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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/09/10
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,)
)
) Appellee,)
)
) v.)
) **MEMORANDUM DECISION**
) (Not for Publication -
) Rule 111, Rules of the
) Arizona Supreme Court)
)
) JOSEPH DAVID CUSIMANO,)
)
) Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-112262-001 DT

The Honorable Kristin C. Hoffman, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
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Attorneys for Appellant

G E M M I L L, Judge

¶1 Joseph David Cusimano appeals his conviction for
possession or use of dangerous drugs and the resulting

imposition of probation. For the reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 In March 2009, the State charged Cusimano with possession or use of dangerous drugs, a class four felony. Phoenix Police Officer B. had found drugs in Cusimano's wallet after arresting Cusimano for indecent exposure in a commercial DVD viewing room in an adult bookstore. Cusimano filed a motion to suppress the drugs on the grounds that: (1) the DVD viewing room was private and, therefore, the officer's warrantless search of the room was unconstitutional under the Fourth Amendment; and (2) even if the search was valid, the officer did not possess probable cause to arrest Cusimano for either public sexual indecency or indecent exposure, and therefore, the search was illegal.¹

¶3 An evidentiary hearing on the motion to suppress was held on August 5, 2009. The only witness to testify at the hearing was Officer B. He testified to the following facts.

¶4 On February 18, 2009, Officer B. went to the "Adult Shoppe," an adult bookstore in Phoenix, to conduct an inspection pursuant to the section of the Phoenix City Code regulating sexually oriented businesses. Upon arriving at the bookstore,

¹ On appeal, Cusimano abandoned his argument that the DVD viewing room was private and the warrantless search was therefore unconstitutional under the Fourth Amendment.

Officer B. advised the clerk of his presence. The bookstore has a main lobby where videos and other items are sold. It also has two large theaters and five DVD preview rooms. Officer B. usually begins his inspections with the DVD preview rooms because they are the "most prevalent rooms" where he has observed public sexual activity, indecent exposure, narcotics use and sales, and weapons violations.

¶15 Customers pay a fee to view a movie in the DVD preview rooms before purchasing it. The doors to these rooms do not have locks on them. There are signs posted in the hallway outside the DVD preview rooms that state: "No loitering in the viewing rooms. Only one person per viewing room," and, "sexual intercourse, oral sexual contact and sexual contact, including masturbation, on the premises is prohibited." Based upon prior experience, Officer B. knew that these rules were not enforced by management.

¶16 On this occasion, Officer B. again began his search with the DVD preview rooms. Upon entering DVD preview room number two, Officer B. saw Cusimano seated on a metal bench naked from the waist down. Officer B. could "see the entire right side of his butt cheek." Cusimano "appeared startled" and "stood up," whereupon Officer B. had a full view of his genitals. Cusimano then began walking towards Officer B. in an "aggressive manner with both of his fists clenched." Officer B.

commanded Cusimano multiple times to put his hands against the wall. Once Cusimano did so, Officer B. conducted a search of his pants, which were lying on the bench near where Cusimano had been sitting.

¶17 Upon finishing a search of Cusimano's pants, Officer B. handed the pants to Cusimano to put on, and the officer placed Cusimano under arrest for indecent exposure and public sexual indecency. Officer B. then continued his search incident to arrest, which included Cusimano's wallet. The officer was uncertain whether the wallet had been in Cusimano's "back pocket or lying on the bench." Inside Cusimano's wallet, Officer B. found "a small plastic baggie of a white powdery substance." The powdery substance was later determined to be methamphetamine.

¶18 The trial court denied Cusimano's motion to suppress, finding that society does not recognize a justified expectation of privacy in such DVD preview rooms and that the officer had probable cause to arrest Cusimano.

¶19 Cusimano waived his right to a jury trial and submitted the matter to the trial court. The trial court considered the testimony at the evidentiary hearing, the police report, and the crime laboratory report. The trial court found Cusimano guilty of the charged offense. On September 28, 2009, the trial court suspended imposition of sentence and placed

Cusimano on probation for two years.

¶10 Cusimano filed a timely notice of appeal on October 16, 2009. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") §§ 12-120.21(A)(1) (2003), 13-4033(A)(1) (2010).

ANALYSIS

¶11 "We review the trial court's ruling on a motion to suppress evidence for clear and manifest error." *State v. Walker*, 215 Ariz. 91, 94, ¶ 16, 158 P.3d 220, 223 (App. 2007) (citation omitted). "In reviewing the trial court's denial of a motion to suppress, we consider the evidence presented at the suppression hearing in the light most favorable to upholding the ruling." *State v. Weinstein*, 190 Ariz. 306, 307, 947 P.2d 880, 881 (App. 1997) (citing *State v. Moore*, 183 Ariz. 183, 901 P.2d 1213 (App. 1995)).

¶12 Cusimano argues that the trial court erred by (1) concluding that the officer had probable cause to arrest him for indecent exposure and (2) deciding that the search incident to arrest was reasonable. The State counters that the officer had probable cause to arrest Cusimano for indecent exposure, thereby justifying the search incident to arrest. Further, the State argues that Cusimano forfeited appellate review of any claim that the scope of the search incident to arrest exceeded constitutional parameters because no such objection or argument

was made to the trial court and, additionally, Cusimano cannot prove fundamental error and resulting prejudice.

Propriety of Arrest

¶13 A police officer has probable cause to make an arrest "when reasonably trustworthy information and circumstance would lead a person of reasonable caution to believe that a suspect has committed an offense." *State v. Hoskins*, 199 Ariz. 127, 137-138, ¶ 30, 14 P.3d 997, 1007-08 (2000) (citation omitted); see also *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996). Cusimano was arrested in violation of the indecent exposure statute, A.R.S. § 13-1402(A) (Supp. 2010).² "A person commits indecent exposure if he or she exposes his or her genitals or anus . . . and another person is present, and the defendant is reckless about whether the other person, as a reasonable person, would be offended or alarmed by the act." *Id.*

¶14 In determining whether probable cause existed to arrest Cusimano for indecent exposure, we examine each element individually. To arrest a person for indecent exposure, a police officer must have probable cause to believe that the person (1) is exposing his genitals or anus (2) in the presence of another and (3) is reckless regarding whether a reasonable

² We cite the current version of the applicable statute because no revisions material to this decision have been made since this incident occurred.

person would be offended or alarmed by the act.

¶15 As to the first requirement, Cusimano had removed his pants and was sitting naked from the waist down on the bench in the DVD preview room. Cusimano then exposed himself in the presence of Officer B. when Officer B. opened the DVD preview room door. Instead of turning his back to the officer or covering himself up or asking the officer for a moment to get dressed, Cusimano walked aggressively toward the officer. Officer B. testified that when Cusimano stood and walked toward him, he had a "full view" of Cusimano's genitals.

¶16 Cusimano argues that because Officer B. often searches adult shops, he has seen genitalia on the movie screens countless times and therefore would not likely be alarmed or offended under these circumstances. We disagree because the evidence permits the conclusion that a reasonable person in the position of the officer would have been offended or alarmed. First, the officer testified he was alarmed or offended by Cusimano approaching him. Second, we agree with the State that viewing genitalia on a screen is significantly different than being approached by a naked man. Finally, the plain language of A.R.S. § 13-1402(A) sets forth an objective "reasonable person" standard. See *Norgord v. State ex rel. Berning*, 201 Ariz. 228, 232, ¶ 15, 33 P.3d 1166, 1170 (App. 2001). A reasonable person approached rapidly by a naked man would likely be alarmed or

offended. Accordingly, the evidence supports the officer having probable cause to believe that Cusimano was reckless in aggressively walking towards the officer before dressing himself.³

¶17 For these reasons, we conclude that the trial court did not err in determining that Officer B. had probable cause to believe Cusimano had committed the offense of indecent exposure.

Search Incident to Arrest Exception

¶18 All warrantless searches are presumed to be unreasonable under the Fourth Amendment unless they fall within one of the few established exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). The Supreme Court has determined that a "search incident to a lawful arrest" is a valid exception to the warrant requirement. *Chimel v. California*, 395 U.S. 752, 759 (1969). Because Officer B. had probable cause to arrest Cusimano for violating the indecent exposure statute, the arrest was lawful. *See State v. Hoskins*, 199 Ariz. at 137-38, ¶ 30, 14 P.3d at 1007-08. Therefore, Officer B. was entitled to conduct

³ We similarly reject Cusimano's argument on appeal that his nudity was no different from nudity experienced regularly in locker rooms, private gyms, steam baths, spas, and at urinals in public restrooms. In those situations, nudity or partial exposure is routine and expected. Furthermore, as already noted, we are not addressing a situation in which an individual is surprised by the presence of another person and quickly turns his back to get dressed or asks for a moment to cover up. Instead, Cusimano stood up and walked toward the officer in an aggressive manner.

a search incident to arrest. See *Chimel*, 395 U.S. at 759.

Scope of the Search

¶19 Cusimano argues for the first time on appeal that the scope of the search incident to arrest exceeded constitutional parameters. He contends that the search of his wallet was not justified as part of the search incident to arrest because Officer B. had concluded his search for weapons and Cusimano had no access to his wallet at the time of the search. The State responds that since Cusimano raised no such claim in the trial court, he has forfeited appellate review of this claim. After reviewing the record, we agree that Cusimano did not raise this specific issue before the trial court.

¶20 “[F]ailure to raise an issue at trial . . . waives the right to raise the issue on appeal.” *State v. Gatliff*, 209 Ariz. 362, 364, ¶ 9, 102 P.3d 981, 983 (App. 2004) (quoting *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991)). Failure to preserve an issue for review limits the scope of review to fundamental error. *Id.* at ¶ 12. Ordinarily we would engage in a fundamental error analysis, but because Cusimano did not argue at trial that the scope of the search incident to arrest exceeded permissible constitutional limitations, we do not have an adequate record and are therefore unable to conduct fundamental error review.

¶21 Thus, Cusimano has forfeited this issue. We further

note that because Cusimano did not raise the issue and develop the necessary record, Cusimano cannot carry his burden of demonstrating prejudice.⁴

CONCLUSION

¶22 For the reasons set forth above, we affirm Cusimano's conviction and imposition of probation.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
DIANE M. JOHNSEN, Presiding Judge

_____/s/_____
MICHAEL J. BROWN, Judge

⁴ We need not reach the issue asserted by the State that Cusimano cannot show the requisite prejudice because the drugs in the wallet would have been inevitably discovered during an inventory search.