DIVISION ONE
FILED: 05/24/2011
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0704
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
JAMES ROBERT FOSTER, JR., Appellant.	)	Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Yavapai County

Cause No. V1300CR820090232

The Honorable Warren R. Darrow, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

DeRienzo and Willaims, PLLC — Prescott Valley
By Craig Williams
Attorneys for Appellant

O R O Z C O, Judge

¶1 James Robert Foster, Jr. (Appellant) appeals his convictions and the sentences imposed for aggravated driving

under the influence with one historical prior felony conviction and committed while on release, a class four felony, and unlawful flight with one historical prior felony conviction and committed while on release, a class five felony.

¶2 Appellant'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 a search of the entire appellate record, he found no arguable question of law that was not frivolous. Appellant was afforded the opportunity to file a supplemental brief in propria persona, but he did not do so.

¶3 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 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, and -4033.A.1 (2010).[1] Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶4 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996).

[1] We cite to the current version of the applicable statutes when no revisions material to this decision have since occurred.

¶5 In November 2005, while Appellant was on probation, a warrant had been issued for his arrest. Officer Harper (Harper), saw a car fitting the description of Appellant's mother's vehicle in an area that Appellant was known to be staying. Without witnessing a traffic violation, Harper activated his patrol vehicle's overhead emergency lights and siren and pulled the vehicle over. As Harper approached the vehicle he believed was being driven by Appellant, the vehicle accelerated, made a u-turn and fled in the opposite direction. Harper immediately returned to his vehicle and activated the patrol vehicle's emergency lights and siren in pursuit of the vehicle. When the pursuit entered an area where school children may have been present, Harper's supervisor instructed him to pull back and stop the pursuit. Harper de-activated the patrol vehicle's emergency lights and siren and continued to follow Appellant's vehicle, but at a reduced speed until Appellant stopped at a residence. Harper arrested Appellant when he exited the vehicle. Harper performed a search incident to arrest and found methamphetamine and a glass pipe in the vehicle's console.

¶6 Appellant admitted to using methamphetamine and marijuana within the past few months prior to his arrest. This was confirmed by a urinalysis, as he tested positive for both methamphetamine and THC.

¶7 In May 2009, Appellant was indicted on charges stemming from his arrest in November of 2005: count one, aggravated driving with a metabolite in the body while his license was suspended, a class four felony; count two, unlawful flight, a class five felony; count three, possession or use of methamphetamine, a class four felony; count four, possession of methamphetamine, a class six felony; and count five, possession of drug paraphernalia, a class six felony.

¶8 Appellant filed a motion to dismiss/suppress arguing Harper had insufficient probable cause for the traffic stop. The trial court denied the motion and held that Harper made two separate stops of Appellant that day. The court found Harper had insufficient probable cause for the first stop, but when Appellant made the u-turn and fled, requiring Harper to pursue, Harper had reasonable suspicion for the second stop, which was valid and constitutional. In denying the motion the court also noted that had evidence been found in Appellant's vehicle during the first stop, it would have been suppressed.

¶9 After a two day trial, the jury found Appellant guilty of counts one and two, and acquitted him on the remaining charges. At sentencing, the State recommended the court impose a presumptive term because Appellant had one prior historical felony conviction within five years and Appellant committed the current offenses while he was on probation. Appellant was

sentenced to presumptive and concurrent sentences of four and a half years as to count one, and two and one quarter years as to count two with thirty-one days credit for presentence incarceration.

¶10 In August 2010, Appellant was granted a delayed appeal, and notice of his delayed appeal was filed on August 19, 2010.

DISCUSSION

¶11 On appeal, we address whether the trial court correctly determined Harper conducted two stops in November 2005, as opposed to one stop devoid of probable cause.

¶12 A "person is seized by the police and thus entitled to challenge the government's action under the Fourth Amendment when the officer by means of physical force or show of authority, terminates or restrains his freedom of movement." *Brendlin v. California*, 551 U.S. 249, 254 (2007) (holding that the passenger of the car was seized along with the driver the moment the car came to a halt on the side of the road and it was error to deny the passenger's suppression motion without probable cause for the stop) (internal citations and quotation marks omitted). "[T]here is no seizure without actual submission [to the officer]; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned." *Id*. In *Brendlin*, the State conceded that there was no "adequate

justification" for the traffic stop, but argued the passenger was not seized. *Id.* at 256. The Supreme Court of the United States addressed this question by determining whether a reasonable person would have believed he was free to terminate the encounter. *Id.* at 256-57. In dicta the Supreme Court stated:

> An officer who orders one particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect a police officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing.

Id. at 257.

¶13 Here, Harper admits that Appellant did not commit a traffic violation in the initial stop, but stopped the vehicle because he believed it was Appellant's mother's vehicle and Appellant might be the man driving the vehicle with an outstanding felony warrant. At this point, when Appellant's vehicle came to a halt, a seizure occurred without sufficient probable cause. Had any evidence been discovered during a search in this stop, the trial court would correctly have granted Appellant's motion to suppress. However, because Appellant ceased his submission to the officer by fleeing the scene, the initial stop was concluded.

¶14 When Harper began to pursue Appellant the second time, Harper's supervisor advised him to stop pursuit due to school children that might be in the area he was driving through. Even if the first stop continued after Appellant fled, when Harper received and followed the order to cease the pursuit, the first stop concluded.

¶15 After following Appellant at a reduced speed, Harper pulled him over and ordered him out of the vehicle. This is when the second stop began, based on the reasonable suspicion of Appellant's conduct in fleeing after the first stop.[2] At this second stop, Appellant's vehicle could be lawfully searched by Harper incident to Appellant's arrest. *State v. Rojers*, 216 Ariz. 555, 557, ¶ 10, 169 P.3d 651, 653 (App. 2007) ("when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (quoting *New York v. Belton*, 453 U.S. 454, 460 (1981))). Thus the court correctly denied Appellant's motion to dismiss/suppress.

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[2] The court found that any taint from the first stop was attenuated by the Doctrine of Attenuation as the second stop was valid and constitutional. *See State v. Kinney*, 225 Ariz. 550, 556-57, ¶ 19, 241 P.3d 914, 920-21 (App. 2010) ("Evidence may be sufficiently distinguishable to be purged of the primary taint [of a constitutional violation] if the causal connection between [the] illegal police conduct and the procurement of [the] evidence is so attenuated as to dissipate the taint of the illegal action." (internal citation and quotations removed)).

CONCLUSION

¶16 We have read and considered counsel's brief, carefully searched the entire record for reversible error and found none. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the jury's findings of guilt. Appellant was present and represented by counsel at all critical stages of the proceedings. At sentencing, Appellant and his counsel were given an opportunity to speak and the court imposed a legal sentence.

¶17 Counsel's obligations pertaining to Appellant's representation in this appeal have ended. Counsel need do nothing more than inform Appellant 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. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Appellant shall have thirty days from the date of this decision to proceed, if he so desires, with an in propria persona motion for reconsideration or petition for review.[3]

[3] Pursuant to Rule 31.18.b, Appellant or his counsel have fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days from the date of this decision.

¶18 For the foregoing reasons, Appellant's convictions and sentences are affirmed.

/S/
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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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PATRICIA K. NORRIS, Presiding Judge

/S/
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JOHN C. GEMMILL, Judge