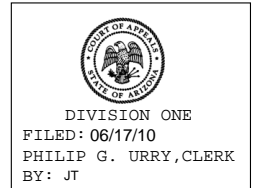


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCP 28(c);  
Ariz. R. Crim. P. 31.21

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



STATE OF ARIZONA, ) 1 CA-CR 09-0286  
)  
) DEPARTMENT C  
Appellee, )  
)  
v. ) **MEMORANDUM DECISION**  
) (Not for Publication -  
RALPH FRANK ORTEGA, ) Rule 111, Rules of the  
) Arizona Supreme Court)  
Appellant. )  
)

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Appeal from the Superior Court in Maricopa County

Cause No. CR2008-141957-001 DT

The Honorable Kristin C. Hoffman, Judge  
The Honorable Cari A. Harrison, Judge

**AFFIRMED**

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Terry Goddard, Arizona Attorney General  
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Phoenix

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Phoenix

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**K E S S L E R**, Judge

¶1 Defendant-Appellant Ralph Frank Ortega ("Ortega") was  
tried and convicted of unlawful flight from a law enforcement

vehicle, a class 5 felony, and sentenced to five years in prison. Ortega appeals his conviction and sentence. Counsel for Ortega filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969). Finding no arguable issues to raise, counsel requests that this Court search the record for fundamental error. Ortega was given the opportunity to, but did not file, a supplemental brief *in propria persona*. For the reasons that follow, we affirm Ortega's conviction and sentence.

#### **FACTUAL AND PROCEDURAL HISTORY**

¶12 J.G. owned a 2003 all terrain vehicle ("ATV") Polaris, which he usually parked on the bed of his 2003 Dodge Ram at his apartment complex. On July 4, 2008 J.G. went outside and noticed that his truck and ATV were gone. He had last seen the truck with the ATV the night before. J.G. asked his neighbor if he had seen the truck and the neighbor claimed to have seen it earlier that morning. J.G. did not see who took the truck with the ATV. He immediately contacted the police. Later that day, J.G. received a call from the police that they had found his ATV and advised him to pick it up. J.G. picked up the ATV around South-Central Phoenix. When the ATV was returned, the wiring had been cut and the ignition key was broken and out of place. The ATV had an ignition key and a pull start, either of which could be used to start it. Four days later, J.G. received a

call from the police to pick up his truck at a different location in Phoenix.

¶13 Officer J.B. testified that on July 4, 2008, she and her partner, Officer C. were on duty. She was in the passenger side of a "fully marked patrol vehicle." The vehicle was a 2008 Chevy Tahoe with police markings on the side and lights on the top, as well as in the front and rear of the vehicle. They observed an ATV coming in their direction in the wrong lane. They decided to conduct a traffic stop.

¶14 The officers activated the emergency overhead lights and notified dispatch of the traffic stop. J.B. testified that C. was saying something over the PA system to Ortega, but did not listen to what was actually said. Ortega stopped, looked back at the officers, pointed to the dirt lot and as they were pulling behind him, Ortega accelerated through the dirt lot. C. testified that the sirens were never activated. He further testified that he activates the sirens if the person "doesn't see [him]" and he believed Ortega had seen him.

¶15 They soon lost sight of the ATV and about halfway down Roeser they turned off the emergency lights. The officers saw debris and dust being picked up by the ATV behind an apartment complex alley. At that point, C. reactivated the lights and followed Ortega through the alley. However, due to the dust and debris, they could not see the ATV, therefore, per department

policy,<sup>1</sup> they stop pursuing the ATV. Their decision to stop pursuit was based on officer safety and to not cause any traffic confusion.

¶16 Helicopter support was called to the scene. The helicopter located the ATV driving westbound on Cody approaching Central Avenue. Ortega entered a trailer park on Second Avenue and Cody, and got off the ATV as Officer F.B. drove up to Ortega. F.B. observed Ortega initially run, but stopped, approached F.B. and offered no resistance when taken into custody by F.B.

¶17 Ortega was charged with theft of a means of transportation and unlawful flight from a law enforcement vehicle. Ortega pled not guilty to both charges.

¶18 At the time of the incident, Ortega was living back and forth with two girlfriends, but was planning on moving back to Tonopah with his aunt and uncle – his adopted parents. He wanted to purchase an ATV to ride it at home. According to Ortega, on July 3, 2008, he had a conversation with a friend, A.,<sup>2</sup> about purchasing an ATV. Ortega testified that on the morning of July 4, 2008, A. stopped by his girlfriend's house.

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<sup>1</sup> Officers are only allowed to pursue vehicles if it is a violent felony.

<sup>2</sup> According to Ortega's testimony, A. lived in the same trailer park as his girlfriend. Other than that, Ortega did not know A. well, nor did he have any contact information.

Ortega noticed A. arrived with what he identified as the stolen Dodge Ram carrying an ATV in the back. Ortega decided to test drive the ATV before purchasing it for \$500. About an hour later, Ortega went to A.'s trailer to test drive the ATV and gave him \$250.

¶19 Ortega testified that when he arrived at A.'s trailer, the ATV was already turned on and did not notice the wires hanging out. While he was driving the ATV, he came across Officers J.B. and C., whom he believed were signaling him to get off the road. He pointed and went into the dirt road and drove back to the trailer park to return the ATV to A. Ortega got off the ATV, which he left running because he did not know how to turn it off. Ortega was taken into custody. After his release, Ortega attempted to contact A., but could not find him.

¶10 Ortega's criminal file indicates that he had been convicted of five prior misdemeanors and two felonies.<sup>3</sup> During trial, Ortega testified that he had been convicted of a two prior felonies in 2004 without specifying what they were. The jury found Ortega not guilty on Count I: theft of means of transportation and guilty on Count II: unlawful flight from a law enforcement vehicle, a non-dangerous felony and repetitive

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<sup>3</sup> Charged with theft on 1/8/04 and resisting arrest on 11/20/04.

offense. Ortega was sentenced to the presumptive term<sup>4</sup> of five years in the Department of Corrections and given credit for 209 days of presentence incarceration.

#### ANALYSIS

¶11 This Court has reviewed the entire record for fundamental error. Error is fundamental when it affects the foundation of the case, deprives the defendant of a right essential to his defense, or is an error of such magnitude that the defendant could not possibly have had a fair trial. See *State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991). After careful review of the record, we find no meritorious grounds for reversal of Ortega's conviction or modification of the sentence imposed. The evidence supports the verdict, the sentence imposed was within the sentencing limits, and Ortega was represented at all stages of the proceedings below.

¶12 The evidence in the record supports the jury conviction of Ortega for the crime of unlawful flight from a law enforcement vehicle. A conviction requires proof that: (1) the defendant willfully fled from or attempted to elude a pursuing law enforcement vehicle; (2) the law enforcement vehicle was appropriately marked showing it to be an official law

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<sup>4</sup> Ortega's two prior felonies were calculated in sentencing. Arizona Revised Statutes ("A.R.S") sections 703(C) and (J) (2010).

enforcement vehicle; (3) the officer while in the law enforcement vehicle used a red, or red and blue lights; and (4) the officer in the law enforcement vehicle, as reasonably necessary, used an audible siren. A.R.S §§ 28-622.01, -624 (2004).

¶13 The first element is satisfied as the jury could reasonably infer that after the defendant made eye contact with officers and saw the emergency lights on the law enforcement vehicle, he failed to stop and willfully fled from the law enforcement vehicle. While Ortega testified that he pointed to the dirt, the evidence was sufficient for the trier of fact to conclude he fled from the police vehicle. *State v. Lucero*, 204 Ariz. 363, 366-67, ¶ 20, 64 P.3d 191, 194-95 (App. 2003) (we do not reweigh the evidence found by the fact-finder; error based on insufficiency of the evidence must be a complete absence of probative acts to support the conviction).

¶14 The second element is satisfied as the pursuing officers were riding in a "fully marked patrol vehicle" with "police markings on the side [and] lights on the top."

¶15 The third element is satisfied given that C. activated the emergency overhead lights. The lights were turned off shortly after the officers lost sight of the ATV to not cause confusion to other traffic in the area. However, when officers established contact with defendant for the second time, the

lights were reactivated.

¶16 For the fourth element, C. testified that he did not believe that it was necessary to activate the sirens because Ortega had seen them. This satisfied the "reasonably necessary" aspect of the fourth element.

¶17 Both Ortega and his counsel were present at sentencing. The court permitted Ortega to speak. The superior court stated on the record the evidence and materials considered, as well as the factors in imposing the sentence. Ortega received a lawful five year sentence pursuant to A.R.S § 13-703 (C) and (J).

¶18 Upon the filing of this decision, counsel shall inform Ortega of the status of the appeal and his options. Defense 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, 684 P.2d 154, 156-57 (1984). On the Court's own motion, Ortega shall have thirty days from the date of this decision to proceed, if he so desires, with a pro per motion for reconsideration or petition for review.



**CONCLUSION**

¶19 For the foregoing reasons, we affirm Ortega's conviction and sentence.

/S/

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DONN KESSLER, Judge

CONCURRING:

/S/

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PATRICK IRVINE, Presiding Judge

/S/

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MICHAEL J. BROWN, Judge