY PROCEDURES

¶21 In his opening brief, Defendant's counsel simply lists, without elaboration, mental health procedures as an issue. Rule 11.2(a) allows a party to make a request in writing for "an examination to determine whether a defendant is competent to stand trial." The rule requires that a motion for such an evaluation "state the facts upon which the mental examination is sought." Defendant's counsel filed a request for a Rule 11 evaluation, asserting that while Defendant appeared to

have a "fairly good understanding of certain aspects of the legal system," he exhibited "substantial paranoia and . . . delusional thought patterns regarding the circumstances at issue during the date of [the] incident." In the motion, counsel advised the court that Defendant was against a Rule 11 evaluation, but contended that "his competency is of great concern in ensuring he is able to competently participate in making important decisions about his case." The record does not indicate that the request for a Rule 11 examination was made for an improper purpose, and procedures were properly followed in accordance with the requirements of Rule 11.2(a).

V. SPEEDY TRIAL RIGHTS

¶22 Next, Defendant argues that his right to a speedy trial was violated. We disagree.

¶23 Neither the United States Constitution nor the Arizona Constitution requires that a trial take place within a specific time period to ensure compliance with the right to a speedy trial. *State v. Spreitz*, 190 Ariz. 129, 139, 945 P.2d 1260, 1270 (1997). Rule 8, however, provides stricter speedy trial rights than those provided by the United States Constitution. *State v. Tucker*, 133 Ariz. 304, 308, 651 P.2d 359, 363 (1982).

¶24 Defendant was arraigned on June 4, 2008. Pursuant to Rule 8.2(a)(1), a trial must commence within 150 days of arraignment if the person is held in custody. Without any

delays, November 1, 2008, should have been Defendant's last day for trial. The trial commenced on February 3, 2009. Therefore, the trial began 244 days after arraignment.

¶25 When it granted defense counsel's motion for a Rule 11 evaluation, the trial court properly excluded time from August 14, 2008, until Defendant's competency was determined on September 23, 2008. *See* Ariz. R. Crim. P. 8.4(a). The new last day was set for December 11, 2008. The court also excluded time from November 10, 2008, to January 20, 2009, and set the new last day as February 20, 2009, when Defendant elected to proceed *pro per*. This period was properly excluded as time necessary for Defendant to prepare for trial. *State v. Long*, 148 Ariz. 295, 296, 714 P.2d 465, 466 (App. 1986). When the court granted Defendant's motion for a continuance, the court properly excluded time from January 20, 2009 to January 26, 2009, and set the new last day as February 26, 2009. *See* Ariz. R. Crim. P. 8.4(a). A total of 117 days were properly excluded; accounting for excludable delays, the trial commenced well within the 150-day period.

VI. TRANSCRIPT ACCURACY

¶26 Without citing to specific portions of the transcript that contain omissions or are inaccurate, Defendant contends that the trial transcript does not contain an accurate presentation of the proceedings below. The transcript was

transcribed by a certified court reporter pursuant to Rule 31.8(b). We can discern no reason to doubt the accuracy of the transcript, and Defendant identifies none.

VII. PROBATION FEE

¶27 *Ne*xt, Defendant argues that the trial court erred when it assessed him a $20 probation fee. We disagree. "[I]n addition to any other penalty assessment provided by law, a probation surcharge of twenty dollars shall be levied on every fine, penalty and forfeiture imposed and collected by the superior . . . courts for criminal offenses . . . ." A.R.*S.* *§* 12-114.01(A) (Supp. 2009). The court imposed a $2,000 drug fine; it was therefore required to impose a $20 probation surcharge.

VIII. REMAINING ISSUES

¶28 The record reflects Defendant received a fair trial. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was present at all critical stages. The court properly instructed the jury on the elements of Possession or Use of Narcotic Drugs. Further, the court properly instructed the jury on the State's burden of proof and the necessity of a unanimous verdict. The court received and considered a presentence report and imposed a legal sentence.

CONCLUSION

¶29 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm. After the filing of this decision, defense counsel's obligations in this appeal have come to an end. Defense counsel need do no more than inform Defendant of the outcome of this appeal and his future options, unless, upon review, counsel finds 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). Defendant has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review. Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has 30 days in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge