DIVISION ONE
FILED: 05/15/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0456
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ALVIN TRAVON HURT,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-120806-001

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

Thomas C. Horne, 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 Stephen R. Collins, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 Alvin Travon Hurt (Defendant) appeals his convictions and sentences for possession of marijuana and possession of drug paraphernalia, both class one misdemeanors.

¶2 Defendant's counsel 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 this court that after a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defendant was afforded the opportunity to file a supplemental brief in propria persona, but he did not do so. Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). 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). Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 Defendant was in a white van with two other individuals. The van was parked in the parking lot of an apartment complex. Officer Rome and Officer Regan of the Mesa Police Department responded to an anonymous call about drug use in a white van at that complex.

¶4 Officer Rome shined her flashlight into the van and asked the occupants to exit. After briefly addressing them, the

officer asked the van's owner for permission to search the van. The owner of the van gave his permission. Inside the van, Officer Rome found a pipe that smelled of burnt marijuana and a small baggie of marijuana.

¶5 After finding the marijuana, Officer Rome questioned each occupant individually about the marijuana and the pipe. The first two individuals denied ownership. When Officer Rome questioned Defendant, he "immediately" admitted to possession of both the marijuana and the pipe. Officer Rome allowed Defendant to leave but advised Defendant that he would be charged for the offenses.

¶6 Defendant was later charged with possession of marijuana and possession of drug paraphernalia, both class six felonies. He was arraigned on June 25, 2010. Prior to trial, the State amended the complaint to designate both counts as class one misdemeanors.

¶7 The projected last day for trial, originally given as December 22, 2010, was extended eighty-seven days for a Rule 11 medical evaluation, fifty-six days to allow the prosecutor to finish two trials and the witness police officer to return from maternity leave, and twenty-five days to accommodate defense counsel's trial schedule. Also during this time, Defendant, through his attorney, moved the court to exclude his confession on Fifth Amendment grounds. *See* U.S. Const. amend. V. At the

suppression hearing the trial court determined that there no was no custodial interrogation and therefore Defendant's statements could be used.

¶8 A bench trial was held on June 10, 2011. Officer Rome testified that she found the marijuana and the pipe and Defendant confessed that the marijuana and the pipe belonged to him. Defendant testified that the pipe was his but that the marijuana was not. Defendant claimed that he was not the owner of the marijuana and that he never admitted to Officer Rome that the marijuana was his. During cross examination, Defendant admitted that he had been convicted of a felony on September 25, 2001 for a crime committed on June 1, 2001.

¶9 The trial court found Defendant guilty on both counts. As to count one, Defendant was fined $1380 plus probation surcharges and sentenced to eighteen months supervised probation.

¶10 This appeal was timely filed, and this court was asked whether any issues should be considered under *Anders* and *Leon*. Through counsel, Defendant also raises the following arguments, which we address in turn.

> 1. Whether the trial court violated Defendant's right to a speedy trial pursuant to Rule 8 of the Arizona Rules of Criminal Procedure.
>
> 2. Whether the trial court allowed the admission of statements obtained in

violation of *Miranda v. Arizona*, 384 U.S. 436 (1966).

3. Whether the trial court erred in allowing Defendant to be impeached at trial with a felony conviction over ten years old.

4. Whether the imposition of a fine of $1380 for 1.3 grams of marijuana was excessive punishment.

DISCUSSION

¶11 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996). Also, when an issue was not raised below, we review only for fundamental error as opposed to harmless error or abuse of discretion. *State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). To prevail under the fundamental error standard, a defendant must show that there was fundamental error and that the error caused prejudice. *Id.* at ¶ 20.

Speedy Trial

¶12 Defendant argues that the trial court violated his right to a speedy trial pursuant to Arizona Rule of Criminal Procedure 8. This issue was not raised at trial; therefore we review for fundamental error. *Henderson*, 210 Ariz. at 567, ¶ 19, 115 P.3d 607. Excluding time for the Rule 11 hearing and the continuances requested and obtained as allowed under Arizona Rule of Criminal Procedure 8.5, trial was held on the 180th day after excluding the statutorily exempt days. There was no

speedy trial issue, as Rule 8.2 requires defendants who are not in custody to be tried within 180 days from arraignment. Ariz. R. Crim. P. 8.2.a(2). Defendant was not in custody prior to the trial. Furthermore, even if there was a technical violation of the rule, we will not overturn a conviction unless the appellant can show prejudice. *State v. Vasko,* 193 Ariz. 142, 148-49, ¶ 30, 971 P.2d 189, 195-96 (App. 1998). Defendant has not argued what, if any, prejudice he might have suffered.

Admissibility of Statements

¶13 Next, Defendant argues that his statements should have been excluded because they were obtained in violation of *Miranda*. We will not overturn a trial court's determination on the admissibility of a defendant's statements unless there has been clear and manifest error.[1] *State v. Newell,* 212 Ariz. 389, 396, ¶ 22, 132 P.3d 833, 840 (2006). In reviewing the trial court's determination, we consider only the evidence presented at the suppression hearing. *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996). "While we view this evidence in the light most favorable to sustaining the trial court's ruling, we review de novo the court's legal conclusions." *State v. Schinzel,* 202 Ariz. 375, 378, ¶ 12, 45 P.3d 1224, 1227 (App. 2002) (citations omitted).

[1] The Arizona Supreme Court has equated "clear and manifest error" to the abuse of discretion standard. *State v. Jones,* 203 Ariz. 1, 5, ¶ 8, 49 P.3d 273, 277 (2002).

¶14 The trial court determined that Defendant was not subject to a custodial interrogation. "A person is in custody if he is under arrest, or if his freedom of movement is restrained to a degree associated with formal arrest." *United States v. Brady,* 819 F.2d 884, 887 (9th Cir. 1987) (citing *New York v. Quarles,* 467 U.S. 649, 655 (1984)). "If a stop is brief, public, and not dominated by the police, a *Miranda* warning is not required." *Id.* (citing *Berkemer v. McCarty,* 468 U.S. 420, 437-39 (1984)).

¶15 We find that the trial court did not abuse its discretion in refusing to exclude Defendant's confession. Defendant and his companions outnumbered the police officers. They were not in handcuffs or placed in the police vehicle. The questioning was brief, and all events occurred in public, outside the apartment complex. The trial court correctly determined that there was no custodial interrogation.

Impeachment using Evidence of Conviction

¶16 Defendant alleges that the trial court erred by "allowing [Defendant] to be impeached at trial with a felony conviction over [ten] years old." Rule 609 of the Arizona Rules of Evidence states that "[e]vidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction." Ariz. R. Evid. 609(b). Defendant was convicted of a felony on September 25,

2001, and his trial in this matter was held in June 2011. Ten years had not elapsed between the conviction and the testimony. We find no error by the trial court in admitting the conviction.

Appropriateness of Punishment

¶17 Lastly, Defendant claims that the $1380 fine imposed is excessive when considering the nature of the crime. Defendant cites to no case law or authority supporting his argument that a fine of $1380 is excessive. The power to assign punishments for crimes lies with the state legislature. *State v. Marquez*, 127 Ariz. 98, 103, 618 P.2d 592, 597 (1980). We do not find Defendant's fine to be excessive.

CONCLUSION

¶18 We have read and considered counsel's brief and carefully searched the entire record for reversible error and found none. *See Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supports the court's finding of guilt. Defendant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Defendant and his counsel were given an opportunity to speak and the trial court imposed a legal sentence pursuant to A.R.S. § 13-707 (2010).

¶19 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 review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). 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/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
_____
PHILIP HALL, Judge

/S/
_____
JOHN C. GEMMILL, Judge