

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

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2011-0265
)	DEPARTMENT B
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
VIANES JAMES CASIAS SR.,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201001686

Honorable Boyd T. Johnson, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz, and
Amy M. Thorson

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Attorneys for Appellee

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ESPINOSA, Judge.

¶1 In this appeal from his convictions for possession of a dangerous drug and possession of drug paraphernalia, appellant Vianes Casias Sr. maintains his

“constitutional rights to be protected against double jeopardy were violated” and he “was subjected to an illegal arrest, making the use of evidence seized as a result of that arrest suppressible.” Finding no error, we affirm.

Background

¶2 We view the facts and all reasonable inferences therefrom in the light most favorable to upholding the convictions. *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). In 2008, Superior police officers were en route to Casias’s home to execute a search warrant when they saw him walking down the street. Determining “it would be safer for [them] to take him into custody out on the street,” the officers decided to arrest him. They searched Casias incident to that arrest and found a black pouch with two vials and a pipe inside; one of the vials contained methamphetamine. During a subsequent interview with police, Casias admitted having used and sold that drug.

¶3 After a first trial ended in mistrial, Casias was convicted of possession of a dangerous drug and drug paraphernalia following a second trial. The trial court suspended the imposition of sentence and placed Casias on probation for a three-year period. This appeal followed.

Discussion

¶4 Casias maintains on appeal that his second trial violated his double jeopardy rights. On the second day of Casias’s first trial, during cross-examination of the state’s criminalist who had tested the vials and pipe for drugs, it became clear the state had provided the defense with a report that the criminalist had completed in another case

against Casias instead of the report for the current charges. Casias moved to dismiss the instant case with prejudice as a consequence for the state's discovery violation in failing to provide the appropriate report. The trial court denied the motion, and Casias then moved to preclude the evidence under Rule 15.7(a)(1), Ariz. R. Crim. P. The court denied that motion as well, noting it would be "tantamount to dismissal with prejudice because it is the only evidence of commission of an offense." Casias then requested a mistrial, pointing out the jury had heard cross-examination testimony from the criminalist about an additional offense. He also argued that, had the state provided the appropriate discovery at the outset, he would have pursued a different trial strategy. The court then granted the mistrial "requested on behalf of the Defendant" without prejudice.

¶5 Casias did not object to his second trial on double jeopardy grounds below, and has therefore forfeited review for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). And, because he does not argue on appeal that the error was fundamental, the argument is waived.¹ *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (concluding argument waived because defendant "d[id] not argue the alleged error was fundamental"). Even if not waived, however, we would reject his argument, which is based on *State v. Aguilar*, 217 Ariz. 235, 172 P.3d 423 (App. 2007). *Cf. State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169

¹To the extent Casias asserts the trial court abused its discretion in denying his earlier motions to dismiss the charges against him with prejudice and to preclude the evidence in question, we do not address those arguments because he does not properly develop them apart from his double jeopardy argument. *See Ariz. R. Crim. P. 31.13(c)(1)(vi); State v. Sanchez*, 200 Ariz. 163, ¶ 8, 24 P.3d 610, 613 (App. 2001) (failing to develop due process argument waived issue on appeal).

P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it sees it). Unlike the situation in *Aguilar*, in which the trial court declared a mistrial in response to the state’s suggestion, 217 Ariz. 235, ¶ 3, 172 P.3d at 425, Casias moved for the mistrial in this case. And “[w]hen a defendant moves for a mistrial, the state may generally re prosecute unless the mistrial was the product of prosecutorial misconduct or judicial overreaching.” *Id.* ¶ 10. Nothing in the record before us suggests that was the case here. Rather, as defense counsel acknowledged below, the prosecutor’s failure to provide the appropriate disclosure apparently was inadvertent.

¶6 For the first time on appeal, Casias also contends he “was subjected to an illegal arrest” and the drugs and paraphernalia seized during the search incident to his arrest should have been suppressed. Generally, “[i]ssues concerning the suppression of evidence which were not raised in the trial court are waived on appeal.” *State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981); *see also State v. West*, 176 Ariz. 432, 440, 862 P.2d 192, 200 (1993) (“In fact-intensive inquiries on motions to suppress, th[is] court is not obliged to consider new theories”), *overruled on other grounds by State v. Rodriguez*, 192 Ariz. 58, 961 P.2d 1006 (1998); *State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988) (“It is particularly inappropriate to consider an issue for the first time on appeal where the issue is a fact-intensive one.”); *State v. Graham*, 97 Ariz. 408, 415-16, 401 P.2d 141, 146-47 (1965). But, our supreme court has stated that we may “review a suppression argument that is raised for the first time on appeal for fundamental error.” *State v. Newell*, 212 Ariz. 389, ¶ 34, 132 P.3d 833, 842 (2006). In this case,

however, fundamental error review is made impossible by Casias's failure to move for suppression below.

¶7 In reviewing a trial court's ruling on a motion to suppress, this court "consider[s] only the evidence presented at the suppression hearing and view[s] it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). But, because Casias did not challenge his arrest below, the court held no suppression hearing and made no findings of fact related to his arrest, and very few facts on that point were adduced at trial. *See State v. Yonkman*, 633 Ariz. Adv. Rep. 4, n.4 (Ct. App. Apr. 26, 2012) (declining to consider "fact-intensive question" not developed in trial court). We are therefore left with little or no evidence relating to Casias's arrest, and we cannot say with any certainty what evidence might have been adduced at a hearing on a motion to suppress. Indeed, such a hearing might take "a decidedly different twist" from the trial testimony currently before us. *Brita*, 158 Ariz. at 124, 761 P.2d at 1028. But, in fact, reviewing the record before us, it appears the arresting officers had a warrant for Casias in addition to the search warrant for his home. Casias moved before trial to preclude the testimony of an unnamed confidential informant whose testimony, according to Casias, "was the basis for the arrest warrant and search warrant used to arrest [him] and search his home." Given the lack of testimony about Casias's arrest and the indication that an arrest warrant had been obtained, Casias cannot meet his burden to establish fundamental, prejudicial error occurred. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607 (defendant bears burden to establish fundamental error so

as “to discourage a defendant from ‘tak[ing] his chances on a favorable verdict, reserving the “hole card” of a later appeal on [a] matter that was curable at trial, and then seek[ing] appellate reversal.”), quoting *State v. Valdez*, 160 Ariz. 9, 13-14, 770 P.2d 313, 317-18 (1989) (alterations in *Henderson*).

Disposition

¶8 Casias’s convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge