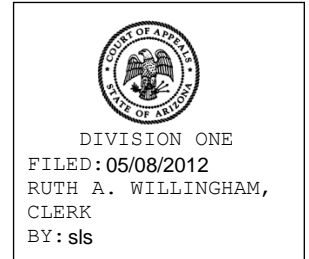


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0768
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MARSHALL ALSTON,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-009407-002DT

The Honorable F. Pendleton Gaines, Judge (Deceased)

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Angela Kebric, Assistant Attorney General
Attorneys for Appellee

Eaton Law Office Phoenix
By Pamela J. Eaton
Attorney for Appellant

B R O W N, Judge

¶1 Marshall Alston appeals his convictions and sentences for conspiracy to possess marijuana for sale ("conspiracy"),¹ illegally conducting an enterprise, possession of marijuana for sale, and possession of drug paraphernalia. Counsel for Alston filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising that after searching the record on appeal, she was unable to find any arguable grounds for reversal. Alston was granted the opportunity to file a supplemental brief *in propria persona*, but he has not done so.

¶2 After an initial review of the record, we ordered additional briefing pursuant to *Penson v. Ohio*, 488 U.S. 75, 83 (1988), addressing whether sufficient evidence supports Alston's conspiracy conviction. We have now considered the *Penson* briefs and reviewed the entire record for reversible error. Finding none, we affirm.

¹ The indictment charged Alston with conspiracy to commit multiple offenses involving marijuana, including possession for sale, transportation for sale, importation into this state, offer to transport for sale or import into this state, sale, transfer, or offer to sell or transfer marijuana.

BACKGROUND²

¶13 Based on a series of wiretaps, police conducted surveillance on a van they suspected to contain a load of marijuana. They observed the van backed up to a door at the rear of a Phoenix home. Shortly after it left the home, police stopped the van and arrested the driver. The van smelled as if it had recently contained a large amount of marijuana, and police found \$150,000 cash in a trash bag behind the driver's seat. The driver had a napkin with a list of numbers that police testified was likely a "ledger" corresponding to weights of individual bales of marijuana totaling approximately 300 pounds.

¶14 Police obtained a search warrant for the home, which contained twenty-three bales of marijuana weighing more than 500 pounds, masking agents, household gloves, packing materials, duffel bags, two heavy-duty scales, a pneumatic press, and two handguns. Police found Alston and one co-defendant hiding in the attic; another co-defendant ran out the back door.

² We view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Alston. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

¶15 Alston was indicted³ on Count 1, conspiracy to possess marijuana for sale, a class 2 felony, in violation of Arizona Revised Statutes ("A.R.S.") section 13-1003 (2010);⁴ Count 2, illegally conducting an enterprise, a class 3 felony, in violation of A.R.S. § 13-2312(B) (Supp. 2011); Count 3, possession of marijuana for sale, a class 2 felony, in violation of A.R.S. § 13-3405 (Supp. 2011); Count 4, misconduct involving weapons, a class 4 felony, in violation of A.R.S. § 13-3102(A)(8) (Supp. 2011); and Count 5, possession of drug paraphernalia, a class 6 felony, in violation of A.R.S. § 13-3415 (2010).

¶16 At the close of the State's case, Alston's attorney joined the co-defendant's motion for a directed verdict as to the conspiracy, illegal conduct of an enterprise, and misconduct involving weapons counts. The court granted the motion as to the misconduct involving weapons count, but denied it as to the other two counts. The jury found Alston guilty on the four remaining counts. The court sentenced Alston to concurrent sentences of five years on Count 1, three-and-a-half years on Count 2, five years on Count 3, and one year on Count 5, with

³ The 47-count indictment named 59 separate defendants, two of whom were tried with Alston.

⁴ Absent material revision after the date of the alleged offense, we cite the statute's current version.

525 days of presentence incarceration credit. This timely appeal followed.

DISCUSSION

¶7 In his *Person* brief, Alston argues the trial court erred in denying his motion for judgment of acquittal because there was insufficient evidence to support his conviction for conspiracy. A judgment of acquittal is appropriate only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "Substantial evidence has been described as more than a mere scintilla of evidence; but it nonetheless must be evidence that reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Stroud*, 209 Ariz. 410, 411-12, ¶ 6, 103 P.3d 912, 913-14 (2005) (internal quotations and citations omitted).

¶8 To convict Alston of conspiracy, the State was required to prove beyond a reasonable doubt that (1) with the intent to promote or aid the commission of possession of marijuana for sale, (2) Alston agreed with one or more persons that at least one of them or another person would engage in conduct constituting that offense, and (3) one of the parties committed an overt act in furtherance of that offense. See A.R.S. § 13-1003(A). Criminal conspiracy can rarely be proved by direct evidence; the requisite agreement may be inferred from

circumstantial evidence, including the overt conduct of the parties. *State v. Avila*, 147 Ariz. 330, 336, 710 P.2d 440, 446 (1985).

¶9 The State presented evidence at trial from which the jury could reasonably have inferred that Alston had an agreement with his codefendants and others to distribute marijuana. Alston and a codefendant were hiding in the attic of a stash house containing more than 500 pounds of marijuana when police entered with a search warrant. Police found masking agents, scales, and packaging materials. In a duffel bag tagged with Alston's name, police found FedEx shipping labels printed with Alston's address, FedEx air bills with the return address of "Marshall Alston" of "Shaw Incorporated," and a receipt for household gloves dated a week before the search. Another codefendant had a FedEx shipping card on his person. A police detective testified that drug traffickers typically only permit individuals intimately involved in the organization and with some stake in it to be present in a stash house. He further testified that he did not believe it was possible to be present in a stash house with that much marijuana and not be involved in the organization.

¶10 The State also presented evidence that at least one of the individuals involved committed an overt act in furtherance of the conspiracy. *See State v. Verive*, 128 Ariz. 570, 581, 627

P.2d 721, 732 (App. 1981) ("Any action sufficient to corroborate the existence of the agreement and to show that it is being put into effect is sufficient to support the conspiracy."). When police entered, a bale of marijuana was in the process of being wrapped for shipment, and several bales had already been packaged. An officer observed that the co-defendant who ran out the back door was wearing gloves similar to the ones found in the stash house and typically worn when packaging marijuana for transport to protect against materials used to mask its odor. In addition, the van that left the stash house contained more than \$150,000 in cash and smelled like it had recently contained a large quantity of marijuana. Accordingly, a reasonable jury could find this evidence sufficient to prove beyond a reasonable doubt that Alston conspired with his co-defendants and others to possess marijuana for sale.

CONCLUSION

¶11 We have searched the entire record for reversible error and find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The record shows Alston was present and represented by counsel at all pertinent stages of the proceedings, was afforded the opportunity to speak before sentencing, and the sentences imposed were within statutory limits. Accordingly, we affirm Alston's convictions and sentences.

¶12 Upon the filing of this decision, counsel shall inform Alston of the status of the appeal and his options. Defense counsel has no further obligations 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). Alston shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

PETER B. SWANN, Presiding Judge

/s/

JON W. THOMPSON, Judge