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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: 05/03/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ) No. 1 CA-CR 11-0440  
)  
Appellee, ) DEPARTMENT D  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
DAVID L. EISLER, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-148863-001

The Honorable Arthur T. Anderson, Judge

**AFFIRMED**

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

James J. Haas, Maricopa County Public Defender Phoenix  
By Thomas J. Baird, Deputy Public Defender  
Attorneys for Appellant

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**B R O W N**, Judge

¶1 David Eisler appeals his conviction and sentence for one count of misconduct involving weapons. Counsel for Eisler

filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising that after searching the record on appeal, he was unable to find any arguable grounds for reversal. Eisler was granted the opportunity to file a supplemental brief *in propria persona*, but he has not done so. Through counsel, he requests that we address the issue of whether the search and seizure was valid. Additionally, our review of the record revealed that the trial court's failure to advise Eisler of his constitutional rights under Arizona Rule of Criminal Procedure 17.6 before stipulating to the existence of his four prior felony convictions may have constituted fundamental error. See *State v. Morales*, 215 Ariz. 59, 60, ¶ 1, 157 P.3d 479, 480 (2007). Pursuant to *Penon v. Ohio*, 488 U.S. 75, 83 (1988), we ordered the parties to file supplemental briefs addressing whether the deficient Rule 17.6 colloquy constituted fundamental error requiring remand. For the reasons discussed below, we affirm Eisler's conviction and sentence.

#### **BACKGROUND<sup>1</sup>**

¶2 In September 2010, Mesa police officers went to a motel looking for T.J. in a matter unrelated to this case. Upon

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<sup>1</sup> We view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Eisler. *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989).

finding T.J. in the parking lot of the motel, police also spoke to her companion, T.B. When they asked T.B. to provide identification, she took two of the officers to her room to get it. When they entered the room, the officers saw a man, later identified as Eisler, sleeping on the bed.

¶13 One officer roused Eisler from his sleep and asked him to accompany them outside. On the way out of the room, Eisler put his hands in his pants pockets and repeatedly turned to face the officer. The officer asked him to remove his hands, which Eisler did momentarily but then returned his hands to his pockets. The officer then conducted a *Terry*<sup>2</sup> search and located a Taser in the left front pocket of Eisler's jeans. After the officer placed Eisler in handcuffs, the officer found a loaded .32-caliber handgun in Eisler's right front pocket. The motel owner gathered the remaining items in the room and gave them to the officer, who discovered a shoulder bag containing a loaded .38-caliber handgun and a greeting card with Eisler's first name on it.

¶14 Eisler was charged by direct complaint with two counts of misconduct involving weapons, class 4 felonies, in violation of Arizona Revised Statutes ("A.R.S.") section 13-3102 (Supp.

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<sup>2</sup> *Terry v. Ohio*, 392 U.S. 1 (1968).

2011).<sup>3</sup> To prove that Eisler had been previously convicted of a felony and was thus prohibited from possessing a gun, the State presented a certified copy of an Arizona Department of Corrections pen pack showing that Eisler had been convicted of three prior felonies. A fingerprint examiner from the City of Mesa testified that he matched the fingerprints on the pen pack to fingerprints he took from Eisler.

¶15 The jury found Eisler guilty of Count 1 (the .32-calibur handgun), but not guilty of Count 2 (the .38-calibur handgun). Prior to sentencing, Eisler stipulated to having four prior felony convictions. The court sentenced him to a slightly mitigated term of nine years' imprisonment, with seventy-eight days of presentence incarceration credit.<sup>4</sup> This timely appeal followed.

#### DISCUSSION

¶16 We first address Eisler's general challenge to the validity of the "search and seizure." Because Eisler was only

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<sup>3</sup> Absent material change since the date of the offense, we cite the current statute.

<sup>4</sup> The record does not include a criminal history report. In our *Penon* order, we asked that if either party was in possession of the report that they file it with this court. Neither party has done so. Therefore, we cannot verify the amount of credit Eisler received and must assume the court's calculation is correct. See *State v. Mendoza*, 181 Ariz. 472, 474, 891 P.2d 939, 941 (App. 1995) ("When matters are not included in the record on appeal, the missing portion of the record is presumed to support the decision of the trial court.").

convicted of Count 1, involving the .32-calibur handgun found in his pocket, we assume he is challenging the *Terry* search of his person. However, because Eisler did not file a motion to suppress the evidence, he has waived this issue on appeal. See *State v. Tison*, 129 Ariz. 526, 535, 633 P.2d 335, 344 (1981) ("Issues concerning the suppression of evidence which were not raised in the trial court are waived on appeal."); 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."). This waiver rule applies "even though rights of constitutional dimensions have been lost." *Tison*, 129 Ariz. at 535-36, 633 P.2d at 344-45.

¶17 Next, in response to our order requiring *Person* briefing, Eisler argues the trial court committed fundamental error in failing to advise him of his constitutional rights prior to accepting Eisler's stipulation to four prior felony convictions. We agree. Rule 17.6 provides: "Whenever a prior conviction is charged, an admission thereto by the defendant shall be accepted only under the procedures of this rule[.]" Our supreme court has held that Rule 17.6 requires the court to conduct a "plea-type colloquy" in which the court explains the

constitutional rights the defendant waives before accepting a defendant's stipulation to the existence of prior felony convictions. *State v. Morales*, 215 Ariz. 59, 61, ¶¶ 7-8, 157 P.3d 479, 481 (2007). This procedure is required to ensure that the defendant's stipulation is knowing and voluntary. *Id.* at ¶ 8.

¶8 Here, the parties informed the court during the sentencing hearing that Eisler had agreed to stipulate to four prior convictions. The prosecutor read a summary of each of Eisler's prior convictions, and Eisler agreed with the description of each. The court then found "the defendant has admitted to those four prior felony convictions." The following conversation then took place between the court and Eisler:

THE COURT: You probably talked to your lawyer about establishing priors. It would be the state's burden to establish those priors by providing testimony or evidence of those priors. So that's a right that you have to challenge the information that they have about those. I assume you talked to your lawyer about that.

THE DEFENDANT: Yeah. I see no point in wasting time. I mean on that.

THE COURT: [Alright]. So any questions to me about what your right is with respect to that before, I guess, I formally accept your stipulation then?

THE DEFENDANT: I don't believe so, sir. It's pretty cut and dried.

THE COURT: [Alright]. Thank you.

¶9 Because the court did not advise Eisler of his constitutional rights, this colloquy was insufficient and Eisler's stipulation cannot be determined to be intelligent and voluntary. See *Morales*, 215 Ariz. at 61, ¶ 10, 157 P.3d at 481. However, our inquiry does not end here. "Under fundamental error review, the defendant bears the burden of persuasion to show both that the error was fundamental and that it caused him prejudice." *Id.* Generally, prejudice is "established by showing that the defendant would not have admitted the fact of the prior conviction had the colloquy been [properly] given." *Id.* at 62, ¶ 11, 157 P.3d at 482. But when there is reliable documentary evidence of the defendant's prior conviction in the record there is no need to remand for this determination. *Id.* at ¶ 13.

¶10 Here, at trial the State submitted into evidence a certified copy of the pen pack, which listed three of the prior convictions Eisler stipulated to and included a certified copy of his fingerprints. The State also presented testimony at trial that the fingerprints in the pen pack matched Eisler's. This court has found such evidence sufficient to support a finding of prior felony convictions. See *State v. Robles*, 213 Ariz. 268, 273, ¶¶ 16-17, 141 P.3d 748, 753 (App. 2006) (holding that, while "the preferred method of proving prior convictions

for sentence-enhancement purposes is submission of certified conviction documents bearing the defendant's fingerprints," a certified copy of a Department of Corrections pen pack showing the defendant's prior convictions and testimony linking those records to the defendant is sufficient) (review denied Nov. 28, 2006). Therefore, we find there is sufficient evidence in the record of three of Eisler's prior felony convictions to preclude a finding of prejudice.<sup>5</sup>

#### CONCLUSION

¶11 We have searched the entire record for reversible error and find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The record shows Eisler was present and represented by counsel at all pertinent stages of the proceedings, was afforded the opportunity to speak before sentencing, and the sentence imposed was within statutory limits. Thus, we affirm Eisler's conviction and sentence.

¶12 Upon the filing of this decision, counsel shall inform Eisler of the status of the appeal and his options. Defense counsel has no further obligations unless, upon review, counsel

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<sup>5</sup> We need not address whether there is sufficient evidence in the record to prove Eisler's alleged fourth felony conviction. See A.R.S. § 13-703(C) (Supp. 2011) (providing a person is sentenced as a class 3 repetitive offender if he or she "stands convicted of a felony and has two or more historical prior felony convictions").



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). Eisler shall have thirty days from the date of this decision to proceed, if he so desires, with a *pro per* motion for reconsideration or petition for review.

/s/

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MICHAEL J. BROWN, Judge

CONCURRING:

/s/

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PETER B. SWANN, Presiding Judge

/s/

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JON W. THOMPSON, Judge