

NOTICE: NOT FOR OFFICIAL PUBLICATION.  
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL  
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION ONE

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STATE OF ARIZONA, *Appellee*,

*v.*

PEDRO GILLEN REYES, *Appellant*.

No. 1 CA-CR 17-0103  
FILED 5-1-2018

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Appeal from the Superior Court in Maricopa County  
No. CR2013-436638-002  
The Honorable Annielaurie Van Wie, Judge *Pro Tempore*

**AFFIRMED**

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COUNSEL

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

Maricopa County Public Defender's Office, Phoenix  
By Kevin D. Heade  
*Counsel for Appellant*

Pedro Gillen Reyes, Douglas  
*Appellant*

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**MEMORANDUM DECISION**

Judge Kent E. Cattani delivered the decision of the Court, in which Presiding Judge James P. Beene and Judge Randall M. Howe joined.

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**C A T T A N I**, Judge:

¶1 Pedro Gillen Reyes appeals his convictions of two counts of aggravated driving under the influence (“DUI”) and the resulting sentences. Reyes’s counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297 (1969), certifying that, after a diligent search of the record, he found no arguable question of law that was not frivolous. Reyes filed a supplemental brief asserting multiple claims of error, which we address below. Counsel asks this court to search the record for reversible error. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30 (App. 1999). After reviewing the record, and for reasons that follow, we affirm.

**FACTS AND PROCEDURAL BACKGROUND**

¶2 In August 2014, a fire captain called the police after observing a white pickup truck driving erratically. The fire captain followed the truck into a gas station parking lot, where he recorded the truck’s license plate number and saw the driver (the only person in the truck) get out of the vehicle and walk into the store. The driver returned to the truck minutes later with a case of beer, and the fire captain followed the truck to a residence and waited for the police.

¶3 When police officers arrived shortly thereafter, the fire captain described and pointed out the driver, who was standing near the truck with another man. The driver, later identified as Reyes, denied that he had been driving the truck and attempted to get away from the police. Officers restrained and arrested Reyes. They found keys to the truck in Reyes’s front pocket.

¶4 A police phlebotomist drew two vials of Reyes’s blood pursuant to a warrant, and subsequent testing showed Reyes had a blood alcohol concentration (“BAC”) of over 0.18 at the time of the draw. A forensic scientist estimated that Reyes’s BAC at the time of driving was

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between 0.183 and 0.191. A records check revealed that Reyes's license had been revoked and his driving privilege suspended at the time of the offense.

¶5 The State charged Reyes with two counts of aggravated DUI: (1) driving while impaired with a suspended license and (2) driving with a BAC of 0.08 or more with a suspended license. See Ariz. Rev. Stat. ("A.R.S.") §§ 28-1381(A)(1), (2), -1383(A)(1). Reyes was released pretrial and warned that failing to appear at any hearing would result in issuance of a warrant for his arrest, and that the proceedings would go forward in his absence. Reyes thereafter attended all hearings until June 2016, when he failed to appear for a settlement conference the day before his then-scheduled trial date. The court continued trial for three weeks, and Reyes then failed to appear for the final pretrial conference; Reyes's attorney offered no reason for Reyes's absence and did not move to continue the trial. When Reyes failed to appear for trial, counsel objected to proceeding in absentia but offered no information suggesting Reyes's absence was involuntary.

¶6 After a three-day trial in Reyes's absence, a jury found Reyes guilty as charged, and further found four aggravating factors as to each count. The court found that Reyes had four prior convictions of aggravated DUI. After Reyes was later arrested, the superior court sentenced him as a category 3 repetitive offender to concurrent, aggravated terms of 12 years' imprisonment for each count, with credit for 139 days of presentence incarceration. Reyes timely appealed.

**DISCUSSION**

**I. Reyes's Pro Se Supplemental Brief.**

**A. Ineffective Assistance of Counsel.**

¶7 Reyes argues that his brother was actually the driver and that his trial counsel provided ineffective assistance by failing to call the brother as a witness, failing to subpoena the brother to ensure his presence as a witness, and failing to investigate any potentially exculpatory video evidence (for example, video from the gas station's security cameras). A claim of ineffective assistance of counsel can only be raised in Rule 32 proceedings for post-conviction relief, not on direct appeal. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9 (2002). We thus do not address the merits of this argument.

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**B. Trial In Absentia.**

¶8 Reyes contends that the superior court erred by proceeding with trial in his absence. He asserts that trial in absentia improperly prevented him from personally confronting the witnesses against him and from testifying on his own behalf.

¶9 Although a criminal defendant has a right to be present at all stages of the proceedings, including trial, he may waive that right through his voluntary absence. *See State v. Reed*, 196 Ariz. 37, 38-39, ¶ 3 (App. 1999); *see also* Ariz. R. Crim. P. 9.1. A court may infer voluntariness if the defendant had actual notice (1) of the time of the proceeding, (2) of the right to be present at the proceeding, and (3) that the proceeding would go forward in his absence should he fail to appear. Ariz. R. Crim. P. 9.1. The defendant has the burden to rebut this inference by showing that his absence was involuntary. *Reed*, 196 Ariz. at 39, ¶ 3; *State v. Sainz*, 186 Ariz. 470, 473 (App. 1996).

¶10 Here, at the beginning of the proceedings, Reyes signed and acknowledged a release order requiring him to appear at all proceedings in the case and warning him that the proceedings could go forward in his absence should he fail to appear. The court reiterated the warning at future hearings. Reyes claims that his absence was due to a miscommunication with his counsel. But Reyes was present when the superior court scheduled the June 2016 conference at which he failed to appear, so he had actual knowledge of the hearing date. Reyes offers no excuse for his failure to communicate with counsel over the next three weeks before trial eventually began. The superior court thus did not err by concluding that Reyes's absence from trial was voluntary and properly proceeded with trial in his absence.

**II. Fundamental Error Review.**

¶11 We have read and considered counsel's brief and have reviewed the record for reversible error. *See Leon*, 104 Ariz. at 300. We find none.

¶12 As outlined above, Reyes was permissibly tried in absentia after failing to appear, and he was represented by counsel at all stages of the proceedings against him. The record reflects that the superior court afforded Reyes all his constitutional and statutory rights, and that the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The court conducted appropriate pretrial hearings, and the evidence presented at trial was sufficient to support the jury's guilty

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verdicts. Reyes's sentences fall within the range prescribed by law, and he has not shown he was deprived of any presentence incarceration credit to which he was entitled.

**CONCLUSION**

¶13 Reyes's convictions and sentences are affirmed. After the filing of this decision, defense counsel's obligations pertaining to Reyes's representation in this appeal will end after informing Reyes of the outcome of this appeal and his future options, unless counsel's review reveals 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, Reyes has 30 days from the date of this decision to proceed, if he desires, with a *pro se* motion for reconsideration or petition for review.



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