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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. MICHAEL WILLIE ENOS, Appellant.	)	2 CA-CR 2010-0026 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200701578

Honorable Bradley M. Soos, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 Michael Enos appeals from his convictions and sentences for possession of marijuana, possession of a narcotic drug, and possession of drug paraphernalia. He asserts his Fourth Amendment rights were violated when he was searched and detained

by a private security guard and, therefore, we should reverse his convictions and vacate his sentences. We affirm.

¶2 On appeal, we view the facts in the light most favorable to sustaining the verdicts. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In November 2006, a private security guard on duty at an apartment complex saw Enos and a woman walk across the complex's parking lot and get into a truck. The guard, dressed in a company uniform and carrying a firearm, approached the truck, introduced himself, and asked if they lived at the complex. The woman said she did not but Enos stated he recently had rented an apartment in the complex.

¶3 Although Enos denied possessing weapons or narcotics, the guard asked him to get out of the truck and empty his pockets. Enos removed several items from his left pocket, but the guard testified, "[i]t looked like [Enos] was going through things in his pocket . . . like he was picking out two or three things . . . to pull out and was going to leave the remaining items in his pocket." Seeing there was "still a bump . . . in the area of the left pocket," the guard then patted the pocket and felt what he believed to be a bag of marijuana. When asked, Enos admitted he had marijuana and pulled the bag from his pocket, also removing a bag of white powder the guard believed to be cocaine. The guard instructed Enos to give him the bag of powder and when Enos refused the guard took the two bags away from him. Enos then threw a third bag containing marijuana into the pickup truck. The guard handcuffed Enos and called police.

¶4 When police officers arrived, they arrested Enos and took possession of the three bags. Enos later admitted the three bags were his. Subsequent testing showed the

bags contained 38.7 grams of marijuana and .18 grams of cocaine, and a criminalist testified these were usable amounts. Enos was charged with possession of a narcotic drug (cocaine), possession of marijuana, and possession of drug paraphernalia. After a three-day trial, the jury convicted him as charged. The trial court sentenced Enos to presumptive, concurrent prison terms, the longest of which was ten years. This appeal followed.

¶5 Enos contends the guard's actions violated his Fourth Amendment right against unreasonable search and seizure.[1] *See generally State v. Jones*, 188 Ariz. 388, 395, 937 P.2d 310, 317 (1997) ("The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures."). He acknowledges he did not raise this argument below and therefore has forfeited his right to seek relief for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). "An unreasonable search performed 'by a private citizen does not violate the Fourth Amendment unless the citizen is acting as an agent of the state.'" *State v. Martinez*, 221 Ariz. 383, ¶ 31, 212 P.3d 75, 83 (App. 2009), *quoting State v. Estrada*, 209 Ariz. 287, ¶ 16, 100 P.3d 452, 456 (App. 2004); *see also United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (Fourth Amendment "wholly inapplicable" to unreasonable search or seizure by private citizen "'not acting as an agent of the Government or with the

[1]Although Enos refers in passing to article II, §§ 23 and 24 of the Arizona Constitution, he fails to explain how those provisions are relevant to the issues he raises. And to the extent he raises a due process claim under the Fifth and Fourteenth Amendments to the United States Constitution, he does not develop that claim in any meaningful way. We therefore do not address these issues. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (claims waived for insufficient argument on appeal).

participation or knowledge of any governmental official'") *quoting Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting). Nor does the private party's wrongdoing "'deprive the government of the right to use evidence that it has acquired lawfully.'" *Martinez*, 221 Ariz. 383, ¶ 31, 212 P.3d at 84, *quoting Walter v. United States*, 447 U.S. at 656.

¶6 Enos admits the state did not "direct" the guard's conduct, but asserts it nonetheless "adopted" the guard's actions by arresting and prosecuting Enos. In determining whether a private party acted as a state agent, we examine "'(1) the government's knowledge and acquiescence, and (2) the intent of the party performing the search.'" *Martinez*, 221 Ariz. 383, ¶ 31, 212 P.3d at 83-84, *quoting State v. Weinstein*, 190 Ariz. 306, 309, 947 P.2d 880, 883 (App. 1997) (*internal citation omitted*). "If either element of this test is not met, then the private citizen was not acting as a state agent." *Id.*

¶7 First, Enos does not cite, nor do we find, any authority suggesting a private citizen's unilateral action is converted to state action if the state somehow ratifies or accepts the results of that citizen's conduct after the fact. As we noted above, the state is entitled to use any evidence it obtained lawfully, irrespective of the private citizen's conduct. *See id.* Although Enos speculates the guard's conduct "was clearly a standard operating procedure on the part of both the security company and the local police," he cites nothing in the record supporting that claim. Indeed, he identifies no evidence and cites no authority that would support a conclusion the guard acted with the state's prior knowledge or agreement. *See Weinstein*, 190 Ariz. at 309, 947 P.2d at 883 (shipping company employee who opened package not state agent despite having been told by

other employees to contact law enforcement regarding suspicious packages and having done so previously); *see United States v. Shahid*, 117 F.3d 322, 326 (7th Cir. 1997) (private security officer who apprehended shoplifter and contacted police not government agent because police had no ability "to control or induce[] decisions of mall security officers to stop and search persons on mall property"); *see also* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument "shall contain . . . citations to the authorities, statutes and parts of the record relied on").

¶8 In any event, even assuming the guard had acted with the state's knowledge and acquiescence, Enos does not identify any evidence suggesting the guard's sole motive was to aid law enforcement. *See Martinez*, 221 Ariz. 383, ¶ 33, 212 P.3d at 84 (private citizen only state agent if citizen "acted on behalf of the state without 'a legitimate independent motivation for conducting the search'"), *quoting United States v. Walther*, 652 F.2d 788, 792 (9th Cir. 1981). Indeed, the record demonstrates otherwise. The guard testified he had initiated the conversation and subsequent search and seizure to ensure Enos and the woman were either "residents . . . or lawful guests of the community" and to promote the apartment complex's policy prohibiting criminal activity on its premises. Although that policy coincides with law enforcement goals—the prevention of crime and apprehension of criminals—"'this happy coincidence does not make a private actor an arm of the government.'" *Shahid*, 117 F.3d at 326, *quoting United States v. Koenig*, 856 F.2d 843, 850-51 (7th Cir. 1988). Thus, because the guard had an independent, private motive for his conduct, he was not acting as an agent of the state even assuming he acted with the state's knowledge and consent.

¶9 Finally, we need not address Enos's related claims that the guard lacked authority to make a citizen's arrest pursuant to A.R.S. § 13-3884, and that his conduct violated several criminal statutes. The sole case Enos cites, *Hardinge v. State*, 500 S.W.2d 870 (Tex. Crim. App. 1973), does not suggest that question is relevant. There, a security guard also was a reserve police officer, and the appellate court did not address whether he had been acting as a state agent when he unlawfully detained the appellant. *Id.* at 871-72. Additionally, even assuming the guard's actions here were unlawful, Enos's convictions would still stand "because the exclusionary rule does not apply to the actions of private citizens." *State v. Chavez*, 208 Ariz. 606, ¶ 15, 96 P.3d 1093, 1097 (App. 2004).

¶10 For the reasons stated, Enos has failed to show error, much less fundamental, prejudicial error. *See State v. Lopez*, 217 Ariz. 433, ¶ 7, 175 P.3d 682, 684 (App. 2008) (to show fundamental error, defendant first must prove error). Enos's convictions and sentences therefore are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge