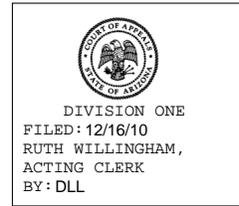


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) No. 1 CA-CR 09-0974
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MIGUEL HERNANDEZ-PENA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-006263-001 DT

The Honorable Pamela D. Svoboda, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, 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 Peg M. Green, Deputy Public Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Miguel Hernandez-Pena ("Defendant") appeals his convictions and sentences for two counts of aggravated driving

under the influence and one count of unlawful flight from law enforcement. Counsel for Defendant 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. Defendant was granted the opportunity to file a supplemental brief *in propria persona*, but he has not done so.

¶12 Our obligation in this appeal is to review the entire record for reversible error. *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We view the facts in the light most favorable to sustaining the conviction and resolve all reasonable inferences against Defendant. See *State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). Finding no reversible error, we affirm.

¶13 Defendant was charged with two counts of driving under the influence, both class 4 felonies, in violation of Arizona Revised Statutes ("A.R.S.") section 28-1383(A)(1)-(2)¹ (Supp. 2010), unlawful discharge of a firearm, a class 6 felony in violation of A.R.S. § 13-3107 (2010), unlawful use of means of transportation, a class 5 felony in violation of A.R.S. § 13-1803 (2010), and unlawful flight from law enforcement, a class 5

¹ We cite to the current versions of the statutes when no changes material to our decision have since occurred.

felony in violation of A.R.S. § 28-3315 (Supp. 2010) and A.R.S. § 28-622.01 (2004). The following evidence was presented at trial.

¶4 At approximately 8:00 p.m. on November 15, 2008, Officer Ruiz and a ride-along passenger were traveling southbound on 27th Avenue in a fully marked police vehicle. As they passed a four-door truck that was headed northbound, Ruiz and the passenger heard several gunshots come from the truck. Ruiz made a quick U-turn and pursued the truck by accelerating above the speed limit.² He observed the truck turn left on West Adams, an unmarked road in a residential neighborhood. The truck passed several moving vehicles on the left, which put the truck in the path of oncoming traffic. The ride-along passenger observed that the truck accelerated after Ruiz made the U-turn and that they followed the truck "at a very high rate of speed through a residential neighborhood." According to Ruiz, he never lost sight of the truck during the pursuit.

¶5 After approximately three minutes of pursuit, the truck stopped at a bakery near 30th Avenue and Van Buren. Ruiz saw a person, later identified as Defendant, exit the truck from the driver's door and walk into the bakery, close the door, and

² Ruiz testified that he activated his overhead lights during the pursuit but could not recall activating his siren because of the other tasks he was focusing on at the time. He noted, however, that turning on the siren would be standard procedure.

turn off the lights inside the building. Two other individuals exited the vehicle, one from the driver's side passenger door and the other from the other side of the truck. Both of them complied with Ruiz's commands. After several backup units had arrived, Defendant exited the bakery and was immediately taken into custody. Ruiz detected an odor of alcohol and transported Defendant to a DUI processing van. After being read the *Miranda*³ warning, Defendant admitted he had "a couple beers . . . five hours ago," but denied driving the truck, stating he had been "inside the business the whole time." He further stated that he did not know who owned the truck, even though his mother was the registered owner.

¶16 Defendant testified that he had consumed some alcohol while target shooting with friends in the north Phoenix area. When the group returned to Phoenix, his cousin B.H. drove him to his family's bakery so he could close up for the evening. His friend J.C. was at the bakery waiting for them. While inside the bakery, Defendant saw Officer Ruiz telling B.H. and J.C. to hold their hands up, but did not go outside, instead continuing to close the bakery. After finishing his work tasks, he saw Ruiz shining a light into the bakery and telling him to come out. He complied and was taken into custody.

³ *Miranda v. Arizona*, 384 U.S. 364 (1966).

¶17 Defendant stipulated that his blood alcohol content registered at .093 and .096. He also admitted that his license was suspended at the time, but he denied driving the truck. When asked why he did not come out when he saw the police take his friends into custody, he explained "drinking and police, they just don't mix."

¶18 At the close of the State's case, the court granted the defense motion for a directed verdict on count 4, unlawful use of means of transportation. The jury found Defendant guilty of both counts of aggravated DUI and one count of unlawful flight from law enforcement, but not guilty of unlawful discharge of a firearm. Defendant was sentenced to five months imprisonment and four years of probation for counts 1 and 2, and three years of probation on count 5. This timely appeal followed.

¶19 We have searched the entire record for reversible error and find none. All of the proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. The record shows Defendant was present and represented by counsel at all pertinent stages of the proceedings, was afforded the opportunity to speak before sentencing, and the sentence was imposed within statutory limits. Accordingly, we affirm Defendant's convictions and sentences.

¶10 Upon the filing of this decision, counsel shall inform Defendant 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). Defendant 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.

/s/

MICHAEL J. BROWN, Judge

CONCURRING:

/s/

DIANE M. JOHNSEN, Presiding Judge

/s/

JOHN C. GEMMILL, Judge