

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

FILED BY CLERK

DEC 17 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	2 CA-CR 2010-0196
)	DEPARTMENT A
Appellee,)	
)	<u>MEMORANDUM DECISION</u>
v.)	Not for Publication
)	Rule 111, Rules of
JOHN CLIFTON LIVINGSTON,)	the Supreme Court
)	
Appellant.)	
_____)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20060977

Honorable Richard D. Nichols, Judge

AFFIRMED

West, Christoffel & Zickerman, PLLC
By Anne Elsberry

Tucson
Attorneys for Appellant

ESPINOSA, Judge.

¶1 Appellant John Livingston was tried and convicted in absentia of aggravated driving while under the influence of an intoxicant and aggravated driving with a blood alcohol concentration of .08 or more, both while his driver's license was suspended. *See* A.R.S. §§ 28-1381(A)(1), (2); 28-1383(A)(1). He also was convicted of

one count of tampering with evidence. *See* A.R.S. § 13-2809(A)(1). After Livingston admitted having two prior felony convictions, the trial court sentenced him to presumptive, concurrent terms of imprisonment, the longest of which was ten years. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967); *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), asserting she has reviewed the record thoroughly but has found no arguable issue for appeal. She asks that we search the record for fundamental error. Livingston has not filed a supplemental brief.

¶2 Viewing the evidence in the light most favorable to sustaining the verdict, we find there was sufficient evidence to support the jury’s finding of guilt. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). A sheriff’s deputy stopped Livingston—who was aware his driver’s license had been revoked—after seeing him speeding on his motorcycle and “weaving noticeably in [his] lane.” Livingston smelled of alcohol, had slurred speech, exhibited six of six cues of intoxication during a horizontal gaze nystagmus test, and had a blood alcohol level of .155 within two hours of driving. After a deputy drew the blood sample and briefly left the room, Livingston took the blood kit and forcefully stepped on it, denting the case.

¶3 The record demonstrates that Livingston was advised of his right to be present at trial and that trial could proceed in his absence, and he was aware of his trial date. *See* Ariz. R. Crim. P. 9.1; *State v. Muniz-Caudillo*, 185 Ariz. 261, 262, 914 P.2d 1353, 1354 (App. 1996) (defendant’s voluntary absence may be inferred if “the defendant had personal knowledge of the time of the proceeding, his right to be present, and the

warning that the proceeding would take place in his absence if he failed to appear”). Livingston’s sentences were within the prescribed statutory range and were imposed lawfully. *See* A.R.S. §§ 28-1383(L)(1), 13-2809(C), 13-604(C).¹

¶4 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and, having found none, Livingston’s convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

¹The Arizona criminal sentencing code has been amended and renumbered, *see* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120, effective “from and after December 31, 2008,” *id.* § 120. We refer in this decision to the statutes as they were worded and numbered at the time of Livingston’s offenses. *See* 2005 Ariz. Sess. Laws, ch. 188, § 1 (§ 13-604).