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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz.R.Sup.Ct. 111(c); ARCAP 28(c);
Ariz.R.Crim.P. 31.24



DIVISION ONE
FILED: 01/14/2010
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BY: GH

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

STATE OF ARIZONA,) 1 CA-CR 08-0856
)
Appellee,) DEPARTMENT D
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
VIOREL BOTOS,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-179170-001 DT

The Honorable Carolyn K. Passamonte, Commissioner

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Michael O'Toole, Assistant Attorney General
Attorneys for Appellee

Maricopa County Public Defender Phoenix
by Cory Engle, Deputy Public Defender
Attorneys for Appellant

I R V I N E, Judge

¶1 Viorel Botos appeals his convictions on two counts of aggravated driving under the influence (DUI). Botos argues that

the trial court erred by admitting breath test results without proper foundation and precluding three defense witnesses. For reasons that follow, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 Around 2:30 a.m. on September 24, 2006, two police officers were stopped at the intersection of 16th Street and Union Hills when they observed Botos driving southbound on 16th Street towards Union Hills at a speed in excess of the speed limit. When Botos stopped at Union Hills for a red light, one officer walked over to speak to him about his speed. Finding that Botos had watery, bloodshot eyes and a moderate odor of alcohol on his breath, the officer had Botos exit his vehicle for further investigation regarding his condition.

¶13 Asked if he knew why he was contacted, Botos answered because he had been "flying down the street." In response to further questioning, Botos stated he had consumed two and one-half beers that evening. After the officer conducted the Horizontal Gaze Nystagmus test and found Botos to exhibit all six cues of alcohol impairment, Botos was arrested for DUI, handcuffed, and transported to a nearby police station for a breath test. At the station, Botos provided two breath samples six minutes apart for duplicate breath testing with an Intoxilyzer. The test results for both samples indicated Botos had a blood alcohol concentration (BAC) of 0.093.

¶4 Botos was indicted on two counts of aggravated DUI, each a class 4 felony. The first count alleged that Botos was driving while "under the influence" and the second alleged that he had a BAC in excess of 0.08 percent within two hours of driving. The charges were aggravated based on the allegation that Botos had two prior convictions for DUI within the past eighty-four months. Upon trial to a jury, Botos was found guilty on both counts as charged. The trial court suspended sentencing and placed Botos on probation for three years with the condition that he serve a four-month prison term. Botos timely appealed.

DISCUSSION

A. Admission of Breath Test Results

¶5 Botos contends the trial court erred in admitting the Intoxilyzer test results. Specifically, Botos argues that there was insufficient foundation for this evidence, asserting that the statutory requirement of a fifteen-minute deprivation period was not satisfied. We review a ruling that adequate foundation exists for admission of evidence for abuse of discretion. *State v. McCray*, 218 Ariz. 252, 256, ¶ 8, 183 P.3d 503, 507 (2008).

¶6 The foundational requirements for admission of breath test results to prove BAC are set forth in Arizona Revised Statutes ("A.R.S.") section 28-1323(A) (Supp. 2009).¹ One of the

¹ We cite the current version of the applicable statute because no revisions material to this decision have since occurred.

requirements is that the test operator follow an approved operational checklist, which includes that the subject undergo a fifteen-minute "deprivation period" prior to the testing. *State v. King*, 213 Ariz. 632, 639, ¶ 32, 146 P.3d 1274, 1281 (App. 2006); Ariz. Admin. Code R13-10-104(B). A deprivation period for BAC breath testing is defined as "a 15-minute period immediately prior to a duplicate breath test during which period the subject has not ingested any alcoholic beverages or other fluids, eaten, vomited, smoked or placed any foreign object in the mouth." A.A.C. R13-10-101(8).

¶7 The officer who conducted the breath tests on Botos testified at trial that he completed a checklist in compliance with Department of Public Safety regulations in administering the breath tests. As part of completing the checklist, the testing officer determined that Botos had been subject to a fifteen-minute deprivation period. Although this officer testified that Botos had been in his presence for only five minutes prior to the first breath test at 3:10 a.m., the trial court could find from the testimony of the other officers who had custody of Botos prior to 3:05 a.m. that the requirement of a fifteen-minute deprivation period had been met.

¶8 The arresting officer testified that he or the other officer present with him at 16th Street and Union Hills had been in contact with Botos from 2:42 a.m. until 3:00 a.m. and that

during that period Botos did not place anything in his mouth or regurgitate. In addition, the officer who drove Botos to the station between 3:00 and 3:05 a.m. testified that Botos had been handcuffed behind his back while being transported and that he did not observe him put anything in his mouth or throw up or belch while in his custody. Considered together, the testimony from these officers and the test operator is sufficient to permit the trial court to find that there had been at least a fifteen-minute deprivation period prior to the breath tests. See *State v. Tyszkiewicz*, 209 Ariz. 457, 459, ¶ 7, 104 P.3d 188, 190 (App. 2005) (holding existence of deprivation period can be established through multiple officers).

¶19 We find no merit to Botos's claim that the deprivation period was disrupted because the transporting officer moved the handcuffs from his back to his front to permit him to telephone his mother prior to driving to the station. Botos asserts that with his hands cuffed in front he would have had access to his mouth. The problem with this argument is that Botos testified that the officer was next to him while he made the telephone call. Thus, the officer would have seen if Botos had placed anything in his mouth during the time his hands were cuffed in front for the telephone call. The only time in which the officer was unable to watch Botos continuously was while driving. Given the officer's testimony that Botos was handcuffed with his

hands behind him while they were driving to the station and therefore did not have access to his mouth during that time, there was no abuse of discretion by the trial court in ruling there was sufficient evidence of the requisite deprivation period for admission of the breath test results.

B. Preclusion of Testimony

¶10 Botos next argues that the trial court violated his constitutional rights to due process and to present a defense by excluding three defense witnesses. The trial court granted the State's motion to preclude their testimony based on findings that the testimony was irrelevant and immaterial. We review a trial court's decision on whether to allow witness testimony for abuse of discretion. *State v. Carlos*, 199 Ariz. 273, 277, ¶ 10, 17 P.3d 118, 122 (App. 2001).

¶11 A criminal defendant has a due process and Sixth Amendment right to call witnesses and present evidence in his defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Washington v. Texas*, 388 U.S. 14, 18-19 (1967). Similar rights are guaranteed by the Arizona Constitution. See Ariz. Const. art. II, § 4 ("No person shall be deprived of life, liberty, or property without due process of law."), § 24 ("In criminal prosecutions, the accused shall have the right . . . to have compulsory process to compel the attendance of witnesses in his own behalf"). However, the right to present witness

testimony is not absolute. *State v. Harrod*, 218 Ariz. 268, 276, ¶ 20, 183 P.3d 519, 527, *cert. denied*, 129 S. Ct. 38 (2008). The right is limited to those witnesses whose testimony would be "relevant and material to the defense." *Washington*, 388 U.S. at 23. Thus, to prevail on a due process or Sixth Amendment claim of violation of the right to present testimony, there must be "some showing that the evidence lost would be both material and favorable to the defense." *United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982).

¶12 One of the witnesses whose testimony was precluded was Botos's mother. According to Botos, his mother would be able to testify that she received a telephone call from him prior to the breath test. Botos maintains her testimony would support his claim that the deprivation period was disrupted by showing that his hands were handcuffed in front and giving him access to his mouth. As previously discussed, however, Botos testified that the transporting officer was present with him during the telephone call, and therefore the officer would have seen if he had placed anything in his mouth at that time. Therefore, as the trial court observed, the mother's testimony confirming that Botos called her would not add anything to his challenge to the foundation for the breath tests. Thus, the trial court did not abuse its discretion in finding this proposed testimony irrelevant. See Ariz.R.Evid. 401 (defining "relevant evidence"

as including a materiality requirement that the evidence pertain to a "fact that is of consequence to the determination of the action").

¶13 Botos also argues that the trial court erred in precluding testimony from two people he was with earlier in the evening. In opposing the State's motion to preclude, Botos asserted these potential witnesses would testify he had been at an emotional gathering for a deceased friend earlier that evening, offering another explanation for why his eyes were watery and bloodshot. He additionally claimed their testimony would serve to impeach the officers' testimony because it would support his testimony that he turned onto 16th Street closer to Union Hills than where the officers stated they first observed him speeding.

¶14 The record fails to establish that the witnesses would have provided relevant testimony. When questioned by the trial court regarding whether the witnesses had firsthand knowledge of Botos crying or having bloodshot or watery eyes, defense counsel stated that he was not sure. In addition, defense counsel implicitly acknowledged that he did not know whether these witnesses could testify in a manner that would impeach the officers' testimony regarding the route driven by Botos. Defense counsel agreed with the trial court's description that "the sum of their testimony would be they were present with him

at some time prior to his being stopped" and did not offer specifics as to when or where the witnesses had been with Botos prior to his encounter with the police. In the absence of an adequate offer of proof or avowal establishing that these witnesses would testify to facts that would make their testimony relevant and material to the incident at 2:30 a.m., we cannot say the trial court abused its discretion in granting the State's motion to preclude their testimony. See *State v. Towery*, 186 Ariz. 168, 179, 920 P.2d 290, 301 (1996) ("When an objection to the introduction of evidence has been sustained, an offer of proof showing the evidence's relevance and admissibility is ordinarily required to assert error on appeal."); Ariz.R.Evid. 103(a)(2) ("Error may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context").

CONCLUSION

¶15 Finding no error, we affirm the convictions.

/s/

PATRICK IRVINE, Judge

CONCURRING:

/s/

JOHN C. GEMMILL, Presiding Judge

/s/

JON W. THOMPSON, Judge