

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

BRIAN JOHN PARDO, *Appellant*.

No. 1 CA-CR 18-0740

FILED 9-17-2019

Appeal from the Superior Court in Maricopa County

No. CR2015-002384-001

The Honorable Jay R. Adleman, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix

By Joshua C. Smith

Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix

By Thomas K. Baird

Counsel for Appellant

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MEMORANDUM DECISION

Judge James B. Morse Jr. delivered the decision of the Court, in which Presiding Judge Jennifer B. Campbell and Judge David D. Weinzweig joined.

M O R S E, Judge:

¶1 Brian John Pardo appeals his convictions and sentences for one count each of conspiracy, illegally conducting an enterprise, possession of marijuana for sale, possession of narcotic drugs for sale, and money laundering. On appeal, Pardo argues that the trial court committed error when it found probable cause in an excised search-warrant affidavit and denied his motion to suppress. For the following reasons, we affirm.

FACTS¹ AND PROCEDURAL HISTORY

¶2 On June 16, 2015, United States Drug Enforcement Agency ("DEA") agents arrested Pardo on an arrest warrant issued after a federal grand jury indicted him for being a felon in possession of a firearm. The DEA agents arrested Pardo outside his apartment before conducting a warrantless entry of the apartment. The agents then secured and executed a search warrant for Pardo's apartment, where they found significant quantities of drugs, drug paraphernalia consistent with personal use and drug sales, cash, and firearms. The search warrant affidavit contained information acquired from the warrantless entry.

¶3 From the evidence obtained in the investigation, a grand jury charged Pardo with conspiracy, a class 2 felony; illegally conducting an enterprise, a class 3 felony; possession of marijuana for sale in an amount over the statutory threshold, a class 3 felony; possession of narcotic drugs for sale in an amount over the statutory threshold, a class 2 felony; money laundering, a class 3 felony; and two counts of misconduct involving weapons, class 4 felonies. Pardo filed a motion to suppress and argued that the warrantless search was constitutionally improper, and, without the

¹ We view the facts in the light most favorable to sustaining the verdict. *See State v. Payne*, 233 Ariz. 484, 509, ¶ 93 (2013).

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information from the warrantless entry, the search warrant affidavit did not establish probable cause. The trial court denied the motion.

¶4 After a seven-day trial in absentia, a jury found Pardo guilty on all charges except one count of misconduct involving weapons,² and the trial court sentenced him to a 19-year term of imprisonment. Pardo filed a delayed appeal under a trial court order, and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1), 13-4031, and 13-4033(A).

DISCUSSION

¶5 We review a trial court's determination whether probable cause exists in a search warrant affidavit de novo. *State v. Buccini*, 167 Ariz. 550, 555 (1991).

¶6 The Fourth Amendment to the United States Constitution requires a showing of probable cause before a search warrant may issue. U.S. Const. amend. IV; *see also* A.R.S. § 13-3913 ("No search warrant shall be issued except on probable cause, supported by affidavit . . ."). A determination of probable cause requires a magistrate to make a "practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Probable cause for a search exists if a reasonably-prudent person would be justified in concluding that the items sought in the warrant are connected to the criminal activity and will be found at the search location. *Buccini*, 167 Ariz. at 556.

¶7 A reviewing court must presume that a search warrant is valid, and the defendant bears the burden of rebutting this presumption. *State v. Crowley*, 202 Ariz. 80, 83, ¶ 7 (App. 2002); *see also State v. Hyde*, 186 Ariz. 252, 272 (1996) ("Close cases should be resolved by giving preference to the validity of warrants."). But when a search warrant is secured and executed after a warrantless search, "[t]he proper method for determining the validity of the search" granted by the warrant "is to excise the illegally obtained information from the affidavit and then determine whether the remaining information is sufficient to establish probable cause." *State v. Gulbrandson*, 184 Ariz. 46, 58 (1995). Regarding the investigation of matters unrelated to the warrantless search, "the police should not be placed in a

² The second misconduct involving weapons charge was severed from the trial and later dismissed.

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worse position than they would have been in, absent the illegal conduct." *Id.*

¶8 No evidentiary hearing was held on Pardo's motion to suppress. The court instead vacated a previously scheduled evidentiary hearing at the state's suggestion and examined the affidavit for probable cause after excising the information obtained during the warrantless entry.³ *See id.*

¶9 The trial court found that the remaining information established probable cause to search and investigate whether Pardo illegally possessed weapons in the apartment. After excision, the affidavit contained a number of relevant facts considered by the trial court to determine if there was probable cause for the issuance of a search warrant. Most notably, DEA surveillance showed Pardo was in the apartment; Pardo was a convicted felon presently facing federal indictment for felon in possession of a firearm; another suspect who lived in the apartment told police after leaving the apartment that Pardo was inside the apartment "with at least one assault rifle and one handgun"; and, after he was arrested, Pardo stated that he lived at the apartment.⁴ The trial court also considered the affidavit's description of Pardo's attempts to conceal his residence (he was not listed on the lease), contradictory statements given by Pardo and other suspects about who resided at the apartment, and Pardo's criminal history.

³ The trial court thus made no factual or legal findings regarding the constitutional propriety of the warrantless entry and search. The proffered reason for the warrantless entry was to secure the residence in a protective sweep. The ruling appears to imply that the court presumed the entry was invalid based upon the state's effective concession in its request to excise the warrantless entry information. We will not review whether the entry was constitutionally valid.

⁴ As noted above, Pardo was arrested outside of the apartment pursuant to an arrest warrant. Thus, the trial court excised only Pardo's "answers to questions about the items observed by the officers during the warrantless entry." Because Pardo's arrest was independent of the warrantless entry of his apartment, his post-arrest statements were not uniformly subject to excision. *See Gulbrandson*, 184 Ariz. at 58.

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¶10 "A person commits misconduct involving weapons by knowingly . . . [p]ossessing a deadly weapon or prohibited weapon if such person is a prohibited possessor" A.R.S. § 13-3102(A)(4). "'Possess' means knowingly to have physical possession or otherwise to exercise dominion or control over property." A.R.S. § 13-105(34). A misconduct involving weapons charge does not require ownership, actual possession, or exclusive possession--constructive or joint possession suffice. *State v. Gonsalves*, 231 Ariz. 521, 523-25, ¶¶ 9-12, 18-19 (App. 2013).

¶11 Considering the totality of the circumstances, we conclude that the trial court correctly denied the motion to suppress because the excised affidavit supported the court's finding of probable cause. In sum, the excised affidavit provided evidence that Pardo, a convicted felon and prohibited possessor facing a federal indictment for the same, lived in an apartment with a roommate who told police that Pardo was inside with an assault rifle and a handgun, Pardo had tried to conceal his true residence, and he and his girlfriend made inconsistent statements about whether Pardo lived in the apartment. In light of these facts, the trial court correctly determined that the excised affidavit established a fair probability that Pardo unlawfully possessed, at least constructively or jointly, firearms at his residence. *See District of Columbia v. Wesby*, 138 S.Ct. 577, 587-89 (2018) (finding probable cause to arrest occupants of a home where totality of circumstances, including "vague and implausible responses" to officers' questions, "suggested criminal activity").

¶12 Because the excised affidavit established probable cause, we decline to address other arguments raised in the parties' briefs pertaining to whether the odor of marijuana coming from the apartment constituted probable cause or whether the good-faith exception to the exclusionary rule applied. *See* A.R.S. § 13-3925(C).

CONCLUSION

¶13 For the foregoing reasons, we affirm Pardo's convictions and sentences.



AMY M. WOOD • Clerk of the Court
FILED: AA