IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JOEL D. HENDERSON,
Appellant.

No. 2 CA-CR 2015-0406
Filed May 16, 2016

Appeal from the Superior Court in Pinal County
No. S1100CR201500925
The Honorable Kevin D. White, Judge

AFFIRMED

COUNSEL

Lynn T. Hamilton, Mesa
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, appellant Joel Henderson was convicted of promoting prison contraband, a class five felony, and sentenced to an enhanced, presumptive prison term of five years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating she has found no arguable issues to raise on appeal. Henderson has filed a supplemental brief.

¶2 Viewed in the light most favorable to sustaining the verdict, *State v. Miles*, 211 Ariz. 475, ¶ 2, 123 P.3d 669, 670 (App. 2005), the evidence at trial established that, after three metal-detecting devices detected metal on Henderson's person, Arizona Department of Corrections (ADOC) personnel obtained a warrant authorizing an x-ray scan of Henderson's body and the removal of any object. An x-ray showed there was a metal object in Henderson's body, which Henderson removed from his rectum following a seventy-two-hour defecation watch; the object was a cell phone, which inmates are prohibited from having and are considered contraband.

¶3 Although counsel states in her opening brief that she found no arguable issues to raise, she lists the following "[s]uggested" issues: the cell phone was discovered during an unlawful body cavity search because the search warrant was not accompanied by a signed, probable-cause affidavit; Henderson was not transported from prison to the court for the final pretrial/status conference, a critical phase of the proceedings that he was entitled to

attend; and, he was denied the right to a speedy trial.[1] In his pro se supplemental brief, Henderson contends the trial court abused its discretion in denying his motion to suppress the cell phone based on the purportedly invalid search warrant and refusing his request for an evidentiary hearing on the motion. He also contends trial counsel was ineffective in failing to file a timely motion to suppress.

Speedy Trial

¶4 Four days before trial, Henderson filed a motion to dismiss the charge with prejudice, based on a violation of his speedy trial rights under Rule 8, Ariz. R. Crim. P., and the federal and state constitutions, which the trial court denied. He had filed a pro se request for final disposition pursuant to the Uniform Mandatory Disposition on Detainers Act and Rule 8.3(b), Ariz. R. Crim. P., in April 2015, about two weeks after he was indicted and a day before counsel was appointed to represent him. Thereafter, while represented by counsel, he waived the Rule 8 time before the court set the case for trial and did not notify the court of any impending Rule 8 violation at the time the trial was set, thereby waiving the claim. *See State v. Swensrud*, 168 Ariz. 21, 23, 810 P.2d 1028, 1030 (1991) (defendant required to object before speedy-trial time expired to avoid waiver of Rule 8 violation). Indeed, at the time the trial date was set, the court and counsel discussed Rule 8; the parties agreed the trial date was within the Rule 8 period. The court did not err in denying the motion to dismiss based on Rule 8.

¶5 Nor did the trial court err in rejecting the constitutional speedy-trial claim. Henderson was arraigned on April 17, 2015, and went to trial on September 15, 2015. "Neither the United States nor the Arizona Constitution requires that a trial be held within a

[1]Although we conclude none of the potential issues suggested by counsel warrants relief, we disagree with counsel's determination that none of the issues is arguable. Accordingly, we warn counsel that the improper filing of an *Anders* brief in future cases could result in the brief being stricken. *See State v. Thompson*, 229 Ariz. 43, ¶ 5, 270 P.3d 870, 873 (App. 2012).

specified time period." *State v. Spreitz*, 190 Ariz. 129, 139, 945 P.2d 1260, 1270 (1997). The period of time was neither excessive, nor prejudicial. *See Barker v. Wingo*, 407 U.S. 514, 530 (1972); *State v. Schaaf*, 169 Ariz. 323, 327, 819 P.2d 909, 913 (1991). And Henderson waived a portion of the delay through counsel, as we previously stated.

Appearance at Pretrial/Status Conference

¶6 On August 31, 2015, counsel for the parties appeared before the trial court for the final pretrial conference. The only thing that occurred at this hearing was the parties and the court confirmed the September 15 trial date. Although a defendant has a constitutional right to be present at all critical stages of the proceedings, *State v. Hall*, 136 Ariz. 219, 222, 665 P.2d 101, 104 (App. 1983), this was not a critical stage. Henderson was represented by counsel, who appeared on his behalf and asked that Henderson's presence be waived. At the sentencing hearing, Henderson asserted he had not waived his presence at the pretrial conference; nevertheless, we see no reversible error given that Henderson's confrontation rights were not implicated and nothing occurred at this insignificant hearing that affected his right to defend against the charge. *See State v. Swoopes*, 216 Ariz. 390, ¶¶ 30-31, 166 P.3d 945, 955 (App. 2007) (federal and state authority addressing right to appear at various stages of proceedings).

Denial of Motion to Suppress

¶7 The day before trial, Henderson filed a motion to suppress the cell phone, arguing the warrant was invalid because the probable-cause affidavit, referred to in the warrant, apparently became detached from the warrant, is not in the record, and was not disclosed to him. After trial counsel conceded the state had disclosed the search warrant in April 2015, the trial court found the motion was untimely filed and precluded it. The court observed the issue regarding the purportedly defective warrant could have been discovered earlier with due diligence. The court added that it would deny the motion in any event for the reasons set forth in the state's

response to the motion and this court's decision in *State v. Palmer*, 156 Ariz. 315, 751 P.2d 975 (App. 1987).

¶8 Rule 16.1(b), Ariz. R. Crim. P., requires that all motions be filed no later than twenty days before trial. And Rule 16.1(c) provides that a motion that is not timely under the rule "shall be precluded, unless the basis therefor was not then known, and by the exercise of reasonable diligence could not then have been known." The trial court did not abuse its discretion in precluding the motion given the court's findings and the record before us, which shows, inter alia, defense counsel received the search warrant in April and a video of the search-warrant video in July. *See State v. Colvin*, 231 Ariz. 269, ¶¶ 7-8, 293 P.3d 545, 547-48 (App. 2013) (trial court has discretion whether to permit or preclude untimely motion). Henderson's separate but related argument that he was entitled to an evidentiary hearing on the motion necessarily fails for the same reason.

¶9 Furthermore, the trial court's determination that the motion lacked merit in any event, in light of this court's decision in *Palmer*, was correct. Officers had reason to believe Henderson had a metal object, likely a cell phone, on or inside his person. For security reasons, it was reasonable for them to conduct the initial scan and then the x-ray, even without a warrant. *See Palmer*, 156 Ariz. at 317, 751 P.2d at 977 (prison officials may inspect inmate "when there is reasonable cause to believe the inmate may have concealed dangerous items on his person"); *see also State v. Bloomer*, 156 Ariz. 276, 278, 751 P.2d 592, 594 (App. 1987) (confirming prisoner's limited Fourth Amendment rights). And prison personnel did not need to take Henderson to the hospital for removal of the cell phone; he removed it himself. Thus, whether the warrant was arguably defective is of no moment.[2]

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[2]We reject, too, Henderson's argument that the warrant was defective because no affidavit exists in the record. The record does contain a copy of the warrant, in which the judge referred to the probable-cause affidavit; counsel attached a copy of the warrant to the motion to suppress. The warrant states the issuing judge had considered the probable-cause affidavit, an unsigned copy of which

¶10 We will not address Henderson's claim that trial counsel was ineffective. Such claims must be raised in a post-conviction proceeding pursuant to Rule 32, Ariz. R. Crim. P. *State v. Spreitz*, 202 Ariz. 1, ¶ 9, 39 P.3d 525, 527 (2002).

¶11 We have reviewed the record for fundamental error and have found none. The evidence supports the jury's verdict and established Henderson was guilty of promoting prison contraband in violation of A.R.S. § 13-2505. The five-year prison term, which the trial court ordered Henderson to serve consecutively to the two consecutive life terms of imprisonment he was already serving, was within the statutory range for this class five felony in light of Henderson's two historical prior felony convictions. *See* A.R.S. § 13-703(G), (J). The sentence was imposed in a lawful manner. We therefore affirm the conviction and the sentence.

Henderson attached to his supplemental brief; Henderson acknowledges Investigative Supervisor Brandon Rodarte, who prepared the affidavit, had given defense counsel a copy of it about a week before trial. Rodarte testified at trial he had given defense counsel a copy of precisely the same affidavit he had submitted to obtain the warrant.