COURT OF APPEALS, DIVISION ONE

BRIEFS

SECTION 2

1 CA-CR 7117

STATE OF ARIZONA

Appellee,

v.

VICTOR THOMAS WHEELER,

Appellant.

MARICOPA COUNTY
SUPERIOR COURT
NO. CR 131056
CR 129973

TRANSMITTAL DATE

000039

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee, vs. VICTOR T. WHEELER, Appellant.	No. 1 CA-CR 7117 MARICOPA COUNTY SUPERIOR COURT No. CR-129973

APPELLANT'S OPENING BRIEF

MARTON, HALLADAY & HALL, P.A.
Michael S. Halladay
817 North Second Street
Phoenix, Arizona 85004

Attorneys for Appellant

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED AUG 26 1983

GLEN D. CLARK, CLERK
By

9-20-83

ISSUES ON APPEAL

I. Trial Counsel's Failure To Raise The Issue Of The Inapplicability Of A.R.S. §28-692.02 to Appellant's Case On The Basis That His Operator's License Was Not Suspended In A Manner Included In That Statute Rendered Counsel's Assistance Ineffective.

II. Appellant Was Improperly Charged Pursuant to A.R.S. §28-692.02, No Showing Of A Previous Violation Of A.R.S. §28-692 Having Been Made.

003041

TABLE OF CONTENTS

	Page
ISSUES ON APPEAL	i
TABLE OF CASES AND AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENT	
I. Trial Counsel's Failure To Raise The Issue Of The Inapplicability Of A.R.S. §28-692.02 To Appellant's Case On The Basis That His Operator's License Was Not Suspended In A Manner Included In That Statute Rendered Counsel's Assistance Ineffective.	3
II. Appellant Was Improperly Charged Pursuant To A.R.S. §28-692.02, No Showing Of A Previous Conviction Having Been Made.	7
CONCLUSION	10

TABLE OF CASES AND AUTHORITIES

Case	Page
Argersinger v.Hamlin, 407 U.S. 25(1972).	6
Arnold Construction Co.,Inc. v. Arizona Board of Regents, 109 Ariz.473, 512 P.2d 1229(1973).	8
Altamirano v. Industrial Commision, 22 Ariz. App. 379, 527 P.2d 1096(1974).	5
Cuyler v. Sullivan, 446 U.S. 335(1980).	6
Gideon v. Wainwright, 372 U.S. 759(1970).	6
McMann v. Richardson, 397 U.S. 759(1970).	6
Nunez v. Superior Court In And For Pima County, 18 Ariz. App. 462, 503 P.2d 420(1972).	9
Southwestern Iron and Steel Industries, Inc. v. State, 123 Ariz. 78, 597 P.2d 981(1979).	4
State v. Batemen, 113 Ariz. 107, 547 P.2d 6 (1976).	9
State v. Cassius, 110 Ariz. 485, 520 P.2d 1109(1974),cert. dism. 420 U.S. 514.	9
State v. Gonzales, 27 Ariz. App. 308, 554 P.2d 904(1976).	4
State v. Phelps, 12 Ariz. App.. 83, 467 P.2d 923(1970).	9
State v. Watson, 134 Ariz. 1,	

653 P.2d 351(1982). 6

Authorities

Ariz. Rev. Stat. Ann.
§28-446 3
§28-692 7
§28-692.02 3
§28-1142 1

Sutherland on Statutory Construction,
Vol. 2A, §47.15. 8

00944

STATEMENT OF THE CASE

Pursuant to A.R.S. §28-1142 Appellant's license to operate a motor vehicle was suspended on May 18, 1981, as a result of his failure to comply with financial responsibility laws. Subsequently, on September 11, 1982, Appellant was arrested for driving while intoxicated while his license was suspended, in violation of A.R.S. §28-692.02. On November 16, 1982, Appellant was arraigned on information in Cause Number CR 129973, charging him with two counts of violating A.R.S. §28-692(A), driving while under the influence of intoxicating liquor, while his license was suspended. Trial was set for January 4, 1983, and the pre-trial conference scheduled for December 15, 1982.

On December 6, 1982, the Court dismissed without prejudice the case against Appellant, vacating both the trial date and the pre-trial conference. On December 15, 1982, the Court reinstated Count I of the information, affirmed the dismissal of Count II, and granted Appellant's motion for the extension of the time for filing motions to January 13, 1983.

On January 15, 1983, Appellant was arraigned on a second charge arising from the events of September 11, 1982, on information in Cause Number CR 131056, in which he was charged with violating A.R.S. §28-692(B), driving with 0.10 percent or more alcohol in his blood, while his license was suspended. On February 23, 1983, on the State's motion, the Court consolidated both charges under Cause Number CR 129973.

000045

On February 15, 1983, the Court continued the pre-trial conference to February 18, 1983, and set a trial date for March 7, 1983. On February 18, 1983, the Court again continued the pre-trial conference and the trial to March 22, 1983.

During the pre-trial stage, various motions were filed by both the State and Appellant. The State moved to dismiss Count II of the information in Cause Number CR 129973 for the reason that it was identical to Count I, which motion was granted. Appellant moved for dismissal of one of the counts, alleging double jeopardy, which motion was denied. Appellant moved for suppression of his own statements and for suppression of the results of the Gas Chromatograph Intoximeter, both of which were denied. Appellant objected to the introduction of his prior bad acts and of the testimony of a police officer as to Appellant's pupil reaction to light on September 11, 1982, the former granted and the latter denied. Appellant further moved for a continuance, which the Court granted, requested a voluntariness hearing, which the Court denied, and moved for dismissal alleging that A.R.S. §28-692.02 was inapplicable in that it applies only to a second offense of driving while intoxicated. This motion was also denied. However, defense counsel at no time challenged the applicability of A.R.S. §28-692.02 to Appellant's case on the basis that his license had not been suspended pursuant to A.R.S. §28-446 as required by A.R.S.§28-692.02.

Thus the case proceeded to trial before a jury on March 22, 1983. On March 24, 1983, that jury rendered guilty verdicts on each of the two charges, Count I, that Appellant operated a

vehicle while intoxicated and while his operator's license was suspended, and Count II, that Appellant operated a vehicle while there was a 0.10 percent or more of alcohol in his blood and while his operator's license was suspended.

This Court has jurisdiction of this matter pursuant to A.R.S. §13-4031 et seq.

ARGUMENT

I. Trial Counsel's Failure To Raise The Issue Of The Inapplicability Of A.R.S. §692.02 To Appellant's Case On The Basis That His Operator's License Was Not Suspended In A Manner Included In That Statute Rendered Counsel's Assistance Ineffective.

Appellant's operator's license was suspended by order of the Motor Vehicle Division of the Arizona Department of Transportation on May 18, 1981, pursuant to A.R.S. §28-1142, as a result of his failure to comply with the financial responsibility laws. (See Exhibit "A", attached hereto and incorporated herein by reference). During the period of suspension Appellant was arrested for driving while intoxicated and charged with violating A.R.S. §28-692.02, which provides as follows:

> "A. A person whose operator's or chauffeur's license is suspended, cancelled, revoked or refused and who commits an offense in violation of § 28-692 during the period of such suspension, cancellation, revocation or refusal, or a person who has never applied for or obtained an operator's or chauffeur's license or a person who has never reapplied for or obtained such license after suspension, cancellation, refusal or revocation pursuant to §28-691 of §28-692.01, who commits a second offense in violation of §28-692, is guilty of a class 5 felony and shall be sentenced to serve not less than six months in prison. A judge shall not grant probation, pardon, parole, commutation or suspension of sentence or release on any other basis, except upon the condition that the person serve not less than six months in prison.

000047

B. The suspension, cancellation, revocation or refusal of an operator's or chauffeur's license is effective as provided in §28-446. [Emphasis added].

Appellant contends that because A.R.S. §28-692.02 applies only where a license has been suspended pursuant to A.R.S. §28-446 and because his own license was suspended pursuant to A.R.S. §28-1142, he could not be prosecuted under A.R.S. §28-692.02. Indeed, it is a well-recognized principle of statutory construction that when a statute specifically includes certain items of a class and omits others, the omission was intentional and the legislature intended that the omitted items be excluded. Southwestern Iron and Steel Industries, Inc. v. State, 123 Ariz. 78, 597 P.2d 981 (1979). Thus, in specifying that, for purposes of A.R.S. §28-692.02, the cancellation, revocation, suspension or refusal of an operator's license is effective as provided in A.R.S. §28-446, the legislature intended to exclude from the statute a suspension or revocation occurring for any other reason, including a violation of A.R.S. §28-1142.

This interpretation is further supported by the legislature's 1982 modification of A.R.S. §28-692.02 to limit revocations or suspension to those obtained pursuant to A.R.S. §28-446. Prior to that time, no distinction was made between types of revocations, and the Arizona Court of Appeals in State v. Gonzales, 27 Ariz. App. 308, 554 P.2d 904 (1976), had held that, because the statute made no distictions, any revocation or suspension could be the basis for a violation of A.R.S. §28-692.02. Because the legislature is presumed to know of all judicial interpretations of legislation, when it modified the

00948

statute to specify the sort of license revocation or suspension upon which a charge of violation of A.R.S. §28-692.02 could be based, the legislature must have intended to correct the judicial interpretation of State v. Gonzales, supra. Altamirano v Industrial Commission, 22 Ariz. App. 379, 527 P.2d 1096 (1974).

Nor can the offense committed by Appellant which resulted in the revocation of his license be deemed to violate A.R.S. §28-446 as well, and thus bring Appellant within the statute. In referring to the statute rather than the offense committed the legislature clearly intended to make A.R.S. §28-692.02 applicable only where the suspension or revocation was imposed pursuant to A.R.S. §28-446. Moreover, even were the Court to interpret A.R.S. §28-692.02 as encompassing suspensions which could have been based on A.R.S. §28-446 even though not in fact obtained pursuant to that section, the conduct of Appellant which resulted in the suspension of his license does not fall within A.R.S. §28-446. That statute provides as follows:

> "A. The department may suspend the license of an operator or chauffeur or require any licensee to attend and successfully complete approved training and educational sessions designed to improve the safety and habits of drivers, upon a showing by the department's records or other sufficient evidence that the licensee:
>
> 1. Has committed an offense for which mandatory revocation of license is required upon conviction.
>
> 2. Has been involved as a driver in any accident resulting in the death or personal injury of another or serious property damage.
>
> 3. Has been convicted with such frequency of serious offenses against traffic regulations governing the movement of vehicles as to indicate a disrespect for traffic laws and a disregard for the safety of other persons on the highways.
>
> 4. Has been convicted of reckless driving as provided in §28-693 or is an habitually reckless or negligent driver of a motor vehicle.

5. Is incompetent to drive a motor vehicle.

6. Has committed or permitted any act involving an unlawful or fraudulent use of the license.

7. Has committed an offense in another state which if committed in this state would be grounds for suspension or revocation.

8. Has been convicted of a violation of §28-692.

9. Has refused to submit to tests required by §28-691.

Appellant's license was suspended because he failed to prove financial responsibility or deposit as security following an accident. No other violation of A.R.S. §28-446 having been shown in the record, and the offense upon which suspension was based not being included in A.R.S. §28-446, there was no basis for Appellant's conviction pursuant to A.R.S. §28-692.02.

Trial counsel's failure to raise this issue, despite her many opportunities to do so, constitutes ineffective assistance of counsel and requires this Court to set aside the guilty verdict entered. A defendant charged with a felony has an absolute and fundamental right to be represented by an attorney, pursuant to both the sixth and fourteenth amendments to the U.S. Constitution. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright 372 U.S. 335 (1934). This right to counsel includes the right to effective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335 (1980); McMann v. Richardson, 397 U.S. 759 (1970).

When determining whether counsel's assistance has been effective, Arizona courts will consider "whether under the circumstances the attorney showed at least minimal competence in representing the criminal defendant" State v. Watson, 134 Ariz. 1, 653 P.2d 351 (1982). In that case counsel's failure to participate in a hearing to contest the prospective in-court

identification of the defendant rendered his assistance ineffective. The court stated;

> "In representation of a person accused of crime, every defense attorney would be expected to file pre-trial motions when the facts raise issues concerning the voluntariness of statements, the legality of searches, or the suggestiveness of identification. Failure of an attorney to pursue such matters would be considered representation which falls below the minimum standards of professional competence required of defense counsel."

653 P.2d at 355. There the court was concerned merely with the evidence to be introduced at trial. Here the concern is with the very applicability of the charges brought against Appellant. If the failure to oppose the introduction of questionable evidence is ineffective assistance, so too must be the failure to object to the clear inapplicability of the offense charged to the case in question.

II. Appellant Was Improperly Charged Pursuant To A.R.S. §28-692.02, No Showing Of A Previous Violation Of A.R.S. §28-692 Having Been Made.

Appellant's actions on September 11, 1982, do not constitute a violation of A.R.S. §28-692.02 inasmuch as he was not shown to have previously committed an offense in violation of A.R.S. §28-692. The pertinent portion of A.R.S. §28-692.02 reads as follows:

> "A. <u>A person</u> whose operator's or chauffeur's license is suspended, cancelled, revoked or refused and who commits an offense in violation of A.R.S. §28-692 during the period of such suspension, cancellation, revocation or refusal, or <u>a person</u> who has never applied for or obtained an operator's or chauffeur's license or <u>a person</u> who has never reapplied for or obtained such license after suspension, cancellation, refusal or revocation pursuant to §28-691 or §28-692.01, who commits a second offense in violation of A.R.S. §28-692, is guilty of a class 5 felony

> and shall be sentenced to serve not less than six months in prison. [Emphasis added].

This statute establishes three categories of persons subject to increased punishment, as indicated in the underscoring in the above statute. Clearly, the legislature has listed three items in a series. It then adds the modifying clause "who commits a second offense," and the question arises whether that phrase modifies only the item in the series to which it is adjacent or to all items of the series. Here it appears that the legislature intended the phrase to apply to each item in the series, for a comma was inserted between the last item and the modifier. This alone justifies Appellant's interpretation, for a statute should be read as punctuated. Sutherland on Statutory Construction, Vol. 2A, §47.15.

In addition, however, is the fact that any other interpretation would result in an absurdity, which must not result in interpreting a statute. Arnold Construction Co., Inc. v. Arizona Board of Regents, 109 Ariz. 473, 512 P.2d 1229 (1973). Again, the modifying clause must apply either to all three categories or to the third to which it is closest. Should it be construed to apply to only the third category, the result would be that a person in the second category, one who had never applied for or obtained a chauffeur's or operator's license, would, without more, be guilty of a class 5 felony. If, on the other hand, the phrase is read to apply to all three categories listed, the result is more consistent with the legislature's intent, imposing increased penalties on each of the three categories of drivers when a second DWI is committed. Nor can it be alleged

that the reference in category one to the person who commits "an offense" in violation of A.R.S. §28-692 is inconsistent with the phrase "who commits a second offense" and precludes the application of the modifying clause to the first category. "An offense" is more general than "a second offense," specifying no precise number. It is a widely recognized principle of statutory construction that a specific provision will be given effect over a general one even where the two are inconsistent. State v. Cassius, 110 Ariz. 485, 520 P.2d 1109, cert dism. 420 U.S. 514 (1974).

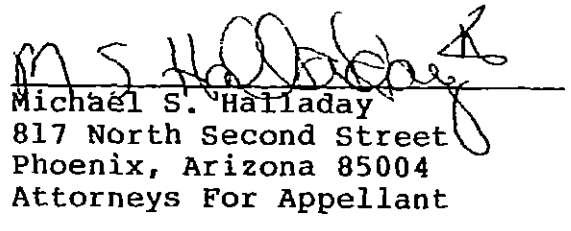
It is Appellant's position that upon application of standard rules of statutory interpretation, the legislature's intent was very clearly to impose the harsher penalty of A.R.S. §28-692.02 only where a second violation of A.R.S. §28-692 had been committed. However, even if this is not so, the statute is at best ambiguous and cannot be found to clearly provide that a first DWI offense while the defendant's license is revoked or suspended renders him guilty of a felony. Criminal statutes must be strictly construed so as to comport with the legislative intent, State v. Phelps, 12 Ariz. App. 83, 467 P.2d 923 (1970); Nunez v. Superior Court In And For Pima County, 18 Ariz. App. 462, 503 P.2d 420 (1972), and where ambiguous, cannot be construed against the defendant, else he will be deprived of adequate notice. State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976). Hence, any doubt as to the meaning of the statute must be resolved in Appellant's favor.

CONCLUSION

The statute under which Appellant was prosecuted, A.R.S. §28-692.02, applies only where one drives while intoxicated and while his license is suspended or revoked pursuant to A.R.S. §28-446. Appellant, charged with violating A.R.S. §28-692.02, drove while his license was suspended pursuant to A.R.S. §28-1142. Thus there existed no basis for the charges brought. Trial counsel, in failing to make the appropriate motions and raise the issue, provided Appellant with ineffective assistance of counsel, requiring this Court to set aside the guilty verdicts. Moreover, the statute in question encompasses only those driving with suspended or revoked licenses who commit second violations of A.R.S. §28-692. Because Appellant was not shown to have previously violated that statute, he could not be prosecuted under that statute and his conviction must be set aside.

RESPECTFULLY submitted this 26th day of August, 1983.

MARTON, HALLADAY & HALL, P.A.



Michael S. Halladay
817 North Second Street
Phoenix, Arizona 85004
Attorneys For Appellant

Two copies of the foregoing mailed this 26th day of August, 1983, to:

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division
Attorney Generals Office
1275 West Washington
Phoenix, AZ 85007

Susan Blair

ORIGINAL

IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION ONE

STATE OF ARIZONA, Appellee,	)	NO. 1 CA-CR 7117
-vs-	)	MARICOPA COUNTY SUPERIOR COURT NO. CR-129973
VICTOR T. WHEELER, Appellant.	)	

APPELLEE'S ANSWERING BRIEF

ROBERT K. CORBIN
Attorney General

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

ROBERT S. GOLDEN
Assistant Attorney General
Department of Law
1275 W. Washington, 2nd Floor
Phoenix, Arizona 85007
Telephone: (602)255-4686

Attorneys for APPELLEE

DIVISION 1
COURT OF APPEALS
STATE OF ARIZONA

FILED SEP 14 1983

GLEN D. CLARK, CLERK
By

80 055

10-4-83

QUESTIONS PRESENTED FOR REVIEW

1. If defense trial counsel challenged the charges on the basis that driving while under the influence of intoxicating liquor while license suspended does not include a suspension due to financial irresponsibility, would she have been successful?

2. Do the charges of driving while under the influence of intoxicating liquor while license suspended require a previous driving while intoxicated conviction?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CASES AND AUTHORITIES	iii
STATEMENT OF THE CASE	1
ARGUMENTS	
I	
THE CONVICTIONS PROPERLY INCLUDE A DRIVER'S LICENSE SUSPENSION DUE TO FINANCIAL IRRESPONSIBILITY; THUS, DEFENSE TRIAL COUNSEL REMAINS EFFECTIVE.	4
II	
THE CHARGES DO NOT REQUIRE A PREVIOUS DRIVING WHILE INTOXICATED CONVICTION.	9
CONCLUSION	13

00057

TABLE OF CASES AND AUTHORITIES

Case	Page
State v. Allen 124 Ariz. 500 605 P.2d 902 (Ct.App. 1979)	6
State v. Gonzales 27 Ariz.App. 308 554 P.2d 904 (1976)	6
State v. Watson 134 Ariz. 1 653 P.2d 351 (1982)	4

AUTHORITIES

Ariz.Rev.Stat.Ann.	
§ 12-120.21(A)(1)	1
§ 13-4031	1
§ 13-4033	1
§ 28-402(3)	5
§ 28-446	6
§ 28-446(A)	6
§ 28-446(A)(2)	5
§ 28-446(A)(6)	5
§ 28-667	5,6
§ 28-692.02	6,10
§ 28-692.02(B)	5
§ 28-1142	6

000058

STATEMENT OF THE CASE

Appellant appeals to this Court, pursuant to Ariz.Rev.Stat.Ann. §§ 12-120.21(A)(1), 13-4031, and -4033, having suffered two convictions of driving while intoxicated (one for driving while under the influence of intoxicating liquor and one for driving while having more than 0.10 percent blood alcohol by weight) while license suspended, and concurrent, presumptive sentences of 2 years imprisonment. This appeal involves these limited facts.

Prior to trial, appellant argued a motion to dismiss. (R.T. of Feb. 18, 1983, at 2.) This motion concerned the alleged requirement that the charges needed a previous driving while intoxicated conviction (the second question presented for review). (Id.) Parenthetically, appellant, on the trial level, never presented the issue of whether the charges include a license suspension due to financial irresponsibility (the first question presented for review). The prosecutor countered the motion by arguing the legislative intent. (Id. at 3.) Based upon the legislative history ("previous code citations") and corresponding legislative intent, the trial court denied the motion to dismiss. (Id.) In making the denial, the trial court noted that the requirement of a prior driving while intoxicated conviction applied only to the last two categories in the charging statute. (Id.)

Just prior to the commencement of trial testimony, the state had its exhibit numbered 2 admitted in evidence. (R.T. of Mar. 22, 1983, at 31.) This public record showed that appellant's license had been suspended. (Id. at 31-32.) A review of this exhibit indicates that the suspension occurred as a result of appellant's financial irresponsibility. (See State's Exhibit Number 2.) It should be noted that the suspension grew out of an accident report involving appellant.

Since appellant, for good reason, does not challenge the sufficiency of the evidence on appeal, appellee condenses the overwhelming evidence of guilt. Officer Roberts began the trial testimony. (R.T. of Mar. 22, 1983, at 32.) On September 11, 1982, this officer, while on routine patrol, followed appellant's vehicle as appellant continued to swerve back and forth down the street. (Id. at 33-34, 35, 42-43, 46, 57.)

After stopping the vehicle, Officer Roberts observed appellant staggering with a strong odor of alcohol about him. (Id. at 56, 58.) Appellant acknowledged that his driver's license had been suspended. (Id. at 59.) He did not do well on the field sobriety tests. (Id. at 61-62, 64, 67.) The officer had the opinion that appellant was "strongly intoxicated." (Id. at 69.) Appellant's vehicle (actually, it belonged to a friend) had no steering

problem. (Id. at 72.) Appellant told the officer that he had consumed "about six beers." (Id. at 77.)

The criminalist testified that appellant registered a reading of 0.21 percent blood alcohol by weight on the night of his arrest when he provided the state with his breath sample. (R.T. of Mar. 23, 1983, at 177, 187.) This meant that appellant had consumed about ten beers. (Id. at 191.) The state rested its case-in-chief. (Id. at 225.)

Appellant opted to testify at his trial. (Id. at 228.) No purpose would be served in presenting appellant's numerous claims and excuses. However, appellant did make certain concessions. Appellant admitted that he drove while his license was suspended. (Id. at 237.) Appellant also admitted that he drove after consuming as many as eight beers. (Id. at 243-44, 251.) The drinking ceased just prior to the stop by Officer Roberts. (Id. at 244.)

Appellant also had his friend and hunting companion (Mr. Hotter) testify at trial, but he presented nothing crucial. (R.T. of Mar. 24, 1983, at 272.) The defense rested. (Id. at 291.) Following arguments and the charge, the jury took less than 2 hours to find appellant guilty of two driving while intoxicated and while license suspended offenses. (Id. at 357-59.) At sentencing, appellant received concurrent, presumptive sentences of 2 years imprisonment. (R.T. of Apr. 22, 1983, at 2, 4.)

00061

Appellant, thereafter, exercised his right to appeal the convictions and sentences.

ARGUMENTS

I

THE CONVICTIONS PROPERLY INCLUDE A DRIVER'S LICENSE SUSPENSION DUE TO FINANCIAL IRRESPONSIBILITY; THUS, DEFENSE TRIAL COUNSEL REMAINS EFFECTIVE.

Appellant first contends that the charges do not encompass a license suspended for reasons of financial irresponsibility. Appellant argues that, because this contention is correct, he had incompetent trial counsel. Appellee submits that once this contention is shown to be incorrect (as shown below), effective assistance of counsel prevails.

Since appellant failed to raise below the issue concerning the scope of the suspended license, he is forced to drag competency of trial counsel into the picture. Of course, this does him no good if the major premise is defective. Thus, if the scope includes a financial irresponsibility suspension, appellant has suffered no resulting prejudice due to the alleged oversight by defense trial counsel. Without resulting prejudice, appellant cannot claim ineffective assistance of counsel. See State v. Watson, 134 Ariz. 1, 653 P.2d 351 (1982).

00062

The relevant statutes and case law clearly indicate that driving while intoxicated and while license suspended charges include a license suspension due to financial irresponsibility. First, in defining "suspension," there is no exception for financial irresponsibility. See Ariz.Rev.Stat.Ann. § 28-402(3). Thus, a suspended license may be one suspended due to financial irresponsibility. Similarly, the crime itself provides no such exception. If the legislature wanted to carve out an exception, it would have so provided.

The substantive crime statute refers to another statute providing the methods of suspension of a driver's license. See Ariz.Rev.Stat.Ann. § 28-692.02(B). One such method is the unlawful use of a license. See Ariz.Rev.Stat.Ann. § 28-446(A)(6). Of course, appellee views driving without financial responsibility to be an unlawful use of the license (or a "fraudulent" use). It is to be noted that, as what happened in the case at bench, a serious property damage accident can lead to a suspended license. See Ariz.Rev.Stat.Ann. § 28-446(A)(2).

This second method becomes crucial in the contest of the financial responsibility law. Ariz.Rev.Stat.Ann. § 28-667 requires an accident report if serious property damage occurs from an automobile accident. Such a report can, as in this case, lead to a suspended license under the

00063

financial responsibility law. See Ariz.Rev.Stat.Ann. § 28-1142. Thus, the statutes in Title 28 go full circle from "1142," through "667" and "446," back to "692.02." In essence, the current law makes financial irresponsibility the equivalent of a traffic offense for purposes of suspension of a driver's license.

Case law, though predating the current statutes, is in accord. The substantive crime statute applies to any suspended license regardless of the reason for the suspension. State v. Gonzales, 27 Ariz.App. 308, 554 P.2d 904 (1976). It is to be noted that this case applied the license suspension to financial irresponsibility though the old statutes had most of the same differences to be gleaned from the new statutes. (Actually, a comparison of the old and new statutes reveals little distinction in substance.) Specifically, the methods of suspension under Ariz.Rev.Stat.Ann. § 28-446(A) remained the same -- neither the old nor the new statute specifically mentions a financial irresponsibility suspension. Parenthetically, by not specifying an exception for financial irresponsibility, the legislature obviously agreed with the judicial interpretation. Thus, the holding in State v. Gonzales, supra, continues to be controlling. State v. Allen, 124 Ariz. 500, 605 P.2d 902 (Ct.App. 1979), represents a later case adhering to this holding.

The instant facts are more limited than the relevant law. Appellant's convictions require the element of driving while license suspended. Proof at trial established this element. The exhibit shows the suspension to be due to financial irresponsibility growing out of an accident involving appellant. At trial, appellant did not challenge this kind of suspension. On appeal, appellant raises the issue for the first time, claiming ineffective assistance of counsel.

Appellee takes the position that the substantive crime statute applies to any suspended license. Obviously, certain traffic offenses can lead to a suspended license. However, the current statutes, the old statutes, and case law all envision suspensions due to financial irresponsibility as well.

The circuitous statutes of Title 28 bring financial irresponsibility into the realm of suspensions referenced by the crime itself. Unlawful or fraudulent use of a driver's license seems to be directy linked with financial irresponsibility. Clearly, serious property damage due to an accident is directly linked with financial irresponsibility.

This particular method of suspension points to why appellant's case fits the crimes charged. (It also shows why the common driver should not find the current statutes

ambiguous.) Appellant lost his driver's license due to a prior accident at a time when he lacked financial responsibility. Now, he is caught driving around in a drunken condition and still without financial responsibility. The legislature has every right to try to deter drunk drivers, who are also financially irresponsible, from driving and creating a situation where uninsured accidents are likely to occur again. This is a greater crime than a simple driving while intoxicated. Therefore, the legislature has a greater penalty under a proper police power rationale.

The legislative intent must be deemed to include a suspended license due to financial irresponsibility based on the above rationale and the statutes themselves. The statutes carve out no exception and engulf appellant's desired exception with their verbiage. Defense trial counsel recognized the lack of exception by not objecting below.

This brings appellee to the final point to be made concerning this first issue. As shown, the instant charges apply to a license suspension due to financial irresponsibility. Thus, appellant's contention lacks merit. Since defense trial counsel had no chance for success had she raised this issue below, there can be no finding of resulting prejudice. Therefore, there can be no

finding, in this regard, that defense trial counsel lacked minimal professional competency. Effective assistance of counsel prevails as it is unchallenged in any other respect.

II

THE CHARGES DO NOT REQUIRE A PREVIOUS DRIVING WHILE INTOXICATED CONVICTION.

For his final contention on appeal, appellant claims that the instant charges and convictions are defective because he has not suffered a previous driving while intoxicated conviction. (Unlike the previous issue, this issue concerning the need for a prior conviction had been raised below.) Thus, appellant continues to argue that the instant charges require a prior conviction in order for them to have been properly charged. Appellee posits that the charges and convictions (driving while intoxicated while license suspended) need no prior conviction (driving while intoxicated) to be brought and upheld.

Appellant, in his opening brief, provides the relevant law. Two rules of statutory construction or interpretation are to be noted. A statute should be interpreted in a manner that avoids absurd results. And it should be interpreted in accordance with its punctuation.

The instant facts reveal that appellant faced two charges of driving while intoxicated and while his driver's license was suspended. The jurors found appellant guilty

00066

of these charges. Appellant argued a motion to dismiss on the basis that the charges allegedly required a simple driving while intoxicated conviction as a condition precedent to the charges. The trial court denied the motion, holding that the legislative history of the substantive crime statute (Ariz.Rev.Stat.Ann. § 28-692.02) displayed the legislative intent: the prior conviction requirement applied only to the last two categories of offenders.

The trial court's holding does not lead to any absurd results. (It is appellant's analysis that leads to an absurdity -- the options regarding statutory interpretation are not limited to having the prior conviction requirement applied to all three categories or just the third; there is another option dictated.) The legislative history (as shown by the evolving statutes and the historical notes thereto) amply displays the clear legislative intent. A brief sojourn through that history establishes the plain, clear meaning of the ultimate statute. That meaning is what the trial court found: the prior conviction requirement applies only to the last two categories.

In 1972, the legislature created the first category of offenders. Thus, a person who commits the crime of driving while intoxicated while license suspended need not have a prior conviction of driving while intoxicated because there

is no reference to a "second offense." As detailed in the "historical note" found in the hardback book, the legislature added the second category in 1975. The new category referenced the need for a "second offense." Thus, one who never applied for a driver's license receives the prior conviction requirement. Similarly, the third category added in 1982 (see the pocket part) also affords the prior conviction requirement to one who never reapplied for a license.

Obviously, the first category is addressed to the individual who suffers a first driving while intoxicated charge but while license suspended. To require a prior conviction would allow the added factor of driving while license suspended to go unpunished. Such would be an absurd result. It is to be noted that the rationale for this greater crime (greater than a simple driving while intoxicated) is provided in the previous argument. This rationale provides notice to the common driver (so does common sense). Therefore, the statute remains unambiguous.

Disecting the statute according to its punctuation leads to the same conclusion. The punctuation again shows the legislative intent as that found by the trial court: the prior conviction requirement applies to the last two categories but not to the first category (appellant's category of driving while intoxicated and while license

00068

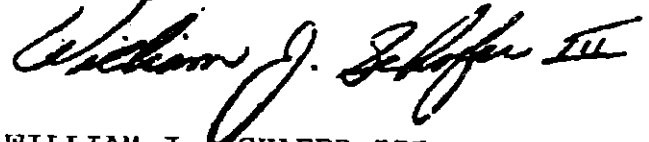
suspended). As set forth in appellant's opening brief, the first category is separated from the other two by a comma and the word "or." However, the second category is separated from the last by just a comma. Therefore, the comma after the last category means that the prior conviction requirement modifies or applies to or goes back to the last two categories but not the first. Thus, the instant charges and convictions do not require a prior driving while intoxicated conviction.

CONCLUSION

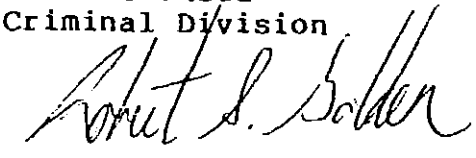
This is not a case for reversal. Appellant's challenges to the charging statute are without merit. The charges do include a driver's license suspension due to financial irresponsibility. Defense trial counsel properly abstained from raising this issue below. Effective assistance of counsel is reflected by the record on appeal. The charges do not require a prior driving while intoxicated conviction; the trial court abused no discretion in denying the motion to dismiss. Convictions and concurrent, presumptive sentences should be affirmed.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division



ROBERT S. GOLDEN
Assistant Attorney General

Attorneys for APPELLEE

A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

ROBERT S. GOLDEN, being first duly sworn upon oath, deposes and says:

That he served the attorney for the appellant in the foregoing case by forwarding two (2) copies of APPELLEE'S ANSWERING BRIEF, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

MICHAEL S. HALLADAY
Marton, Halladay & Hall, P.A.
817 North Second Street
Phoenix, Arizona 85004
Attorney for APPELLANT

this 14th day of September, 1983.

ROBERT S. GOLDEN

SUBSCRIBED AND SWORN to before me this 14th day of September, 1983.

CHRIS L. PISKE
NOTARY PUBLIC

My Commission Expires:

October 28, 1985

CR46-30
2740D clp

00 373