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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 12/28/2010
RUTH WILLINGHAM,
ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0084
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
)
JOSE MAGDALENO NINE,)
) (Not for Publication -
Appellant.) Rule 111, Rules of the
) Arizona Supreme Court)
)
)
)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2009135592-001 DT

The Honorable Carolyn K. Passamonte, 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 Christopher V. Johns, Deputy Public Defender
Attorneys for Appellant

B A R K E R, Judge

¶1 Jose Magdaleno Nine appeals from his conviction and sentence for unlawful flight from a law enforcement vehicle, a class five felony. Nine was sentenced on January 8, 2010, and timely filed a notice of appeal on January 28, 2010. Nine's 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 this court that after searching the entire record on appeal, he finds no arguable ground for reversal. Nine was granted leave to file a supplemental brief *in propria persona* on or before December 6, 2010 but did not do so.

¶2 We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033(A) (2010). We are required to search the record for reversible error. Finding no such error, we affirm.

Facts and Procedural Background¹

¶3 On May 28, 2009, at about 8:30 in the morning, police officer Michael Pacheco was in the area of 7th Avenue and Buckeye in Phoenix when he observed an individual on a blue motorcycle running a red light. Pacheco was driving a commercial inspection vehicle, a large police pick-up truck

¹ We review the facts in the light most favorable to sustaining the jury's verdict and resolve all inferences against Nine. *State v. Fontes*, 195 Ariz. 229, 230, ¶ 2, 986 P.2d 897, 898 (App. 1998).

equipped with red and blue lights, LEDs, and a siren. When the motorcyclist ran the red light, Pacheco attempted to follow the vehicle to issue a traffic citation. In his attempt to follow the motorcycle, he noticed that his speed was exceeding sixty miles per hour near a residential area. Pacheco activated his lights, and when the motorcyclist did not respond, Pacheco activated his siren.

¶4 When the siren was activated, Pacheco noticed the driver of the motorcycle turning his head in Pacheco's direction and moving into the left median lane. The motorcyclist turned left onto 13th Avenue, and Pacheco could see the driver's face and eyes through his motorcycle helmet. Even though road workers were working on 13th Avenue, the motorcyclist accelerated his bike. Due to the police department's safety policy, Pacheco did not pursue the motorcyclist. The driver glanced back a few blocks down the road and accelerated away from the scene.

¶5 Pacheco advised the police radio operators of the fleeing motorcyclist and gave them the area of the occurrence and a description of the vehicle and what the operator was wearing. He described the bike as a blue racing-style motorcycle with a single exhaust and a somewhat obscured license plate. He noted that the driver was wearing a dull black helmet and a tan shirt.

¶16 Two other police detectives were investigating an unrelated matter when they noticed a motorcycle fitting the description of the one Pacheco had been following parked outside of a convenience store. They noticed a suspect with a tan shirt, who they later identified as Nine. They stopped Nine, and shortly thereafter Pacheco arrived at the store and arrested Nine. After the arrest, Pacheco asked Nine if he knew that he should have stopped "for him."² Nine said that he did.

¶17 On June 1, 2009, Nine was charged with unlawful flight from a law enforcement vehicle. Nine's case proceeded to trial where he and his counsel were present for all critical stages. Nine testified that he was an eighteen-year-old college student and that he was working two jobs to afford his living expenses. When the incident occurred, he was driving home from work because he was sick to his stomach. He testified that his motorcycle was extremely loud and that his helmet significantly muffled exterior noises. He also told the jury that he could

² Officer Pacheco's testimony at trial was inconsistent whether he had asked Nine if he had known he should have stopped "for him." Pacheco's police report also did not state that he had asked whether Nine knew he should have stopped "for him." According to Nine's testimony, he admitted to Officer Pacheco that he should have stopped because he believed Pacheco to be referring to his running the red light. Because we view the facts in the light most favorable to upholding the verdict - here, in the light most favorable to the State - we accept Officer Pacheco's later version of the facts. See *Fontes*, 195 Ariz. at 230, ¶ 2, 986 P.2d at 898.

not see directly behind him while riding his bike because his bike lacked rear-view mirrors and his peripheral vision was impaired by his helmet. He testified that he did not know that Pacheco was attempting to pull him over.

¶18 At the conclusion of the trial, the jury found Nine guilty of unlawful flight from a law enforcement vehicle. Nine was sentenced to eighteen months of unsupervised probation.

Discussion

¶19 We have reviewed the record and have found no meritorious grounds for reversal of Nine's conviction. See *Anders*, 386 U.S. at 744; *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Nine was present at all critical stages of the proceedings and was represented by counsel. All proceedings were conducted in accordance with the Arizona Rules of Criminal Procedure. Accordingly, we affirm the conviction and sentence.

¶10 After the filing of this decision, counsel's obligations in this appeal have ended subject to the following. Counsel need do no more than inform Nine of the status of the appeal and Nine's future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Nine 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.

/s/

DANIEL A. BARKER, Judge

CONCURRING:

/s/

DONN KESSLER, Presiding Judge

/s/

JON W. THOMPSON, Judge