

**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**  
**JULY 29 2009**  
COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	2 CA-CR 2008-0345
Appellee,	)	DEPARTMENT B
	)	
v.	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
ERNESTO ORALDO VARELA,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074728

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

Barton & Storts, P.C.  
By Brick P. Storts, III

Tucson  
Attorneys for Appellant

B R A M M E R, Judge.

¶1 Appellant Ernesto Oraldo Varela was charged with aggravated driving while under the influence of alcohol (DUI) and aggravated driving with an alcohol concentration

of .08 or greater, both charges aggravated based on his having driven while his license was suspended or revoked. He was also charged with possessing less than two pounds of marijuana and possessing drug paraphernalia. He was convicted of all charges after a jury trial. The trial court found Varela had committed the offenses while on probation and had one historical prior felony conviction, and it enhanced his sentences for the DUI offenses based on those factors. It designated the remaining two counts class one misdemeanors and sentenced him to time served after crediting him with thirty-eight days' presentence incarceration credit. On the DUI offenses, the court sentenced him to concurrent, presumptive prison terms of 4.5 years, giving him presentence incarceration credit on those terms as well.

¶2 Counsel has filed a brief in accordance with *Smith v. Robbins*, 528 U.S. 259 (2000); *Anders v. California*, 386 U.S. 738 (1967); and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999). Counsel avows he has found no arguably meritorious issues to raise on appeal. Varela has submitted a letter to this court, which we have regarded as a supplemental brief challenging the sentence. He asks us to reduce the 4.5-year prison terms based on his remorse, his desire to turn his life around, the anticipated birth of his child, and his obligations to other family members. But this court will not disturb a sentence that is within the limits of applicable sentencing statutes unless the trial court has abused its discretion. *State v. Thomas*, 142 Ariz. 201, 204, 688 P.2d 1093, 1096 (App. 1984). An abuse of discretion is characterized by arbitrariness or capriciousness or a failure to conduct an

adequate investigation into the facts relevant to sentencing. *Id.*; *see also State v. Patton*, 120 Ariz. 386, 388, 586 P.2d 635, 637 (1978).

¶3 The record reflects the trial court received numerous letters in support of Varela, including letters from his family and one from Varela himself, which is very much like the letter he submitted to this court. Not only do we presume the court considered any evidence presented in mitigation, *see State v. Everhart*, 169 Ariz. 404, 407, 819 P.2d 990, 993 (App. 1991), but the court here stated it had read the presentence report and the letters. It found there existed a variety of mitigating circumstances, and the state essentially conceded there were no aggravating circumstances. But, as defense counsel pointed out at the sentencing hearing and as the court itself noted repeatedly, the minimum prison terms the court could impose for the DUI offenses were presumptive terms, presumably because, as the court found, Varela had committed the offenses while on probation and had one prior felony conviction. *See former A.R.S. § 13-604.02(B)*, amended and renumbered as § 13-708(C), 2008 Ariz. Sess. Laws, ch. 301, §§ 17(B), 32. The court made clear it would have sentenced Varela to mitigated terms except that it lacked the authority to do so. The court was correct that it lacked the discretion to give a lesser sentence than those imposed.

¶4 Pursuant to our obligation under *Anders* and its progeny, we have reviewed the entire record and find ample evidence to support the convictions and no error that we can characterize as fundamental and prejudicial. *See State v. Henderson*, 210 Ariz. 561,

¶¶ 19-20, 115 P.3d 601, 607 (2005). Therefore, we affirm the convictions and the sentences imposed.

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J. WILLIAM BRAMMER, JR., Judge

CONCURRING:

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PETER J. ECKERSTROM, Presiding Judge

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GARYE L. VÁSQUEZ, Judge