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

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0799
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JORGE HERNANDEZ ROQUE,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-007446-005DT

The Honorable Michael W. Kemp, Judge

AFFIRMED

Thomas C. Horne, 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 Louise Stark, Deputy Public Defender
Attorneys for Appellant

G E M M I L L, Judge

¶1 Jorge Hernandez Roque ("Defendant") appeals from his convictions and sentences for conspiracy to commit possession of marijuana for sale and possession of marijuana for sale

involving a weight greater than four pounds, each a class two felony. Defendant's counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law and requesting that this court examine the record for reversible error. Counsel's brief also includes a list of issues that Defendant requested counsel raise. Defendant was afforded the opportunity to file a supplemental brief *in propria persona* but did not do so. See *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 "We view the facts and all reasonable inferences therefrom in the light most favorable to sustaining the convictions." *State v. Powers*, 200 Ariz. 123, 124, ¶ 2, 23 P.3d 668, 669 (App. 2001).

¶13 On the afternoon of June 17, 2009, police were conducting surveillance on a house located on West Vista Avenue in Glendale as part of a narcotics investigation. The house was the target of a previous narcotics investigation that uncovered a large marijuana transaction.

¶14 Sergeant S.K. of the Glendale Police Department was conducting surveillance on the West Vista house from a car parked in a neighbor's driveway. From his position, Sergeant

S.K. observed a black Dodge truck parked on the street in front of the house. At approximately 1:00 p.m., Sergeant S.K. observed a black Toyota Camry with a Washington license plate briefly stop in front of the house and then leave. The Camry returned twenty minutes later and parked on the street in front of the house. The driver, who was later identified as Christopher Notice, walked to the front door of the house and was let inside. Several minutes later, at approximately 1:45 p.m., Notice returned to the Camry and drove away.

¶15 Shortly after, Defendant exited the West Vista house and moved the Dodge pickup truck onto the driveway. Defendant went inside the house and returned to the truck a few minutes later carrying a large black plastic bag that contained "bulky material." He placed the black bag under a piece of drywall in the truck's bed and drove away in the truck.

¶16 Police Officer L.P. was assisting with the surveillance and was stationed in an unmarked car on the perimeter of the neighborhood. Officer L.P. was advised that the Camry and Dodge left the West Vista house. Officer L.P. and other officers in the area began mobile surveillance on both vehicles. According to Officer L.P., the Camry and Dodge stopped at a gas station for approximately five minutes and then both vehicles traveled to a golf course. The vehicles stopped in the parking lot at the golf course. Officer L.P. observed

Notice leave the Camry, grab a large black plastic bag from the bed of the Dodge truck, and place the bag in the trunk of the Camry. Defendant never left the truck. Once Notice put the bag in the trunk of the Camry, both cars left the parking lot.

¶17 Officer L.P. followed the Camry from the parking lot and assisted another officer in stopping the car. According to Officer L.P., when he approached the passenger side of the Camry he smelled a strong odor of marijuana coming from inside the vehicle. Shortly after the stop, Detective C.B. arrived with his drug-sniffing dog, Buddy. Buddy alerted Detective C.B. to the trunk of the car and, in particular, a large black plastic bag. It was later determined that the bag contained over seven pounds of marijuana. Police also found marijuana during a subsequent search of the West Vista house. The marijuana found inside the house was the same type of marijuana found in the Camry.

¶18 At approximately the same time police stopped the Camry, other members of the surveillance team stopped the Dodge truck. Detective L.B. assisted in the traffic stop of the Dodge and made contact with Defendant. Detective L.B. took Defendant to her police car and asked for his name and identification. Defendant told Detective L.B. that he did not have identification and provided her with a false name.

¶19 While in the car, Detective L.B. read Defendant his

*Miranda*¹ rights. After being read his *Miranda* rights, Defendant agreed to speak with Detective L.B. According to Defendant, his boss had asked him to go to the West Vista house to perform extra work. Defendant said his boss paid him \$100 to follow Notice because the tags on the Camry were expired. He also said there were "some black males and some Hispanic males in the house[,] " and that while he was inside the house he smelled marijuana and saw people counting money.

¶10 As with the Camry, Detective C.B. had Buddy perform a "free air sniff" around the Dodge, and Buddy alerted Detective C.B that there were narcotics in the truck. Detective C.B., however, did not find any drugs and opined that Buddy was smelling marijuana that was previously inside the truck. Defendant was arrested and taken to jail.

¶11 On August 27, 2009, Defendant and several others were named in a ten count indictment. Defendant was charged with one count of conspiracy to commit possession of marijuana for sale (Count 1) and one count of possession of marijuana for sale having a weight that exceeds four pounds (Count 3), both class two felonies. The State also alleged that Defendant had two prior felony convictions, and that he was on conditional release for those convictions at the time he allegedly committed the

¹ *Miranda v. Arizona*, 384 U.S. 436 (1966).

current offenses.

¶12 The matter proceeded to a jury trial in August 2010. Defendant was tried with co-defendant, Juan Abundez Leyva. Similar to Defendant, Leyva was arrested and charged with various drug-related offenses as a result of the investigation into the West Vista house on June 17, 2009.

¶13 During trial, the jury heard testimony from several members of law enforcement who were working surveillance on the West Vista house and conducting mobile surveillance on Defendant. During direct examination, Detective L.B. commented that Roque had past arrests. Defendant's counsel objected and the court sustained the objection. The court struck Detective L.B.'s statement from the record and gave the jury a curative instruction. Counsel for Defendant moved for a mistrial, but his motion was denied. Also, at the close of the State's case-in-chief, Defendant's counsel moved for a directed verdict pursuant to Rule 20, Arizona Rule of Criminal Procedure, arguing there was insufficient evidence regarding the chain of custody of the black plastic bag. The motion was denied and the jury ultimately found Defendant guilty as charged.

¶14 On September 7, 2010, Defendant filed a motion for a new trial arguing that he had not received a fair trial because of Detective L.B.'s statements about his prior arrests. On September 29, 2010, at Defendant's sentencing hearing, the court

denied the motion. During the sentencing hearing, Defendant admitted to his prior felony convictions in 2006 and 2008, and admitted that he was on probation for those convictions at the time he committed the offenses currently at issue. The court sentenced Defendant to a presumptive prison term of 15.75 years on each count and ordered the sentences to be served concurrently. Defendant was given 229 days of pre-incarceration credit. The court also revoked Defendant's probation for the 2006 and 2008 convictions and sentenced him to two presumptive one-year prison terms, to be served concurrently with his 15.75 year sentences.

¶15 Defendant timely appealed and we have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A)(1) (2010).

DISCUSSION

¶16 As noted above, Defendant requested his counsel raise several issues in the opening brief. First, as best we can discern, Defendant asserts for the first time that there was insufficient evidence that he was the one who committed the offenses because the State did not produce fingerprint or photograph evidence linking him to the crimes, and because there were other Hispanic males at the West Vista house that fit Sergeant S.K.'s description. "Reversible error based on insufficiency of the evidence occurs only where there is a

complete absence of probative facts to support the conviction." *State v. Scott*, 113 Ariz. 423, 424-25, 555 P.2d 1117, 1118-19 (1976).

¶17 Here, there was substantial evidence that it was Defendant, and not some other person at the West Vista house, who committed the charged offenses. Sergeant S.K. identified Defendant in court and testified that he saw Defendant exit the West Vista house carrying a large black plastic bag full of bulky material. The record reveals that the bag contained over seven pounds of marijuana. Sergeant S.K. also testified that he saw Defendant place the bag of marijuana in the bed of the black Dodge truck and drive away. In addition, Officer L.P. testified that he followed the truck to the golf course parking lot where he observed Notice take the marijuana from the bed of the Dodge truck and place it in the Camry. Shortly after, Detective L.B. assisted with a traffic stop of the truck and identified Defendant as its driver. With this evidence, the State sufficiently proved that it was Defendant who committed the charged offenses. There was no need for further evidence of fingerprints or photographs.

¶18 Next, Defendant asserts that because the jury did not find that Count 1, conspiracy to possess marijuana for sale, involved more than four pounds of marijuana, his conviction on that charge cannot be classified as a class two felony. Unlike

the verdict form for Count 3, the verdict form for the conspiracy count did not ask the jury to determine whether the amount of marijuana involved weighed more than four pounds. Before the verdict forms were delivered to the jury, the State advised the court that no finding of amount was necessary for the conspiracy count and defense counsel did not object. We agree with the State that an additional finding of amount with respect to the conspiracy count was unnecessary and therefore find no error.

¶19 Other than a conspiracy to commit a class one felony, the offense of conspiracy "is an offense of the same class as the most serious offense which is the object of or result of the conspiracy." A.R.S. § 13-1003(D) (2010).² Here, Defendant was charged with, and found guilty of, conspiracy to possess marijuana for sale. The "object of" the conspiracy was possession of marijuana for sale and the "most serious offense" with respect to possession of marijuana for sale consists of an amount having a weight greater than four pounds, a class two felony. A.R.S. § 13-3405(B)(6) (2010). In addition, the "result of" the conspiracy at issue was possession of marijuana for sale having a weight greater than four pounds. Accordingly, Defendant's conspiracy conviction was correctly classified as a

² We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

class two felony.

¶20 Last, Defendant contends the court erred in denying his motion for a new trial. It appears Defendant is asserting that he did not receive a fair and impartial trial because Detective L.B testified that he had previous arrests. The trial court "is in the best position to determine whether or not to grant a new trial." *State v. Valdez*, 167 Ariz. 328, 332, 806 P.2d 1376, 1380 (1991). Accordingly, we review a court's decision to grant or deny a motion for new trial for an abuse of discretion. *Id.* In addition, motions for a new trial should be granted only "with great caution." *State v. Rankovich*, 159 Ariz. 116, 121, 765 P.2d 518, 523 (1988).

¶21 Because of the court's remedial efforts following Detective L.B.'s improper statements, the court did not abuse its discretion in denying Defendant's motion for a new trial. As mentioned above, the court struck Detective L.B.'s statement from the record. In addition, the court instructed the jury that the statement was "completely irrelevant" and that the jury was "not to consider [the statement] in any way in determining [Roque's] guilt in this case."

¶22 Having considered defense counsel's brief and examined the record for reversible error, see *Leon*, 104 Ariz. at 300, 451 P.2d at 881, we find none. The sentence imposed falls within the range permitted by law, and the evidence presented supports

the conviction. As far as the record reveals, Defendant was represented by counsel at all stages of the proceedings, and these proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶23 Pursuant to *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984), counsel's obligations in this appeal have ended. Counsel need do no more than inform Defendant of the disposition of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. Defendant has thirty days from the date of this decision in which to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.

CONCLUSION

¶24 Defendant's convictions and sentences are affirmed.

_____/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

_____/s/_____
PATRICK IRVINE, Presiding Judge

_____/s/_____
PHILIP HALL, Judge