IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

CARNELL LAMONT DARGEN, *Appellant*.

Nos. 1 CA-CR 14-0872, 1 CA-CR 14-0873, 1 CA-CR 14-0874 (Consolidated)
FILED 9-10-2015

Appeal from the Superior Court in Maricopa County
Nos. CR2014-122849-001, CR2013-459776-001, CR2012-117804-001
The Honorable Peter C. Reinstein, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Terry J. Adams
Counsel for Appellant

MEMORANDUM DECISION

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Randall M. Howe and Judge Andrew W. Gould joined.

S W A N N, Judge:

¶1 Carnell Lamont Dargen appeals his convictions and sentences for possession of dangerous drugs and for violating the conditions of his probation. This case comes to us as an appeal under *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969). Dargen'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 (App. 1999). Dargen 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 have found none. Therefore, we affirm Dargen's convictions and sentences.

FACTS AND PROCEDURAL HISTORY

¶3 Dargen was charged with knowingly possessing or using methamphetamine. The state also alleged that Dargen committed the offense while on probation in two other felony matters. Dargen pled not guilty and the matter proceeded to a jury trial.

¶4 At trial, the state presented evidence of the following facts. Phoenix Police Officer Plumb and his partner responded to a radio call about voices coming from inside a vacant house. Plumb and his partner approached the house and, finding it empty, went to the back of the house where they found a shed. Plumb saw the light from a flashlight moving around inside the shed and heard the shuffling of tools. Plumb looked inside the shed and saw Dargen crouched down and digging through a plastic bin. Plumb said Dargen seemed frantic, as though he was searching for something. Plumb then announced his presence and told Dargen to walk towards him with his hands up.

¶5 Plumb detained[1] Dargen, then entered the shed and conducted a search of the area. Plumb testified that when he looked inside the bin that Dargen had been searching through, he observed a plastic bag of methamphetamine.[2]

¶6 Plumb testified that after he found the methamphetamine, he asked Dargen about the plastic bin. Dargen stated that it was his bin and he used it to store his tools. Then Plumb confronted Dargen about the methamphetamine and Dargen stated that the drugs were his and that he was a methamphetamine user.

¶7 Plumb then placed Dargen under arrest and seated him in the back of his patrol car. Dargen was given *Miranda* warnings at the precinct but Plumb testified that he was not able to get a productive interview with Dargen because Dargen was being uncooperative.

¶8 At the conclusion of the state's case in chief, Dargen rested without presenting any evidence.

¶9 After considering the evidence and hearing closing arguments, the jury found Dargen guilty of possession of dangerous drugs. Dargen stated that he was on probation in two different felony matters at the time of the offense. The state also presented copies of the sentencing minute entries for the two prior convictions and a "prison penpack" which included Dargen's photograph and fingerprints.

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[1] When asked to elaborate on what he meant by "detained," Plumb stated, "'Detained him' meaning he had no right to -- we had reason to believe that he was possibly inside of a structure that he wasn't supposed to be in. And I was going to ask [my partner] Officer Cornwell if he could do a records check on the home to see who the actual homeowner is or the property owner was." He also stated, "[W]e had him come out to us, detained him. Officer Cornwell stood by him." Dargen was not in custody during this initial detention for purposes of *Miranda v. Arizona*, 384 U.S. 436 (1966). Dargen's freedom of movement was not restrained to the degree associated with formal arrest. *See State v. Waller*, 235 Ariz. 479, 484, ¶ 10 (App. 2014). And given the totality of the circumstances, a reasonable person would likely not have felt that he or she was not at liberty to terminate the encounter. *See Howes v. Fields*, 132 S. Ct. 1181, 1189 (2012). Additionally, "[p]olice officers have authority to detain and question persons . . . without providing *Miranda* warnings when they have a reasonably articulable suspicion of criminal activity." *State v. Pettit*, 194 Ariz. 192, 195, ¶ 15 (App. 1998).

[2] The substance was later tested and the results confirmed that the bag contained 73.5 milligrams of methamphetamine.

¶10 Dargen was sentenced to the presumptive term of 10 years' imprisonment for possession of dangerous drugs and was given credit for 217 days of presentence incarceration.

¶11 In case number CR2013-459776, the court found that Dargen had violated the conditions of his probation. His probation was revoked and he was sentenced to 2.5 years' imprisonment to be served concurrently with his sentence for possession of dangerous drugs. He was given 270 days of presentence incarceration credit.

¶12 In case number CR2012-117804, the court found that Dargen had violated the conditions of his probation. His probation was revoked and he was sentenced to one year in prison to be served concurrently with his other sentences. He was given 520 days of presentence incarceration credit.

¶13 Dargen timely appeals.

DISCUSSION

¶14 The record reveals no fundamental error.

¶15 Dargen was present and represented at all critical stages. The record shows no evidence of jury misconduct and the jury was properly composed of eight jurors. *See* A.R.S. § 21-102(B); Ariz. R. Crim. P. 18.1(a).

¶16 The evidence that the state presented at trial was properly admissible. We note that Dargen did not object to any of the statements made at trial regarding his unwillingness to answer Ofc. Plumb's questions after he had been given *Miranda* warnings. Specifically, Plumb testified that "while trying to gain some type of interview with Mr. Dargen, I became frantic. He wasn't answering my questions. Sometimes he would ignore me, and I couldn't get a good interview question/answer question/answer with him. So I was not able to get a good interview with Mr. Dargen. So I did not have a full interview with him." He also testified on redirect examination that "[t]he defendant was somewhat uncooperative with my time in wanting to ask him questions. Even from the beginning I couldn't get one question out or an answer back from my initial question." Additionally, in her closing argument, the prosecutor stated, "He was arrested. They tried to question him, but he was too incoherent to do so." And in her rebuttal closing argument, the prosecutor stated, "They went over to the plea [sic] and he tried to give him his Miranda Rights. He said he understood but he was incoherent. The defendant was [ ] too incoherent to actually conduct the interview. This is not for lack of trying on Officer Plumb's part. He tried to do those things that the defense expects to be done, and he was trying to do it in the

best setting possible at the precinct, not in this high drug activity area that was discussed where the defendant was found."

¶17 The "prosecutor may not comment [or solicit testimony] on a defendant's post-arrest, post-*Miranda* warnings silence as evidence of guilt" but may "comment on a defendant's post-*Miranda* warnings statements 'because a defendant who voluntarily speaks after receiving *Miranda* warnings has not been induced to remain silent.'" *State v. Ramirez*, 178 Ariz. 116, 125 (1994) (citation omitted). "Similarly, a prosecutor may comment on a defendant's conduct and demeanor." *Id*. Dargen did not invoke his right to remain silent. *See Berghuis v. Thompkins*, 560 U.S. 370, 381-82 (2010) (holding that a defendant's invocation of the right to remain silent must be unambiguous, and making no statement is not sufficient). But because the state did not demonstrate that Dargen understood his rights, it did not establish that he waived his right to silence. *See id*. at 384.

¶18 The statements made about Dargen's unwillingness to cooperate were vague, but the trial court should have restricted any comments made about Dargen's post-*Miranda* interview to his conduct and demeanor. Because we are restricted to fundamental error review, we cannot say that this constituted "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 (2005) (citation omitted).

¶19 The evidence presented at trial was sufficient to support Dargen's conviction. Dargen was charged with possession of dangerous drugs under A.R.S. § 13-3407(A)(1), which required the state to prove that Dargen possessed or used a dangerous drug. The state produced evidence that Ofc. Plumb observed Dargen searching through a plastic bin in an abandoned shed. Once Plumb and his partner detained Dargen, Plumb conducted a search of the shed and found a plastic bag of methamphetamine in the bin where Dargen had been searching. Dargen then told Plumb that the bin was his and he used it as a toolbox. Then Plumb confronted Dargen about the methamphetamine and Dargen stated that the methamphetamine was his and that he was a methamphetamine user. This evidence was sufficient to allow the jury to find Dargen guilty of possession of dangerous drugs.

¶20 Additionally, Dargen's conditions of supervised probation provided, "I will maintain a crime-free lifestyle[ ] by obeying all laws, and not engaging or participating in any criminal activity." The conditions further provided, "I will not possess or use illegal drugs or controlled substances." Dargen stipulated that he was on probation at the time he committed the current

offense.[3] Additionally, the state provided the court with copies of the sentencing minute entries for the two prior felony convictions and a "prison penpack," which included Dargen's photograph and fingerprints. The evidence was sufficient for the court to find that Dargen had violated the terms and conditions of his probation.

¶21 At sentencing, Dargen was given an opportunity to speak and the court stated on the record the evidence and materials it considered and the factors it found in imposing sentence. The court imposed legal terms of imprisonment, *see* A.R.S. §§ 13-702(D), -703(C) and (J), -708(C) and (E), -3407(B)(1), and correctly calculated Dargen's presentence incarceration credit under A.R.S. § 13-712(B).[4]

CONCLUSION

¶22 We have reviewed the record for fundamental error and find none. *See Leon*, 104 Ariz. at 300. We therefore affirm Dargen's convictions and sentences.

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[3] Dargen's stipulation did not meet the requirements of an appropriate colloquy under Ariz. R. Crim. P. 17.6. *See State v. Carter*, 216 Ariz. 286, 289, ¶¶ 13-14 (App. 2007). However, Dargen's statement combined with the minute entries and "prison penpack" adequately demonstrate that at the time of the offense, Dargen was on probation in two prior felony matters. Therefore, on this record there is no reversible error and no need for a remand because the evidence is sufficient to disprove prejudice. *See State v. Morales*, 215 Ariz. 59, 61-62, ¶¶ 10-13 (2007) (holding that when colloquy required by Rule 17.6 is not given, remand to determine prejudice is not required if record contains sufficient evidence of prior convictions).

[4] The court was required to sentence Dargen to consecutive sentences for his 2014, 2013 and 2012 convictions under A.R.S. § 13–708(C). *See State v. Piotrowski*, 233 Ariz. 595, 598, 599, ¶¶ 13, 16-17 (App. 2014). However, "[o]ur power to correct an illegal sentence to correspond to a verdict is predicated on an appeal by the state. It is not the function of an appellate court to expand this process by undertaking to seek out error the state has neglected to pursue through proper jurisdictional channels. Therefore, we will continue to decline correction of illegally lenient sentences in the absence of proper appeals or cross-appeals by the state." *State v. Dawson*, 164 Ariz. 278, 286 (1990).

¶23 Defense counsel's obligations pertaining to this appeal have come to an end. *See State v. Shattuck*, 140 Ariz. 582, 584-85 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Dargen of the status of this appeal and his future options. *Id.* Dargen 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, Dargen has 30 days from the date of this decision in which to file a motion for reconsideration.