DIVISION ONE
FILED: 08/02/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0944
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
DALEN CHRISTOPHER JONES,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-126835-001 DT

The Honorable Maria del Mar Verdin, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General By Kent E. Cattani, Chief Counsel Criminal Appeals/Capital Litigation Section And William Scott Simon Attorneys for Appellee	Phoenix
Law Offices of Ballecer & Segal By Natalee Segal Attorneys for Appellant	Phoenix

K E S S L E R, Judge

¶1 Appellant Dalen C. Jones ("Jones") appeals the classification of his marijuana possession as a class six felony. Jones argues that classifying mere possession of a

small amount of marijuana as a felony offense violates the cruel and unusual punishment provisions of the Eighth Amendment to the United States Constitution and Article 2, Section 15, of the Arizona Constitution.[1] We disagree, and affirm the trial court's decision.

FACTUAL AND PROCEDURAL HISTORY[2]

¶2 Jones shot his uncle in the leg at the Silver Pony bar in south Phoenix and fled the scene. When he was later apprehended, police found a small amount of marijuana in a baggie in his pants pocket, which Jones acknowledged was his. At trial, a criminalist testified that the marijuana weighed 5.7 grams, or enough for about "twenty cigarettes, maybe a few less."

¶3 The State indicted Jones on three counts of aggravated assault, one count of attempted aggravated assault, one count of disorderly conduct, and one count of possession of marijuana, a class six felony. Prior to trial, the State dismissed the attempted aggravated assault charge. At trial, the jury acquitted Jones on one aggravated assault charge but convicted him on all other counts.

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[1] The Arizona Supreme Court has held that absent compelling circumstances Arizona and federal cruel and unusual punishment provisions will be interpreted identically. Appellant does not suggest there are such compelling circumstances in this case and we find none; thus, no separate analysis is needed. *State v. Davis*, 206 Ariz. 377, 380-81, ¶ 12, 79 P.3d 64, 67-68 (2003).

[2] The facts in this summary are uncontested.

¶4 The trial court sentenced Jones to concurrent prison terms of 7.5 years for the charges of aggravated assault and 2.5 years for disorderly conduct. Regarding possession of marijuana, the trial court placed Jones on probation for 2 years, to begin after his discharge from prison.

¶5 Jones filed a timely notice of appeal from the judgment and sentence. This Court has jurisdiction under Arizona Constitution Article 4, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A) (2010).

ANALYSIS

¶6 Jones argues that A.R.S. § 13-3405(B)(1) (Supp. 2010), which classifies possession of less than two pounds of marijuana not for sale as a class six felony, is unconstitutional, and that his sentence constitutes reversible fundamental error.[3] This Court reviews constitutional issues *de novo*. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62, 94 P.3d 1119, 1140 (2004); *Martin v. Reinstein*, 195 Ariz. 293, 301, ¶ 16, 987 P.2d 779, 787 (App. 1999).

[3] Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984)). To obtain reversal, the defendant must also show the fundamental error prejudiced him. *Henderson*, 210 Ariz. at 567, ¶ 20, 115 P.3d at 607.

¶7 The Arizona Supreme Court most recently reviewed the constitutional provisions for cruel and unusual punishment in 2006. *See State v. Berger*, 212 Ariz. 473, 483, ¶ 51, 134 P.3d 378, 388 (2006) (holding that twenty consecutive ten-year sentences for possession of child pornography was not unconstitutional). There, the court applied the United States Supreme Court's "narrow proportionality principle," which prohibits only sentences that are "grossly disproportionate" to the crime.[4] *Id.* at 475, ¶ 10, 134 P.3d at 380 (quoting *Ewing*, 538 U.S. at 20). To determine whether a sentence is grossly disproportionate, the court established a threshold test comparing "the gravity of the offense [to] the harshness of the penalty." *Id.* at 476, ¶ 12, 134 P.3d at 381 (quoting *Ewing*, 538 U.S. at 28). If this comparison leads to an inference of disproportionality, the court further tests the inference by considering (1) similar sentences the State has imposed on other crimes and (2) the sentences other states impose for the same crime. *Berger*, 212 Ariz. at 476, ¶ 12, 134 P.3d at 381. *See also Ewing*, 538 U.S. at 23-24; *Harmelin v. Michigan*, 501 U.S. 957, 1004-05 (1991) (Kennedy, J., concurring in part and concurring in the judgment).

[4] This standard applies only to noncapital crimes. *Ewing*, 538 U.S. 11, 20 (2003).

¶8 However, because the legislature, not the judiciary, determines punishment for criminal offenses, any classification or sentence which rationally furthers a legislative penological goal in a substantial way is entitled to deference and does not meet the threshold test. *Berger*, 212 Ariz. at 477, ¶ 17, 134 P.3d at 382. Alternatively, while a legislative sentencing scheme may not constitute cruel and unusual punishment on its face, it may be unconstitutional as applied to a particular sentence imposed on a particular defendant. *Id.* at 481, ¶ 39, 134 P.3d at 386. In that situation, a specific sentence may be found grossly disproportionate in the rare situation when a specific defendant or crime so significantly deviates from the anticipated offender or crime under the law that punishing him in an equally harsh manner would have no effect on the law's penological goal. *See Berger,* 212 Ariz. at 481, ¶ 40, 134 P.3d at 386; *State v. Davis,* 206 Ariz. 377, 385, ¶ 36, 79 P.3d 64, 72 (2003) (holding that Davis was "caught in the very broad sweep of the governing statute" that made no distinction between the perpetrators of incest, serial pedophiles, and an eighteen-year-old man engaging in sex initiated by a fifteen-year-old girlfriend); *State v. Bartlett*, 171 Ariz. 302, 306-10, 830 P.2d 823, 827-31 (1992) (holding that although Bartlett had "consensual sexual relations" with a minor under fifteen years

of age, "the circumstances of this crime . . . minimize its severity" and do not merit a forty-year sentence).[5]

¶9 Jones does not argue that the sentence of two years' probation is disproportionate to the offense. He argues only that felony classification itself outweighs the crime, since a felony conviction may deprive a person of the "right to vote, to hold office, [and] to be a juror," and such a conviction can adversely affect the lives of "young citizens." Thus, he contends that classifying possession of marijuana as a felony constitutes cruel and unusual punishment. Assuming that a classification of an offense can violate the prohibition of cruel and unusual punishment, we disagree with Jones's conclusion.

¶10 We presume the legislature acts constitutionally, and if there is any reasonable basis for a statute, even if such basis is debatable, it will be upheld unless clearly unconstitutional. *Berger*, 212 Ariz. at 477, ¶ 17, 134 P.3d at 382; *State v. McInelly*, 146 Ariz. 161, 163, 704 P.2d 291, 293 (App. 1985). Marijuana may cause societal harm, as evidenced by the illegal drug trafficking market and the dangers of enforcing drug laws. Considering a related issue, the court in *State v.*

[5] While our Supreme Court overturned *Bartlett* on the issue of individualized analysis of gross disproportionality, *State v. DePiano*, 187 Ariz. 27, 30, 926 P.2d 494, 497 (1996), the Court later disapproved of *DePiano* on this very point. *Davis*, 206 Ariz. at 384, ¶ 34, 9 P.3d at 71.

Wadsworth upheld strict classification (in categories of illegal drugs) for marijuana, citing widespread use of the drug and its availability as "justifications for . . . more severe penalties." 109 Ariz. 59, 63, 505 P.2d 230, 234 (1973) (holding that "[t]he fact that an objectionable practice is widespread may mandate a stiffer penalty in order to discourage its continued use").

¶11 We recognize that the fears of marijuana's possible adverse effects on health and society are subject to serious question, and there is still an ongoing debate about the benefits and health risks of marijuana use and whether it should be decriminalized. *Compare* National Institutes of Health National Institute on Drug Abuse InfoFacts: Marijuana (http://www.nida.nih.gov/Infofacts/marijuana.html (last visited June 29, 2011) (summarizing possible adverse health effects of marijuana use), *with* Marijuana: Myths vs. Reality, Marijuana Policy Project (http://www.mpp.org/library/research/marijuana-myths-vs-reality.html (last visited June 29, 2011) (summarizing arguments dispelling possible health risks from use of marijuana). *See also* Kara Godbehere Godwin, *Is the End of the War in Sight: An Analysis of Canada's Decriminalization of Marijuana and the Implications for the United States "War on Drugs"*, 22 Buff. Pub. Int. L.J. 199 (2003-04); Alex Kreit, *The Decriminalization Option: Should States Consider Moving from a*

Criminal to a Civil Drug Court Model, 2010 U. Chi. Legal F. 299 (2010). Given this debate, it is ultimately up to the legislature to determine if, on balance, unlawful possession of small amounts of marijuana is serious enough to sanction as a felony or as a crime at all. Since the State has a legitimate interest in preventing the possession and sale of illegal drugs and there is a rational debate on the societal effects of such drugs, a felony classification is a rational means of deterring and punishing offenders.

¶12 When a punishment (or classification, in this case) is supported by rational legislative purposes, it does not meet the threshold test of gross disproportionality unless it is clearly unconstitutional. Once we find a rational basis for the classification, it is up to the legislature, not a court, to determine at what quantity possession of marijuana should be considered a felony or even a crime. The court has no standard by which to judge the severity of the possession of two pounds of marijuana versus that of a few ounces or several pounds. Thus, the Court defers to the legislature's decision as to the amount of marijuana in possession which may be classified as a class six felony.

¶13 Nor can we say that, as applied to the facts in this case, a felony classification for marijuana is that rare situation where a specific defendant or crime so significantly

deviates from the anticipated offender or crime under the law, such that punishing him equally harshly would have no effect on the law's penological goal. *See Berger,* 212 Ariz. at 481, ¶ 40, 134 P.3d at 386. Recognizing the harshness of the felony classification, the law allows for re-classification of possession of marijuana under some circumstances as a misdemeanor. A.R.S. §§ 13-604(A) (2010), -3405(H) (2010). Thus, at some point in the future, the court could reclassify the marijuana conviction as a misdemeanor. The severity of a felony conviction is also tempered by Arizona law prohibiting incarceration for first or second time possession of controlled substances absent other extenuating circumstances. A.R.S. § 13-901.01 (2010).

¶14 According to *Wadsworth*, the goal of this legislation is to reduce the overall amount of marijuana used within the state. *Wadsworth*, 109 Ariz. at 63, 505 P.2d at 234. Since Jones acknowledged the marijuana was his and for personal use, he is the intended perpetrator, and his felony conviction falls within the goals of the statute.

¶15 Moreover, to show fundamental error in this felony conviction, Jones would need to prove that the classification prejudiced him. While he argues that the effects of a felony conviction are severe, we cannot find prejudice here, because Jones was simultaneously convicted of three more severe

felonies, and this specific felony can have no worse effect on his record than the others.

¶16 Jones's claim that the classification is shockingly over-harsh because it targets perpetrators of a "trivial offense" fails to recognize the legislative bases for the felony classification of marijuana as well as legislative tempering of such classification and limitation of incarceration. In cases where the classification might incur a punishment that is too harsh, the court has the freedom to lower it. However, we note that overturning Jones's felony conviction for possession as constitutionally infirm is a futile act given that he was convicted of other felonies not related to the possession count.

CONCLUSION

¶17 It is the legislature, not the court, which decides what a crime is and prescribes punishment for such. The court must defer to the legislature unless the legislation is clearly unconstitutional. This law, criminalizing possession of small amounts of marijuana as a felony, is rationally related to a

legitimate state purpose. Therefore, we affirm the judgment of the superior court.

/s/
DONN KESSLER, Judge

CONCURRING:

/s/
JOHN C. GEMMILL, Presiding Judge

/s/
PATRICK IRVINE, Judge