DIVISION ONE
FILED: 12/06/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 11-0289
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
ERIK SCOTT SUCKLING,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-144194-001DT

The Honorable Michael W. Kemp, Judge

AFFIRMED

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

James J. Haas, Maricopa County Public Defender — Phoenix
By Spencer D. Heffel, Deputy Public Defender
Attorneys for Appellant

S W A N N, Judge

¶1 Erik Scott Suckling ("Defendant") timely appeals from his class one misdemeanor conviction for possession of marijuana. Pursuant to *Anders v. California*, 386 U.S. 738

(1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel advises us that a thorough search of the record has revealed no arguable question of law and requests that we review the record for fundamental error. See *State v. Richardson*, 175 Ariz. 336, 339, 857 P.2d 388, 391 (App. 1993). Defendant was given an opportunity to file a supplemental brief *in propria persona* but did not do so. Finding no fundamental error after a thorough review of the record, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 While on patrol on the evening of March 22, 2010, Officer Fogelson of the City of Goodyear Police Department served as a "backup" officer following a traffic stop conducted by Officer McCarthy. McCarthy received a report of an impaired driver, and when he located the reported car, he followed it, paced it travelling at 50 miles per hour in a 40 mile per hour zone, and conducted a traffic stop. Fogelson then arrived on scene and began fulfilling his duties by making sure McCarthy was safe and "keep[ing] control of other occupants in the vehicle while [McCarthy talked] to the driver."

¶3 Fogelson saw that there were four occupants in the vehicle, and when he began speaking to the female passenger in

[1] "We view the evidence in the light most favorable to sustaining the [verdict] and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

the front seat, he smelled "the odor of marijuana coming from the passenger compartment of the car." Fogelson told McCarthy that he smelled marijuana and then asked the passengers if they had any marijuana -- all responded "no." Defendant, sitting in the back seat, then told Fogelson that he had smoked marijuana earlier in the day.

¶4 Fogelson told McCarthy of the marijuana odor again, and McCarthy had all the occupants get out of the car and sit on the curb. While Fogelson stood behind the group, McCarthy spoke to each occupant and received separate consent to search the car from both the driver and the owner, the female front-seat passenger. McCarthy searched the car and found "a folded piece of paper that contained a green leafy substance consistent with marijuana" in "very close proximity to where [Defendant] was sitting." McCarthy then asked Defendant if the marijuana was his, and Defendant admitted it was. McCarthy did not place Defendant in handcuffs, but finished writing the warning for the driver. As McCarthy was completing the warning, and without prompting or questioning, Defendant told him that he "purchased marijuana from a friend at Friendship Park and he smoked some of it earlier in the day." McCarthy completed the warning, placed Defendant in handcuffs, and took him to the police station.

¶5 Once they arrived at the police station, Defendant was fingerprinted, photographed and Mirandized before McCarthy

conducted an interview. McCarthy asked no questions before the interview and did not discuss the crime with Defendant. During the interview, Defendant again admitted purchasing, owning and smoking the marijuana.

¶6 Defendant was indicted on one count of possession of marijuana, a class 6 felony. Defendant moved to suppress his statements made during the stop on *Miranda* grounds. He also moved to suppress the physical evidence on the grounds that the stop was pretextual and that his seizure was "prolonged and unjustified."

¶7 The state moved to redesignate the count against Defendant from a class 6 felony to a class 1 misdemeanor and to proceed with a bench trial. The bench trial was held on April 1, 2011, and at the conclusion of the evidence, the court heard argument on Defendant's motions to suppress.

¶8 As to the suppression of the marijuana, the court ruled that it was admissible because not only did the officers have probable cause to search, they received consent from both the driver and the owner, and Defendant had no standing to assert a Fourth Amendment violation. On the *Miranda* issue, the court ruled that Defendant's statement that he smoked marijuana earlier in the day was pre-custody, and the statement that he purchased marijuana from a friend and smoked it earlier in the day was spontaneous, thus neither were violative of his Fifth

Amendment rights. The court did suppress Defendant's statement in response to the officer's question "Is that your marijuana?" because "all of the individuals . . . were in custody at that point."

¶9 The court found Defendant guilty of possession of marijuana, a class 1 misdemeanor. Defendant was sentenced to one year unsupervised probation and a $750 fine as his "first strike" under Proposition 200.

¶10 Defendant timely appeals. We have jurisdiction under A.R.S. § 12-120.21.

DISCUSSION

¶11 We have read and considered the brief submitted by counsel and have reviewed the entire record. *Leon*, 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error.

¶12 All of the pre- and post-trial proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was present at all critical phases of the proceedings and represented by counsel. A voluntariness hearing was not required as Defendant did not request one and the evidence did not call for one. The trial court properly considered the motions to suppress and properly ruled on suppression of Defendant's statements and the physical evidence. Defendant was not entitled to a jury trial. The evidence supports the verdict. Defendant was present at sentencing and

waived a presentence report. The sentence imposed was within the statutory range.

CONCLUSION

¶13 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 Defendant'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 Defendant of the status of this appeal and his future options. *Id.* Defendant 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, Defendant has 30 days from the date of this decision in which to file a motion for reconsideration.

/s/
_____
PETER B. SWANN, Judge

CONCURRING:

/s/
_____
MARGARET H. DOWNIE, Presiding Judge

/s/
_____
DONN KESSLER, Judge