IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 10/31/2013
RUTH A. WILLINGHAM, CLERK
BY: mjt

STATE OF ARIZONA,	)	1 CA-CR 13-0020
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
	)	Rule 111, Rules of the
DANIEL STEWART BROWN,	)	Arizona Supreme Court)
	)	
Appellant.	)	
	)	

Appeal from the Superior Court in Mohave County

Cause No. S8015CR201101268

The Honorable Steven F. Conn, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Joseph T. Maziarz, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Adele Ponce, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Maricopa County Public Defender — Phoenix
by Barbara Cook-Hamp, Deputy Public Defender
Attorneys for Appellant

T H U M M A, Judge

¶1 This is an appeal under *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Counsel for Defendant Daniel Stewart Brown has advised the court that, after searching the entire record, she is unable to discover any arguable questions of law, and has filed a brief requesting this court conduct an *Anders* review of the record. Brown was given the opportunity to file a supplemental brief pro se, but has not done so. This court has reviewed the record and finds no reversible error. Accordingly, Brown's convictions and resulting sentences are affirmed.

FACTS[1] AND PROCEDURAL HISTORY

¶2 In November 2011, Brown was stopped for speeding. By the time Brown stopped his car, he had pulled into his driveway, and although asked to stop by Officer Foster, walked toward his residence. Brown turned and asked Officer Foster "are you going to arrest me again?" When Officer Foster asked for a license, Brown replied, "you know I don't have a driver's license."

¶3 Eventually, Brown was placed under arrest. No field sobriety tests were performed because Brown would not comply with Officer Foster's commands. At the police station, after being read an implied consent and agreeing to testing,

[1] This court views the facts "in the light most favorable to sustaining the verdict, and resolve[s] all reasonable inferences against the defendant." *State v. Rienhardt*, 190 Ariz. 579, 588-89, 951 P.2d 454, 463-64 (1997) (citation omitted).

breathalyzer tests using an Intoxilyzer 8000 were conducted. Exhibits received in evidence at trial show that Brown had an initial blood alcohol content level of .113 and a second reading, completed within twenty minutes of the first, showed a blood alcohol content level of .110. At the time of the offense, Brown's driver's license was suspended.

¶4 Brown was indicted for aggravated driving a vehicle while under the influence of intoxicating liquor and aggravated driving a vehicle while under the influence of intoxicating liquor with an alcohol concentration of .08% or more, both class four felonies, in violation of Arizona Revised Statutes (A.R.S.) sections 28-1383(A)(1), 28-1381, 13-701, 13-702 and 13-801 (2013).[2]

¶5 Brown failed to appear at trial. The superior court found Brown previously had been advised of the trial date, that his absence was voluntary and that no good cause had been shown for his absence and, accordingly, trial proceeded as scheduled. During trial, the only witness called was Officer Foster. The State stipulated to a motion in limine filed by Brown and, as modified by the superior court, the motion successfully limited the admission of potential evidence, including testimony by Officer Foster about statements Brown made during his arrest.

[2] Absent material revisions after the relevant dates, statutes cited refer to the current version unless otherwise indicated.

During a one-day trial, Brown's counsel represented his interests, the jury heard evidence and arguments and was properly instructed on the law. After deliberations, the jury found Brown guilty on both counts.

¶6 Brown was picked up on a warrant approximately a month after trial and was held pending sentencing. At sentencing, the parties stipulated to the state's dismissal of an older out-of-state conviction. Brown stipulated to a prior non-historical Arizona felony conviction, which meant he was not probation eligible. The court found no aggravating factors and two mitigating factors. Accordingly, the court sentenced Brown to two concurrent prison sentences of 1.75 years (less than presumptive), with 102 days of credit for time served, mandatory DUI assessments and related surcharges.

¶7 Brown timely appealed his convictions and sentences. This court has jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and -4033(A)(1).

DISCUSSION

¶8 The court has reviewed and considered counsel's brief and has searched the entire record for reversible error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (providing guidelines for briefs when counsel has determined no arguable issues to appeal). Searching the record and counsel's brief reveals no reversible error.

¶9 The record shows that Brown was represented by counsel at all stages of the proceedings and counsel was present at all critical stages. From the record, all proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. The sentences imposed were within the statutory limits. Neither counsel nor Brown raised any issues on appeal.

¶10 Though Brown was absent from his trial, Brown's counsel advised the court that he had been in contact with Brown and had advised Brown of the trial date and the consequences for failing to appear at such trial. *See* Ariz. R. Crim. P. 9.1 (defendant's waiver of right to be present). While Brown apparently broke his back the day after the trial, such an incident could not provide a valid excuse for failing to appear at trial the day before. Because the record indicates Brown was aware of his court date, his right to be present at trial and that trial would go forward in his absence, there was no error in proceeding with the trial when Brown failed to attend. *See State v. Suniga*, 145 Ariz. 389, 392, 701 P.2d 1197, 1200 (App. 1985) (Ariz. R. Crim. P. 9.1 creates a presumption that absence is voluntary when notice of court date given to defendant).

¶11 During jury selection, after the superior court denied a challenge for cause, Brown used a peremptory strike to remove a prospective juror who was a probation officer in the past. This individual had worked on a number of DUI cases and had lost

a close family friend to a drunk driver. During the court's voir dire, the juror initially indicated he did not know if he could set aside his personal feelings about the charges and make a decision based solely on the evidence presented, but said, "I think I could try." When questioned further by the court about whether it would be "a challenge for [him] to be fair in this case" the potential juror responded "[n]o, I think it would be all right." Based on this dialogue, the court did not remove the juror for cause and Brown used a preemptory challenge to remove the juror.

¶12 A "prospective juror should be struck for cause 'when a juror's answers demonstrate that he has serious misgivings about his ability to be a fair and impartial juror.'" *State v. Smith*, 182 Ariz. 113, 115, 893 P.2d 764, 766 (App. 1995) (citation omitted). But, simply "because a juror has preconceived notions or opinions does not necessarily render him incompetent to fairly and impartially decide a case. If a juror is willing to put aside his opinions and base his decision solely upon the evidence." *State v. Poland*, 144 Ariz. 388, 398, 698 P.2d 183, 193 (1985) (citation omitted). Here, the court was able to observe the potential juror's demeanor and followed up with further questioning given the juror's apparent hesitance. Because the superior court is in the best position to observe and question prospective jurors, the denial of the challenge to

the potential juror for cause was not error. *State v. Hoskins*, 199 Ariz. 127, 149, 14 P.3d 997, 1019 (2000).

CONCLUSION

¶13 This court has read and considered counsel's brief and has searched the record provided for reversible error. *Leon*, 104 Ariz. at 300, 451 P.3d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. From the court's review, the record reveals no reversible error. The proceedings appear to have been conducted in compliance with the Arizona Rules of Criminal Procedure, Brown was represented by counsel at all stages of the proceedings and the sentences imposed are within the statutory limits. Brown's convictions and resulting sentences are therefore affirmed.

¶14 Upon the filing of this decision, defense counsel is directed to inform Brown of the status of his appeal and of his future options. Defense counsel has no further obligations unless, upon review, counsel 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). Brown shall have thirty days from the date of this decision to proceed, if he desires, with a pro se motion for reconsideration or petition for review.

/S/_____
SAMUEL A. THUMMA, Judge

CONCURRING:

/S/_____
RANDALL M. HOWE, Presiding Judge

/S/_____
PATRICIA A. OROZCO, Judge