

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



DIVISION ONE
FILED: 10/06/2011
RUTH A. WILLINGHAM,
CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,) 1 CA-CR 10-0749
)
Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication - Rule
ERIC WILLIAM MORRISON,) 111, Rules of the Arizona
) Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2009-006121-001 DT

The Honorable John R. Ditsworth, Judge
The Honorable John R. Hannah, Judge

AFFIRMED

Thomas C. Horne, 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 Terry J. Adams, Deputy Public Defender
Attorneys for Appellant

Eric William Morrison Florence
Appellant

N O R R I S, Judge

¶1 Eric William Morrison timely appeals from his

conviction and sentences for two counts of aggravated assault, a class three dangerous felony. Ariz. Rev. Stat. ("A.R.S.") § 13-1204 (2008). After searching the record on appeal and finding no arguable question of law that was not frivolous, Morrison's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), asking this court to search the record for fundamental error. Morrison filed a supplemental brief *in propria persona*. After reviewing the entire record, we find no fundamental error and, therefore, affirm Morrison's conviction and sentences.

FACTS AND PROCEDURAL BACKGROUND

¶12 On September 3, 2008 at around 9:50 p.m., Morrison drove his car westbound on Union Hills Drive through a red light at the 47th Avenue intersection and collided head-on with a car stopped at the light in an eastbound lane of Union Hills Drive. Eyewitnesses later testified before the collision Morrison was driving far in excess of the posted speed limit without his headlights on, swerving through the westbound lanes of the road, and driving, in the wrong direction, in the eastbound lanes. An eyewitness also testified Morrison drove through at least two other red lights before he drove through the red light at Union Hills and 47th Avenue and collided with the stopped car.

¶13 Both Morrison and the victims in the stopped car were

injured in the collision. After Morrison was transported to a nearby hospital for treatment, a phlebotomist drew a sample of his blood, and the police obtained it without a search warrant. Laboratory tests performed on Morrison's blood established he had a blood alcohol concentration of .250 -- over three times the legal limit of .08 -- at the time of the collision. This evidence was presented at trial after the superior court denied Morrison's motion to suppress the blood tests.

¶14 A grand jury indicted Morrison for two counts of aggravated assault as a dangerous offense. When Morrison failed to appear at the time set for trial, the superior court determined he was voluntarily absent and the trial therefore proceeded *in absentia*. After a four-day trial, the jury found Morrison guilty as charged and further found both counts to be dangerous offenses. The Phoenix Police Department arrested Morrison seven months later pursuant to a bench warrant and took him into custody before sentencing. The superior court sentenced Morrison to two 7.5-year prison terms -- the presumptive sentence for a class three dangerous felony, A.R.S. § 13-604(I) -- and ordered the sentences to run concurrently. Morrison received 125 days of pre-sentence incarceration credit.

DISCUSSION

¶15 On appeal, Morrison argues (1) he did not waive his right to be present at trial; (2) the superior court should have

suppressed the tests performed on his blood because the police obtained his blood without probable cause and in the absence of exigent circumstances; and (3) the superior court erroneously granted the State's motion in limine to exclude evidence concerning the victim's consumption of alcohol.

I. Morrison's Absence at Trial

¶16 We review for abuse of discretion the superior court's finding that Morrison was voluntarily absent from trial. *State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996). "The right to be present at trial is protected both by the Sixth Amendment to the federal constitution as incorporated and applied to the states through the Fourteenth Amendment, and by article II, section 24 of the Arizona Constitution." *State v. Levato*, 186 Ariz. 441, 443, 924 P.2d 445, 447 (1996). A defendant "may waive the right to be present at any proceeding by voluntarily absenting himself or herself from it." Ariz. R. Crim. P. 9.1. A court "may infer that an absence is voluntary if the defendant had personal notice of the time of the proceeding, the right to be present at it, and a warning that the proceeding would go forward in his or her absence." *Id.*; see also *Muniz-Caudillo*, 185 Ariz. at 262, 914 P.2d at 1354.

¶17 Morrison argues his case "was transferred to a different judge at the last second with no notice" to him. This argument is not supported by the record. Morrison was present

at the trial management conference held on the morning of the first day of trial and was personally instructed by the superior court judge -- the same judge who would later preside at his trial -- that trial would begin that afternoon. At sentencing, Morrison explained he was absent because he "just kind of fell apart, lost it and [he] didn't know what to do and [he] left." The record is therefore clear Morrison had "personal notice of the time of the proceeding."

¶18 Morrison also argues he was not admonished the trial would proceed in his absence. Although the transcripts indicate some confusion among the judge and counsel for both sides about whether he had been admonished, the superior court correctly found, and the record demonstrates, Morrison had been previously warned the trial would proceed in his absence if he failed to appear. Indeed, on the morning of the first day of trial, the superior court informed Morrison that "his failure to appear at the Final Trial Management Conference or Trial may result in a bench warrant being issued for his arrest and the FTMC and Trial being conducted in [his] absence." As discussed above, Morrison was present at the final trial management conference held later that morning, but failed to appear for trial. In addition, the record demonstrates Morrison had been admonished trial would proceed in his absence on three different occasions before he was admonished on the first day of trial -- a total of four

separate admonitions. Thus, the superior court did not abuse its discretion in finding Morrison was voluntarily absent from trial.

II. The Warrantless Blood Test

¶9 Morrison also contends the superior court should have suppressed the blood test evidence because police obtained a sample of his blood without a warrant and, he argues, without probable cause and in the absence of exigent circumstances. We review the superior court's ruling on a motion to suppress for abuse of discretion, but review constitutional and purely legal issues de novo. *State v. Booker*, 212 Ariz. 502, 504, ¶ 10, 135 P.3d 57, 59 (App. 2006). We consider "only the evidence presented at the suppression hearing . . . and view it in the light most favorable to upholding the court's ruling." *State v. Blakley*, 226 Ariz. 25, 27, ¶ 5, 243 P.3d 628, 630 (App. 2010).

¶10 A search "is presumed to be unreasonable under the Fourth Amendment if it is not . . . conducted pursuant to a valid search warrant." *Id.* at 27, ¶ 6, 243 P.3d at 630 (quoting *State v. Gant*, 216 Ariz. 1, 3, ¶ 8, 162 P.3d 640, 642 (2007)). Accordingly, under "Arizona law, absent express consent, police may obtain a DUI suspect's blood sample only pursuant to a valid search warrant, Arizona's implied consent law . . . or the medical blood draw exception" authorized in A.R.S. § 28-1388(E)

(1999). *State v. Aleman*, 210 Ariz. 232, 236, ¶ 11, 109 P.3d 571, 575 (App. 2005). Under the medical blood draw exception in A.R.S. § 28-1388(E),

if a law enforcement officer has probable cause to believe that a person [has been driving while intoxicated] and a sample of blood . . . is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes.

Thus, under this exception, it is "constitutionally permissible" to obtain a sample of blood taken without a search warrant if "there is 'probable cause . . . to believe the person has [been driving under the influence of an intoxicant], . . . exigent circumstances are present and, . . . the blood is drawn for medical purposes by medical personnel.'" *Aleman*, 210 Ariz. at 237, ¶ 12, 109 P.3d at 576 (quoting *State v. Cocio*, 147 Ariz. 277, 286, 709 P.2d 1336, 1345 (1985)).

¶11 During the suppression hearing, both parties agreed, for purposes of this exception to the warrant requirement, the blood taken by the phlebotomist at the hospital was drawn for medical purposes by medical personnel. Morrison, however, argued at the suppression hearing, and now on appeal, there were no exigent circumstances present and no probable cause to believe he was intoxicated.

¶12 We disagree. First, the "highly evanescent nature of

alcohol in [Morrison's] blood stream guaranteed that the alcohol would dissipate over a relatively short period of time," thus creating exigent circumstances. See *Cocio*, 147 Ariz. at 284, 709 P.2d at 1345. This is true even though the blood had already been drawn and contained when police seized it. *Id.* at 285, 709 P.2d at 1346; see also *Lind v. Superior Court*, 191 Ariz. 233, 237, ¶ 17, 954 P.2d 1058, 1062 (App. 1998). Second, the State presented ample evidence at the suppression hearing demonstrating the seizing officer had probable cause to believe Morrison was intoxicated. "Probable cause is something less than the proof needed to convict and something more than suspicions." *State v. Howard*, 163 Ariz. 47, 50, 785 P.2d 1235, 1238 (App. 1989) (holding "an odor of alcohol" was sufficient for probable cause under the medical draw exception). Here, the officer had heard eyewitness reports of Morrison's extremely reckless driving, had smelled alcohol on Morrison's breath that was "almost offensive it was so strong," and had observed Morrison's eyes to be red and bloodshot. Thus, the superior court did not abuse its discretion in denying Morrison's motion to suppress the blood test evidence.

III. The State's Motion in Limine

¶13 Morrison further contends the superior court erroneously granted the State's motion in limine to preclude at trial, as irrelevant, any evidence regarding one of the victim's

consumption of alcohol. The superior court's "ruling on admissibility of evidence will not be disturbed on appeal absent a clear abuse of discretion." *State v. Emery*, 141 Ariz. 549, 551, 688 P.2d 175, 177 (1984). We agree with the superior court -- there was no "issue of fault or causation" that would make this evidence relevant. All of the evidence presented at trial demonstrated the victims' car was stopped at the red light when it was struck by Morrison's car. We further note the superior court permitted Morrison to "re urge the issue and ask for permission to present the evidence" if evidence at trial suggested "an issue of fault or causation that would make the alcohol-related evidence relevant." In addition, the superior court allowed a juror to ask the victim if she had consumed any alcohol on the night of the collision, because it affected the "reliability of [the victim's] perception as a witness." Under these circumstances, the superior court did not abuse its discretion in granting this motion.

IV. Anders Review

¶14 We have reviewed the entire record for reversible error and find none. See *Leon*, 104 Ariz. at 300, 451 P.2d at 881. Morrison received a fair trial. He was represented by counsel at all stages of the proceeding. The jury was properly comprised of 12 members, and the court properly instructed the jury on the elements of the charges, Morrison's presumption of

innocence, the State's burden of proof, and the necessity of a unanimous verdict. The superior court received and considered a presentence report, Morrison was given an opportunity to speak at sentencing, and his sentences were within the range of acceptable sentences for his offenses.

CONCLUSION

¶15 We decline to order briefing and affirm Morrison's conviction and sentences.

¶16 After the filing of this decision, defense counsel's obligations pertaining to Morrison's representation in this appeal have ended. Defense counsel need do no more than inform Morrison of the outcome of this appeal and his future options, unless, upon review, counsel finds an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 583, 584-85, 684 P.2d 154, 156-57 (1984).

¶17 Morrison has 30 days from the date of this decision to proceed, if he wishes, with an *in propria persona* petition for review. On the court's own motion, we also grant Morrison 30

