

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



DIVISION ONE  
FILED: 01/27/2011  
RUTH WILLINGHAM,  
ACTING CLERK  
BY: GH

STATE OF ARIZONA, ) 1 CA-CR 10-0427  
)  
Appellee, ) DEPARTMENT C  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
) Rule 111, Rules of the  
ROBERT LEE HERRELL, ) Arizona Supreme Court)  
)  
Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Mohave County

Cause No. CR 2008-0671

The Honorable Lee F. Jantzen, Judge

**AFFIRMED**

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Thomas C. Horne, Attorney General by Kent E. Cattani, Chief Counsel, Criminal Appeals/Capital Litigation Section Attorneys for Appellee	Phoenix
Jill L. Evans, Mohave County Appellate Defender Attorney for Appellant	Kingman
Robert Lee Herrell Appellant	Tucson

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P O R T L E Y, Judge

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Defendant, Robert Lee Herrell, has advised us that after searching the entire record, she has been unable to discover any arguable questions of law, and has filed a brief requesting us to conduct an *Anders* review of the record. Additionally, Defendant filed a supplemental brief and raises several issues.

#### FACTS<sup>1</sup>

¶2 When police served a search warrant at an apartment Defendant shared with his girlfriend, they found him sleeping in the bedroom. Defendant was read his *Miranda*<sup>2</sup> warnings and was asked where the drugs were hidden. He told the police that the drugs were located in a blue pouch/bank bag in a night stand next to the bed. The bag contained two glass pipes with burnt residue, several small plastic baggies, rolling papers, a digital scale, and two baggies containing 7.55 grams of methamphetamine. He subsequently told police that he purchased a quarter ounce of methamphetamine every other day and sold the

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<sup>1</sup> We review the facts in the light most favorable to sustaining the verdict. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

<sup>2</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966).

drugs to pay rent. He also told police that the drugs belonged to him and that his girlfriend had "no involvement."

¶3 Defendant was charged with possession of methamphetamine for sale and possession of drug paraphernalia. The trial judge refused to accept Defendant's plea,<sup>3</sup> and the case was reassigned to a different judge. At trial, in addition to the State's evidence, Defendant testified that he knew the bag was in the nightstand, but denied that it contained drugs. He also denied that he told the police that he sold drugs.

¶4 After being instructed, the jury convicted Defendant as charged. Defendant was sentenced to eight years in prison for possession of dangerous drugs for sale, and a concurrent term of one year for possession of drug paraphernalia. He was also given 442 days of presentence incarceration credit.

¶5 We have jurisdiction over this 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, and -4033(A)(1) (2010).

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<sup>3</sup> The trial judge refused to accept the plea with a sentence of probation because Defendant had two prior felony convictions and previously failed to complete probation. The State had been unaware of Defendant's prior felony convictions. Subsequently, Defendant requested and was granted a change of judge pursuant to Arizona Rule of Criminal Procedure 10.2(a).

## DISCUSSION

¶6 Defendant raised a number of claims in his supplemental brief that we will address. He first argues that the State improperly commented on his right to remain silent. The record, however, does not support his claim. The State did not comment on his right to remain silent. He provided statements to the police, which were repeated at trial, and he testified in his own defense. Consequently, the record does not support his assertion.

¶7 Defendant next asserts that police did not read him the *Miranda* warnings. Although the police testified that Defendant was Mirandized, Defendant waived any appellate argument because he did not file a motion to suppress the statements or object to their admission at trial. "Issues concerning the suppression of evidence which were not raised in the trial court are waived on appeal." *State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981); see also Ariz. R. Crim. P. 16.1(c) ("Any motion, defense, objection, or request not timely raised under Rule 16.1(b) shall be precluded, unless the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known, and the party raises it promptly upon learning of it."). The waiver rule applies "even though rights of constitutional dimensions

have been lost." *Tison*, 129 Ariz. at 535-36, 633 P.2d at 344-45.

¶8 We may, however, review a suppression argument raised for the first time on appeal for fundamental error. *State v. Jones*, 185 Ariz. 471, 480-82, 917 P.2d 200, 209-11 (1996). 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)) (internal quotation marks omitted).

¶9 We find no error here, much less fundamental error, because the investigating officers testified that Defendant was read the *Miranda* warnings. Additionally, we note that the trial court instructed the jury that it had to independently determine the voluntariness of any statements made to the police, and we assume the jury followed the instructions. See *State v. Newell*, 212 Ariz. 389, 403, ¶ 69, 132 P.3d 833, 847 (2006).

¶10 Defendant next contends that the trial court erred when the State was allowed to comment on his prior felony conviction. Defendant filed a motion in limine to try to keep out his two prior felony convictions because they were more prejudicial than probative. The trial judge conducted a

balancing test pursuant to Arizona Rule of Evidence 403, and determined that if Defendant testified, he could be impeached by his sanitized 2006 conviction<sup>4</sup> but his 1991 conviction was inadmissible. Defendant testified and admitted that he had the 2006 conviction. Then, during closing argument, the State suggested to the jury that Defendant's prior felony conviction could be used to "assess his credibility."

¶11 We review an evidentiary ruling for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, 10, ¶ 15, 66 P.3d 50, 53 (2003). Here, the trial court did not abuse its discretion when it determined that only the sanitized 2006 felony conviction was admissible.

¶12 Defendant also asks that we reconsider his sentence because it was harsh and unfair. Defendant does not challenge his sentence which was less than the presumptive term. Instead, he seeks to be resentenced to a lesser term. Defendant has not cited to any authority which would allow us to independently reconsider his sentence. Consequently, we cannot resentence him.

¶13 Finally, Defendant makes several arguments relating to racial profiling and the search warrant affidavit, as well as the integrity of the investigating officers. Defendant,

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<sup>4</sup> The conviction was for Defendant being a felon in possession of a firearm.

however, did not raise these issues below. Consequently, they have been waived and we will not consider them absent fundamental error. See *State v. Bolton*, 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995). We have considered the arguments and do not find fundamental error.

¶14 We have read and considered counsel's brief, and have searched the entire record for reversible error. We find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The record, as presented, reveals that Defendant was represented by counsel at all stages of the proceedings, and the sentence imposed was within the statutory limits.

#### CONCLUSION

¶15 After this decision has been filed, counsel's obligation to represent Defendant in this appeal has ended. Counsel need do no more than inform Defendant of the status of the appeal and Defendant's future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. See *State v. Shattuck*, 140 Ariz. 582, 585, 684 P.2d 154, 157 (1984). Defendant can, if desired, file a motion for reconsideration or petition for review pursuant to the Arizona Rules of Criminal Procedure.

¶16 Accordingly, we affirm Defendant's convictions and sentences.

/s/

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MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/

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MARGARET H. DOWNIE, Judge

/s/

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PATRICIA A. OROZCO, Judge