DIVISION ONE
FILED: 12/14/2010
RUTH WILLINGHAM, ACTING CLERK
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**IN THE COURT OF APPEALS**
**STATE OF ARIZONA**
**DIVISION ONE**

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| STATE OF ARIZONA, Appellee, | ) | No. 1 CA-CR10-0086 |
| | ) | DEPARTMENT C |
| v. | ) | **MEMORANDUM DECISION** |
| | ) | (Not for Publication - Rule 111, Rules of the Arizona Supreme Court) |
| ROBERT ALAN JOHNSON, Appellant. | ) | |

Appeal from the Superior Court in Maricopa County

Cause Nos. CR2008-164345-001 SE

The Honorable Pamela Hearn Svoboda, Judge *Pro Tempore*

**AFFIRMED**

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Terry Goddard, Arizona Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender, — Phoenix
By Louise Stark, Deputy Public Defender
Attorney for Appellant

Robert Alan Johnson — San Luis
Appellant

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**D O W N I E**, Judge

**¶1** Robert Alan Johnson ("defendant") appeals his conviction for aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs (with any drug or its metabolite in his body). Pursuant to *Anders v. California,* 386 U.S. 738 (1967), and *State v. Leon,* 104 Ariz. 297, 451 P.2d 878 (1969), defense counsel has searched the record and found 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 filed a supplemental brief *in propria persona*.[1] On appeal, we view the evidence in the light most favorable to sustaining the conviction. *State v. Tison,* 129 Ariz. 546, 552, 633 P.2d 355, 361 (1981).

**FACTS AND PROCEDURAL HISTORY**

**¶2** On February 19, 2008, Detective Ingram saw defendant park his truck facing the wrong direction on a street. The detective, who was not wearing a uniform, approached the truck and identified himself as a police detective. He could smell marijuana coming from the truck cab, and defendant admitted he had been "smoking a joint." When defendant exited the vehicle,

[1] On December 2, 2010, defendant filed a document captioned "Amendment to Motion for Leave to Allow Appellant to file Supplemental Brief in Propria Persona." The court has not considered that document or its attachments; we did consider the timely-filed supplemental brief that defendant previously submitted.

Detective Ingram observed he was "jittery," with quick and sudden movements and fast speech. Defendant gave the detective an Arizona identification card and said his driver's license was revoked. Detective Ingram confirmed that defendant's license had been revoked and placed him under arrest.

**¶3** When Officer Gaupel arrived to perform a drug evaluation on defendant, he detected a strong odor of marijuana. Officer Gaupel also saw that defendant had watery, bloodshot eyes and very large pupils. He read defendant his *Miranda* rights. Defendant again admitted smoking marijuana that night and having a suspended driver's license. Officer Gaupel opined that defendant exhibited signs of methamphetamine ingestion, noting his jittery behavior, rapid speech, and excessive laughing. Urine testing revealed the presence of amphetamine, methamphetamine, and marijuana metabolite.

**¶4** Defendant was charged with two class four felonies. Count one alleged that he drove or was in actual physical control of a vehicle while under the influence of intoxicating liquor or drugs. Count two alleged that defendant drove or was in actual physical control of a vehicle while a drug defined in Arizona Revised Statutes ("A.R.S.") section 13-3401 or its metabolite was in his system.

**¶5** A jury trial ensued. Defendant did not appear for trial. The court found that his absence was voluntary and

allowed the State to try him *in absentia*. At the conclusion of the State's case in chief, the court denied defendant's motion for a judgment of acquittal pursuant to Rule 20, Arizona Rules of Criminal Procedure ("Rule"), on count 1.

**¶6** The jury convicted defendant of count 2 and found him not guilty as to count 1. At sentencing, defendant stipulated to two prior felony convictions, and the court sentenced him to the presumptive term of ten years in prison. Defendant received 84 days' presentence incarceration credit.

**DISCUSSION**

**¶7** We have read and considered the brief submitted by defense counsel and have reviewed the entire record. *Leon,* 104 Ariz. at 300, 451 P.2d at 881. We find no fundamental error. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure, and the sentence imposed was within the statutory range. Defendant was represented by counsel at all critical phases of the proceedings. The jury was properly impaneled and instructed. The jury instructions were consistent with the offenses charged. The record reflects no irregularity in the deliberation process.

**¶8** In his supplemental brief, defendant does not clearly articulate issues for our review or cite relevant legal

authority.[2] Merely mentioning an argument is insufficient. Briefs must present significant arguments, supported by authority, setting forth the appellant's position on the issues raised. The failure to so argue a claim usually constitutes abandonment and a waiver of that claim. *State v. Moody,* 208 Ariz. 424, 452 n.9, ¶ 101, 94 P.3d 1119, 1147 n.9 (2004). However, in our discretion, we address the following issues, which are at least minimally developed.

**A. Criminal History**

**¶9** Defendant alleges the criminal history provided to the trial court was inaccurate and that the prosecutor filed false documents regarding his prior felony convictions. "Convicted defendants have a due process right to a fair sentencing procedure which includes the right to be sentenced on the basis of accurate information." *State v. Grier*, 146 Ariz. 511, 515, 707 P.2d 309, 313 (1985). To have a sentence set aside, the defendant must show: "(1) that the information before the sentencing court was false or misleading and, (2) that the court relied on the false information in passing sentence." *Id.* With his supplemental brief, defendant included a printout of his prior felony criminal history that matches the criminal history

[2] For example, defendant states, "Suppression of Miranda rights. A Judge's opinion can and should be challenged." At other points in his supplemental brief, defendant quotes or summarizes trial testimony without making any legally cognizable argument regarding it.

provided to the trial court in the presentence report.[3] We find no error in the information provided to the court, and defendant has not articulated any specific errors.

**B. Judicial Bias**

**¶10** Defendant alleges the trial judge was biased against him because she considered his prior convictions for sentencing purposes and because an arresting officer told him the judge was "angry," and his attorney told him the judge was "very upset and mad at him." We presume a trial judge is free from prejudice and bias. *State v. Hurley*, 197 Ariz. 400, 404, ¶ 24, 4 P.3d 455, 459 (App. 2000). A defendant must overcome this presumption by proving "a hostile feeling or spirit of ill-will, or undue friendship or favoritism, towards one of the litigants." *State v. Cropper,* 205 Ariz. 181, 185, ¶ 22, 68 P.3d 407, 411 (2003) (citation omitted).

**¶11** Our independent review of the record reveals no bias. Defendant stipulated to two prior felony convictions, against the advice of counsel, because he hoped the court would give him a mitigated sentence. This stipulation put the sentencing range at six to ten years, with a ten year presumptive term. A.R.S. § 13-703(C), (J) (2010). In weighing the mitigating and

[3] The presentence report did include two aggravated DUI's from 1982 and 1983 that were not found on defendant's printout. However, the trial court did not consider these offenses because they were too old.

aggravating factors, the court considered some of the additional convictions in aggravation, as is permissible, and gave defendant the presumptive sentence. *See Grier*, 146 Ariz. at 515, 707 P.2d at 313 (holding a sentence within statutory limits will not be modified or reduced unless the sentence is clearly an abuse of discretion); *Pinto v. Superior Court*, 119 Ariz. 612, 612, 583 P.2d 268, 268 (App. 1978) (noting trial court can consider an unalleged and unproven conviction in determining an appropriate sentence).

**C. Adequacy of the Evidence**

**¶12** Defendant contends the officer lied and "changed [his] story several times" and that the forensic scientist gave "personal opinions instead of laboratory facts." "No rule is better established than that the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974); *see also State v. Lehr*, 201 Ariz. 509, 517, ¶ 24, 38 P.3d 1172, 1180 (2002). We do not reweigh credibility or trial evidence on appeal. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Sasak*, 178 Ariz. 182, 186, 871 P.2d 729, 733 (App. 1993).

**¶13** Defendant also argues that some of the State's evidence was questionable because various procedures and testing

were not pursued. Defendant has cited no authority for the proposition that the State was required to conduct additional testing, and we are aware of none. Defendant has not alleged that the State unreasonably interfered with his right to gather exculpatory evidence. Defendant's complaints may go to the weight that should be given to the State's evidence, but we find no fundamental error in admitting the evidence. A reasonable jury could have found the State's evidence to be credible.

**D. Ineffective Assistance of Counsel**

**¶14** Defendant argues he received ineffective assistance of counsel for various reasons. Ineffective assistance of counsel claims are properly raised in Rule 32 proceedings. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002). "Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *Id.*

**CONCLUSION**

**¶15** We affirm defendant's conviction and sentence. Counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do nothing more than inform defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). On the court's own motion, defendant shall have

thirty days from the date of this decision to proceed, if he so desires, with an *in propria persona* motion for reconsideration or petition for review.

/s/
MARGARET H. DOWNIE, Judge

CONCURRING:

/s/
MAURICE PORTLEY, Presiding Judge

/s/
PATRICIA A. OROZCO, Judge