

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: 09/30/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0901
)
Appellee,) DEPARTMENT E
)
v.) MEMORANDUM DECISION
)
GEORGE YBARRA,) (Not for Publication -
) Rule 111, Rules of the
Appellant.) Arizona Supreme Court)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2008-169581-001 DT

The Honorable Edward Burke, Judge

CONVICTION AND SENTENCE 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 Cory Engle, Deputy Public Defender
Attorneys for Appellant

George Ybarra Eloy
Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following George Ybarra's conviction of possession of drug paraphernalia, a Class 4 felony. Ybarra's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Ybarra filed a "Motion to Clarify," which we will construe as a supplemental brief. Counsel now asks this court to search the record for fundamental error. After reviewing the entire record, we affirm Ybarra's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2 Ybarra was pulled over on a routine traffic stop and arrested for driving on a suspended license.¹ During a search incident to arrest, police found a pipe used to ingest methamphetamines hidden in Ybarra's sock. A subsequent search of Ybarra's car uncovered a clear plastic baggie containing 150 milligrams of methamphetamine. Ybarra was charged with possession or use of a dangerous drug and possession of drug paraphernalia. A jury found him guilty of possession of drug

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Ybarra. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

paraphernalia but acquitted him on the other charge. After the State proved one historical prior felony conviction, the court sentenced Ybarra to a mitigated term of one year in prison.

¶13 Ybarra timely appealed. 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 (2010) and -4033(A)(1) (2010).²

DISCUSSION

¶14 The record reflects Ybarra received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages, except the evidentiary hearing on a motion to suppress, in which his presence was waived by counsel. The court held appropriate pretrial hearings.

¶15 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of eight members. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict. The court received and considered a presentence report and addressed its contents

² Absent material revisions after the date of an alleged offense, we cite a statute's current version.

during the sentencing hearing and imposed a legal sentence on the crime of which Ybarra was convicted.

¶16 In his *pro persona* filing, Ybarra argues the court erroneously failed to grant him presentence incarceration credit for time he spent in federal custody on a separate immigration matter. Contrary to Ybarra's argument, however, presentence incarceration credit is not available to a defendant incarcerated on an unrelated federal charge. See A.R.S. § 13-712(B) (2010); *State v. Lalonde*, 156 Ariz. 318, 320, 751 P.2d 978, 980 (App. 1987) (defendant not entitled to credit against Arizona sentence for incarceration by another sovereign on a non-Arizona charge).

CONCLUSION

¶17 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶18 After the filing of this decision, defense counsel's obligations in this appeal have ended. Defense counsel need only inform Ybarra 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). On the court's own motion, Ybarra has 30 days from the date of this decision to proceed, if

he wishes, with a *pro per* motion for reconsideration. Ybarra has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICK IRVINE, Judge

/s/
PHILIP HALL, Judge