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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. HENRY ALEXANDER CONGRESS, Appellant.	2 CA-CR 2008-0254 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074038

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Terry Goddard, Arizona Attorney General
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Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Henry Congress was convicted of one count of aggravated driving under the influence (DUI) and one count of aggravated driving with an alcohol concentration (AC) of .08 or more, both while his driver's license was suspended or revoked or in violation of a restriction, and one count of fleeing from law enforcement. The trial court sentenced Congress to presumptive, concurrent prison terms, the longest of which was 4.5 years. On appeal, Congress argues the court erred in denying his motion for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., on the DUI and AC charges. Because the trial court did not err, we affirm.

¶2 We review a trial court's denial of a Rule 20 motion for an abuse of discretion. *State v. Henry*, 205 Ariz. 229, ¶ 11, 68 P.3d 455, 458 (App. 2003). When considering claims of insufficient evidence, "we view the evidence in the light most favorable to sustaining the verdict and reverse only if no substantial evidence supports the conviction." *State v. Pena*, 209 Ariz. 503, ¶ 7, 104 P.3d 873, 875 (App. 2005). Substantial evidence is "evidence that 'reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt.'" *State v. Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d 912, 913-14 (2005), *quoting State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997).

¶3 To convict a defendant of aggravated DUI or aggravated driving with an AC of .08 or greater while his license was suspended, the state must prove beyond a reasonable doubt that the defendant's driver's license was suspended at the time of the offense and that the defendant "knew or should have known" of the suspension. *State v. Williams*, 144 Ariz.

487, 489, 698 P.2d 732, 734 (1985) (offense of driving without a license necessarily requires culpable mental state); A.R.S. §§ 28-1383(A)(1); 28-1381(A)(2). The Motor Vehicle Division (MVD) of the Arizona Department of Transportation must provide written notice "to a person possessing a driver license, to an unlicensed driver or to a nonresident driver" when it has suspended, revoked, cancelled or disqualified that person of the license or privilege to drive. A.R.S. § 28-3318(A)(1). If that driver is not licensed to drive in Arizona, the MVD may mail notice of a license suspension to "any address known to the department, including the address listed on a traffic citation received by the department." § 28-3318 (A), (C).

¶4 The state is not required to prove the defendant received the notice or had actual knowledge of the license suspension, and notice is complete upon mailing. § 28-3318(D), (E). Once the state proves the notice was mailed, the licensee is presumed to have received the notice and to have known his license was suspended. *See State v. Church*, 175 Ariz. 104, 108, 854 P.2d 137, 141 (App. 1993). Although this presumption may be rebutted, to do so a defendant bears the burden of establishing he did not receive actual notice. *See id.*; *see also State v. Cifelli*, 214 Ariz. 524, ¶ 13, 155 P.3d 363, 366 (App. 2007).

¶5 Here, the state produced evidence that two notices of suspension had been sent to Congress's addresses known to the MVD. Therefore, Congress is presumed to have received notice that his license was suspended.

¶6 Congress argues he sustained his burden of overcoming this presumption when he "provided proof that he had . . . an address on E[ast] Freestone . . . that was different from the address to which the notice [of license suspension] was mailed." In support of this argument, Congress refers to the testimony of the custodian of MVD records who stated that two notices were sent to Congress's addresses as then known to the MVD, and that he was personally served. This testimony does not support Congress's assertion but rather directly supports the state. The custodian of records at the MVD testified that the second notice of Congress's license suspension was mailed to the East Freestone Drive address on September 5, 2007, one month before Congress was arrested. And a police officer who was there when Congress was arrested testified that Congress lived at the E. Freestone Drive address at that time. This constitutes substantial evidence from which the jury reasonably could find beyond a reasonable doubt that Congress knew or should have known his license was suspended when he was arrested on October 10, 2007.[1] *See Stroud*, 209 Ariz. 410, ¶ 6, 103 P.3d at 913-14.

[1]Although we need not address Congress's argument concerning personal notice, Congress also concedes he was personally served with the notice of license suspension in December of 2003, consistent with MVD records. His unsupported contention that the state was required to prove that no hearing had been requested after the service of the notice is waived for lack of sufficient argument. *See State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 615-16 (App. 2004); Ariz. R. Crim. P. 31.13(c)(1)(vi). Furthermore, the lack of any record of a hearing in the approximately four years between that service and the present offense indicates no hearing was requested, and Congress did not testify otherwise.

¶7 The case Congress cites in support of his position does not compel a different conclusion. In *Cifelli*, 214 Ariz. 524, ¶ 19, 155 P.3d at 368, Division One of this court held that the presumption of notice did not apply if the defendant established through affirmative evidence that he had moved from the address listed with the MVD but he had failed to notify the MVD he had changed his address. But Congress did not testify that he did not receive the notice, as Cifelli did, *see id.* ¶ 5, and there is no evidence that Congress failed to notify the MVD that his address had changed. And we have already explained that the state presented evidence that notice was mailed to Congress's correct address.

Conclusion

¶8 In light of the foregoing, we conclude the trial court did not err in refusing to grant Congress's motion for judgment of acquittal. We therefore affirm his convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge