

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: 11-16-2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE
COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
)
 Appellee,) 1 CA-CR 09-0919
)
 v.) DEPARTMENT E
)
) MEMORANDUM DECISION
 JOHNNY LEE ALLEN,) (Not for Publication -
) Rule 111, Rules of the
 Appellant.) Arizona Supreme Court)
)
 _____)

Appeal from the Superior Court of Maricopa County

Cause No. CR 2009-115813-001 DT

The Honorable F. Pendleton Gaines, III, Judge

AFFIRMED

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
by Louise Stark, Deputy Public Defender
Attorneys for Appellant Phoenix

W E I S B E R G, Judge

¶1 Johnny Lee Allen ("Defendant") appeals from his conviction following a jury trial and from the sentence imposed. 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, counsel finds no arguable ground for reversal. 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). Having done so and finding no reversible error, we affirm.

¶12 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).

FACTS AND PROCEDURAL HISTORY

¶13 We view the facts in the light most favorable to sustaining the conviction. *State v. Stroud*, 209 Ariz. 410, 412, ¶ 6, 103 P.3d 912, 914 (2005). Defendant was indicted for possession for sale of narcotic drugs, a class 2 felony. The State alleged that Defendant had one historical prior felony conviction for attempt to commit possession for sale of narcotic drugs, a class 3 felony.¹

¶14 At trial, Officer Hinz testified that on March 3, 2009, he and Detective Ganz were on duty in the Central City Precinct in Phoenix, a high crime neighborhood. Officer Hinz was driving a

¹Defendant committed this offense on August 2, 1994, was sentenced on May 31, 1995, but was not released from custody until 2000. Thus, the prior felony conviction could be used to enhance

fully marked police vehicle, and both officers were in uniform. Two undercover agents in the area alerted the officers that Defendant had failed to use the crosswalk when he crossed the street and they stopped Defendant for jaywalking.

¶15 Officer Hinz made contact with Defendant. He noticed that Defendant's hands were in his pockets and for safety reasons, he asked Defendant to remove his hands. Defendant put his hands in his pockets two more times, and the officer again asked Defendant to remove his hands from his pockets. Defendant had difficulty doing this and "appeared to be pretty concerned about whatever it was in his pockets." The officer conducted a pat-down search for weapons.

¶16 In the meantime, Detective Ganz searched the area to see if Defendant had dropped something. He ran an identification check and found that Defendant had an outstanding warrant for his arrest on an unrelated, non-drug charge. Officer Hinz then arrested Defendant and searched him. In Defendant's pockets, he found a rolled up piece of toilet paper containing four off-white rock-like objects, which in his experience, appeared to be crack cocaine. He also found about \$300, a wallet, and cell phone. Officer Hinz seized the items and gave them to Officer Ganz, who later impounded them.

his sentence. A.R.S. §§ 13-105(22)(b), 13-703(B)(2)(2010).

¶17 Officer Hinz gave Defendant his *Miranda* rights and asked him about the items he found. Defendant first said that he was going to smoke the crack cocaine with a friend. When the officer questioned him about the amount of drugs in his possession, which was not consistent with personal use, Defendant said he was going to sell the drugs to a female for \$100 at a nearby gas station.

¶18 A City of Phoenix forensic scientist analyzed the impounded substance believed to be drugs. She concluded it was cocaine base in a useable condition weighing 940 milligrams (over the threshold amount of 750 milligrams).

¶19 The jury convicted Defendant of the lesser-included offense of possession of narcotic drugs. The State filed an allegation that Defendant was ineligible for probation under A.R.S. § 13-901.01 (Proposition 200) because he had two prior drug convictions. The court found that Defendant had one 1995 prior historical felony conviction for attempt to commit possession for sale of narcotic drugs, a class 3 felony. The court also found that Defendant was convicted on March 17, 2005 of possession or use of marijuana, a class 1 misdemeanor, and that he was ineligible for probation under Proposition 200.² The court imposed a slightly mitigated sentence of 3.5 years for possession of narcotic drugs

²We have held that a preparatory drug offense qualifies as a prior drug offense under Proposition 200. See *Raney v. Lindberg*, 206 Ariz. 193, 198-99, ¶¶ 17-19, 76 P.3d 867, 872-73 (App. 2003)(disagreeing with *State v. Ossana*, 199 Ariz. 459, 461-62, ¶ 11, 18 P.3d 1258, 1260-61 (App. 2001)).

with one prior historical felony conviction and awarded Defendant 220 days of presentence incarceration credit. The court imposed a \$2,000 fine. Defendant obtained permission to file a delayed notice of appeal pursuant to an Rule 32.1(f), Arizona Rules of Criminal Procedure.

DISCUSSION AND CONCLUSION

¶10 Counsel was unable to find a non-frivolous issue to argue in this appeal. However, Defendant has asked counsel to raise the issue of whether the State sufficiently proved Defendant's March 17, 2005 misdemeanor conviction for possession of marijuana, which removed him from mandatory probation under Proposition 200. We conclude that the State did prove the prior conviction.

¶11 Under A.R.S. § 13-901.01(H)(1) (2010), unless otherwise qualifying for probation, "[a] person is not eligible for probation . . . if the court finds the person . . . [h]ad been convicted three times of personal possession of a controlled substance or drug paraphernalia." The State argued that the instant offense was Defendant's third prior felony conviction and that he was not entitled to mandatory probation under this statute.

¶12 At sentencing, the State produced evidence of (1) two latent fingerprint cards (Exhibit 1); (2) a certified copy of Defendant's fingerprint card (Exhibit 2); (3) Defendant's booking photograph (Exhibit 3); a certified copy of a minute entry of Defendant's March 17, 2005 conviction (Exhibit 4); a certified copy

of a minute entry of Defendant's admission of a probation violation relating to the 2005 conviction and his reinstatement on probation (Exhibit 5); a certified copy of a minute entry of Defendant's May 31, 1995 conviction (Exhibit 6); and (7) Arizona Department of Corrections pen pack (Exhibit 7). A latent print examiner testified that he compared Defendant's known fingerprints with fingerprints on the minute entries. He concluded there was a match between the fingerprints on Exhibit 2 and those on Exhibit 6, but was unable to make any other comparisons because of the quality of the fingerprints on the other documents.

¶13 Defense counsel argued that the State had failed to prove that Defendant was the person who had been convicted of drug possession in 2005 because the latent print examiner could not match the fingerprints on Exhibit 2 with those on Exhibits 4, 5 and 7, and because Exhibit 2 did not have a case number on it. She argued that "John" and "Allen" are common names and that another person with the identical name could also have the same date of birth. The State responded and the court agreed that it had met its burden of proof because the first and last names and the date of birth on the fingerprint card and Defendant's booking photograph (Exhibits 2 and 3) matched the first and last names and date of birth on the minute entries relating to the 2005 conviction (Exhibits 4 and 5).

¶14 "The State meets its burden of proving a prior conviction by offering into evidence a certified copy of a defendant's prior conviction and establishing that the defendant is the person to whom the document refers." *State v. Carreon*, 210 Ariz. 54, 65, ¶ 53, 107 P.3d 900, 911 (2005). Here, the State offered certified copies of minute entries establishing the 2005 felony conviction. The first and last names and date of birth on Defendant's fingerprint card, booking photograph and pen pak matched the name and date of birth on each of those minute entries. Sufficient evidence existed for the court to find that Defendant was the person referred to in those conviction records.

¶15 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 sentence imposed was within the statutory limits and there was sufficient evidence for the jury to find that Defendant committed the offense.

¶16 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*. Accordingly, we affirm Defendant's conviction and sentence.

/s/ _____
SHELDON H. WEISBERG, Judge

CONCURRING:

/s/ _____
PHILIP HALL, Presiding Judge

/s/ _____
PETER B. SWANN, Judge