

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



DIVISION ONE
FILED: 07-29-2010
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0885
)
) DEPARTMENT E
Appellee,)
) MEMORANDUM DECISION
v.)
) (Not for Publication -
JOHN DENNIS McCLUSKEY,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Yuma County

Cause No. S1400CR200900342

The Honorable Andrew W. Gould, Judge

CONVICTION AND SENTENCE AFFIRMED

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

Michael A. Breeze Yuma
By Edward F. McGee, Deputy Public Defender
Attorneys for Appellant

J O H N S E N, Judge

¶1 This appeal was timely filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz.

297, 451 P.2d 878 (1969), following John Dennis McCluskey's conviction of theft of means of transportation, a Class 3 felony. McCluskey's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. See *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. 738; *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). McCluskey was given the opportunity to file a supplemental brief but did not do so. Counsel now asks this court to search the record for fundamental error. After reviewing the entire record, we affirm McCluskey's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶12 One night at Kofa High School in Yuma, McCluskey entered a school van and drove away in it.¹ McCluskey was apprehended and gave a written statement to police, which was read to the jury. In the statement, McCluskey admitted he took the van and stated, "I tried to sell it and no one wanted it. I ended up parking it at the house of someone I know was in jail. I took the license plate off and threw it in the dumpster down the road." At trial, McCluskey testified to the same facts.

¶13 After the jury convicted McCluskey, the court found he had two historical prior felony convictions and sentenced him to

¹ Upon review, we view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against McCluskey. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

the presumptive term of 11.25 years' imprisonment with 293 days' presentence incarceration credit.

¶14 McCluskey timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and -4033 (2010).²

DISCUSSION

¶15 McCluskey asked his counsel to request we address whether his appointed trial counsel was ineffective. This argument, however, is not properly raised on appeal but instead must be raised in a proceeding for post-conviction relief. *State v. Torres*, 208 Ariz. 340, 345, ¶ 17, 93 P.3d 1056, 1061 (2004) (citations omitted).

¶16 The record reflects McCluskey received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court held appropriate pretrial hearings. The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of eight members with one alternate. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous

² Absent material revisions after the date of an alleged offense, we cite a statute's current version.

verdict, which was confirmed by juror polling. The court considered a presentence report, addressed its contents during the sentencing hearing and imposed a legal sentence.

CONCLUSION

¶7 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. After the filing of this decision, defense counsel's obligations pertaining to this appeal have ended. Defense counsel need do no more than inform McCluskey of the outcome of this appeal and his future options, unless, upon review, counsel finds "an issue appropriate for submission" to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, McCluskey has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. McCluskey has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

/s/
DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/
PATRICK IRVINE, Judge

/s/
ANN A. SCOTT TIMMER, Judge