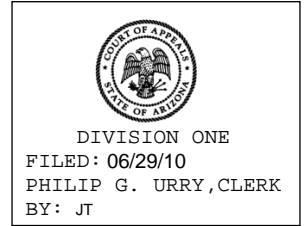


NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE



STATE OF ARIZONA,) No. 1 CA-CR 09-0151
)
Appellee,) DEPARTMENT A
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
JOSEPH KARIHO GENTRY,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)
)

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-182117-001 DT

The Honorable Pamela V. Svoboda, Judge *Pro Tempore*

AFFIRMED

Terry Goddard, Arizona Attorney General Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Julie A. Done, Assistant Attorney General
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender Phoenix
By Karen M. Noble, Deputy Public Defender
Attorneys for Appellant

B R O W N, Judge

¶1 Appellant Joseph Kariho Gentry appeals from his convictions for two counts of aggravated driving under the influence of intoxicating liquor or drugs ("DUI") and the resulting sentences. Gentry argues that the trial court improperly denied his motion to dismiss because police officers unreasonably interfered with his right to counsel. For the following reasons, we affirm.

BACKGROUND¹

¶2 In December 2007, Police Officer Tieman stopped Gentry after Gentry drove through a red light. Officer Tieman observed signs that Gentry had been drinking alcohol and administered a field sobriety test. Gentry was then placed under arrest for DUI and was given his *Miranda* rights.²

¶3 Officer Tieman then took Gentry to a police DUI van so Officer Lawler could draw Gentry's blood to determine his blood alcohol concentration ("BAC"). Gentry requested that Officer Lawler "appoint him a lawyer." Officer Lawler told Gentry that he could not do so and instead provided Gentry with a phone book so he could contact an attorney himself. Officer Lawler then delayed drawing Gentry's blood by taking the next person in line

¹ We summarize the facts as asserted in Gentry's motion to dismiss and the State's response, which appear to have come from the police reports filed in this case. The police reports are not in the record, but the facts presented here are undisputed.

² See *Miranda v. Arizona*, 384 U.S. 436, 444 (1966).

to give Gentry time to contact an attorney. Gentry was not successful in finding an attorney with whom he could consult prior to the blood draw, although he apparently called a civil attorney from the phone book who did not answer the phone. Officer Lawler subsequently obtained a warrant and drew Gentry's blood nearly two hours after Gentry was arrested. The test results revealed that Gentry had a BAC of .188 and Gentry was charged with two counts of Aggravated DUI.

¶14 Gentry filed a motion to dismiss asserting that his right to counsel was violated. The trial court denied the motion, ruling that "the State did not unreasonably restrict [Gentry's] right to consult a lawyer." Gentry moved for reconsideration, which the court also denied. Following a three-day trial, a jury convicted Gentry on both counts. Gentry timely appealed.

DISCUSSION

¶15 Gentry argues the trial court erred in denying his motion to dismiss. He asserts that police violated his right to counsel by not appointing an attorney for him or assisting him in contacting a DUI attorney prior to drawing his blood even though Gentry requested that officers "appoint him a lawyer."³

³ Gentry also asserts that the officers' refusal to assist him in finding suitable counsel was an attempt to take advantage of his indigent status in violation of the equal protection clause. We decline to address this issue because our review

¶16 Generally, orders denying a motion to dismiss are left to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *State v. Chavez*, 208 Ariz. 606, 607, ¶ 2, 96 P.3d 1093, 1094 (App. 2004). "We view the facts and evidence in the light most favorable to sustaining the trial court's ruling, but we review questions of law de novo." *Id.* (citation omitted).

¶17 It is well-settled that a person accused of DUI has no right to an attorney prior to deciding whether to submit to a BAC test. *State ex rel. Webb v. City Court*, 25 Ariz. App. 214, 216, 542 P.2d 407, 409 (1975). However, an accused has a right to contact an attorney as soon after arrest as feasible, provided that contact does not interfere with the investigation at hand. *Kunzler v. Pima County Superior Court*, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987); *McNutt v. Superior Court*, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982); *State v. Transon*, 186 Ariz. 482, 484-85, 924 P.2d 486, 488-89 (App. 1996).

¶18 When applied to individuals suspected of DUI, the purpose of the right to contact an attorney is to provide "a fair chance to obtain independent evidence of sobriety essential

finds no fundamental error and Gentry's assertion lacks supporting facts and argument. See *State v. Bolton*, 182 Ariz. 290, 297, 896 P.2d 830, 837 (1995) (absent fundamental error appellate court will not consider issues, even constitutional ones, raised for the first time on appeal).

to [a] defense at the only time it [is] available." *Transon*, 186 Ariz. at 485, 924 P.2d at 489 (quoting *Montano v. Superior Court*, 149 Ariz. 385, 389, 719 P.2d 271, 275 (1986)). The right to gather exculpatory evidence includes a reasonable opportunity to contact counsel. *Id.* at 485, 924 P.2d at 489 (citations omitted). Moreover, the police "may not unreasonably restrict" a person's access to an attorney. *State v. Juarez*, 161 Ariz. 76, 80, 775 P.2d 1140, 1145 (1989).

¶19 Here, when Gentry expressed his desire to speak with counsel after his arrest and after being informed of his *Miranda* rights, officers provided Gentry with a phone book and gave him time to contact an attorney. Gentry consulted the yellow page listings and made at least one phone call but was unsuccessful in contacting an attorney who could consult with him regarding DUI matters at that time. Notably, Gentry concedes that once he "was provided a phone book, and a reasonable opportunity to talk to an attorney, his 'Right to Counsel' was satisfied."

¶10 Nonetheless, Gentry contends that the police unreasonably restricted his access to an attorney by failing to assist him in finding counsel. Specifically, he argues that because he was indigent and had a right to "appointed counsel," police were required to do more than merely allow him an opportunity to call an attorney. He contends that the police were required to direct him to DUI attorneys who they knew would

have offered free advice and that their failure to do so was tantamount to "informing [him] that he may not call his attorney before taking the test[.]" *Juarez*, 161 Ariz. at 81, 775 P.2d at 1145. He claims that this failure to assist him in finding counsel, or otherwise "appoint" counsel prior to drawing his blood, was a violation of his Fifth and Sixth Amendment rights to counsel. We disagree.

¶11 As the trial court properly noted, the Fifth Amendment does not require counsel to be appointed at the scene of a crime; it requires only that when a person is in police custody, all police questioning must stop upon that person's request to have counsel present. *Miranda*, 384 U.S. at 444-45. Gentry does not argue that he was questioned in violation of *Miranda*; we therefore find no violation of his Fifth Amendment rights. Similarly, Gentry's Sixth Amendment right to have counsel appointed was not implicated because that right attaches only after an initial appearance, not at the scene of a crime. Ariz. R. Crim. P. 4.2(a)(5); see *State v. Moody*, 208 Ariz. 424, 445, ¶ 65, 94 P.3d 1119, 1140 (2004) (recognizing that the "Sixth Amendment right to counsel extends to 'all criminal stages of the criminal process'" but does not include the "taking of non-testimonial physical evidence"); see also *State v. Martinez*, 221 Ariz. 383, 386, ¶ 11, 212 P.3d 75, 78 (App. 2009) (stating that

the "Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated'").

¶12 Although police officers could not prevent Gentry from seeking counsel prior to a blood draw, they were under no duty to assist him in this regard. See *Juarez*, 161 Ariz. at 81, 775 P.2d at 1145 (concluding that permitting detainee to call an attorney, even though detainee actually called a friend, was sufficient to satisfy requirement that police had not unreasonably restricted access to counsel); *Smith v. Cada*, 114 Ariz. 510, 514, 562 P.2d 390, 394 (App. 1977) (holding that while the State could not unreasonably prevent a suspect from obtaining an independent blood test, it was not obligated to facilitate an independent test for the suspect). Based on the record before us, we conclude Gentry's right to counsel was not violated and thus the trial court did not err in denying his motion to dismiss.

CONCLUSION

¶13 For the foregoing reasons, we affirm Gentry's conviction and sentences.

/s/

MICHAEL J. BROWN, Presiding Judge

CONCURRING:

/s/

PHILIP HALL, Judge

/s/

DANIEL A. BARKER, Judge