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



DIVISION ONE
FILED: 02/10/2011
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0234
)
) DEPARTMENT B
Appellee,)
) **MEMORANDUM DECISION**
v.)
) (Not for Publication -
HARRELL GORDON SETTLE, JR.,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-156154-001 DT

The Honorable James R. Morrow, Judge *Pro Tempore*
The Honorable Steven K. Holding, Judge *Pro Tempore*
The Honorable Steven P. Lynch, Judge *Pro Tempore*
The Honorable Pamela Hearn Svoboda, Judge *Pro Tempore*
The Honorable Lisa Ann Vandenberg, Judge *Pro Tempore*

CONVICTION AND SENTENCE AFFIRMED

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Harrell Gordon Settle, Jr. Kingman
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 the conviction of Harrell Gordon Settle, Jr., of one count of possession or use of dangerous drugs, a Class 4 felony.

¶2 Settle's counsel has searched the record on appeal and found no arguable question of law that is not frivolous, and asks us to search the record for fundamental error. 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). Settle filed two supplemental briefs raising several issues. After reviewing the entire record, we affirm Settle's conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶3 Two Phoenix police officers stopped Settle for riding a bicycle after dark without a headlight.¹ One of the officers saw him drop a small plastic bag that later was confirmed to contain methamphetamine. After the jury convicted Settle, the superior court found he had two historical prior felony convictions and sentenced him to a mitigated term of six years. Settle timely appealed.

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

¶14 We have jurisdiction of Settle's appeal 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(A)(1) (2010).²

DISCUSSION

A. Fundamental Error Review.

¶15 The record reflects Settle received a fair trial. He was represented by counsel at all stages of the proceedings and was present for all critical stages except for the reading of the verdict. The State presented direct evidence sufficient to convict. The jury was properly comprised of eight members with two alternates. 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 verdict, which was confirmed by juror polling. The court received and considered a presentence report and addressed its contents during the sentencing hearing and imposed a legal sentence on the crime of which Settle was convicted.

B. Issues Raised by Settle.

¶16 Settle first argues he was incompetent to stand trial pursuant to Arizona Rule of Criminal Procedure 11.1. That rule

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

prohibits a defendant from being tried and convicted "while, as a result of mental illness, defect, or disability, the person is unable to understand the proceedings against him . . . or to assist in his . . . own defense." Ariz. R. Crim. P. 11.1. Settle does not cite any facts in the record to support his contention that he was unable to understand the proceedings against him, nor do we locate any such facts in our review. Indeed, Settle's testimony indicates he clearly understood the charges against him, the potential penalty if convicted and the nature of the trial proceedings. He answered the questions posed to him and coherently explained his version of events. Settle argues his numerous documented illnesses and medications demonstrate his incompetence to stand trial. Rule 11.1, however, provides that "[t]he presence of a mental illness, defect or disability alone is not grounds for finding a defendant incompetent to stand trial."³

¶17 Settle next argues that the judge who presided over his Rule 11 proceeding had an impermissible conflict of interest because he also presided over a portion of Settle's criminal

³ Roughly 90 days after Settle's trial, his lawyer moved to have him evaluated pursuant to Rule 11 "based on observations . . . and the substantial deterioration of his condition in the past several weeks." Settle was evaluated, found to be incompetent and was involuntarily committed for treatment. Roughly two months later the court found that his competency had been restored, and sentencing occurred thereafter.

trial. He cites no authority for this proposition. Settle did not move for a change of judge during the proceedings, and nothing in the record reveals judicial bias or prejudice resulting in an unfair trial.

¶18 Settle also argues his counsel was ineffective. Claims of ineffective assistance of counsel may not be raised on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002) (ineffective assistance of counsel claims must be raised pursuant to Arizona Rule of Criminal Procedure 32).

¶19 Settle next argues police lacked probable cause to stop and question him. A legal traffic stop, however, only requires that police have a reasonable suspicion that a party has committed an offense. *State v. Livingston*, 206 Ariz. 145, 147, ¶ 9, 75 P.3d 1103, 1105 (App. 2003). Further, “[a] traffic violation alone is sufficient to establish reasonable suspicion.” *United States v. Choudhry*, 461 F.3d 1097, 1100 (9th Cir. 2006).

¶10 Arizona Revised Statute § 28-817 (2004) requires a bicycle used at night to have “a lamp on the front that emits a white light visible from a distance of at least five hundred feet to the front.” Although Settle testified he was carrying a flashlight in his hand at the time, he admitted he was riding a

bicycle at night without a headlight. Therefore, there is no constitutional infirmity in the traffic stop.

¶11 Settle further argues officers lacked probable cause to arrest him. The record, however, discloses that police arrested him only after they saw him drop a plastic bag that contained what a field test proved to be methamphetamine.

¶12 Settle also claims that the arresting officers did not have jurisdiction to stop him because he was on private property. There is no evidence in the record to support this assertion. On appeal, Settle offers a handwritten note on a map printed from a commercial Internet site in support of his argument, but on appeal, we are limited to reviewing evidence in the record.

¶13 Settle next contends he was not given a *Miranda* warning until after he arrived at the police station. See *Miranda v. Arizona*, 384 U.S. 436 (1966). Settle did not move to suppress any statements he made to the police, however. Only one of Settle's statements was admitted as evidence at trial to support an element of the crime for which he was charged. The record reveals he gave that statement voluntarily after the arresting officer read him his rights.

¶14 Settle questions the credibility of the officers who testified against him. The jury apparently believed the

officers, however, and witness credibility is a matter for the jury. *State v. Hall*, 204 Ariz. 442, 455, ¶ 55, 65 P.3d 90, 103 (2003).

¶15 Settle claims that the commissioners who heard his case and sentenced him exceeded their statutory authority. Because commissioners are permitted to preside over many of the proceedings in which Settle participated pursuant to Arizona Supreme Court Rule 96(a)(11), we construe his argument to refer only to the jury trial and sentencing.

¶16 Four different commissioners participated in Settle's trial and sentencing. All four had been appointed judges *pro tempore* in accordance with A.R.S. § 12-141 (2003). See Maricopa County Bd. of Supervisors Formal Meeting Minutes 17 (Apr. 23, 2008) (approving the appointment of James R. Morrow, Steven K. Holding, Stephen P. Lynch and Pamela Svoboda as judges *pro tempore* pursuant to A.R.S. § 12-141 for the period beginning July 1, 2008 and ending June 30, 2009); see also Maricopa County Bd. of Supervisors Formal Meeting Minutes 14 (May 6, 2009) (approving the appointment of judges *pro tempore*); *Pro Tempore* Administrative Order No. 2009-17 of the Supreme Court of the State of Arizona (appointing Pamela Svoboda and Lisa Ann Vandenberg as judges *pro tempore*, subject to the approval of the Maricopa County Board of Supervisors, for the period beginning

July 1, 2009 and ending June 30, 2010). A judge *pro tempore* has the same powers and duties as a superior court judge. A.R.S. § 12-144(D) (2003).

¶17 Settle next argues there was an inadequate chain of custody for the drug evidence used to convict him. He relies solely on the fact that the arresting officers were from a different precinct than the officer who conducted the field test on the drugs, and he points to nothing in the record to suggest that the chain of custody was inadequate. We conclude his argument has no merit.

¶18 Finally, Settle states, "The courts [sic] allowed concealment to be a part of this possession [sic] charge." We construe this argument as a challenge to the court's instructions to the jury that it "may consider any evidence of the defendant's concealing evidence, together with all the other evidence in this case. [The jury] may also consider the defendant's reasons for concealing evidence." The evidence, however, supported the giving of a concealment instruction. The arresting officer testified that Settle attempted to put the plastic bag containing drugs into his pocket. See *State v. Tschilar*, 200 Ariz. 427, 436, ¶ 36, 27 P.3d 331, 340 (App. 2001) ("A party is entitled to an instruction on any theory reasonably supported by the evidence.").

CONCLUSION

¶19 We have reviewed the entire record for reversible error and have identified none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881.

¶20 After the filing of this decision, defense counsel's obligations in this appeal have ended. Defense counsel need do no more than inform Settle 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, Settle has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Settle 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/

MICHAEL J. BROWN, Judge

/s/

JOHN C. GEMMILL, Judge