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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 10/30/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) 1 CA-CR 11-0376  
)  
Appellee, )  
) DEPARTMENT A  
v. )  
)  
VIVIAN MARIE PAXTON, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
Appellant. ) Rule 111, Rules of the  
) Arizona Supreme Court)  
)  
)  
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Appeal from the Superior Court in Mohave County

Cause Nos. S8015CR201000689

The Honorable Lee Frank Jantzen, Judge

**AFFIRMED AS MODIFIED, REMANDED FOR RESENTENCING**

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Criminal Appeals/Capital Litigation Section  
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender Kingman  
By Jill L. Evans  
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**K E S S L E R**, Judge

¶1 Vivian Marie Paxton ("Paxton") filed this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), following her conviction of possession of dangerous drugs for sale, methamphetamine, a class 2 felony, under Arizona Revised Statutes ("A.R.S.") section 13-709.03 (2010), and possession of drug paraphernalia, methamphetamine, a class 6 felony under A.R.S. § 13-3415 (2010).

¶2 Finding no arguable issues to raise, Paxton's counsel requested that this Court search the record for fundamental error. Paxton was given the opportunity to, but did not submit a *pro per* supplemental brief. For the reasons that follow, we affirm Paxton's convictions, remand for resentencing as to count II, and modify her sentences to reflect an increase to her presentence incarceration credit.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶3 On July 7, 2010 Officer JJ happened to see Paxton on the back of Patrick Papilli's ("Papilli") motorcycle. At the time, JJ knew Paxton had an outstanding warrant. As a result, JJ followed Papilli and Paxton to a motel. Afterward, JJ set up surveillance and watched Papilli and Paxton enter a room. While performing surveillance, JJ only saw Papilli and Paxton enter the room. Around 10:25 p.m., JJ reported that Papilli and Paxton left the motel on Papilli's motorcycle.

¶4 Acting on JJ's information, around 10:30 p.m., Sergeant SS pulled over Papilli and Paxton. During the traffic stop, Corporal CW took custody of Paxton and placed Paxton in the back seat of his unmarked police vehicle. Before placing Paxton in the vehicle, CW performed a visual inspection of the back seat. Approximately fifteen minutes later, an officer guided Paxton out of CW's vehicle and into a transport van. Subsequently, SS searched the back seat of CW's vehicle and found plastic baggies in the crease of the rear back seat where Paxton had been sitting. At least one of the baggies contained a white crystal substance.

¶5 Later that evening, JJ obtained a search warrant for Papilli and Paxton's motel room. Prior to midnight, JJ with a team including Detective BM performed a search of the room using Papilli's room key. In the room, BM found a glass pipe, a digital scale, a plastic scale, and a large plastic baggie containing smaller plastic baggies. In addition, JJ found a letter from a local business with Paxton's name and four sheets of paper containing: (1) last names and first names with phone numbers; (2) a list of first names; and (3) names with dollar amounts, subtraction and equal signs, and weights. These papers, JJ testified, were a drug ledger because the dollar amounts were consistent with the prices of particular methamphetamine weights. Later, the police department sent the evidence that JJ

and BM collected in the motel room and in CW's vehicle to a crime lab for analysis.

¶6 The next day, July 8, 2010, Paxton requested to speak with JJ while in jail.<sup>1</sup> Before interviewing Paxton, JJ read Paxton her *Miranda*<sup>2</sup> rights, and Paxton indicated she understood her rights. During the interview, Paxton stated that she supplied about 8-12 ounces of methamphetamine a week to approximately 25-30 customers. In addition, Paxton stated that the methamphetamine found in CW's vehicle belonged to her and that the drug ledger was in her handwriting.

¶7 At trial, JJ testified about Paxton's statements during the interview. JJ also testified that Paxton asked if there would be leniency for her honesty. In response, JJ advised Paxton that her "honesty would be taken into consideration and the information would be given to the prosecuting attorney." In addition to Paxton's statements, the State produced other evidence at trial such as the digital scale with Paxton's fingerprint, the plastic baggies, the glass pipe, and JJ's testimony that Paxton carried more methamphetamine than a typical user.

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<sup>1</sup> JJ testified that this was the second interview. During the first interview, Paxton asked for an attorney and told JJ she did not want to continue talking.

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

¶8 The jury found Paxton guilty of count 1, possession of dangerous drugs for sale, methamphetamine; and count 2, possession of drug paraphernalia, methamphetamine. Paxton, however, was not present for the reading of the verdict.<sup>3</sup>

¶9 On May 20, 2011, Paxton appeared for sentencing. The trial court sentenced Paxton to the presumptive term of ten years' imprisonment for count 1, one year concurrent imprisonment for count 2, and one and a half years of community supervision.<sup>4</sup> See A.R.S. §§ 13-709.03 (2010), -702 (2010).

#### STANDARD OF REVIEW

¶10 In an *Anders* appeal, this Court must review the entire record for fundamental error. *State v. Richardson*, 175 Ariz.

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<sup>3</sup> During the jury deliberation, Paxton left the court with her father. Without informing her father, Paxton left and did not return to her father's car. Paxton's counsel personally contacted Paxton and informed her to return for the jury verdict. When Paxton was still absent fifteen minutes later, Paxton's counsel again phoned Paxton. Afterward, Paxton's counsel requested a delay for reading the verdict. But, because Paxton's counsel and father did not know Paxton's whereabouts, the trial court denied the delay and continued with the reading of the verdict. The trial court then issued a bench warrant for Paxton's arrest. In this case, Paxton had notice of the jury reading, Paxton was aware of right to be present, and the trial court had warned Paxton that if she failed to appear the jury trial would continue without her presence. As a result, the trial court could infer from Paxton's conduct that she was voluntarily absent and thus, waived her presence. See *State v. Superior Court (Ochoa)*, 183 Ariz. 139, 142-45, 901 P.2d 1169, 1172-75 (App. 1995). Therefore, the trial court's denial of the request to delay did not result in fundamental error.

<sup>4</sup> As discussed later, the sentence for count II is only in the minute entry. See discussion *infra* Part II.

336, 339, 857 P.2d 388, 391 (App. 1993). Fundamental error is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To obtain a reversal, the defendant must also demonstrate that the error caused prejudice. *Id.* at 567, ¶ 20, 115 P.3d at 607.

#### **DISCUSSION**

¶11 After careful review of the record, we find no grounds for reversal of Paxton's convictions. The record reflects Paxton had a fair trial, she was represented at all critical stages of the trial, and all proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure.

#### **I. SUFFICIENCY OF THE EVIDENCE**

¶12 "In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict and resolve all reasonable inferences against the defendant." *State v. George*, 206 Ariz. 436, 440, 79 P.3d 1050, 1054 (App. 2003). Unless rational jurors could not have found the defendant guilty beyond a reasonable doubt, there is no error. *Id.*

¶13 There is evidence in the record to support the jury's conviction of Paxton for the crime of possession of dangerous drugs for sale. For a conviction, the State must show that: (1) the defendant knowingly possessed dangerous drugs; (2) the object was in fact dangerous drugs; and (3) the defendant possessed dangerous drugs for purposes of sale. A.R.S. § 13-3407(A)(2) (2010).

¶14 There was ample evidence to support that Paxton knowingly possessed a dangerous drug. The arresting officers found baggies of drugs both in CW's vehicle and in Paxton's hotel room. Furthermore, Paxton told JJ that the drugs belonged to her. In addition, a criminalist testified that a lab analysis revealed that the substance in the baggies was methamphetamine. For purposes of the statute, methamphetamine is a dangerous drug. A.R.S. § 13-3401(6)(a)(xiii) (2010). Finally, JJ testified that Paxton told him that she had been selling approximately 8-12 ounces of methamphetamine to 25-30 customers a week. The drug ledger, in Paxton's handwriting, supports Paxton's statements because the ledger showed around twenty-five names associated with dollar amounts consistent with the costs of methamphetamine. In addition, JJ testified that a user generally would not carry the amount of methamphetamine that the police found. A jury could infer that only a methamphetamine seller carries over nine ounces. Because the evidence supported

Paxton's statements that she sold methamphetamine, a reasonable jury could find Paxton guilty.

¶15 There was also sufficient evidence to support the jury's conviction of the crime of possession of drug paraphernalia. To obtain a conviction the State must show: (1) the defendant used or possessed with the intent to use, drug paraphernalia to process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce methamphetamine into the human body; and (2) the object was drug paraphernalia. A.R.S § 13-3415(A) (2010). Under the statute, drug paraphernalia includes scales to measure drugs and a glass pipe to inhale a dangerous drug. A.R.S. § 13-3415(F) (2) (e), (1). To determine whether the objects are drug paraphernalia, a court may consider "[t]he proximity of the object[s] to drugs." A.R.S § 13-3415(E) (4).

¶16 In Paxton's hotel room, police officers found two scales and a glass pipe. At trial, a criminalist testified that Paxton's fingerprint was on the digital scale. Furthermore, at the police interview Paxton stated that the scales were "theirs." The police found these items in addition to methamphetamine in the hotel room. From these facts, a reasonable jury could determine that the scales and the glass pipe were drug paraphernalia. Thus, the evidence supports the jury's conviction.



¶17 After comparing the evidence to the elements in the statutes, there is sufficient evidence to support the jury's conviction of Paxton.

## II. SENTENCING AND PRESENTENCE INCARCERATION CREDIT

¶18 When the trial court's statements on record do not resolve a discrepancy between the oral pronouncement of sentence and the corresponding minute entry, remand for clarification is appropriate. *State v. Bowles*, 173 Ariz. 214, 216, 841 P.2d 209, 211 (App. 1992); *See State v. Leon*, 197 Ariz. 48, 49 n.3, ¶ 5, 3 P.3d 968, 969 n.3 (App. 1999) (finding that when the oral pronouncement of sentence is clear, the oral pronouncement of sentence controls over the corresponding minute entry). In this case, it is unclear whether the trial court imposed a sentence for count II at sentencing. The sentencing minute entry, however, indicates that the trial court sentenced Paxton to one year for count II. Thus, there is a discrepancy between the oral pronouncement and the court's sentencing minute entry. Because the record does not reveal the trial court's intent, the case is remanded to determine the sentence imposed for count II.

¶19 Presentence incarceration credit is given for the time spent in custody beginning on the day of booking and ending on the day before sentencing. *See State v. Carnegie*, 174 Ariz. 452, 454, 850 P.2d 690, 692 (App. 1993); *State v. Hamilton*, 153 Ariz. 244, 246, 735 P.2d 854, 856 (App. 1987). Paxton was taken into

custody on July 7, 2010. She was then released on bond August 2, 2010. After failing to appear, she was booked into county jail on March 30, 2011 until her sentencing on May 20, 2011. While Paxton's total time incarcerated prior to sentencing was 78 days, she only received a credit of 56 days. We, therefore, modify the sentences to reflect this correction.

#### **CONCLUSION**

¶20 For the foregoing reasons, we affirm Paxton's convictions but modify her sentences to grant her 78 days of presentence incarceration credit and remand for resentencing on count II. Upon the filing of this decision, defense counsel shall inform Paxton of the status of her appeal and her future appellate 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). Upon the Court's own motion, Paxton shall have thirty

days from the date of this decision to proceed, if she so desires, with a *pro per* motion for reconsideration or petition for review.

/S/  
DONN KESSLER, Judge

CONCURRING:

/S/  
ANN A. SCOTT TIMMER, Presiding Judge

/S/  
PATRICIA K. NORRIS, Judge