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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THE STATE OF ARIZONA, Appellee, v. HILARIO AGUIRRE, Appellant.	2 CA-CR 2012-0173 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR201002346

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

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V Á S Q U E Z, Presiding Judge.

¶1 After a jury trial, Hilario Aguirre was convicted of conspiracy to commit possession and transportation of marijuana for sale, possession of marijuana for sale, and illegally conducting an enterprise. The trial court sentenced him to concurrent, aggravated prison terms, the longest of which was twenty years. On appeal, Aguirre argues the court erred by denying his motion to suppress evidence obtained during an unconstitutional search of his property and by sentencing him to aggravated prison terms based on improper aggravating factors. For the reasons that follow, we affirm.

Factual Background and Procedural History

¶2 In reviewing the denial of a motion to suppress, we consider only the evidence presented at the suppression hearing, *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996), which we view in the light most favorable to supporting the trial court's ruling, *State v. Gay*, 214 Ariz. 214, ¶ 4, 150 P.3d 787, 790 (App. 2007). On October 11, 2010, Pinal County Sheriff's Deputy James Rimmer was on assignment with the Pinal County Narcotics Task Force conducting surveillance of property in rural Pinal County suspected of being used by a Mexican drug cartel as part of a large-scale drug operation. Rimmer had received information from a confidential informant that there were approximately six thousand pounds of marijuana on the property. Consistent with the information he had received from the informant, Rimmer observed a red Chevrolet pickup truck with two male occupants arrive at the property's main entrance. One of the occupants got out of the vehicle, opened a locked gate, and closed it after the vehicle was

driven onto the property. About thirty minutes later, one of the men drove away in the truck, leaving the other on the property.

¶3 The man who had remained at the property was observed walking around holding some sort of gardening tool "pretending to do yard work." Rimmer, together with Special Agent Wakefield of Immigration and Customs Enforcement and other Pinal County Sheriff's deputies, drove to the gate and called the man over to speak with them. The man, who was visibly nervous and spoke with a trembling voice, furnished his driver's license to the officers and was identified as Rick Teran. He stated he did not live on the property or know who owned it, but was there to "clean up." Rimmer asked Teran if there was anything illegal on the property, to which he responded there was "a lot" of "weed" but it was "not [his] place." Teran said, "I don't want any trouble, they will get me."

¶4 Rimmer asked Teran for permission to enter the property so that he could show them the marijuana. Teran agreed but stated he did not have a key to the locked gate, so Rimmer and Wakefield climbed over the fence. As Rimmer pulled himself over the fence, he saw three men exit one of the trailers on the property and run toward the desert. Rimmer and Wakefield ran after the men but abandoned the pursuit after alerting other officers who apprehended the individuals a short time later. Rimmer and Wakefield then conducted a protective sweep of the property to confirm no one else was hiding. While conducting the sweep, Rimmer observed several hundred bales of marijuana in various structures and vehicles.

¶5 After Rimmer and Wakefield determined no other individuals were present, they left the property and secured it while they obtained a search warrant. During a subsequent search of the property, officers discovered 306 bales of marijuana weighing over five thousand pounds.

¶6 Aguirre later was identified as the man officers had seen arriving at and departing from the property in the red truck and was apprehended the same day. He also was determined to be the owner of the property. Aguirre admitted he had known about the marijuana and stated he had been paid to store it on his property.

¶7 Aguirre was indicted for conspiracy to possess and transport marijuana for sale, illegally conducting an enterprise, transportation of marijuana for sale, and possession of marijuana for sale. Aguirre was acquitted of transportation of marijuana for sale but was convicted of the lesser-included offense of possession of marijuana for sale. The jury also found him guilty of illegally conducting an enterprise and of conspiracy, and found the amount of marijuana involved was in excess of four pounds. *See* A.R.S. § 13-3405(B). Aguirre was sentenced as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Discussion

Motion to Suppress

¶8 Aguirre first challenges the trial court's denial of his motion to suppress, claiming the officers' warrantless entry onto his property violated his rights under the Fourth Amendment of the United States Constitution and article II, § 8 of the Arizona

Constitution.[1] Specifically, Aguirre argues the court erred in finding: (1) the initial contact between the officers and Teran was lawful because the police were in a public place; (2) Teran had common authority over the premises to consent to police entry onto the property; (3) once police entered the property, exigent circumstances justified a protective sweep; and (4) the search warrant was valid. "In reviewing a trial court's ruling on a motion to suppress, we defer to the trial court with respect to the factual determinations it made but review the court's legal conclusions de novo." *State v. Olm*, 223 Ariz. 429, ¶ 7, 224 P.3d 245, 248 (App. 2010).

Public Place

¶9 Aguirre first argues that when the law enforcement officers approached Teran at the property's main gate, they were not in a public place. In the trial court, Aguirre argued that the property was protected against unlawful searches by the Fourth Amendment. However, he did not argue below, as he does on appeal, that officers had intruded into a protected area before they climbed over the fence; instead, he apparently conceded that "they were legally outside the fenced property." Because Aguirre did not make this argument below, he has forfeited the right to seek relief on this issue for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d

[1]Although Aguirre cites to article II, §§ 23-24 of the Arizona Constitution, he does not assert that Arizona's constitution offers more protection than its federal counterpart. Indeed, except in the context of a home search, the Arizona Constitution affords no greater protection against searches and seizures than the United States Constitution. *State v. Juarez*, 203 Ariz. 441, ¶ 14, 55 P.3d 784, 787 (App. 2002); *State v. Johnson*, 220 Ariz. 551, ¶ 13, 207 P.3d 804, 810 (App. 2009). We therefore limit our review to Fourth Amendment jurisprudence.

601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Furthermore, because he does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

¶10 Additionally, Aguirre has not provided any citation to the record or relevant legal authority to support this argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall contain argument with "citations to the authorities, statutes and parts of the record relied on"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (failure to offer sufficient argument waives claim on appeal). Although Aguirre refers to state's exhibit 2 in his reply brief, which apparently is a map of the property, that exhibit is not a part of the record on appeal, and it was Aguirre's duty, as the party seeking relief, to prepare and perfect the record. *See State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995). And "[w]here matters are not included in the record on appeal, the missing portions of the record will be presumed to support the action of the trial court." *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982). We therefore do not consider this argument further.

Common Authority

¶11 Aguirre next argues the trial court erred in determining Teran had authority to consent to the officers' entry onto the property. This is a mixed question of law and fact that we review de novo. *State v. Flores*, 195 Ariz. 199, ¶ 11, 986 P.2d 232, 236 (App. 1999).

¶12 Subject to a few well-recognized exceptions, a warrant is required to search an area in which an individual has a reasonable expectation of privacy. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); *see also* U.S. Const. amends. IV, XIV, § 1; Ariz. Const. art. II, § 8. One such exception is a search conducted pursuant to valid consent. *United States v. Matlock*, 415 U.S. 164, 165-66 (1974). Consent to search can be given by a third party if the third party has apparent "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *Id.* at 170; *see also Illinois v. Rodriguez*, 497 U.S. 177, 179 (1990).

> Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

Matlock, 415 U.S. at 171 n.7 (internal citations omitted); *State v. Tucker*, 118 Ariz. 76, 78, 574 P.2d 1295, 1297 (1978).

¶13 Aguirre argues Teran "repeatedly disclaimed any authority to grant consent" for the officers to enter the property. However, nothing in the record suggests Teran ever told the officers he lacked the authority to grant consent, and the lack of authority cannot be inferred solely from his statements that he did not own the property. *Matlock*, 415 U.S. at 171 n.7. "The test for determining common authority . . . focuses on apparent authority rather than actual authority." *State v. Castaneda*, 150 Ariz. 382, 389, 724 P.2d 1, 8 (1986). "Thus, if it reasonably appeared that [the] third party had common authority over the premises, then the consent to search [was] valid." *Id*.

¶14 Aguirre maintains that Teran's lack of authority is demonstrated by the fact that he "did not even have a key to enable the [officers] to enter the property through the gate." Although we agree this is a legitimate factor to consider, *see State v. Stanley*, 167 Ariz. 519, 526, 809 P.2d 944, 951 (1991) (third parties had common authority over business property because defendant, through his mother, gave them keys to property), it is not dispositive, and other factors suggest the officers reasonably believed Teran had common authority over at least parts of the property outside the structures. While conducting surveillance, Rimmer observed Teran and Aguirre arrive in a red pickup truck matching the description given by the confidential informant, and, shortly thereafter, Aguirre left in the truck but Teran remained. Rimmer testified that it appeared that Teran was alone on the property. It also appeared that Teran was pretending to do yard work and when officers approached and spoke with him, Teran admitted knowing there was a large quantity of marijuana on the property. Contrary to Aguirre's suggestion, these

factors reasonably suggested to the officers that Teran was serving some function on the property beyond that of a "lazy clean-up man." Teran had joint access to at least some portions of the property, and Aguirre had assumed the risk that Teran might permit the officers to enter in his absence.[2] *See Matlock*, 415 U.S. at 171 n.7.

Exigent Circumstances

¶15 Aguirre next argues there were no exigent circumstances to justify the protective sweep of the property because "the officers themselves created the circumstances which they deemed 'exigent.'" The existence of exigent circumstances is a mixed question of law and fact that we review de novo. *State v. Soto*, 195 Ariz. 429, ¶ 7, 990 P.2d 23, 24 (App. 1999).

¶16 Exigent circumstances are a well-recognized exception to the warrant requirement, justifying entry by law enforcement officers into a protected area. *State v. Ault*, 150 Ariz. 459, 463, 724 P.2d 545, 549 (1986). Exigent circumstances are "'those in which a substantial risk of harm to the persons involved or to the law enforcement process would arise if the police were to delay until a warrant could be obtained.'" *Mazen v. Seidel*, 189 Ariz. 195, 197, 940 P.2d 923, 925 (1997), *quoting State v. Green*, 162 Ariz. 431, 433, 784 P.2d 257, 259 (1989). Circumstances that have been deemed

[2]Aguirre argues the trial court "applied an incorrect standard" in deciding Teran had common authority because the court based its determination on an erroneous belief that the confidential informant had supplied the officers with information about Teran. We disagree. In ruling on the motion, the court stated Teran had common authority "based on the information given to the [officers], the statements by . . . Teran and [police] observations [of him]." In our view, the ruling reflects the court was considering the totality of the circumstances and not focusing narrowly on information given by the informant.

exigent include: (1) response to an emergency; (2) hot pursuit; (3) probable destruction of evidence; (4) the possibility of violence; and (5) knowledge that a suspect is fleeing or attempting to flee. *See id*.; *Soto*, 195 Ariz. 429, ¶ 8, 990 P.2d at 25; *see also State v. Gissendaner*, 177 Ariz. 81, 83, 865 P.2d 125, 127 (App. 1993).

¶17 Citing *State v. Main*, 159 Ariz. 96, 764 P.2d 1155 (1988), Aguirre contends that exigent circumstances justifying a protective sweep only occur when law enforcement officers are lawfully already on the property. This argument apparently is premised on Aguirre's contention that the officers entered the property unlawfully and it was this unlawful entry that triggered the flight of three suspects, leading to the foot chase and subsequent protective sweep. However, we already have rejected Aguirre's argument that the officers were on the property unlawfully.

¶18 And even were we to determine that Teran had limited authority to consent to entry by law enforcement officers onto the property but not the structures or vehicles, once the officers were lawfully on the property, exigent circumstances justified further intrusion. Just as Rimmer began to pull himself over the fence onto the property, he saw three men run from a trailer into the desert. Having just observed three suspected felons fleeing the property, *see Soto*, 195 Ariz. 429, ¶ 8, 990 P.2d at 25, the officers were justified in conducting a protective sweep to make sure no other individuals were hiding. "A 'protective sweep' is a quick and limited search of premises . . . to protect the safety of police officers or others." *Maryland v. Buie*, 494 U.S. 325, 327 (1990). It is limited to an inspection of those places in which a person may be hiding, *id*., and is justified "only

when [law enforcement officers] reasonably perceive an immediate danger to their safety," *State v. Kosman*, 181 Ariz. 487, 491, 892 P.2d 207, 211 (App. 1995). Rimmer testified that Teran had expressed fear of those who owned the marijuana—suggesting they would "get [him]." Rimmer stated that this heightened his own fear as he gave chase to the fleeing suspects. Moreover, the sweep was limited to a visual inspection of the places in which individuals could be hiding, including various structures and under the raised plywood floors of two trucks.

¶19 Aguirre suggests the protective sweep "was no more than a pretext to search the property," which he argues is demonstrated by the fact that the officer "didn't bother to enter the travel trailer, where the three individuals had come from, in order to determine if anyone else was actually hiding there." However, in his affidavit in support of the application for a search warrant, Rimmer stated the officers did indeed "clear[]" the travel trailer during the protective sweep, and that no additional individuals had been found inside. And once the officers completed the protective sweep, they secured the property and obtained a search warrant. Under these circumstances, the trial court did not abuse its discretion in denying Aguirre's motion to suppress.[3]

[3]The state argues that even had the protective sweep been inappropriate, the warrant nevertheless was supported by sufficient probable cause based on information obtained from independent sources. Under the independent source doctrine, evidence first discovered pursuant to an illegal entry need not be suppressed if subsequently discovered pursuant to a warrant "'based on information legally obtained.'" *Soto*, 195 Ariz. at 431, 990 P.2d at 25, *quoting State v. Gulbrandson*, 184 Ariz. 46, 58, 906 P.2d 579, 591 (1995). When information learned during an unlawful entry is included in a search warrant along with information obtained from independent sources, "[t]he proper method for determining the validity of the search . . . is to excise the illegally obtained

Aggravating Factors

¶20 Aguirre next argues "the trial court illegally sentenced [him] to an exceptionally aggravated term of incarceration based upon improper aggravating factors." Whether a trial court may employ a particular factor in aggravation is a question of law we review de novo. *State v. Alvarez*, 205 Ariz. 110, ¶ 6, 67 P.3d 706, 709 (App. 2003). However, "[a] trial court has broad discretion to determine the appropriate penalty to impose upon conviction, and we will not disturb a sentence that is within the statutory limits . . . unless it clearly appears that the court abused its discretion." *State v. Cazares*, 205 Ariz. 425, ¶ 6, 72 P.3d 355, 357 (App. 2003).

¶21 At sentencing, the trial court adopted two aggravating factors found by the jury: the crime was committed with (1) the expectation of the receipt of anything of pecuniary value; and (2) the presence of an accomplice. The court also noted that, in a separate proceeding, the state had established that Aguirre had been convicted of a felony within the preceding ten years, but, because that felony was used for sentence-enhancement purposes, it would "not consider that prior conviction in and of itself as an aggravating circumstance." Additionally, the court found two factors as "especially aggravating"—the amount of marijuana involved, i.e., over five thousand pounds; and the

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information . . . and then determine whether the remaining information is sufficient to establish probable cause." *Gulbrandson*, 184 Ariz. at 58, 906 P.2d at 591. We agree with the state that, even before stepping onto the property, the officers had significant legally obtained information that a large quantity of marijuana was on the property, including Teran's admission and information from a reliable confidential informant. However, we need not engage in a more extended analysis of the state's argument because we conclude there was no illegally obtained information in the search warrant.

offense was committed "only 12 days after having committed a prior offense involving the sale of illegal drugs." The court found Aguirre's prior gainful employment a mitigating factor but sentenced him to aggravated prison terms above the maximum but less than the aggravated maximum terms of imprisonment. *See* A.R.S. § 13-703(I), (K).

¶22 First, Aguirre argues the two factors found by the jury and adopted by the trial court—pecuniary gain and presence of an accomplice—were improper aggravators because they were "essential elements" of the crimes of possession for sale and conspiracy with which he was charged. He maintains "[a]n essential and irreducible element of the offense of possession for sale . . . is the expectation of pecuniary gain," and the presence of an accomplice is an element of conspiracy because "an individual cannot conspire without the participation of another individual." Citing *State v. Alvarez*, 205 Ariz. 110, 67 P.3d 706 (App. 2003), he contends "[a] court cannot impose an aggravated sentence based on a factor which constitutes an essential element of the offense." The state counters that neither pecuniary gain nor the presence of an accomplice constitutes an element of the offenses. And, the state argues that even if they were, the trial court nonetheless properly considered them because they are specifically enumerated in A.R.S. § 13-701(D) as aggravating circumstances.

¶23 Assuming without deciding that these aggravators also were elements of the offenses, we are persuaded that the trial court properly considered them. In *State v. Bly*, our supreme court approved of the use of a deadly weapon or dangerous instrument, an element of the underlying crime, as both a sentence enhancer and as an aggravating

circumstance, deferring to the legislature's determination with respect to the appropriate punishment for a particular offense. 127 Ariz. 370, 371-72, 621 P.2d 279, 280-81 (1980). And in *State v. Germain*, we stated, "an element of a crime may also be used as an aggravating factor" when it is one of those aggravators specifically enumerated in § 13-701(D). 150 Ariz. 287, 290, 723 P.2d 105, 109 (App. 1986); *see also Alvarez*, 205 Ariz. 110, ¶ 11, 67 P.3d at 710. Thus, because commission of a crime for pecuniary gain and presence of an accomplice are both statutorily enumerated aggravating circumstances, § 13-701(D)(4), (6), the court properly considered them, even if they were offense elements. Similarly, any allegation of error related to the use of Aguirre's prior conviction both as a sentence enhancer and an aggravator must fail, because use of the prior conviction in that manner is consistent with the sentencing scheme adopted by our legislature. § 13-701(D)(11); *State v. Bonfiglio*, 228 Ariz. 349, ¶ 21, 266 P.3d 375, 380 (App. 2011) (same prior conviction may be used to enhance sentencing range and aggravate sentence within that range).

¶24 Aguirre next argues the trial court erred in considering the amount of marijuana as an aggravating circumstance. Citing *Alvarez*, 205 Ariz. 110, 67 P.3d 706, he contends this factor was inappropriate because it has "already been reckoned into the statutory sentencing scheme elsewhere" and only qualifies as an aggravator pursuant to § 13-701(D)(24), the catchall provision.

¶25 Although *Germain* did not involve drug offenses, we nevertheless find it instructive. There, we considered whether the trial court properly had considered the

defendant's reckless conduct or infliction of serious injury and death as aggravating factors even though they were necessary elements of the crime of reckless manslaughter. 150 Ariz. at 289-90, 723 P.2d at 107-08. We agreed with the defendant "that reckless conduct which is merely sufficient to constitute an element of reckless manslaughter . . . may not be used as an aggravating factor at sentencing," because in such circumstances the legislature's "carefully structured statutory scheme" would be undermined. *Id.* at 290, 723 P.2d at 108. However, we also found that "[w]here the degree of the defendant's misconduct rises to a level beyond that which is merely necessary to establish an element of the underlying crime, the trial court may consider such conduct as an aggravating factor" under the catchall provision. *Id.*; *see also Alvarez*, 205 Ariz. 110, ¶ 11, 67 P.3d at 710.

¶26 Here, Aguirre was convicted of conspiracy to possess and transport marijuana for sale and possession of marijuana for sale, and those crimes were elevated to class-two felonies based on his possession of more than four pounds of marijuana. *See* A.R.S. § 13-3405(A)(2), (A)(4), (B)(6), (B)(11). However, Aguirre possessed more than five thousand pounds of marijuana, an amount significantly greater than that required to support his conviction. Accordingly, the trial court appropriately considered the quantity of the marijuana involved as an aggravating circumstance pursuant to § 13-701(D)(24).

¶27 We find no error in the trial court's consideration of aggravating factors and no abuse of discretion in the sentence imposed.

Disposition

¶28 For the reasons set forth above, Aguirre's convictions and sentences are affirmed.

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

CONCURRING:

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

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