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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THE STATE OF ARIZONA, Appellee, v. MONTANA L. SCOTT, Appellant.	2 CA-CR 2011-0388 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause Nos. CR200900423 and CR200900721 (Consolidated)

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Montana Scott was convicted of possession of a dangerous drug, possession of drug paraphernalia, theft by control, and two counts of

weapons misconduct. He was sentenced to a six-month jail term for theft, to be followed by presumptive, concurrent prison terms on the remaining counts, the longest being ten years. On appeal, he argues law enforcement officers did not have probable cause to search his recreational vehicle (RV), the trial court should have suppressed his statements to the officers, and insufficient evidence supports his drug-related convictions. For the following reasons, we affirm Scott's convictions and sentences.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the convictions. *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 914 (2005). Casa Grande Police Detective Mark McCabe testified that an investigation in March 2009 of two "vehicle pursuits" had led him to a residential property in Pinal County where Scott allegedly lived. The property consisted of a "large main redwood painted trailer style house," a travel trailer or camper on one side of the main house, and an RV on the other side of the house. A few vehicles were parked around the main house, and behind the RV was a large trailer from a tractor-trailer that appeared to be used as a storage unit. As he approached the main house, McCabe heard yelling from inside and saw people inside "getting up and running back and forth." At that time, Scott came out onto the porch; McCabe recognized him from his driver's license photograph and stated that he wanted to speak to Scott about the vehicle pursuit.

¶3 McCabe asked Scott if he lived there, and Scott replied that he did. McCabe also asked about another person suspected of being involved in the vehicle pursuit, Harvey Ullrich. Scott stated Ullrich had left the residence "a little while ago."

McCabe was concerned for officer safety because of the unknown people inside the house, and Scott gave the officers permission to conduct a protective sweep of the house. They found a woman in the master bedroom and another woman hiding in the shower. They found Ullrich, for whom they had an arrest warrant, attempting to hide in a closet. They also found a plastic bag of methamphetamine in the master bedroom.

¶4 Based on the methamphetamine in the bedroom, McCabe then sought a search warrant for the premises. During the ensuing search, the officers also found several small glass pipes caked with methamphetamine residue in the bedroom. They found two small bags of methamphetamine in the kitchen cabinets, along with a digital scale and four glass pipes with burnt methamphetamine residue. In the RV, officers found a "sawed-off shotgun" on a shelf, a rifle on a shelf, a stolen laptop computer, and a glass pipe with methamphetamine residue inside.

¶5 As a result of the search, Scott was arrested and charged with possession of a dangerous drug, possession of drug paraphernalia, theft by control, and three counts of misconduct involving weapons. He was tried in absentia, and the jury found him guilty of all charges. Before he was sentenced, the trial court granted the state's motion to dismiss with prejudice one count of weapons misconduct. After being taken into custody, Scott was sentenced as set forth above to a six-month, flat-time jail sentence for theft by control, to be served consecutively to presumptive, concurrent prison sentences on the other counts. This timely appeal followed.[1]

[1]Although Scott delayed sentencing for over a year by absconding from trial and then evading law enforcement, our statute prohibiting certain appeals by fugitives, A.R.S.

Discussion

Probable Cause for Search

¶6 Scott argues the officers did not have probable cause to search his RV. However, he has raised this fact-intensive question for the first time on appeal, and, therefore, he has forfeited review for all but fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 600, 607 (2005); *State v. Cañez*, 202 Ariz. 133, ¶ 70, 42 P.3d 564, 586 (2002) ("[W]e will review for fundamental error even absent a pretrial motion to suppress."). But although the issue of probable cause was discussed at length at the hearing on Scott's motion to suppress based on *Franks v. Delaware*, 438 U.S. 154, 155-56 (1978), there was no evidence taken and no factual development on the question.[2] Rather, the hearing was limited to whether the search warrant affidavit contained information that Detective McCabe knew or should have known to be false. Thus, Scott

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§ 13-4033(C), does not bar us from considering his case. As we explained in *State v. Bolding*, this law applies "only if the defendant has been informed he could forfeit the right to appeal if he voluntarily delays his sentencing for more than ninety days." 227 Ariz. 82, ¶ 20, 253 P.3d 279, 285 (App. 2011). This specific notice is necessary in order for a court to infer from a defendant's conduct that he knowingly, voluntarily, and intelligently has waived his constitutional right to appeal. *Id.* Here, the state has not claimed Scott ever received such notice, nor has the state moved to dismiss the appeal pursuant to § 13-4033(C). Instead, the state has conceded we have jurisdiction, and we concur with this assessment.

[2]Although the trial court held a "hearing," it was not an evidentiary hearing; rather, the court allowed Scott to make offers of proof and argument. Under *Franks*, before being entitled to an evidentiary hearing, the defendant has the burden to make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit" that was necessary to a finding of probable cause. 438 U.S. at 155-56. Here, the court found Scott had not met his preliminary burden.

cannot show fundamental, prejudicial error because "our record is wholly inadequate" to decide the issue. *State v. Estrella*, ___ Ariz. ___, n.1, 286 P.3d 150, 153 n.1 (App. 2012).

Suppression of Statements

¶7 Scott argues the trial court erred in admitting the statement he made to a police officer outside the residence about possessing a stolen laptop computer because the officer had not read him the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The court found the statement was voluntary and "made in compliance with *Miranda*" and denied Scott's motion to suppress it. When reviewing the denial of a motion to suppress entered after a suppression hearing, we consider only the evidence presented at that hearing and view it in the light most favorable to upholding the trial court's order. *State v. Carlson*, 228 Ariz. 343, ¶ 2, 266 P.3d 369, 370 (App. 2011). Although we defer to the trial court's factual findings, we review de novo its ultimate legal conclusions. *See State v. Newell*, 212 Ariz. 389, ¶ 27, 132 P.3d 833, 841 (2006).

¶8 At the hearing, Casa Grande Police Officer Terry Pickett testified that when he had arrived at the residence, he was assigned with "keeping security at the scene" and "[k]eeping an eye" on Scott while Detective McCabe obtained the search warrant. Pickett did not provide the *Miranda* warnings to Scott, but rather engaged in what he described as a "casual conversation" with him. As part of that conversation, Pickett asked Scott whether a person named Chris had been to the residence before. Scott replied he knew Chris and had bought a laptop computer from him for $75. When Pickett expressed that he was "surprised you could buy a laptop for $75," Scott said that the computer probably had been stolen. After that statement, Pickett ended the conversation

about the laptop. As stated above, during the subsequent search, officers found a stolen laptop in the RV.

¶9 Individuals are not constitutionally entitled to the protection of *Miranda* every time they speak to a law enforcement officer. *State v. Carter*, 145 Ariz. 101, 106, 700 P.2d 488, 493 (1985). Rather, *Miranda*'s procedural safeguards are limited to defendants that are subject to custodial interrogation. 384 U.S. at 444. Here, Scott was not in custody when he made the inculpatory statement about the laptop computer, and, therefore, Pickett was not required to have given the *Miranda* warnings.[3] *See State v. Stanley*, 167 Ariz. 519, 523, 809 P.2d 944, 948 (1991).

¶10 "'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.'" *State v. Ramirez*, 178 Ariz. 116, 123, 871 P.2d 237, 244 (1994), *quoting United States v. Brady*, 819 F.2d 884, 887 (9th Cir. 1987). We assess "whether under the totality of the circumstances a reasonable person would feel that he was in custody or otherwise deprived of his freedom of action in a significant way." *Carter*, 145 Ariz. at 105, 700 P.2d at 492. Factors to be considered when determining whether an individual is in custody include "the site of the questioning; whether objective indicia of arrest are present; . . . the length and form of the interrogation[; and] . . . the method used to summon the individual." *State v. Cruz-Mata*, 138 Ariz. 370, 373, 674 P.2d 1368, 1371 (1983). Another factor is whether the

[3]To the extent Scott is arguing any of his statements were not voluntary, he has failed to develop the argument; therefore, we do not address it. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to develop argument sufficient for review results in waiver).

investigation is focused on the individual, if that focus is communicated to him. *Stansbury v. California*, 511 U.S. 318, 325 (1994); *accord Stanley*, 167 Ariz. at 523, 809 P.2d at 948. Objective indicia of arrest include being "subjected to the booking process," the use of physical restraints, and the drawing of weapons. *Cruz-Mata*, 138 Ariz. at 373, 674 P.2d at 1371.

¶11 Here, the site of questioning was Scott's residence. "Generally, interrogating a person in his home does not create the type of atmosphere to be held of doubtful validity, especially when the questioning is investigatory rather than accusatory." *State v. Thompson*, 146 Ariz. 552, 556, 707 P.2d 956, 960 (App. 1985). There was no evidence he was placed in restraints or told he was not free to leave. *Cf. State v. Fulminante*, 161 Ariz. 237, 243, 778 P.2d 602, 608 (1988) (prisoner not in custody when not in restraints and free to leave interrogator's presence), *aff'd*, 499 U.S. 279 (1991). Nor was there evidence that Officer Pickett displayed a weapon during their encounter. McCabe testified that Scott could have ingested methamphetamine during the time the officers were at the residence, a fact that could imply his freedom of movement was not restricted to the extent it would have been had he been placed under arrest. Finally, the questions Pickett asked were not focused on Scott as a suspect, but rather on another person, "Chris." *Cf. Thompson*, 146 Ariz. at 556, 707 P.2d at 960 (questioning not accusatory but investigatory). Because Scott was not in custody when he made the statement to Pickett, we find no error in the court's conclusion as to that statement.

¶12 However, Scott also argues his subsequent statements to Detective McCabe should have been suppressed. After the search warrant was executed and Scott was

arrested, McCabe interviewed Scott at the police station and first read him the *Miranda* warnings. During that interview, Scott admitted he had stored his personal property in the RV and made other incriminating statements about the contraband found in it. Relying on *Missouri v. Seibert*, 542 U.S. 600 (2004) (plurality opinion), Scott contends the initial unwarned statement to Pickett tainted the subsequent statements he made to McCabe.

¶13 *Seibert* does not control this case. In *Seibert*, five justices disapproved the intentional police tactic of obtaining an unwarned confession, giving *Miranda* warnings, and then having the suspect repeat the confession. 542 U.S. at 604, 618. There, the police officer "made a 'conscious decision' to withhold *Miranda* warnings" from a suspect in custody. *Seibert*, 542 U.S. at 605-06. Seibert's "unwarned interrogation was conducted in the station house, and the questioning was systematic, exhaustive, and managed with psychological skill . . . [and] there was little, if anything, of incriminating potential left unsaid." *Id*. at 616.

¶14 Here, unlike in *Seibert*, the second interrogation at the police station was not "a mere continuation of the earlier questions," nor were Scott's answers "fostered by references back to the confession already given." *Id.* Scott was not in custody during the first encounter, and he made a brief statement about the stolen laptop before the questioning ceased. Pickett did not ask Scott about the drugs that had been found in the main house, and the RV had not yet been searched, so Pickett could not have questioned Scott about the contraband found there. Accordingly, *Seibert* is distinguishable on its facts, and, as noted above, Scott has not argued that his *Miranda* waiver was invalid or

that his statements to McCabe otherwise were involuntary. We find no error in the admission of Scott's statements to law enforcement officers.

Sufficiency of Evidence

¶15 Finally, Scott challenges the sufficiency of evidence supporting his conviction for possession of a dangerous drug and drug paraphernalia. We review the sufficiency of evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). In doing so, we determine whether there is substantial evidence supporting the conviction. *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "Substantial evidence is that which reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Rodriguez*, 192 Ariz. 58, ¶ 10, 961 P.2d 1006, 1008 (1998); *accord Jackson v. Virginia*, 443 U.S. 307, 319 (1979). If reasonable jurors could fairly disagree about whether evidence establishes a fact at issue, the evidence is considered substantial. *Rodriguez*, 192 Ariz. 58, ¶ 10, 961 P.2d at 1008.

¶16 Scott contends "there was no evidence which tied [him] to the possession of the drugs," the drugs in the main bedroom belonged to Ullrich, and "[t]here was no indication . . . that [Scott] accessed the kitchen cabinets or that he knew that the drugs could be found there." Possess means "knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(34).[4] "One who exercises dominion or control over property has constructive possession of it even if it is not in his physical possession." *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶ 13, 965

[4]We cite the current version of the statute, as the relevant provision has simply been renumbered since Scott committed his offenses. *See* 2008 Ariz. Sess. Laws, ch. 301, § 10.

P.2d 94, 97 (App. 1998). Constructive possession exists when the prohibited property "is found in a place under [the defendant's] dominion and control and under circumstances from which it can be reasonably inferred that the defendant had actual knowledge of the existence of the [property]." *State v. Villavicencio*, 108 Ariz. 518, 520, 502 P.2d 1337, 1339 (1972). Constructive possession may be proven by direct or circumstantial evidence. *See State v. Villalobos Alvarez*, 155 Ariz. 244, 245, 745 P.2d 991, 992 (App. 1987). And, possession need not be exclusive but "may be sole or joint." *State v. Miramon*, 27 Ariz. App. 451, 452, 555 P.2d 1139, 1140 (1976); *see, e.g.*, *Villavicencio*, 108 Ariz. at 520, 502 P.2d at 1339 (cardboard box of narcotics on open back porch accessible to others still under dominion and control of defendant); *State v. Donovan*, 116 Ariz. 209, 213, 568 P.2d 1107, 1111 (App. 1977) (finding sufficient evidence of constructive possession of drugs in bedroom, even if defendant shared residence, because "possession may be jointly by two or more persons").

¶17 The state presented sufficient evidence from which a reasonable jury could have found that Scott had constructive possession of the drugs found in the house. Scott answered the door and said he lived there when the police first arrived, and then he gave them permission to perform a protective sweep, showing he had dominion and control over the premises. *See United States v. Dozal*, 173 F.3d 787, 794 (10th Cir. 1999) (decision about whether to allow search of property constitutes evidence of dominion and control); *State v. Stevens*, 228 Ariz. 411, n.7, 267 P.3d 1203, 1209 n.7 (App. 2012) (noting refusal to consent to search might be used to rebut mere presence defense and show dominion and control). Moreover, a pipe with methamphetamine residue was

found in his RV, and Scott also told McCabe he had ingested methamphetamine earlier that day, which is evidence he had knowledge of and access to the drugs.

¶18 Scott also argues "the state's evidence fails because it failed to quantify the drug to establish that whatever was in the baggie constituted a usable amount of methamphetamine." But, McCabe testified that, based on his experience, the amount found in the plastic bag from the bedroom was a "usable amount" of methamphetamine because "a very, very small amount of meth is a usable amount." And, in any event, whether there is a "'usable quantity'" of a drug "is neither an element of the possession offense nor necessary to sustain a conviction for it." *State v. Cheramie*, 218 Ariz. 447, ¶ 21, 189 P.3d 374, 378 (2008). There was sufficient evidence supporting his drug-related convictions.

Disposition

¶19 For the foregoing reasons, the convictions and sentences are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.