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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. KARL ANTHONY MACKEY, Appellant.	)	2 CA-CR 2009-0382 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091449001

Honorable John S. Leonardo, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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H O W A R D, Chief Judge.

¶1 Appellant Karl Mackey drove his car while intoxicated early in the morning on April 9, 2009, and collided into a utility pole. He was convicted after a jury trial of aggravated driving while under the influence of an intoxicant (DUI), aggravated driving

with an alcohol concentration (AC) of .08 or more, both based on his having driven while his driver license or privilege to drive in Arizona had been suspended, criminal damage, possession of marijuana, and possession of drug paraphernalia. On appeal he contends the state did not present sufficient evidence that he had received notice that his driver license or privilege to drive in Arizona had been suspended and that the trial court had erred by denying his motion for judgment of acquittal on that ground pursuant to Rule 20, Ariz. R. Crim. P. We affirm for the reasons stated below.

¶2 The DUI and AC-related convictions were aggravated based on the fact that at the time Mackey committed the crimes, he knew or should have known his driver license or privilege to drive in Arizona was suspended. *See* A.R.S. § 28-1383(A)(1). Mackey contends nothing in the records of the Motor Vehicle Division (MVD) of the Department of Transportation, which were introduced through its custodian of records Annie Garigan, established he actually had received notice of the suspension or that notice of the suspension had been mailed to Mackey.

¶3 Rule 20 provides that "the court shall enter a judgment of acquittal of one or more offenses charged in an indictment . . . , if there is no substantial evidence to warrant a conviction." "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. DiGiulio*, 172 Ariz. 156, 159, 835 P.2d 488, 491 (App. 1992), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). "If reasonable minds could differ as to whether the properly admitted evidence, and the inferences therefrom, prove all elements of the offense, a

motion for acquittal should not be granted." *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). "We conduct a de novo review of the trial court's decision, viewing the evidence in a light most favorable to sustaining the verdict." *Id.*

¶4 To convict Mackey of the charges of aggravated DUI and aggravated driving with an AC of .08 or greater, the state was required to prove beyond a reasonable doubt Mackey's driver license or his privilege to drive in Arizona had been suspended at the time he committed the offenses and that he "knew or should have known" about the suspension. *See State v. Williams*, 144 Ariz. 487, 489, 698 P.2d 732, 734 (1985) (driving without license requires culpable mental state; culpable mental state requires state prove defendant knew or should have known license suspended); *see also* A.R.S. §§ 28-1383(A)(1); 28-1381(A)(2). "The state is not required to prove actual receipt of the notice or actual knowledge of the suspension" of the Arizona driver license or the privilege to drive in Arizona. *See* A.R.S. § 28-3318(D), (E); *State v. Cifelli*, 214 Ariz. 524, ¶ 13, 155 P.3d 363, 366 (App. 2007).

¶5 Mackey points to portions of Garigan's testimony during which she conceded there was nothing in the MVD records establishing notice of the suspension had been mailed to him. Garigan explained that portions of Mackey's records had been destroyed in accordance with MVD's record retention policy and disposition schedule. An MVD letter/affidavit, which is part of the MVD record introduced as an exhibit at trial, is consistent with her testimony about the destruction of the records. The state argues in its answering brief, however, that there was other evidence from which reasonable jurors could have found beyond a reasonable doubt that Mackey knew or

should have known his driver license or privilege to drive in Arizona had been suspended. We agree.

¶6 Garigan testified Mackey never had been issued an Arizona driver license; for that reason, his record was identified by a record number, not a driver license number. She explained that Mackey's record showed MVD had received an affidavit on June 17, 1989; the affidavit no longer exists but Garigan assumed the affidavit was an order of suspension from a law enforcement officer, which apparently triggered the actual suspension. Although she admitted nothing in the record established notice of the suspension had been mailed to Mackey, which would have given rise to the rebuttable presumption that he had received notice, *see Cifelli*, 214 Ariz. 524, ¶ 13, 155 P.3d at 366, she explained that, based on the type of suspension, notice would not have been mailed to him but would have been served personally.

¶7 Garigan also explained that a person may apply to MVD for a personal identification card and that the MVD record reflected Mackey had applied for and received Arizona identification cards on at least three occasions. She testified that when a person goes to MVD to apply for an identification card, the clerk "should" tell the person whether they are eligible for a driver license or ineligible because the person's privilege to drive has been suspended. She stated that "the agents are . . . trained that if there [are] any withdrawal actions or any stop actions, that they should tell the individual at that time." When the trial court asked Garigan a question posed by one of the jurors—whether MVD would "typically notify someone without a license that the privilege to drive had been suspended"—she said it would. And, she added, if the person did not

have an Arizona driver license, service of notice could be personal. She conceded nothing in the MVD records established Mackey had been served personally or by mail with notice that his privilege to drive in Arizona had been suspended.

¶8 Denying Mackey's Rule 20 motion, the court concluded:

> I think that although it is not the strongest case in that regard, . . . Ms. Garigan's testimony . . . that in this kind of a suspension . . . would have been personally served and that the Department of Motor Vehicles records have been destroyed, as is in keeping with their archiving practices, and the fact that she also established that the license was suspended—not the license, but the privilege to drive was suspended for over 20 years, would indicate that I think a jury could, on th[at] basis, find that the defendant should have known his privilege to drive was suspended.

Given the length of time of the suspension, Mackey's numerous applications for an identification card, Garigan's testimony that suspensions of this kind are served personally, not mailed, and that the practice of MVD agents is to inform persons who apply for a personal identification card that a previous driver license suspension period has terminated and that they may reapply for a license; and the fact that Mackey apparently only had the Arizona identification card in his possession at the time of the accident, not a driver license from any state, we cannot say the court erred.[1]

¶9 It is for the jury to draw whatever inferences the evidence reasonably permits. *See Bible*, 175 Ariz. at 602, 858 P.2d at 1205. From the circumstantial evidence the state presented, reasonable jurors could find beyond a reasonable doubt that Mackey

[1]The state could and should have provided a much better record that Mackey had notice that his license was suspended. But it did not properly argue for the admission of his prior convictions for driving on a suspended license as evidence of his knowledge.

either knew or, at the very least, should have known his privilege to drive in Arizona was suspended. In determining whether there is substantial evidence to withstand a Rule 20 motion and support a conviction, we do not distinguish between circumstantial and direct evidence. *See State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993) ("Arizona law makes no distinction between circumstantial and direct evidence."). Indeed, as the jury was correctly instructed, "[e]vidence may be direct or circumstantial."

¶10 For the reasons stated, we affirm the convictions and the sentences imposed.

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

CONCURRING:

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

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