DIVISION ONE
FILED: 10/31/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 13-0116
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
RANDY ALLEN BRITTAIN,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Yavapai County

Cause No. P1300CR201200336

The Honorable Tina R. Ainley, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel,
Criminal Appeals Section
Attorneys for Appellee

David Goldberg Attorney at Law — Fort Collins, CO
by David Goldberg
Attorney for Appellant

S W A N N, Judge

¶1 Defendant Randy Allen Brittain appeals his convictions and sentences for theft of means of transportation, a class 3 felony, and trafficking in stolen property in the first degree,

a class 2 felony. 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). Defendant's appellate counsel has searched the record on appeal and found no arguable, nonfrivolous question of law, and asks us to review the record for fundamental error. *See Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Defendant was given the opportunity to file a supplemental brief *in propria persona* but did not do so.

¶2 We have searched the record for fundamental error and find none. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

¶3 Defendant was indicted and tried for one count of theft of means of transportation and one count of trafficking in stolen property in the first degree. At the jury trial, the state presented evidence of the following facts.

¶4 On January 15, 2012, A.R. met Defendant and Defendant's wife at a swap meet in Prescott Valley and offered to sell his 2007 Toyota Tundra to the couple. Defendant expressed interest in potentially purchasing the truck, so A.R. gave Defendant his contact information and a map to his home. Defendant stated that he would be in touch.

¶5 Between January 16 and January 19, Defendant telephoned A.R. several times. Defendant told A.R. that he was interested in purchasing the truck but wanted to test-drive it on a weekend trip to his second home in Las Vegas. Defendant told A.R. that he would come to A.R.'s home to pick up the truck for the test drive and would leave his own Toyota Tacoma truck at A.R.'s home. A.R. had seen the Tacoma at the swap meet and Defendant had represented that he owned it. The Tacoma was actually a rental vehicle.

¶6 On January 19, Defendant and his wife arrived at A.R.'s home driving a Nissan. Defendant told A.R. that he had been unable to bring the Tacoma because it had recently been damaged in an accident. Defendant reiterated that he wanted to drive the Tundra before paying for it. Defendant and A.R. agreed that Defendant would pay $32,000 for the Tundra if he decided to purchase it after the test drive to Las Vegas. The two men then traveled to a bank where a notary public notarized (1) A.R.'s signature on a title document purporting to transfer ownership of the Tundra to Defendant, and (2) both parties' signatures on a handwritten note, authored by Defendant, that stated: "I, RANDY BRITTAIN, AM, BUYING 2007 TOYOTA TUNDRA FROM [A.R.], FOR THE SOME OF $22,00.00 IN FULL, SOLD ON 1-19-12." Defendant told A.R. that the note stated a purchase price lower than that which the parties had agreed to because this would

help Defendant avoid tax liability. Defendant kept the note and A.R. kept the title transfer document, and Defendant did not pay A.R. any money. When Defendant and A.R. returned to A.R.'s home, Defendant left in the Tundra and Defendant's wife left in the Nissan.

¶7 The next day, January 20, Defendant telephoned A.R. and told him that he was going to return to A.R.'s home. Defendant and his wife arrived at A.R.'s home in the Tundra later that day and gave A.R. various items of personal property that he had left in the truck. Defendant then told A.R. that he had learned from his bank that he would not be able to immediately refinance his second home in Las Vegas to obtain the money to pay for the Tundra, but would be able to immediately obtain a loan using the title to the truck as collateral. A.R. agreed that Defendant could take the notarized title transfer document to use for the loan. Both parties signed a document prepared by Defendant's wife that stated: "I, RANDY, AM TAKING TITLE FOR TRUCK, TO BRING BACK CASH IN PAYMENT." At the bottom of the document, Defendant wrote: "PAID WHEN COME BACK FROM VEGAS TRIP." After the parties executed the document, Defendant and his wife took possession of the title transfer document and left in the Tundra.

¶8 Defendant later telephoned A.R. and told him that he had obtained the loan and would pay A.R. when he returned from Las Vegas. But Defendant never paid any money to A.R., never returned the Tundra, and did not respond to A.R.'s repeated attempts to contact him. On January 23, Defendant traded the Tundra to a used-automobile dealer for a different vehicle and cash. He kept the camper shell and trailer hitch that had been attached to the Tundra. Police later seized the Tundra from the automobile dealership and seized the camper shell and trailer hitch from Defendant's home. Defendant told police that the parties had agreed upon a purchase price of $22,000 for the Tundra and that he paid that amount in cash to A.R. on January 19. Defendant told one officer that he had obtained the cash by taking a loan against his home in Las Vegas, but told another officer that he had used money that he borrowed from a sibling plus money that he made from investing a settlement award.

¶9 At the conclusion of the state's case-in-chief, Defendant moved for judgments of acquittal on both counts. The court denied the motions and Defendant rested. After considering the evidence, the jury found Defendant guilty on both counts.

¶10 At sentencing, the state presented evidence and the court found that Defendant had a prior non-historical felony conviction from 2004. The court then found additional

aggravating factors and also found mitigating factors. The court entered judgment on the jury's verdicts and sentenced Defendant to a presumptive term of 3.5 years in prison for theft of means of transportation and a mitigated term of 3 years in prison for trafficking in stolen property in the first degree, with the sentences to be served concurrently and with credit for 34 days of presentence incarceration. Defendant timely appeals.

DISCUSSION

¶11 The record reveals no fundamental error. Defendant was present and represented by counsel at all critical stages. Defendant's counsel on appeal specifically requested that no transcript of jury voir dire be prepared. The record before us shows no evidence of jury misconduct and the jury was properly comprised of eight jurors. *See* A.R.S. § 21-102(B); Ariz. R. Crim. P. 18.1(a).

¶12 The evidence that the state presented at trial was properly admissible and was sufficient to support Defendant's convictions. A person commits the crime of theft of means of transportation when he knowingly and without lawful authority "[o]btains another person's means of transportation by means of any material misrepresentation with intent to permanently deprive the person of the means of transportation," A.R.S. § 13-1814(A)(3), and he commits the crime of trafficking in stolen property in the first degree when he "knowingly initiates,

organizes, plans, finances, directs, manages or supervises the theft and trafficking in the property of another that has been stolen." A.R.S. § 13-2307(B). Here, the state presented evidence that Defendant persuaded A.R. to give him his Tundra by making misrepresentations about his intent to pay for the vehicle at a later date, and then sold the Tundra to a third party. This evidence was sufficient to allow the jury to find Defendant guilty on both counts.

¶13 At the sentencing hearing, the state presented sufficient evidence to show that Defendant had a prior non-historical felony conviction that was less than ten years old. Based on this showing, the court properly sentenced Defendant as a category one repetitive offender under A.R.S. § 13-703 and properly found additional aggravating factors. *See* A.R.S. § 13-701(D)(11); *State v. Lamar*, 210 Ariz. 571, 577, ¶ 26, 115 P.3d 611, 617 (2005); *State v. Aleman*, 210 Ariz. 232, 240, ¶ 25, 109 P.3d 571, 579 (App. 2005). Defendant was given the opportunity to speak at the sentencing hearing, and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence. The court acted within its discretion to determine that the aggravating factors and the mitigating factors, weighed together, warranted the imposition of a presumptive sentence for the conviction of thefts of means of transportation and a mitigated sentence for the conviction of

trafficking in stolen property in the first degree. The court imposed legal sentences and correctly calculated Defendant's presentence incarceration credit. *See* A.R.S. §§ 13-703(H), 13-1814(D), 13-2307(C).

¶14 After Defendant filed his notice of appeal from his convictions and sentences, he filed a Notice of Petition for Post Conviction Relief that the superior court stayed pending resolution of this appeal. Defense counsel contends that the stay was error and presents a "colorable issue," but states that he "does not believe the issue can be raised other than perhaps via a petition for review" and "it appears more expeditious and judicious to resolving Appellant's PCR claim by proceeding expeditiously with this appeal." Counsel is correct that the matter is not within the scope of this appeal. We therefore do not address it.

CONCLUSION

¶15 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881. We therefore affirm Defendant's convictions and sentences.

¶16 Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Defendant

of the status of this appeal and Defendant's future options. *Id.* Defendant has 30 days from the date of this decision to file a petition for review *in propria persona*. *See* Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Defendant has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Presiding Judge

CONCURRING:

/s/
_____
DIANE M. JOHNSEN, Chief Judge

/s/
_____
RANDALL M. HOWE, Judge