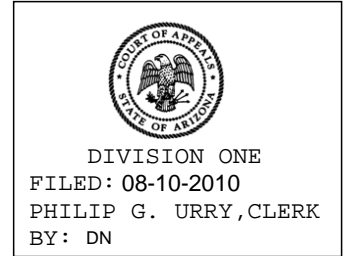


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) 1 CA-CR 09-0933
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
DANIEL SEARS WILLIS,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Apache County

Cause No. CR 2009-076

The Honorable Donna J. Grimsley, Judge

AFFIRMED AS CORRECTED

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

Emily L. Danies Tucson
Attorney for Appellant

N O R R I S, Judge

¶1 Daniel Sears Willis timely appeals from his conviction and sentence for possession of drug paraphernalia, a class six felony. After searching the record on appeal and finding no arguable question of law that was not frivolous, Willis's

counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. This court granted counsel's motion to allow Willis to file a supplemental brief *in propria persona*, but Willis chose not to do so. After reviewing the entire record, we find no fundamental error and therefore affirm Willis's conviction and sentence as corrected to reflect a four-day increase in his presentence incarceration credit.

FACTS AND PROCEDURAL BACKGROUND¹

¶12 On February 28, 2009, police conducted a traffic stop of Willis's truck and a K-9 police officer searched his vehicle. With the assistance of his canine, the officer found a vial containing "a white crystalline substance" and "a green leafy substance," and a little black box containing five plastic baggies consistent with drug paraphernalia. After the officer arrested him, Willis answered the officer's questions regarding the items and Willis's drug use.² The officer found Willis's responses not credible.

¹We view the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Willis. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

²When the officer asked Willis if there was anything illegal in his vehicle, he answered, "Um, not totally." When asked "what the methamphetamine, marijuana was in the vial,"

¶13 The State charged Willis with possession of dangerous drugs and possession of drug paraphernalia. It later amended the information to allege Willis had historical prior felony convictions. Before trial, the State filed a Contingent Motion for Judicial Notice of two of Willis's prior felonies for sentence enhancement purposes, the jury found Willis guilty of possession of drug paraphernalia, and at sentencing the superior court granted the State's motion for judicial notice. The court sentenced Willis to the presumptive 3.75 year term for a category three repetitive offender, with 245 days of presentence incarceration credit. See Ariz. Rev. Stat. ("A.R.S.") § 13-703(C), (J) (2010).³

DISCUSSION

¶14 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Willis received a fair trial. He was represented by counsel at all stages of the proceedings and was present at all critical stages.

Willis responded, "Yeah, right, that's for my pills." Finally, the officer asked Willis about the last time he had used drugs. According to the officer, Willis stated he used drugs "two days prior, and he said that's why he forgot what the items [were] that were inside the vehicle." The superior court ruled these statements were admissible at trial after holding a voluntariness hearing.

³We cite to the current versions of statutes in this decision because they are identical to the versions in effect at the time of Willis's offense.

¶15 The evidence presented at trial was substantial and supports the verdict. The jury was properly comprised of eight members and the court properly instructed the jury on the elements of the charge, Willis's presumption of innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Willis was given an opportunity to speak at sentencing, and his sentence was within the range of acceptable sentences for his offense.

¶16 Although the sentence imposed by the court falls within the legal range, the manner in which the State submitted proof Willis had two prior felony convictions for purposes of sentence enhancement was problematic. While a superior court is entitled to take judicial notice of its own criminal records, *In re Sabino R.*, 198 Ariz. 424, 425, ¶ 4, 10 P.3d 1211, 1212 (App. 2000), to properly enhance a defendant's sentence using prior convictions the State must also "submit positive identification establishing that the accused is the same person who previously was convicted." *State v. Bennett*, 216 Ariz. 15, 16, ¶ 2, 162 P.3d 654, 655 (App. 2007) (quoting *State v. Cons*, 208 Ariz. 409, 415, ¶ 16, 94 P.3d 609, 615 (App. 2004)). Without this "positive identification," an enhanced sentence is illegal and constitutes fundamental error, even if the defendant failed to object. *State v. Thues*, 203 Ariz. 339, 340, 54 P.3d 368, 369

(App. 2002); see *State v. Karr*, 221 Ariz. 319, 324, ¶ 21, 212 P.3d 11, 16 (App. 2008).

¶17 In this case, without objection from Willis, the State presented no direct evidence of a "positive identification" of him as the same person who was previously convicted, and Willis failed to object to the court taking judicial notice of the convictions. The record, however, contains sufficient evidence to make this positive identification. Specifically, the record contains the informations from both prior felonies, a plea agreement associated with the second felony, and a probation officer's statement Willis was placed on probation for the first felony.⁴ Both prior felonies took place in Apache County. Willis's full name and birthday, listed on the sentencing minute entry in this case, match the name and birthday listed on both informations in the prior felony cases. In addition, the cause numbers in the State's motion to allege priors match the cause numbers on the informations and plea agreement contained in the record.

¶18 Finally, the sentencing minute entry contains an error in that the court did not grant Willis the proper presentence

⁴These documents were part of a "Pre-Sentence Report/Addendum" evidently "attached" to the "Addendum Pre-sentence Report" filed in this case. The record as transmitted to this court by the clerk of the superior court was in disarray, however, and the "Pre-Sentence Report/Addendum" was neither attached to the "Addendum Pre-sentence Report" nor separately listed in the index of the record on appeal.

incarceration credit. We therefore correct the sentence imposed to reflect 249 days of presentence incarceration credit,⁵ instead of 245 days. See A.R.S. § 13-712(B) (2010); *State v. Mathieu*, 165 Ariz. 20, 25, 795 P.2d 1303, 1308 (App. 1990).

CONCLUSION

¶9 We decline to order briefing and affirm Willis's conviction and sentence as corrected.

¶10 After the filing of this decision, defense counsel's obligations pertaining to Willis's representation in this appeal have ended. Defense counsel need do no more than inform Willis 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984).

⁵The record reflects Willis was taken into custody on March 18, 2009. He was sentenced November 23, 2009.

¶11 Willis has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Willis 30 days from the date of this decision to file an *in propria persona* motion for reconsideration.

/s/

PATRICIA K. NORRIS, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

MAURICE PORTLEY, Judge