

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: 07/12/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 10-0641
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
ERIC DUANE TONGATE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-172475-001 SE

The Honorable Carolyn K. Passamonte, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Margaret M. Green, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Eric Duane Tongate ("Appellant") appeals from his conviction for theft, a class 3 felony. Appellant appeals pursuant to *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Appellant's

counsel has searched the record on appeal and finds no arguable non-frivolous question of law. See *Anders*, 386 U.S. 738; *Smith v. Robbins*, 528 U.S. 259 (2000); *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel asks this court to independently review the record for fundamental error. Appellant was given the opportunity to file a supplemental brief but has not done so. We have reviewed the record and find no fundamental error. Accordingly, we affirm.

FACTS¹ AND PROCEDURAL HISTORY

¶2 Appellant was the branch manager of a store that provided check cashing, loans and other financial services. The store contained a safe, which had outer and inner compartments. Although many managers could open the safe, only Appellant had the key that allowed access to the inner compartment. The safe was in an area usually inaccessible to all but employees, who accessed it through a pair of locked doors and a hallway known as the "man trap." The store was protected by a monitored alarm system that also monitored access to the safe.

¶3 On Monday, October 22, 2007, Appellant inventoried the safe and determined that it contained the amount of money shown in the store's accounting system. Appellant then ordered additional cash be delivered to the store. When the cash

¹ On appeal, we view the facts in the light most favorable to sustaining the convictions. *State v. Haight-Gyuro*, 218 Ariz. 356, 357, ¶ 2, 186 P.3d 33, 34 (App. 2008).

arrived on October 24, Appellant put it in the inner compartment without examining the contents of that compartment. The cash delivered included \$20,000 in \$100 bills.

¶4 On October 25, an outside manager was brought in to run the store while the store's employees attended a team-building event. The covering manager had access to the outer compartment but not the inner one. The covering manager discovered that the amount of money in the outer compartment differed from what the accounting system showed. When contacted about the problem, Appellant claimed he "just forgot to move money," and when he returned to the store that day, he went to the safe area and did something -- the record is unclear what -- that reconciled the outer compartment with the accounting system.

¶5 On October 26, 2007, Appellant was fired for reasons unrelated to this case. Appellant turned over his key to the inner compartment and left the store before the safe was inventoried. The inventory showed that the inner compartment was missing \$20,000, in the form of two straps of one hundred \$100 bills. There was no indication that the inner compartment had been forced open. After Appellant learned of the missing money, he made no effort to assist the store in determining what happened to it.

¶16 On November 8, 2008, a direct complaint was filed charging Appellant with one count of theft, a class 3 felony.² After his initial appearance, Appellant was released on his own recognizance. Appellant received a five-day trial before eight jurors. He testified on his own behalf, and contradicted some of the testimony of the other witnesses. However, he did not deny that money was missing, or allege that anyone else accessed the inner compartment between his inventory of the safe on Monday and the discovery that money was missing from the inner compartment on Friday.

¶17 The jury found Appellant guilty of theft of more than \$4,000 but less than \$25,000 in value. The court sentenced him to two years of probation and ordered him to pay \$20,000 in restitution. The court also imposed a deferred sentence of 45 days, conditioned on Appellant complying with the terms of his probation and making restitution. Appellant timely appeals. We have jurisdiction under A.R.S. § 12-120.21.

DISCUSSION

¶18 The record reflects Appellant received a fair trial. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Appellant was represented at all stages of the proceedings. The court properly instructed

² The complaint was later amended to correct the alleged date of the crime.

the jury on the elements of the charged offense. Further, the court properly instructed the jury on the state's burden of proof. There was sufficient evidence to support the jury's verdict. The court received and considered a presentence report and imposed a legal sentence.

CONCLUSION

¶19 We have reviewed the record for fundamental error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Accordingly, we affirm Appellant's conviction and sentence. Defense counsel's obligations pertaining to this appeal have come to an end. See *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Unless, upon review, counsel discovers an issue appropriate for petition for review to the Arizona Supreme Court, counsel must only inform Appellant of the status of this appeal and his future options. *Id.* Appellant has 30 days from the date of this decision to file a petition for review *in propria persona*. See Ariz. R. Crim. P. 31.19(a). Upon the court's own motion, Appellant has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/

PETER B. SWANN, Presiding Judge

CONCURRING:

/s/

DANIEL A. BARKER, Judge

/s/

PATRICIA K. NORRIS, Judge