

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: 05/22/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 11-0719
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
PAUL SCHWARZ,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-158595-001 DT

The Honorable Steven P. Lynch, Judge *Pro Tempore*

AFFIRMED

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

Phoenix

James J. Haas, Maricopa County Public Defender
By Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

Phoenix

B R O W N, Judge

¶1 Paul Schwarz appeals his conviction and sentence for one count of possession or use of dangerous drugs. Counsel for Schwarz 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, he was unable to find any arguable grounds for reversal. Schwarz was granted the opportunity to file a supplemental brief *in propria persona*, but he has not done so.

¶2 Our obligation 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 view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Schwarz. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Finding no reversible error, we affirm.

BACKGROUND

¶3 Schwarz was charged by direct complaint of one count of possession or use of dangerous drugs, a class 4 felony, in violation of Arizona Revised Statutes section 13-3407(A)(1) (Supp. 2011).¹ The following evidence was presented at trial.

¶4 Phoenix police officer Baynes was on duty in the area of 32nd Street and Earll. He witnessed Schwarz riding a bicycle southbound in the northbound lanes, "playing frogger with the oncoming traffic." Baynes conducted a traffic stop. When Schwarz reached into his pants pocket to produce his

¹ Absent material revision after the date of the alleged offense, we cite the statute's current version.

identification, a knife fell to the ground. Baynes then conducted a "pat-down" for officer safety. He felt an object in Schwarz's front pocket, and Schwarz removed a key chain with a screw-top metallic vial attached to it. He asked Schwarz what the vial contained, and Schwarz responded "speed," which Baynes knew to mean methamphetamine. Upon opening the vial, he discovered two small baggies of a white crystalline substance. Baynes conducted a field test on the substance and confirmed it was meth. A criminalist testified that the substance was in fact 2.1 grams of meth, a usable amount.

¶15 A jury found Schwarz guilty as charged. Prior to sentencing, Schwarz stipulated that he had been convicted of three prior felonies. The court sentenced him to a mitigated term of eight and one-half years' imprisonment with 109 days of presentence incarceration credit. This timely appeal followed.

DISCUSSION

¶16 We have searched the entire record for reversible error and find none. We note, however, that the trial court failed to engage in a proper colloquy with Schwarz in connection with his decision to stipulate to the existence of three prior felony convictions. See Ariz. R. Crim. P. 17.6 ("Whenever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule[.]") Our supreme court has held that Rule 17.6 requires the

trial court to conduct a "plea-type colloquy" in which the court explains the constitutional rights the defendant waives before accepting a defendant's stipulation to the existence of prior felony convictions. *State v. Morales*, 215 Ariz. 59, 61, ¶¶ 7-8, 157 P.3d 479, 481 (2007). Because the trial court did not advise Schwarz of his constitutional rights or explain the effect waiving those rights would have on his sentence, the colloquy was insufficient, and Schwarz's stipulation was not intelligent and voluntary. *See id.* at ¶ 10.

¶7 However, "[u]nder fundamental error review, the defendant bears the burden of persuasion to show both that the error was fundamental and that it caused him prejudice." *Id.* Generally, prejudice is "established by showing that the defendant would not have admitted the fact of the prior conviction had the colloquy been [properly] given." *Id.* at 62, ¶ 11, 157 P.3d at 482. But when there is reliable evidence of the defendant's prior conviction in the record, there is no need to remand for this determination. *Id.* at ¶ 13 (concluding "there would be no point in remanding for a hearing merely to again admit" copies of the defendant's conviction records that were already admitted at a pretrial hearing).

¶8 Here, the State submitted into evidence at sentencing a certified copy of an Arizona Department of Corrections pen pack which listed Schwarz's three prior convictions, along with

his name, birth date, physically identifying information, and a photograph. Schwarz stated his name and birth date on the record, which match those listed on the pen pack. Thus, consistent with *Morales*, we conclude it is unnecessary to remand for a hearing because Schwarz cannot establish prejudice.

¶9 All of the other proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The record shows Schwarz was present and represented by counsel at all pertinent stages of the proceedings, was afforded the opportunity to speak before sentencing, and the sentence imposed was within statutory limits. Accordingly, we affirm Schwarz's conviction and sentence.

CONCLUSION

¶10 Upon the filing of this decision, counsel shall inform Schwarz 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). Schwarz 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