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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. NARCISO GABRIEL CASILLAS, Appellant.	2 CA-CR 2011-0303 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20061419

Honorable Stephen C. Villarreal, Judge
Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

Ronald Zack, PLC
By Ronald Zack
Tucson
Attorney for Appellant

K E L L Y, Judge.

¶1 After a trial held in his absence, a jury found appellant Narciso Casillas guilty of possession and transportation of marijuana for sale, both class two felonies. Following the jury's verdicts, the trial court granted the state's motion to dismiss the possession charge with prejudice and entered a conviction on the sole charge of transportation for sale. The court later found Casillas had two or more historical prior

felony convictions and sentenced him to an enhanced, substantially-mitigated, 10.5-year prison term.

¶2 Counsel has filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing he has reviewed the entire record but has found no arguable, non-frivolous issue to raise on appeal. Consistent with *Clark*, 196 Ariz. 530, ¶ 32, 2 P.3d at 97, he has provided "a detailed factual and procedural history of the case with citations to the record," and asks this court to search the record for fundamental error. Casillas has filed a supplemental, pro se brief, in which he argues the trial court committed fundamental, prejudicial error in failing to instruct the jury that possession of marijuana was a lesser-included offense of transportation of marijuana and in permitting the state to dismiss the lesser charge of possession, rather than the greater charge of transportation.

¶3 We conclude substantial evidence supported the jury's verdicts. *See* A.R.S. § 13-3405(A)(2), (4) and (B)(6), (11). In sum, a Tucson police officer initiated a traffic stop of the vehicle Casillas was driving because of an equipment violation and, when he began speaking with Casillas, noticed the strong odor of marijuana coming from within the car. When the officer asked where the marijuana was, Casillas motioned to a large plastic bag on the floor of the front passenger seat. A subsequent search of the bag revealed that it contained a large bale of marijuana, later determined to weigh 11.25 pounds. Also found in the vehicle were a scale and a box of plastic bags.

¶4 Casillas correctly identifies the principle that "when a possession for sale charge is incidental to a transportation for sale charge, the former is a lesser-included

offense, for one cannot possibly be guilty of the transportation for sale charge without also being guilty of the possession for sale charge." *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 13, 965 P.2d 94, 97 (App. 1998). The indictment against Casillas was thus "multiplicitous," because it "charge[d] a single offense in multiple counts." *Merlina v. Jejna*, 208 Ariz. 1, ¶ 12, 90 P.3d 202, 205 (App. 2004). But although a multiplicitous indictment "raise[s] the potential that a defendant may be subjected to double punishment," *id.*, "[m]ultiplicitous charges alone do not violate double jeopardy; only resulting multiple convictions or punishments are prohibited," *State v. Ortega*, 220 Ariz. 320, ¶ 9, 206 P.3d 769, 772 (App. 2008). To prevent such a violation, the trial court correctly vacated the jury's verdict on the lesser-included offense of possession for sale, by dismissing that charge. *See Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 21, 965 P.2d at 99 (noting that remedy for "two convictions . . . improperly based on one act" is to vacate "lesser" conviction).

¶5 Casillas maintains he was prejudiced because his attorney "had to prepare a defense on two separate charges," and his "questions to the witness[es] and closing argument [were] based on the fact . . . [that he] was charged with two separate charges." But he cites nothing in the record to support this assertion, and his defense to both charges was that the marijuana belonged to a passenger in his vehicle, and not to him. As the state acknowledged, the possession charge, like the transportation charge, was based on the fact that the marijuana was in Casillas's vehicle. No separate defense was required or presented.

¶6 For the same reason, Casillas is mistaken that he was entitled to an instruction that possession for sale was a lesser-included offense of transportation for sale. "[A] lesser-included offense instruction is required if the jury could 'find (a) that the State failed to prove an element of the greater offense and (b) that the evidence is sufficient to support a conviction on the lesser offense.'" *State v. Bearup*, 221 Ariz. 163, ¶ 23, 211 P.3d 684, 689 (2009), *quoting State v. Wall*, 212 Ariz. 1, ¶ 18, 126 P.3d 148, 151 (2006). Because the state was required to prove the marijuana was in Casillas's vehicle in order to establish either transportation for sale or possession for sale, no lesser-included offense instruction was required. *State v. Cousin*, 136 Ariz. 83, 87, 664 P.2d 233, 237 (App. 1983) ("The trial court need only give the lesser included offense instruction when the element that distinguishes the two charges is in dispute.").

¶7 Casillas next relies on *State v. Gonzales*, 105 Ariz. 434, 466 P.2d 388 (1970), to argue that the "greater" charge of transportation of marijuana for sale should have been dismissed. That case is inapposite. In *Gonzales*, the jury's manslaughter verdict failed to specify whether it had found the defendant guilty of voluntary or involuntary manslaughter. *Id.* at 435, 466 P.2d at 389. The court held, "[W]here there is doubt as to the degree of the offense of which the defendant was found guilty, the defendant should be deemed convicted of the lesser degree." *Id.* at 436, 466 P.2d at 390. Here, there was no doubt as to the jury's verdicts; Casillas was found guilty of both transportation for sale and possession for sale. To avoid violation of double jeopardy principles, only one of those convictions could stand, and the trial court correctly

dismissed the lesser charge of possession for sale. *See Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 21, 965 P.2d at 99.

¶8 Casillas was represented by counsel and our review of his sentence confirms it was within the range authorized and was imposed in a lawful manner. *See* A.R.S. § 13-703(J).[1] In our examination of the record pursuant to *Anders*, we have found no fundamental or reversible error and no arguable issue warranting further appellate review. *See Anders*, 386 U.S. at 744. Accordingly, Casillas's conviction and sentence are affirmed.

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

CONCURRING:

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

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

[1]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because no changes in the statutes are material to the issues in this case, *see id.* § 119, we refer in this decision to the current section number rather than that in effect at the time of the offense in this case.