DIVISION ONE
FILED: 06/28/2012
RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 11-0647
	)	DEPARTMENT C
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
JESS NEAL LEETHAM, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-173216-001SE

The Honorable Carolyn K. Passamonte, Judge *Pro Tem*

AFFIRMED

Thomas C. Horne, 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 Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

W I N T H R O P, Chief Judge

¶1 Jess Neal Leetham ("Appellant") appeals his conviction and sentence for one count of aggravated driving or actual

physical control while under the influence of intoxicating liquor or drugs ("DUI"). Appellant's counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record on appeal and found no question of law that is not frivolous. Appellant's counsel therefore requests that we review the record for fundamental error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999) (stating that this court reviews the entire record for reversible error). Although this court granted Appellant the opportunity to file a supplemental brief *in propria persona*, he has not done so. He has, however, raised one issue through counsel that we address.

¶2 We have appellate jurisdiction pursuant to the Arizona Constitution, Article 6, Section 9, and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (West 2012),[1] 13-4031, and 13-4033(A). Finding no reversible error, we affirm.

[1] We cite the current Westlaw version of the applicable statutes because no revisions material to this decision have since occurred.

I. FACTS AND PROCEDURAL HISTORY[2]

¶3 On September 16, 2010, the State charged Appellant by information with one count of aggravated DUI, a class four felony, in violation of A.R.S. §§ 28-1381(A)(3) and 28-1383(A)(1). In pertinent part, the State alleged that Appellant had driven or been in actual physical control of a vehicle while there was any drug defined in A.R.S. § 13-3401 (including marijuana, amphetamine, or methamphetamine) or its metabolite in his body and while his Arizona driver's license was suspended or revoked. The State later alleged that Appellant had one non-dangerous historical prior felony conviction (for possession of dangerous drugs for sale, a class two felony committed on July 23, 2002) and one non-historical prior felony conviction (for aggravated assault, a class three felony committed on June 10, 1991), and had committed the charged offense while on release from confinement for the historical prior offense. *See* A.R.S. § 13-708(C).

¶4 At trial, the State presented the following evidence: At approximately 5:15 p.m. on November 20, 2009, Mesa Police Officer Johnston was conducting "DUI enforcement" on his motorcycle and assisting Mesa Police Officer Slaughter with a

[2] We review the facts in the light most favorable to sustaining the verdict and resolve all reasonable inferences against Appellant. *See State v. Kiper*, 181 Ariz. 62, 64, 887 P.2d 592, 594 (App. 1994).

traffic stop. While acting as back-up for Officer Slaughter, Officer Johnston observed a Chevy Malibu drive past him, and he decided to follow that vehicle.

¶5 Officer Johnston observed the Malibu pull into the left-hand turn lane and turn south onto the next street one block west of his location. He lost sight of the Malibu momentarily as he waited a few seconds for passing traffic before he "pulled out" to catch up to that vehicle. As he turned south to follow the Malibu, he observed it "stopped approximately half a block down on the eastside of the road facing south," with its brake lights still illuminated. The officer noted that the Malibu was parked "facing the wrong way on the road," and no one was coming to or leaving the vehicle.

¶6 As Officer Johnston parked behind the Malibu, he observed that the driver (Appellant) was the only person in the vehicle, and he recognized Appellant as the person he had seen drive past him moments earlier. As Appellant exited the vehicle, the officer asked him for his license. Appellant admitted that his driver's license had been suspended since 1991, but he produced an Arizona identification card and advised the officer that he had stopped to visit friends in the neighborhood.

¶7 While speaking with Appellant, Officer Johnston noticed that Appellant's "eyes were bloodshot and watery," he

"had a flush face," and he seemed "kind of argumentative." When questioned, Appellant denied he had been drinking or using illegal drugs earlier that evening.

¶8 Officer Johnston decided to administer various field sobriety tests. In the meantime, Officer Slaughter arrived as back-up. Appellant performed poorly on the first two tests, and Officer Johnston noticed "a couple clues of possible impairment," which the officer concluded were indicia of "[p]ossible methamphetamine or Cannibus use." Appellant began but did not complete the third test; instead, he stopped and told the officer "you've already made up your mind, you're going to arrest me." He then turned around, put his hands behind his back, and told the officer to "just take me to jail." Based on Appellant's failure to perform the tests and other indicia of drug use, including "eyelid tremors and body tremors" and a burn mark on Appellant's lower lip, Officer Johnston arrested Appellant.[3]

¶9 Officer Johnston called for a tow truck, and before Appellant's vehicle was towed, Officer Johnston conducted an inventory search of the vehicle and found a glass pipe that he recognized as paraphernalia used to smoke methamphetamine. Appellant was transported to a nearby police station, where

[3] According to the officers, at no time did Appellant deny having driven the Malibu, and no one else ever informed them that Appellant was not the driver.

police obtained both a urine and blood sample from him. Subsequent testing of the urine sample revealed the presence of amphetamine, methamphetamine, and marijuana metabolite in Appellant's system.

¶10 A custodian of records for the Arizona Motor Vehicle Department ("MVD") testified that MVD's records showed that, as of November 20, 2009, Appellant's Arizona driver's license had been suspended since 1991 and had been revoked. Notices of suspension and revocation had been mailed on numerous occasions to Appellant's address on record as provided by Appellant. MVD's records indicated that the suspension and revocation were still in effect at the time of trial.

¶11 Appellant presented several witnesses in his defense. His mother testified that, late in the afternoon on the day Appellant was arrested, she loaned her recently purchased Chevy Malibu to her son's girlfriend. Appellant was not present at the time.

¶12 Appellant's girlfriend testified that she borrowed the Malibu during the afternoon of Appellant's arrest to travel to some friends' house and meet with Appellant, who was at the house. After she arrived, she parked on the wrong side of the street, hurried into the house to "go to the bathroom," handed Appellant the keys to the Malibu on her way in, "and asked him to get the cigarettes out of the car." She remained in the

house to make a phone call. Approximately forty-five minutes later, one of the friends entered the house and told her Appellant was being arrested. By the time she exited the house to see what was happening, Appellant had been taken to jail and the Malibu was being towed. Although several people were present when the police arrested Appellant, no one told her why he had been arrested, and she did not ask or otherwise attempt to find out. She testified that only she had driven the Malibu that day, not Appellant.[4]

¶13 A.S., a friend of both Appellant and his girlfriend, testified that on November 20, 2009, she was present as several friends, including Appellant, were preparing to move a travel trailer. She remembered that Appellant's girlfriend arrived and handed Appellant the keys to the Malibu so he could get cigarettes. She did not see Appellant drive the Malibu that day, but she saw police officers arrive and question him about driving it. She conceded, however, that she did not tell the officers that Appellant had not been driving, even after the officers arrested him.

[4] She conceded, however, that she did not call the Mesa Police Department to advise them that she, rather than Appellant, had been the driver, and she had waited until shortly before trial before telling anyone her story, even though Appellant's trial was held more than fifteen months after his arrest.

¶14 Appellant testified and denied driving the Malibu on November 20, 2009. He stated that he was helping friends move a trailer when his girlfriend arrived in the Malibu. As she came to the door, she gave him the keys, and he went out to the vehicle to get some cigarettes, but "in that short time," police officers arrived. The officers asked him to do some field sobriety tests, and he consented, but "[a]bout halfway through it" he refused to continue because "[t]hey were going to take [him] to jail either way." Appellant claimed he tried to tell the officers he had not been driving the Malibu, but "they kept ordering me to do the test." Appellant admitted that he knew his license was suspended on November 20, 2009, and that he had used methamphetamine and marijuana near the time of his arrest, but he denied knowing anything about the glass pipe found in the Malibu. He also admitted having been previously convicted of a felony in 2002.

¶15 The jury found Appellant guilty as charged. After determining the State had proven the existence of both the alleged historical prior felony conviction for enhancement purposes and the alleged non-historical prior felony conviction for aggravation purposes, the trial court sentenced Appellant to the presumptive term of 4.5 years' imprisonment in the Arizona Department of Corrections ("ADOC"). The court also credited

Appellant for 49 days of presentence incarceration. Appellant filed a timely notice of appeal.

II. ANALYSIS

¶16 At sentencing, the trial court found that Appellant had one historical prior felony conviction (possession of narcotic drugs for sale, a class two non-dangerous felony, which Appellant admitted at trial) and one non-historical prior felony conviction (aggravated assault, a class three non-dangerous felony). With regard to the non-historical prior felony conviction, the court found Appellant had committed that offense on June 10, 1991, and that he was convicted of that offense on April 3, 1992, in Maricopa County Superior Court Cause No. CR91-92851. Through counsel, Appellant questions whether the State presented "sufficient evidence to prove that he had a non-historical prior [felony conviction] for the trial court to use as an aggravating factor to sentence him to the presumptive term."

¶17 We conclude the trial court did not err in determining that Appellant committed the non-historical prior felony conviction alleged by the State. Appellant's argument appears to stem from the fact that the latent print examiner who obtained Appellant's fingerprints before sentencing and compared them to fingerprints on certified documents provided by the State (admitted in evidence as Exhibits 1-5), stated that her

results were "inconclusive" as to the first four documents (Exhibits 1-4), meaning that the fingerprint impression located on the documents lacked "sufficient quality or quantity of detail to be individualized or excluded from [Appellant]."[5] The examiner did conclude, however, that in comparing Appellant's fingerprints to the fingerprints on Exhibit 5, which was an automated summary report from ADOC, she was able to conclude that "the left thumb in the ten-print card was individualized or identified to [Appellant]." She also identified the photo included in Exhibit 5 as that of Appellant. Exhibit 5 indicates that a person with the same name and date of birth as Appellant committed a class three non-dangerous felony on June 10, 1991, and was convicted in Maricopa County Cause No. CR91-92851, with a sentence date of April 3, 1992. Given the record before us, we conclude that the trial court did not err in finding Appellant committed the non-historical prior felony conviction alleged by the State.[6]

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[5] Exhibits 1 and 2 indicate that a person with the same name and date of birth as Appellant committed aggravated assault, a class three non-dangerous felony, on June 10, 1991, and that he was convicted of and placed on probation for that offense on April 3, 1992, in Maricopa County Superior Court Cause No. CR 91-92851.

[6] Furthermore, even if we were to assume *arguendo* that the court erred in finding the State proved the presence of the non-historical prior felony conviction as an aggravating factor, Appellant can show no harm and therefore no fundamental error requiring reversal. In Arizona, "the maximum punishment

¶18 We have reviewed the entire record for reversible error and find none. *See Leon*, 104 Ariz. at 300, 451 P.2d at 881; *Clark*, 196 Ariz. at 537, ¶ 30, 2 P.3d at 96. The evidence presented at trial was substantial and supports the verdict, and the sentence was within the statutory limits. Appellant was represented by counsel at all stages of the proceedings and was given the opportunity to speak at sentencing. The proceedings were conducted in compliance with his constitutional and statutory rights and the Arizona Rules of Criminal Procedure.

¶19 After filing of this decision, defense counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do no more than inform Appellant of the status of the appeal and of his future options, unless counsel's review reveals an issue appropriate for petition for review to the Arizona Supreme Court. *See State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant has thirty days from the date of this decision to

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authorized by a jury verdict alone, without the finding of any additional facts, is the presumptive term." *State v. Johnson*, 210 Ariz. 438, 441, ¶ 10, 111 P.3d 1038, 1041 (App. 2005) (citations omitted). If a trial court ultimately imposes a presumptive term, the court may find and consider an unproven aggravating factor in determining a defendant's sentence because the punishment will not exceed the statutory maximum allowed by the verdict. *See id*. at 441-42, ¶¶ 10-13, 111 P.3d at 1041-42. Thus, a trial court does not err in considering an aggravating circumstance not properly found if the court does not rely on the circumstance to increase the punishment beyond the maximum authorized by the verdict alone. *See id*. at 442, ¶ 13, 111 P.3d at 1042.

proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

III. CONCLUSION

¶20 Appellant's conviction and sentence are affirmed.

_____/S/_____
LAWRENCE F. WINTHROP, Chief Judge

CONCURRING:

_____/S/_____
PATRICIA K. NORRIS, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge