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

DIVISION ONE
FILED: 03/23/2010
PHILIP G. URRY,CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	No. 1 CA-CR 09-0640
v.	DEPARTMENT A
DAMIEN DONTE TERRY, Appellant.	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-111509-001 DT

The Honorable Julie P. Newell, Judge *Pro Tem*

AFFIRMED

Terry Goddard, Arizona 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

D O W N I E, Judge

¶1 Damien Donte Terry ("defendant") timely appeals his conviction for possession or use of marijuana, a class 1

misdemeanor, pursuant to Arizona Revised Statutes ("A.R.S.") sections 13-702(G) and -3405 (Supp. 2009). Pursuant to *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has searched the record and found no arguable question of law. Counsel requests that we review the record for fundamental error. *See State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona*, but he did not do so. On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Tison,* 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981), *cert. denied,* 459 U.S. 882 (1982).

FACTS AND PROCEDURAL HISTORY

¶2 At approximately 5:00 a.m. on February 13, 2009, Officer A.B. and his partner were on routine patrol in an industrial area and saw a group of men standing near a parked vehicle with "smoke surrounding them." As they drove past, Officer A.B. smelled marijuana through the "slightly cracked" windows of the patrol car. The officers turned around and parked approximately twenty feet away. As Officer A.B. approached a man later identified as defendant, the smell of marijuana grew stronger. On the hood of the parked car, Officer A.B. saw a pamphlet with a "green, leafy substance" sitting on it that he suspected to be marijuana. Officer A.B. made eye

contact with defendant and watched him grab the pamphlet, turn his arm to the side, and dump the substance on the ground. Officer A.B. saw the substance fall from the pamphlet to the ground; he retrieved a clump of the green, leafy substance on the ground. It "smelled like . . . marijuana," and the officer impounded it.

¶3 Defendant was charged with possession or use of marijuana, a class 6 felony.[1] The trial court later granted the State's motion to designate the charge a class 1 misdemeanor.[2] The court also granted defendant's motion to preclude evidence of a prior conviction, but denied his request that it take judicial notice of the time of sunrise on February 13, 2009.

¶4 Defendant waived a jury trial, and a one-day bench trial was held. The State presented three witnesses; defendant cross-examined each. Defendant then moved for a judgment of acquittal pursuant to Arizona Rule of Criminal Procedure ("Rule") 20, asserting the State failed to prove "possession of the green, leafy substance from the hood to what was recovered." The motion was denied. The defense called one witness;

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[1] At defendant's arraignment, two other charges were dismissed.

[2] The motion also requested a bench trial due to the nature of the charge. *See Derendal v. Griffith,* 209 Ariz. 416, 422, ¶ 21, 104 P.3d 147, 153 (2005) (finding a rebuttable presumption that no jury trial is necessary for a misdemeanor offense punishable by no more than six months of incarceration). Defendant did not file a response.

defendant did not testify. The court found defendant guilty. At defendant's request, the court moved immediately to sentencing and imposed a six-month term of unsupervised probation. *See* Ariz. R. Crim. P. ("Rule") 26.3(a)(1) (allowing a defendant to request that his sentence be pronounced earlier).

DISCUSSION

¶5 We have read and considered the briefs submitted by defendant and his counsel and have reviewed the entire record. *State v. Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was present at all critical phases of the proceedings and represented by counsel.

¶6 The trial court properly denied defendant's Rule 20 motion. A judgment of acquittal is appropriate only when there is "no substantial evidence to warrant a conviction." Rule 20. Substantial evidence is such proof that "reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990) (citation omitted). "Reversible error based on insufficiency of the evidence occurs only where there is a complete absence of

probative facts to support the conviction." *State v. Soto-Fong*, 187 Ariz. 186, 200, 928 P.2d 610, 624 (1996) (citation omitted).

¶7 The State presented substantial evidence of guilt. Officer A.B. testified he smelled marijuana as the patrol car passed by defendant and that he saw defendant throw a "green, leafy substance" on the ground. Officer A.B. retrieved a clump of the substance, which testing revealed to be marijuana. Defendant's Rule 20 motion was based on his belief that the lighting conditions at the time prevented Officer A.B. from "actually see[ing] what he says he saw." Officer A.B., however, testified "it was light . . . I could see well enough to not use my flashlight and not use my spotlight." A defense witness also testified there were four utility poles with lights that would illuminate the area. On these facts, the trier of fact could have found Officer A.B.'s testimony to be credible.

¶8 Even assuming that defendant had a right to a jury trial on the misdemeanor charge, the trial court obtained an appropriate waiver.[3] Before accepting a jury waiver, "the court shall address the defendant personally, advise the defendant of the right to a jury trial and ascertain that the waiver is knowing, voluntary, and intelligent." Rule 18.1(b)(1). Whether

[3] Acknowledging "it's kind of a strange definition of when you're eligible for a trial or not eligible for a trial," the court engaged in a colloquy to ensure it was "totally covered on this."

a waiver is made knowingly will depend on the unique circumstances of each case. *State v. Butrick,* 113 Ariz. 563, 566, 558 P.2d 908, 911 (1976) (citation omitted). The pivotal consideration "is the requirement that the defendant understand that the facts of the case will be determined by a judge and not a jury." *State v. Conroy,* 168 Ariz. 373, 376, 814 P.2d 330, 333 (1991) (citations omitted). To ensure that a defendant understands the right waived, the court must address the defendant personally and receive an affirmative response. *Butrick,* 113 Ariz. at 566, 558 P.2d at 911.

¶9 Defendant was represented by counsel. The judge directly questioned defendant, and he answered each question. The court determined that defendant had signed a written waiver, discussed it with his attorney, understood the form, and had no additional questions. Defendant stated no one had forced, threatened or coerced him to sign the waiver, nor were any promises made. Only then did the court find the waiver was voluntarily, knowingly, and intelligently made.

¶10 Finally, the trial court properly refused to take judicial notice of the time of sunrise on February 13, 2009. "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose

accuracy cannot reasonably be questioned." Ariz. R. Evid. 201(b). A court "shall take judicial notice if requested by a party and supplied with the necessary information." *Id.* 201(d).

¶11 Defendant asked the court to take judicial notice of documents from the U.S. Naval Observatory showing that "civil twilight" was at 6:49 a.m. on February 13, 2009, meaning "artificial illumination is normally required on ordinary outdoor activities" occurring before that time. The proffered document was not certified and came from an internet website. The State objected because a "printout from a website might not be what it purports to be," and the document was not self-authenticating. Because the authenticity of the documents was questionable, the trial court appropriately declined to take judicial notice.[4]

CONCLUSION

¶12 We affirm defendant's conviction and sentence. 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

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[4] Over the State's objection, the court allowed Officer A.B. to read the sunrise data and description of civil twilight into the record. Defendant then cross-examined Officer A.B. about the lighting conditions that morning.

review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, 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.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
LAWRENCE F. WINTHROP, Judge