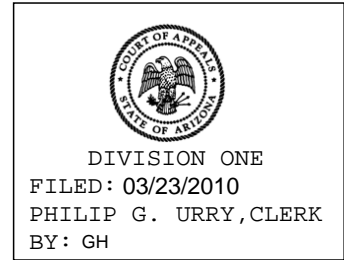


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES. See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 08-0493
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication
RICHARD FORBES MCNEIL,) - Rule 111, Rules of
) the Arizona Supreme
Appellant.) Court)
)
_____)

Appeal from the Superior Court of Mohave County

Cause No. CR2007-0938

The Honorable Steven F. Conn, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
And Aaron J. Moskowitz, Assistant Attorney General
Attorneys for Appellee

Dana P. Hlavac, Mohave County Public Defender Kingman
By Jill L. Evans, Deputy Public Defender
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Richard Forbes McNeil (defendant) appeals from his convictions for one count of possession of narcotic drugs for sale, a class 2 felony, one count of possession of drug

paraphernalia, a class 6 felony, and the sentences imposed. For the following reasons, we affirm.

¶12 Defendant was charged with one count of possession of narcotic drugs for sale, one count of possession of narcotic drugs, and one count of possession of drug paraphernalia after police found a packet containing foil balls with heroin in them on defendant's person and a syringe of heroin on top of a refrigerator. The state alleged that the amount of heroin at issue exceeded the statutory threshold of one gram. At trial, the evidence showed that the heroin amounted to 1.09 grams, and that defendant had admitted to supplying heroin to three different people. The jury convicted defendant as charged. The trial court found that the statutory threshold amount had been exceeded. At the sentencing hearing, the trial court found that the possession for sale conviction and possession conviction had been based on the heroin and merged the possession conviction into the possession for sale conviction. The trial court sentenced defendant to a substantially mitigated term of three years in prison on the possession for sale conviction, and a fully mitigated term of six months in prison on the possession of drug paraphernalia conviction, with the sentences to be served concurrently. Defendant timely appealed.

¶13 Defendant raises one issue on appeal: whether the trial court erred by finding that the aggregate amount of heroin he possessed for both sale and personal use exceeded the statutory threshold of one gram possessed for sale pursuant to Arizona Revised Statutes (A.R.S.) § 13-3408 (A)(2)(D) (2007). Because defendant failed to raise this issue below, we review for fundamental error. See *State v. Henderson*, 210 Ariz. 561, 567-69, ¶¶ 19-26, 115 P.3d 601, 607-09 (2005).

¶14 A.R.S. § 13-3408(D) provides:

If the aggregate amount of narcotic drugs involved in one offense or all of the offenses that are consolidated for trial equals or exceeds the statutory threshold amount, a person who is convicted of a violation of subsection A, paragraph 2, 5 or 7 of this section is not eligible for suspension of sentence, probation, pardon or release from confinement on any basis until the person has served the sentence imposed by the court, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted.

We find no error, fundamental or otherwise. Defendant was convicted of possession of narcotic drugs for sale pursuant to A.R.S. § 13-3408(A)(2). The amount of heroin in defendant's possession exceeded the threshold amount of one gram. See A.R.S. § 13-3401(36)(a). Pursuant to A.R.S. § 13-3408(D), defendant was not eligible for probation. Defendant argues that "while there was sufficient evidence that the weight of the

eight balls [of heroin] tested (1.09 grams) was 'barely' over the statutory threshold amount (one gram), there was no finding by the jury, nor reasonable evidence to support any finding by the court, that all of the eight foils totaling the 1.09 grams were possessed 'For Sale.'" However, defendant misinterprets A.R.S. § 13-3408(D), which plainly states that that a person who is convicted under A.R.S. § 13-3408(A)(2) and possesses drugs exceeding the threshold amount "in one offense or all of the offenses" is not eligible for probation.

¶15 For the foregoing reasons, we affirm defendant's convictions and sentences.

/s/

JON W. THOMPSON, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

PATRICK IRVINE, Judge