IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06-29-2010
PHILIP G. URRY, CLERK
BY: GH

STATE OF ARIZONA,	)	
	)	1 CA-CR 09-0474
Appellee,	)	
	)	DEPARTMENT E
v.	)	
	)	MEMORANDUM DECISION
ERNESTO GONZALEZ,	)	(Not for Publication -
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
_____	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR 2007-182113-001-DT

The Honorable F. Pendleton Gaines, Judge

AFFIRMED AS MODIFIED

Terry Goddard, Attorney General
by Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee Phoenix

James Haas, Maricopa County Public Defender
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Attorneys for Appellant Phoenix

W E I S B E R G, Judge

¶1 Ernesto Gonzalez ("Defendant") appeals from his convictions and sentences imposed after a jury trial. Defendant's counsel has filed a brief in accordance with *Anders v. California*,

386 U.S. 738, 744 (1967), and *State v. Leon,* 104 Ariz. 297, 299, 451 P.2d 878, 880 (1969), advising this court that after a search of the entire record on appeal, he finds no arguable ground for reversal, but he does mention two issues that Defendant wishes to raise. This court granted Defendant an opportunity to file a supplemental brief, but none was filed. Counsel now requests that we search the record for fundamental error. *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999).

¶2 We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033 (A) (2010). Finding no reversible error, we affirm Defendant's convictions and his sentences as modified.

FACTS AND PROCEDURAL BACKGROUND

¶3 We review the facts in the light most favorable to sustaining the verdict. *See State v. Stroud,* 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005). Defendant was indicted for possession of over four pounds of marijuana for sale, a Class 2 felony, and possession of drug paraphernalia, a Class 6 felony. His co-defendant, Alexander Gonzalez-Garcia, was charged with two additional felonies, possession of dangerous drugs (methamphetamine) for sale and resisting arrest. The State filed allegations of historical prior felony convictions and of aggravating circumstances other than prior convictions.

¶4 Among others, Defendant noticed the defense of mere presence. Defendant joined in his co-defendant's motion to suppress evidence obtained as a result of a warrantless entry and subsequent search of a house. Following an evidentiary hearing, the court denied the motion to suppress. Defendant also filed a motion to sever his trial from that of his co-defendant. The court denied that motion as well. After the State presented its case, Defendant renewed and the court denied his motion to sever. The following evidence was presented at trial.

¶5 On December 26, 2007, Phoenix police Officer Kartchner, along with other police units, responded to a call of a residential burglary involving armed suspects who had invaded a house and had fled. Officer McBride entered the house where the home invasion occurred and did a protective sweep of the interior. He did not find armed subjects or anything of evidentiary value inside. However, as he and other officers were walking around the perimeter of the house, they smelled a very strong odor of fresh marijuana emanating from the house next door. The officer decided to make contact with any individuals in that house to determine if the armed suspects were inside, if there were victims who needed protection and to investigate the source of the smell of marijuana.

¶6 A team of officers knocked on the door and were yelling loudly. They heard a car alarm go off in the garage and could hear movement inside the garage. Defendant opened the front door.

Officer McBride observed that he was "extremely agitated" and was talking back to the officers. He was aggressive and did not want to come outside to speak to them. With the door open, the officers could smell an even stronger odor of marijuana coming from the house. The officers proceeded to enter the house to do a protective sweep and to investigate the odor of marijuana. They found large bales of marijuana throughout the house and in the garage. They also found the co-defendant hiding in a closet in the bathroom of the master bedroom.

¶7 Detective Rice testified that based on his training and experience, he believed that the home invaders had targeted the wrong residence and that the house where officers found the marijuana was a "stash house" where large amounts of drugs are stored and distributed. Detective Chadwick executed a search warrant that Detective Bensen obtained after the initial entry into the stash house. He seized 80 bales of marijuana, numerous items used for wrapping, packaging and concealing marijuana, drug transaction ledgers and a set of keys found on Defendant, one of which fit the stash house door.

¶8 Core samples of the bales were tested and revealed that the substance was marijuana and that the total weight was 1,672 pounds. Detective Bensen estimated that 1,672 pounds of marijuana had a street value of $836,000 or more and that the marijuana was

possessed for sale. At trial, the jury was shown a video of the co-defendant purchasing numerous items of drug paraphernalia.

¶9 The jury found Defendant guilty on both charges. The court found that the State proved four historical prior felony convictions. The court sentenced Defendant to presumptive, concurrent terms of imprisonment of 15.75 years for possession of marijuana for sale and 3.75 years for possession of drug paraphernalia, with 274 days of presentence incarceration.[1]

DISCUSSION

¶10 Through counsel, Defendant has raised two issues. He claims the trial court abused its discretion in denying his motion to suppress evidence and his motion to sever.

Motion to Suppress

¶11 Defendant claims the warrantless entry into the stash house violated his rights under the Fourth and Fourteenth Amendments and that all evidence seized as result of that illegal entry should have been suppressed as "fruit of the poisonous tree." In denying the motion to suppress, the court found that the

[1]Although the minute entry states that the court imposed a sentence of 3.75 years for possession of drug paraphernalia, the transcript states that the sentence is 3.5 years. This is incorrect as the court intended to impose the presumptive sentence, which is 3.75 years. Where there is a discrepancy between an oral pronouncement of sentence and the minute entry, normally the oral pronouncement controls; however, where it is clear from the record that the transcript does not reflect what the court intended, it is not necessary to remand for resentencing or to correct the record. *State v. Bowles,* 173 Ariz. 214, 841 P.2d 209 (App. 1992).

officers had probable cause to enter the stash house and that exigent circumstances existed that justified their initial warrantless entry. We agree.

¶12 The trial court's ruling on a motion to suppress should not be reversed "absent clear and manifest error." *State v. Stanley,* 167 Ariz. 519, 523, 809 P.2d 944, 948 (1991). Police officers may not conduct a warrantless entry into a house absent exigent circumstances. *State v. White,* 160 Ariz. 24, 32, 770 P.2d 328, 336 (1989). Situations recognized as exigent circumstances include response to an emergency, hot pursuit, probability of destruction of evidence, the possibility of violence and preventing a suspect from fleeing or attempting to flee. *Id.*; *State v. Ault,* 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986). Probable cause may arise from an officer's sense of smell, including the smell of marijuana emanating from a hotel room, the trunk of an automobile or a suitcase. *State v. Decker,* 119 Ariz. 195, 197, 580 P.2d 333, 335 (1978). Thus, if the smell of marijuana provided the officers with probable cause to search the stash house and exigent circumstances existed to enter the house without a warrant, the initial warrantless entry was legal. *State v. Kosman,* 181 Ariz. 487, 491, 892 P.2d 207, 211 (App. 1995).

¶13 As the trial court found, the officers had probable cause to search the stash house because of the strong odor of marijuana emanating from it. There were also exigent circumstances. The

officers were called to the scene of a home invasion involving armed suspects who had fled. They reasonably believed that the armed suspects had targeted the wrong house. When they knocked on the door of the stash house, they heard a car alarm go off and movement inside the garage. The officers were concerned that the armed suspects were inside the house or the garage and may have been attempting to flee, possibly with weapons or contraband. They were also concerned that victims might be inside who needed protection. Exigent circumstances existed because of the possibility that armed suspects were attempting to flee, the potential for violence and the possibility of destruction of evidence. The warrantless entry was not illegal.

¶14 Further, the police officers could lawfully conduct a protective sweep of the stash house once they lawfully entered it and exigent circumstances existed. *State v. Main,* 159 Ariz. 96, 99, 764 P.2d 1155, 1158 (App. 1988). While engaged in a protective sweep, they saw bales of marijuana in plain view and obtained a search warrant based on that information. The evidence obtained as a result of the search pursuant to the warrant was admissible. *State v. Gulbrandson,* 184 Ariz. 46, 57, 906 P.2d 579, 590 (1995). The trial court did not err in denying Defendant's motion to suppress evidence.

Motions to Sever

¶15 Defendant claims the trial court erred in denying his motions to sever. He claims that a damaging video showing the co-defendant purchasing drug paraphernalia was admitted at trial and caused severe prejudice to his mere presence defense. He also argued below that it would be difficult for the jury to segregate the evidence against each defendant as the co-defendant was charged with two additional offenses, and that the evidence against the co-defendant was stronger and would "rub-off" on Defendant. In denying the motion to sever, the trial court found that the evidence in the case overlapped and "intertwined to a substantial degree," that Defendant had not demonstrated mutually exclusive defenses, that the jury would be able to separate the evidence on each count against each defendant, and that Defendant had not established the danger of prejudice in a joint trial.

¶16 We review the denial of a motion to sever for an abuse of discretion. *State v. Cruz,* 137 Ariz. 541, 544, 672 P.2d 470, 473 (1983). When multiple defendants are charged with the same offense, which may be proved by the same evidence, the cases against each defendant may be joined for trial. *State v. Grannis,* 183 Ariz. 52, 58, 900 P.2d 1, 7 (1995); Ariz. R. Crim. P. 13.3(b). A court must sever the trials on motion of any party if "necessary to promote a fair determination of the guilt or innocence of any defendant of any offense." Ariz. R. Crim. P. 13.4(a). In making

that determination, the court must balance the possible prejudice to the defendant against the interests of judicial economy; to that end the defendant must demonstrate substantial and compelling prejudice against which the court is unable to protect. *Grannis,* 183 Ariz. at 58, 900 P.2d at 7. The mere introduction of evidence concerning one defendant's conduct that does not implicate the other defendant does not constitute grounds for severance. *State v. Van Winkle,* 186 Ariz. 336, 339, 922 P.2d 301, 304 (1996). Further, although there may be some possibility of confusion in a joint trial, in the interests of judicial economy, joint trials are the rule, not the exception. *State v. Murray,* 184 Ariz. 9, 25, 906 P.2d 542, 558 (1995).

¶17 Here, as the court found, there was substantial overlapping evidence against both defendants on the charges of possession of marijuana for sale and possession of drug paraphernalia. Most of the evidence involved that found at the stash house. Evidence that the co-defendant alone purchased some items of drug paraphernalia was not so prejudicial to Defendant that severance was required. Also, neither defendant testified. Thus, there was no danger arising from one defendant making incriminating statements against the other or offering antagonistic or mutually exclusive defenses. *See Grannis,* 183 Ariz. at 58, 900 P.2d at 7.

¶18 Although the co-defendant was charged with two other offenses, there is nothing to suggest that this evidence had a rub-off effect on Defendant. On this point, the jury was specifically instructed that it must consider each count separately on the evidence and not be influenced by evidence on any other counts. Defendant has failed to show that he suffered substantial and compelling prejudice sufficient to warrant severance. The court did not err in denying Defendant's motions to sever.

Presentence Incarceration Credit

¶19 We note that the court awarded Defendant 274 days of presentence incarceration credit. The presentence report correctly reflected that Defendant was in custody from December 26, 2007 to March 25, 2008 and from October 27, 2008 to April 30, 2008. Although the sentencing was originally set for May 1, 2009, it was continued until May 29, 2009. The record indicates that the number of days of presentence incarceration credit is incorrect and that Defendant is entitled to 302 days of presentence incarceration credit, rather than 274 days. *See* § 13-712(B) (2010)(defendant is entitled to presentence incarceration credit "for [a]ll time spent in custody pursuant to an offense until the prisoner is sentenced to imprisonment"). Failure to award the correct amount of presentence incarceration credit is fundamental error. *State v. Ritch,* 160 Ariz. 495, 498, 774 P.2d 234, 237 (App. 1989). Accordingly, pursuant to A.R.S. § 13-4037(A), we modify Defendant's

sentences to reflect that he is entitled to 302 days of presentence incarceration credit.

CONCLUSION

¶20 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 represented by counsel at all stages of the proceedings, the sentences imposed were within the statutory limits, and sufficient evidence existed for the jury to find Defendant committed the offenses.

¶21 After the filing of this decision, counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do no more than inform Defendant of the status of the appeal and of Defendant's future options, unless counsel's review reveals 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). On the court's own motion, Defendant has thirty days from the date of this decision to proceed, if he desires, with a motion for reconsideration or petition for review *in propria persona.*

¶22 Accordingly, we affirm Defendant's convictions and sentences as modified.

/s/_____
SHELDON H. WEISBERG,
Presiding Judge

CONCURRING:

/s/_____
PHILIP HALL, Judge

/s/_____
JOHN C. GEMMILL, Judge