IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

SHAWN GLENN YOUNG, *Appellant*.

No. 1 CA-CR 17-0044
FILED 2-13-2018

Appeal from the Superior Court in Maricopa County
No. CR2015-126652-001
The Honorable David V. Seyer, Judge *Pro Tempore*

AFFIRMED

COUNSEL

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

Brown & Little, PLC, Chandler
By Matthew O. Brown
Counsel for Appellant

Shawn Glenn Young, Florence
Appellant

MEMORANDUM DECISION

Judge Diane M. Johnsen delivered the decision of the Court, in which Presiding Judge Lawrence F. Winthrop and Judge Maria Elena Cruz joined.

J O H N S E N, Judge:

¶1 Shawn Glenn Young timely filed this appeal in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), following his convictions of four counts of aggravated driving under the influence, all Class 4 felonies. Young's counsel has searched the record on appeal and found no arguable question of law that is not frivolous. *See Smith v. Robbins*, 528 U.S. 259 (2000); *Anders*, 386 U.S. at 744; *State v. Clark*, 196 Ariz. 530 (App. 1999). Counsel now asks this court to search the record for fundamental error.

¶2 Young has filed a supplemental brief, raising two issues. First, he asserts his first two trial attorneys did next to nothing for him and although his third attorney tried to help him, it was too late to accept the State's original plea offer, which is what he wanted to do. Second, he contends that at sentencing, the superior court erroneously enhanced his sentence using a prior conviction for the crime of endangerment, which Young asserts was reduced to driving under the influence.

¶3 After reviewing the entire record and considering the issues Young raised in his supplemental brief, we affirm Young's convictions and sentences.

FACTS AND PROCEDURAL BACKGROUND

¶4 Early one day in July 2014, a Phoenix police officer stopped Young for speeding. Young's eyes were bloodshot and watery, his speech was slurred, and he smelled of alcohol. The officer administered a Horizontal Gaze Nystagmus test, which Young failed. After Young refused to take more field sobriety tests, the officer arrested him. Within an hour, Young submitted to breathalyzer and blood tests, both of which showed his blood alcohol content to be higher than twice the statutory 0.08 limit.

¶5 Before trial, Young moved to suppress expert testimony regarding his post-arrest blood test, arguing the expert witness who was to testify had not performed the test. The court denied the motion. During

the three-day trial, the expert witness testified to his opinion that Young's blood-alcohol content was over the 0.08 limit, based in part on the blood-test report. The State also presented evidence of the breathalyzer tests and evidence that Young had two prior convictions for driving under the influence.

¶6 The jury convicted Young of all four charged counts: Aggravated driving while under the influence of intoxicating liquor with a suspended or revoked driver's license, Arizona Revised Statutes ("A.R.S.") §§ 28-1381(A)(1) (2018), -1383(A)(1) (2018); aggravated driving with an alcohol concentration of 0.08 percent or more with a suspended or revoked driver's license, A.R.S. §§ 28-1381(A)(2), -1383(A)(1); aggravated driving while under the influence with two prior driving-under-the-influence convictions within 84 months, A.R.S. §§ 28-1381(A)(1), -1383(A)(2); and aggravated driving with an alcohol concentration of 0.08 percent or more with two prior driving-under-the-influence convictions within 84 months, A.R.S. §§ 28-1381(A)(2), -1383(A)(2).[1] At sentencing, Young admitted to an historical prior felony conviction for endangerment and was sentenced to slightly mitigated four-year concurrent terms of incarceration on each count. A.R.S. 13-703(B), (I).

¶7 Young timely appealed. We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution, and A.R.S. §§ 12-120.21(A)(1) (2018), 13-4031 (2018) and -4033(A)(1) (2018).

DISCUSSION

¶8 The record reflects Young received a fair trial. He was represented by counsel at all stages of the proceedings against him and was present at all critical stages. The court held appropriate pretrial hearings. The court did not conduct a voluntariness hearing; however, the record did not suggest a question about the voluntariness of Young's statements to police. *See State v. Smith*, 114 Ariz. 415, 419 (1977); *State v. Finn*, 111 Ariz. 271, 275 (1974).

¶9 The State presented both direct and circumstantial evidence sufficient to allow the jury to convict. The jury was properly comprised of eight members. The court properly instructed the jury on the elements of the charges, the State's burden of proof and the necessity of a unanimous verdict. The jury returned a unanimous verdict, which was confirmed by

[1] Absent material revision after the date of an alleged offense, we cite a statute's current version.

juror polling. The court received and considered a presentence report, addressed its contents during the sentencing hearing and imposed legal sentences on the crimes of which Young was convicted.

¶10 Young does not raise an arguable issue in his supplemental brief. Young's assertion that his lawyers were ineffective does not raise an appealable issue because "ineffective assistance of counsel claims are to be brought in Rule 32 proceedings. Any such claims improvidently raised in a direct appeal . . . will not be addressed by appellate courts regardless of merit." *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9 (2002). And the record shows that the court properly considered Young's 2012 endangerment conviction. Young admitted to that conviction at his sentencing; the judge, in a detailed colloquy, advised Young of the sentencing consequences of stipulating to the prior felony and asked him if he still wanted to admit the conviction.

¶11 Finally, no issue of fundamental, reversible error was raised by the court's denial of Young's motion to suppress expert opinion testimony about his post-arrest blood alcohol content based on his blood test. In that motion, Young argued that his rights under the Confrontation Clause barred the expert testimony because the test was conducted by a criminalist who did not testify, not by the expert witness.

¶12 In *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Supreme Court expressly left open the question of whether such testimony is admissible. *See id.* at 668, 673 (Sotomayor, J., concurring in part) (while blood-alcohol test reports are generally inadmissible when the person who performed the tests does not testify, a different question would be presented if the expert discussed the reports in testifying but the reports themselves were not admitted in evidence); *see also State ex rel. Montgomery v. Karp*, 236 Ariz. 120, 123-25, ¶¶ 10, 13-19 (App. 2014) (admitting similar expert testimony about defendant's blood-alcohol tests); *but see State v. Smith*, 242 Ariz. 98, 102, ¶ 13 (App. 2017) (ruling such expert testimony inadmissible when the expert does not reach any "independent conclusions"). Even if error occurred, however, Young cannot show he was prejudiced because the blood evidence was cumulative; the two breathalyzer tests in evidence also showed his blood-alcohol content was twice the 0.08 limit. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶ 20 (2005) (reversal for fundamental error requires not only fundamental error but also prejudice).

CONCLUSION

¶13 We have reviewed the entire record for reversible error and find none, and therefore affirm the convictions and resulting sentences. *See Leon*, 104 Ariz. at 300.

¶14 Defense counsel's obligations pertaining to Young's representation in this appeal have ended. Counsel need do no more than inform Young of the outcome of this appeal and his future options, 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). On the court's own motion, Young has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* motion for reconsideration. Young has 30 days from the date of this decision to proceed, if he wishes, with a *pro per* petition for review.

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