DIVISION ONE
FILED: 08/31/2010
RUTH WILLINGHAM, ACTING CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee,	)	1 CA-CR 09-0507
	)	DEPARTMENT A
v.	)	**MEMORANDUM DECISION** (Not for Publication - Rule 111, Rules of the Arizona Supreme Court)
RICHARD JOHN ALLENZA, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-138349-001DT

The Honorable Pamela D. Svoboda, Commissioner

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
Attorneys for Appellee

James J. Haas, Maricopa County Public Defender — Phoenix
By Cory Engle, Deputy Public Defender
Attorneys for Appellant

Richard John Allenza — Phoenix
Appellant

O R O Z C O, Judge

¶1 Richard John Allenza (Defendant) appeals from the denial of his motion to dismiss entered by the trial court after an evidentiary hearing on the claim of interference with the right to counsel.

¶2 Defendant's counsel filed a brief in accordance with *Anders v. California*, 386 U.S. 738 (1967) and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), advising this Court that after a search of the entire appellate record, he found no arguable question of law that was not frivolous. Defendant was afforded the opportunity to file a supplemental brief in propria persona, and he has done so.

¶3 Our obligation in this appeal is to review "the entire record for reversible error." *State v. Clark*, 196 Ariz. 530, 537, ¶ 30, 2 P.3d 89, 96 (App. 1999). We have jurisdiction pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 and -4033.A.1 (2010).[1] Finding no reversible error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶4 When reviewing the record, "we view the evidence in the light most favorable to supporting the verdict." *State v. Torres-Soto*, 187 Ariz. 144, 145, 927 P.2d 804, 805 (App. 1996).

[1] Unless otherwise specified, we cite to the current version of the applicable statutes when no revisions material to this decision have since occurred.

Defendant was charged with two counts of aggravated driving under the influence (DUI) of intoxicating liquor or drugs, each a class four felony. Prior to trial, Defendant filed a motion to dismiss, arguing that the arresting officers violated his right to counsel under the Sixth Amendment of the United States Constitution. The motion was denied without comment or a hearing. A jury found Defendant guilty as charged. The trial court sentenced Defendant to four months in prison but suspended the sentence and placed him on probation for a term of four years. Defendant filed a timely notice of appeal, contending that the trial court erred by summarily denying his motion to dismiss without an evidentiary hearing. *State v. Allenza*, 1 CA-CR 07-0609, 2009 WL 838237, at 2, ¶ 1 (Ariz. App. March 31, 2009)

¶5 This Court remanded the case to the trial court for an evidentiary hearing on the issue of interference with the right to counsel. *Id.* at 2-3, ¶¶ 10-11. We held that the trial court abused its discretion in summarily denying Defendant's motion to dismiss without an evidentiary hearing. *Id.* at 2, ¶ 9.

¶6 On remand, an evidentiary hearing was held to determine whether the arresting officers interfered with Defendant's right to counsel. After considering the pleadings, testimony, credibility of the witnesses and relevant case law, the trial court denied Defendant's motion to dismiss.

¶7 The court considered eight factors in finding Defendant was given a meaningful opportunity to consult with an attorney: (1) police officers gave Defendant thirty-two minutes to locate and consult with an attorney; (2) Defendant's testimony that he was not given advice on whether to submit to the breath test was not credible; (3) Defendant's testimony was not credible when he stated he only had one drink because his blood alcohol level was .199; (4) Defendant did not utilize almost five minutes of the thirty-two minutes that he was given to speak with an attorney; (5) the DUI van officer in this case had processed thousands of DUIs and testified that in his experience, almost all individuals received the necessary legal advice from an attorney within five minutes, and Defendant was on the telephone for nine minutes; (6) the DUI van officer believed that based on Defendant's actions, he was unnecessarily delaying or impeding the investigation by ignoring multiple requests to terminate the telephone call; (7) Defendant was released thirty-five minutes after his last breath test and had the opportunity to further consult with an attorney and independently collect exculpatory evidence; and (8) at the conclusion of the investigation, although fifteen minutes remained prior to the two hour window[2] from the time that driving

[2] *See* A.R.S. § 28-1381.A.2 (Supp. 2009).

had ended, the officer could not have predicted what amount of time might be remaining and it was reasonable for the officer to tell Defendant to terminate the telephone call in order to expedite the investigation.

¶8 Based on the foregoing factors, the court found Defendant was given a meaningful opportunity to consult with an attorney and the officers were justified in terminating the telephone conversation so as not to "further impede" their investigation. This timely appeal followed.

DISCUSSION

¶9 Defendant raises five issues in his supplemental brief: (1) the empanelled jurors were not racially diverse; (2) the empanelled jurors did not understand the medical and technical aspects presented at trial; (3) the trial court's denial of his discovery motion requesting production of the breathalyzer's source codes violated his Sixth Amendment right to confront any and all witnesses against him; (4) counsel failed to obtain additional witnesses;[3] and (5) the arresting officers acted in a belligerent and intimidating manner during Defendant's arrest.

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[3] As we understand Defendant's argument, he is alleging that his counsel was ineffective. Defendant may raise an ineffective assistance of counsel claim in a Rule 32 proceeding. Ariz. R. Crim. P. 32. These claims may not be raised in a direct appeal, regardless of merit. *State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9, 39 P.3d 525, 527 (2002).

¶10 None of these issues were raised in Defendant's first appeal. The only issue raised during the first appeal dealt with whether the trial court erred in denying Defendant's motion to dismiss. As previously stated, this Court remanded the matter to the trial court for an evidentiary hearing on Defendant's claim that officers deprived him of his right of counsel.

¶11 "The Court of Appeals is a court of limited jurisdiction and has only jurisdiction specifically given to it by statute." *Campbell v. Arnold*, 121 Ariz. 370, 371, 590 P.2d 909, 910 (1979). The record before us reflects that the notice of appeal specifies only the order denying Defendant's motion to dismiss after the evidentiary hearing on remand. Therefore, our jurisdiction is limited to reviewing the issue raised upon remand. *See Hanania v. City of Tucson*, 123 Ariz. 37, 39 n.3, 597 P.2d 190, 192 n.3 (App. 1979).

Right to Counsel

¶12 A person is always entitled to the assistance of counsel, including the right to private consultation with an attorney, whether in custody or not. *Kunzler v. Pima County Superior Court*, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987); *see* Ariz. R. Crim. P. 6.1.a. Any person suspected of DUI should be given a meaningful opportunity to contact and talk privately with counsel. *See State v. Holland*, 147 Ariz. 453, 455-56, 711

P.2d 592, 594-95 (1985). "It is only when the exercise of that right will hinder an ongoing investigation that the right to an attorney must give way in time and place to the investigation by the police." *Kunzler*, 154 Ariz. at 569, 744 P.2d at 670.

¶13 Defendant testified that he was allowed to leave the DUI van to have a conversation with his attorney. The trial court found that Defendant was provided with an opportunity to have a private, meaningful and reasonable consultation with counsel. The record indicates that Defendant was given approximately thirty minutes to consult with an attorney, and the DUI van officer warned Defendant two or three times to decide whether to submit to a breath test. The trial court found that the DUI van officer was justified in terminating the telephone call after multiple warnings to Defendant. Officers are to complete investigations within two hours from the time that driving has ended and officers were coming close to the two hour period. *See* A.R.S. § 28-1381.A.2; *McNutt v. Superior Court*, 133 Ariz. 7, 10 n.2, 648 P.2d 122, 125 n.2 (1982) ("[I]t is crucial for both the state and the defendant to gather evidence relevant to intoxication close in time to when the defendant allegedly committed the crime."). Finally, the trial court found that Defendant's ability to gather exculpatory evidence was not hindered by the investigation.

¶14 It is for the trier of fact to determine the credibility of witnesses and resolve factual issues. *State v. Alawy*, 198 Ariz. 363, 365 n.2, ¶ 7, 9 P.3d 1102, 1104, n.2 (App. 2000). We defer to the trial court's factual findings as they are supported by the record. Because we find no error in the trial court's findings, we affirm.

CONCLUSION

¶15 We have read and considered the briefs submitted by Defendant and his counsel and have reviewed the entire record on appeal for reversible error and have found none. *Clark*, 196 Ariz. at 541, ¶ 49, 2 P.3d at 100. All of the proceedings on remand were conducted in compliance with the Arizona Rules of Criminal Procedure and substantial evidence supported the trial court's denial of Defendant's motion to dismiss. Defendant was present and represented by counsel at all critical stages of the proceedings.

¶16 Counsel's obligations pertaining to Defendant's representation in this appeal have ended. Counsel need do nothing more than inform Defendant of the status of the appeal and his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *State v. Shattuck*, 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). Defendant shall have thirty days from the date of this decision to proceed, if he so desires,

with an in propria persona motion for reconsideration or petition for review.[4]

¶17 For the foregoing reasons, Defendant's convictions and sentences are affirmed.

/s/
_____
PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/s/
_____
DANIEL A. BARKER, Judge

/s/
_____
LAWRENCE F. WINTHROP, Judge

[4] Pursuant to Arizona Rule of Criminal Procedure 31.18.b, Defendant or his counsel have fifteen days to file a motion for reconsideration. On the Court's own motion, we extend the time to file such a motion to thirty days from the date of this decision.