DIVISION ONE
FILED: 12/21/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0077
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION**
GARY EDWARD GENTRY, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR-2007-179147-001 DT

The Honorable Lisa Ann Vandenberg, Judge Pro Tempore

AFFIRMED

Terry Goddard, 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 Green, Deputy Public Defender
Attorney for Appellant

H A L L, Judge

¶1 Defendant, Gary Edward Gentry, appeals from his convictions and the sentences imposed. For the reasons set forth below, we affirm.

¶2 Defendant's appellate counsel 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), advising that, after a diligent search of the record, she was unable to find any arguable grounds for reversal. The brief also advised that defendant asked the court to consider issues on appeal. This court granted defendant an opportunity to file a supplemental brief, which he did. *See State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). He presented two issues: the police officer's probable cause to conduct a traffic stop and the right to a speedy trial.

¶3 We review for fundamental error, which is "error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005) (quotation omitted). We view the evidence presented at trial in a light most favorable to sustaining the verdict. *State v. Alvarado*, 219 Ariz. 540, 541, ¶ 2, 200 P.3d 1037, 1038 (App. 2008). Finding no reversible error, we affirm.

¶4 Defendant was indicted for two counts of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs, class four felonies.

¶5 The following evidence was presented at trial. Former police officer K.V. testified that he was on patrol on July 16, 2007 at approximately 10:05 p.m., when he noticed a white car make a u-turn into the middle lane on Scottsdale Road, drive under the posted speed limit, and "driv[e] out of its marked lane of travel, by about a tire width or so . . . three or four times." The "car was swerving between all three lanes of travel." K.V. decided to stop the driver[1] based on the "[t]he lane travel and the driving under the speed limit."[2]

¶6 After K.V. began speaking with defendant, he "could smell the [odor] of intoxicants coming from [defendant's] breath, and that [defendant's] eyes were bloodshot and watery, and his speech . . . kind of slow and mumbled." K.V. conducted field sobriety tests on defendant and observed that defendant was unsteady on his feet, had heavy mood swings, and "a possible neurological dysfunction . . . caused by alcohol." Defendant failed the field sobriety tests. K.V. stated that defendant denied consuming any alcohol that evening and defendant admitted

---

[1] K.V. identified the driver as defendant.

[2] Defendant argues in his supplemental brief that K.V.'s reason for stopping defendant was an "illegal u-turn," which K.V. later retracted at trial. We disagree. K.V. specifically testified that although he had seen defendant make a u-turn, he was unsure whether defendant had committed a violation because he had not seen whether the light was red or green at the time of the u-turn. Therefore, K.V. did not stop defendant because he made a u-turn.

that his driver's license had been suspended. Based on defendant's symptoms of intoxication, his driving, and the outcome of the field sobriety tests, K.V. arrested defendant.

¶7 Adelle Wieck, a phlebotomist, drew blood from defendant that night. Criminalist Jennifer Valdez tested defendant's blood and determined that he had a blood alcohol concentration of 0.265. Valdez estimated that defendant had consumed a minimum of twelve or thirteen drinks at the time the blood was drawn.

¶8 Defendant testified that he had consumed three beers prior to driving on a suspended license on July 16, 2007.

¶9 The jury found defendant guilty of one count of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs, impaired to the slightest degree, a class four felony, and one count of aggravated driving or actual physical control while under the influence of intoxicating liquor or drugs, alcohol concentration of 0.08 percent, a class four felony. The court sentenced defendant to concurrent prison terms of four months with thirty-six days of presentence incarceration credit. The court placed defendant on probation for four years upon his release from prison.

¶10 Defendant timely appealed. This court has jurisdiction pursuant to the Arizona Constitution, Article 6,

Section 9, and Arizona Revised Statutes sections 12-120.21(A)(1) (2003), 13-4031, and -4033(A)(1) (2010).

¶11 Defendant first asserts that K.V. lacked "[p]robable/[r]easonable cause" to initiate a traffic stop. An investigatory stop of a vehicle for a traffic violation is a seizure pursuant to the Fourth Amendment. *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996). Police officers, however, need only possess a reasonable suspicion, and not probable cause, that a driver has committed an offense in order to properly conduct a traffic stop. *Id.*; *State v. Livingston*, 206 Ariz. 145, 147, ¶ 9, 75 P.3d 1103, 1105 (App. 2003). "A traffic violation alone is sufficient to establish reasonable suspicion." *United States v. Choudry*, 461 F.3d 1097, 1100 (9th Cir. 2006) (citation omitted).

¶12 Defendant maintains that a court "at some level had ruled that tire width lane travel is not a legal reason for a traffic stop." We believe he is referring to *Livingston*, which held that the trial court properly granted the motion to suppress evidence because the police officer lacked reasonable suspicion to stop a vehicle when the driver's right side tires crossed the white shoulder line on one occasion on a rural, curved road with no traffic. 206 Ariz. at 147, 148, ¶¶ 4-5, 12, 75 P.3d at 1105, 1106. This case, however, is distinguishable from *Livingston* because K.V. testified that defendant's vehicle

"was swerving between three lanes of travel" and he was "driving under the speed limit" on a busy road in the city of Scottsdale. We therefore conclude that K.V. properly conducted a traffic stop based on reasonable suspicion.

¶13 Next, defendant maintains that his right to a speedy trial had been violated. A speedy trial issue cannot be presented for the first time on appeal and we therefore decline to address it. *See State v. Guerrero*, 159 Ariz. 568, 570-71, 769 P.2d 1014, 1016-17 (1989) ("[D]efendant cannot . . . allow the trial to continue to verdict and sentence, and then, *for the first time,* raise the speedy trial issue and claim the need for reversal.").

¶14 We have searched the entire record for reversible error. *See Leon,* 104 Ariz. at 299, 451 P.2d at 880. We find none. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure. Defendant was given an opportunity to speak before sentencing, and the sentence imposed was within statutory limits.

¶15 After the filing of this decision, counsel's obligations pertaining to defendant's representation in this appeal have ended. Counsel need do no more than inform defendant of the status of the 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, 684 P.2d 154, 156-57 (1984). Defendant has thirty days from the date of this decision to proceed, if he desires, with a pro per motion for reconsideration or petition for review.

CONCLUSION

¶16 For the foregoing reasons, we affirm defendant's convictions and sentences.

_/s/_____
PHILIP HALL, Presiding Judge

CONCURRING:

_/s/_____
SHELDON H. WEISBERG, Judge

_/s/_____
PETER B. SWANN, Judge