IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

DAWAYNE DUNCAN, *Appellant*.

No. 1 CA-CR 16-0482
FILED 2-6-2018

Appeal from the Superior Court in Maricopa County
No. CR2012-110614-002
The Honorable Pamela S. Gates, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Joseph T. Maziarz
Counsel for Appellee

Ballecer & Segal LLP, Phoenix
By Natalee E. Segal
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Randall M. Howe delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge Jon W. Thompson joined.

H O W E, Judge:

¶1 This appeal is filed in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969). Counsel for Dawayne Duncan has advised this Court that counsel found no arguable questions of law and asks us to search the record for fundamental error. Duncan was convicted of aggravated driving while under the influence of an intoxicating liquor (impaired), a class 4 felony, and aggravated driving or actual physical control while under the influence of an intoxicating liquor (Blood Alcohol Concentration ("BAC") of 0.08 or higher), a class 4 felony. Duncan has filed a supplemental brief in propria persona, which the Court has considered. After reviewing the record, we affirm Duncan's convictions and sentences and correct his presentence incarceration credit.

FACTS AND PROCEDURAL HISTORY

¶2 We view the facts in the light most favorable to sustaining the judgment and resolve all reasonable inferences against Duncan. *See State v. Fontes*, 195 Ariz. 229, 230 ¶ 2 (App. 1998).

¶3 On February 23, 2012, at 12:31 a.m. near 35th Avenue and Bell Road in Phoenix, Officer Richard Codding saw Duncan driving at about 60 MPH in a 45 MPH zone. Officer Codding recorded Duncan's speed on his radar device and followed Duncan to the intersection of 35th Avenue and Bell Road where Duncan had stopped for a red light. Before Officer Codding activated his lights, Duncan made a right turn onto 35th Avenue by crossing a "safety zone," which separated three through traffic lanes from a dedicated right turn traffic lane. Officer Codding immediately followed Duncan and activated his emergency lights to make a stop.

¶4 After Duncan stopped his car, Officer Codding asked him for his driver's license, and Duncan gave him an Arizona Identification Card because Duncan's driver's license had been suspended. While interacting with Officer Codding, Duncan showed signs consistent with alcohol consumption, such as watery, bloodshot eyes and an odor of alcohol. After

Officer Codding asked Duncan to exit his car, Duncan placed his hand on the side of his car for support while walking. Duncan participated in a horizontal gaze nystagmus test, and the results indicated that he had a BAC of 0.08 or above. He then refused to do any other field sobriety tests. Officer Codding arrested Duncan and took him to a "DUI van" for a blood test.

¶5 At the DUI van, Officer William Bennett read Duncan his *Miranda*[1] rights and advised him of the "implied consent law." Duncan refused to take a blood test, and the officers obtained a warrant and gave Duncan a physical copy of the warrant at 3:35 a.m. Officer Bennet drew Duncan's blood at 3:51 a.m. A forensic scientist tested Duncan's blood for its alcohol concentration, and the results showed a BAC of 0.100 at the time of the test. The forensic scientist did a retrograde extrapolation to determine Duncan's BAC at 2:30 a.m., and the results showed a BAC between 0.095 and 0.138 within two hours of driving.

¶6 Before trial, Duncan underwent competency proceedings and was found incompetent but restorable. About five months later, the trial court found that Duncan's competency had been restored. At a settlement conference, Duncan was informed of both the possible range of the sentences if he was convicted and the State's plea offer. Duncan rejected the plea offer.

¶7 The court held trial in May 2015, and Officers Codding and Bennett and a forensic scientist testified to the aforementioned facts. Additionally, a custodian of records for the Department of Motor Vehicles testified to Duncan's driving record. While looking over Duncan's admitted driving record, the custodian stated that Duncan received multiple suspended licenses and notice was sent to him for each suspension. The custodian also testified that Duncan's license was suspended on February 23, 2012.

¶8 During trial, Duncan believed that five jurors had overheard him speaking with his attorney outside of the courtroom. The five jurors were individually questioned, and every juror responded that they had not heard any conversation between Duncan and his counsel. Duncan moved for acquittal at the close of the State's case, which the trial court denied. Duncan exercised his right not to testify and rested his case. A jury convicted Duncan of the charged offenses and he admitted to having two prior felony convictions from 2000 and 2009.

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1 *Miranda v. Arizona*, 384 U.S. 436 (1966).

¶9 The trial court conducted the sentencing hearing in compliance with Duncan's constitutional rights and Arizona Rule of Criminal Procedure 26. The trial court found that the mitigating factors, Duncan's mental health and family support, outweighed the aggravating factors. Duncan received concurrent eight-year sentences for both counts with presentence incarceration credit for 417 days. The trial court imposed the following fines and fees: (1) $1,500 to the Public Safety Equipment Fund, (2) $1,372.50 DUI fine, (3) $1,500 to the Prison Construction and Operations Fund, (4) $250 to the DUI Abatement Fund, (5) $20 for Probation Assessment, and (6) $20 for a time payment fee under A.R.S. § 12–116. Duncan timely appealed.

DISCUSSION

¶10 We review the entire record for reversible error. *State v. Thompson*, 229 Ariz. 43, 45 ¶ 3 (App. 2012). Counsel for Duncan has advised this Court that after a diligent search of the entire record, counsel has found no arguable question of law. However, in his supplemental brief, Duncan raises eight issues.

¶11 First, Duncan argues that certain evidence was not used or presented to the trial court. Duncan, however, has not specified what evidence he wanted to introduce or how the evidence would have helped his defense. Because he has failed to adequately develop this argument, it is deemed waived. *See* Ariz. R. Crim. P. 31.10(a)(7) (The opening brief must set forth "appellant's contentions with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies."); *see also State v. Carver*, 160 Ariz. 167, 175 (1989).

¶12 Second, Duncan argues that the grand jury erroneously charged him for two DUI's in his indictment dated July 2, 2013. The record shows that Duncan received one DUI charge under A.R.S. § 28–1381(A)(1), which pertains to whether he drove a car under the influence of an intoxicating liquor. Duncan also received a DUI charge under A.R.S. § 28–1381(A)(2), which pertains to whether he drove a car while having a BAC of 0.08 or higher. The indictment appropriately charged Duncan under the two distinct statutes, and therefore, no error occurred.

¶13 Third, relating to the previous claim, Duncan argues that he was already charged and convicted for his "First DUI" on February 23, 2012, because he served nine days in jail, and therefore, he claims that he received double punishment. Duncan did not receive double punishment

because he did not get convicted for either DUI until the conclusion of his trial on May 21, 2015. He then received his sentence on June 21, 2016,[2] and he received incarceration credit for 417 days, which included the nine days that he served from February 23 to March 2, 2012. Thus, no error occurred.

¶14 Fourth, Duncan mentions that the Phoenix Police Department advised the Maricopa County Attorney's Office that some lab reports printed before June 21, 2013, may contain an administrative error in the serial number of the supervisor that approved the report. Again, Duncan does not explain how this administrative error prejudiced him or interfered with his defense. Thus, this argument is deemed waived. *See* Ariz. R. Crim. P. 31.10(a)(7); *see also Carver*, 160 Ariz. at 175.

¶15 Fifth, Duncan states that Officer Codding's testimony was inconsistent because he stated that Duncan stopped at the red light and also went through the red light. "The finder-of-fact, not the appellate court, weighs the evidence and determines the credibility of witnesses." *State v. Cid*, 181 Ariz. 496, 500 (App. 1995). We will not disturb the jury's decision if substantial evidence supports its verdict. *Id.* Even so, the record does not support the assertion that Officer Codding's testimony was inconsistent. Officer Codding stated that Duncan stopped at the red light while in one of the through lanes. He then stated that Duncan made a right turn during the red light while driving through the safety zone that divided the through lanes from the dedicated right turn lane. As such, his argument is without merit.

¶16 Sixth, Duncan claims that the court failed to conduct a *Donald*[3] advisement. The record shows, however, that at a settlement conference on December 11, 2014, the court informed Duncan of the possible sentencing range he could receive if he was convicted and of the State's plea offer. Therefore, no error occurred. Duncan also states that he has a *Donald* claim based on his attorney's failure to inform him of a plea offer. This appears to be an ineffective assistance of counsel claim. As such, it is not appropriate in this direct appeal, and we need not address this issue. *See State v. Spreitz*, 202 Ariz. 1, 3 ¶ 9 (2002) (clarifying that ineffective assistance of counsel claims are to be brought in Rule 32 proceedings and not to be addressed by the appellate court in a direct appeal).

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[2] Duncan had another case pending before the court, and he received sentencing after he pled guilty to the charges in the second case.

[3] *State v. Donald*, 198 Ariz. 406 (App. 2000).

¶17 Seventh, Duncan contends that the trial court sentenced him to an illegal term because it used a historical prior from 1996, which would be over ten years old. The record shows that the trial court considered two prior felony convictions, one of which occurred in 2000 and the other occurred in 2009. The court clearly did not consider a conviction from 1996. Moreover, the 2009 conviction was well within the ten-year period for a historical prior conviction. As for the 2000 conviction, it falls within the same ten-year period because Duncan received a 78-month prison sentence. *See* A.R.S. § 13–105(22)(b) (Any time spent incarcerated "is excluded in calculating if the offense was committed within the preceding ten years."). Thus, this argument fails.

¶18 Last, Duncan argues that the officers did not have a warrant to draw his blood. Officer Codding testified that he gave a physical copy of the warrant to Duncan, and Officer Bennett testified that the warrant was served before he drew Duncan's blood. Duncan did not present any evidence to refute their testimony. As such, no error occurred.

¶19 We have read and considered counsel's brief and fully reviewed the record for reversible error, *see Leon*, 104 Ariz. at 300, and we find an error regarding Duncan's incarceration credit. Failure to award full credit for time served in presentence incarceration is a fundamental error that may be raised at any time. *State v. Cofield*, 210 Ariz. 84, 86 ¶ 10 (App. 2005). Here, Duncan received incarceration credit for 417 days. After reviewing the record, we find that Duncan should have been credited with 420 days.

¶20 All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. So far as the record reveals, counsel represented Duncan at all stages of the proceedings, and the sentences imposed were within the statutory guidelines. We decline to order briefing and affirm Duncan's convictions and sentences.

¶21 Upon the filing of this decision, defense counsel shall inform Duncan of the status of the appeal and of his future options. 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 (1984). Duncan shall have 30 days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review.

CONCLUSION

¶22 For the foregoing reasons, we affirm Duncan's convictions and sentences and correct his presentence incarceration credit.

AMY M. WOOD • Clerk of the Court
FILED: AA