DIVISION ONE
FILED: 6/4/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 12-0500
	)	
Appellee,	)	DEPARTMENT D
	)	
	)	**MEMORANDUM DECISION**
v.	)	(Not for Publication-
	)	Rule 111, Rules of the
SHON DERAY GAULDIN	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court of Maricopa County

Cause No. CR2011-146172-001 DT

The Honorable Bruce R. Cohen, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Jeffrey L. Force, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Judge

¶1 This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969). Counsel for Shon Deray Gauldin (defendant), after searching the entire record, has been unable to discover any arguable questions of law and has filed a brief requesting this court conduct an *Anders* review of the record. Defendant has been afforded an opportunity to file a supplemental brief *in propria persona*, and he has done so.

¶2 In 2011, a police officer witnessed defendant and another man engaged in what appeared to be a hand-to-hand drug transaction. As the officer approached, he noticed that defendant clenched his left fist as if holding a small object. A second officer arrived at the scene and walked toward defendant. Defendant put the clenched fist into his pants pocket. When he removed his hand, it was in a natural, open position. The officer performed a pat-down and felt one rectangular object and two small, pebble-like objects. Defendant claimed that the pocket held only his cell phone. The officer reached into defendant's pocket and discovered a cell phone and two rocks of crack cocaine.

¶3 The state charged defendant with one count of possession or use of narcotic drugs, a class 4 felony. At trial, defendant testified that he had borrowed the pants from a friend earlier that day. He claimed that he had no knowledge of the cocaine in his pocket when stopped by the officers and that it did not belong to him.

¶4 A jury convicted defendant as charged. Defendant admitted to three prior felony convictions, making him a category 3 repetitive offender. *See* Ariz. Rev. Stat. (A.R.S.) § 13-703(C) (2010). The court sentenced defendant to a presumptive term of 10 years in prison with credit for 278 days of presentence incarceration. Defendant timely appealed.

¶5 Defendant makes three arguments in his supplemental brief. First, he claims he received ineffective assistance of counsel during trial proceedings. We do not consider such claims on direct appeal and thus do not consider this argument. *See State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 415, ¶ 20, 153 P.3d 1040, 1044 (2007) (ineffective assistance of counsel claims only appropriate in Rule 32 post-conviction proceedings). Second, defendant argues that the trial court committed structural error when it omitted the definition of "intentionally" from the final jury instructions. A reasonable doubt instruction that erroneously states the burden of proof is structural error. *Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). However, the offense with which defendant was charged here requires that the he "knowingly . . . possess or use a narcotic drug."[1] A.R.S. § 13-3408(A) (2010). Because the

[1] The trial court correctly instructed the jury on the definition of "knowingly" as required by the statute.

offense does not require that the act be intentional, we find no error in the trial court's instruction.

¶6 Finally, defendant asserts that the trial court erred in denying his motion to suppress drug evidence, which he argues was obtained in violation of the Fourth Amendment to the United States Constitution and Article 2, Section 8 of the Arizona Constitution. Defendant testified at trial that he consented to the pat-down. The United States Supreme Court held in *Minnesota v. Dickerson* that an officer may lawfully seize contraband during a pat-down if its "contour or mass makes its identity immediately apparent." 508 U.S. 366, 375-76 (1993). The officer testified that based on his training and the circumstances, he knew during the pat-down that the pebbles in defendant's pocket were rocks of crack cocaine. Accordingly, we find no error in the trial court's denial of defendant's motion to suppress evidence.

¶7 We have read and considered counsel's brief and defendant's brief and have searched the entire record for reversible error. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, defendant was adequately represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits. Pursuant to *State v.*

Shattuck, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), defendant's counsel's obligations in this appeal are at an end. Defendant has thirty days from the date of this decision in which to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

¶8 We affirm the conviction and sentence.

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/

_____
JOHN C. GEMMILL, Presiding Judge

/s/

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DONN KESSLER, Judge