

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



DIVISION ONE
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BY: GH

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

STATE OF ARIZONA,) 1 CA-CR 09-0509
)
Appellee,) DEPARTMENT C
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
RUDY GENEHA,) Rule 111, Rules of the
) Arizona Supreme Court)
Appellant.)
)

Appeal from the Superior Court in Navajo County

Cause No. S-0900-CR-0020080510

The Honorable John Lamb, Judge

AFFIRMED

Terry Goddard, Attorney General Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Suzanne M. Nicholls, Assistant Attorney General
Attorneys for Appellee

The Brewer Law Office Show Low
by Benjamin M. Brewer
Attorney for Appellant

I R V I N E, Presiding Judge

¶1 Rudy Geneha ("Geneha") appeals from his convictions
and sentences for aggravated driving under the influence and

aggravated driving with a blood alcohol content of .08 or more. He argues that the trial court erred in refusing to grant his motion to dismiss on the grounds that he was deprived of his right to counsel before taking a breath test. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶12 We view the facts in the light most favorable to sustaining the verdicts and resolve all inferences against Geneeha. *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

¶13 In September 2007, Department of Public Safety officer O.W. was on patrol. He observed a green truck traveling substantially below the speed limit swerving in and out of the northbound traffic lane. Additionally, a man sitting in the truck bed signaled with his hands that the driver of the truck had been drinking.¹ As a result of the unsafe lane changes, Officer O.W. initiated a traffic stop. The driver identified himself as Geneeha by showing the officer an Arizona driver's license. As Officer O.W. spoke with Geneeha, he observed a strong odor of liquor coming from inside the truck and that Geneeha's eyes were bloodshot and watery. When Geneeha exited the truck, Officer O.W. noticed that Geneeha was unsteady on his

¹ This passenger later told Officer O.W. that Geneeha had been drinking whiskey.

feet, had a strong odor of liquor coming from his breath, and was swaying from front to back and from side to side.

¶14 Geneeha refused to submit to a field sobriety test, but consented to a horizontal gaze nystagmus test. Officer O.W. observed six cues of impairment during the test. He then administered a portable breath test, which showed Geneeha's blood alcohol content to be .198. As a result, Officer O.W. placed Geneeha under arrest at approximately 5:59 p.m. While inside the police car, Officer O.W. informed Geneeha of his *Miranda* rights.² In response to a clarifying question asked by Officer O.W., Geneeha stated that he would not answer any questions unless a court appointed attorney was present. Officer O.W. then transported Geneeha to the DPS headquarters in Holbrook and read Geneeha the admin per se/implied consent affidavit. Geneeha agreed to submit to a breath test and signed the independent test advisory form. Officer O.W. then administered two breathalyzer tests that established Geneeha had a blood alcohol content of .226 at 7:02 p.m. and .219 at 7:09 p.m.

¶15 In July 2008, the State charged Geneeha by information with one count of aggravated driving while under the influence of intoxicating liquor as a third offense within the preceding

² Subsequently, Officers O.W. and another officer performed an inventory search of Geneeha's truck that revealed multiple beer cans and bottles of whiskey.

eighty-four months and one count of aggravated driving with a blood alcohol content of .08 or more as a third offense within the preceding eighty-four months. Geneeha filed a motion to dismiss the charges on the grounds that his right to counsel was violated pursuant to the Fifth and Sixth Amendments of the United States Constitution; Article 2, Section 24, of the Arizona Constitution; and Rule 6.1 of the Arizona Rules of Criminal Procedure. After hearing testimony from Officer O.W., the court denied the motion and stated:

Since criminal charges had not been filed, the state did not violate the defendant's 6th Amendment rights nor his Article 2 section 24 Arizona constitutional rights. Since Miranda is inapplicable to evidence obtained from Mr. Geneeha's breath test, there is no Miranda violation. Since the officers never impeded Mr. Geneeha's opportunity to consult with an attorney, they did not violate Mr. Geneeha's due process rights under Arizona case law and under Rule 6.1.

Before trial, Geneeha and the State stipulated to the admission of evidence and Geneeha waived his right to a jury trial. The court found Geneeha guilty as charged and sentenced him to four months' imprisonment and three years' probation.

¶16 Geneeha timely appealed. We have jurisdiction pursuant to Arizona Constitution Article 6, Section 9, and Arizona

Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010), and -4033(A) (2010).³

DISCUSSION

¶7 Geneeha argues that the trial court abused its discretion in denying his motion to dismiss. Geneeha contends that he requested to speak to an attorney before submitting to a breath test at the DPS office and that the giving of the admin per se violated his right to counsel.⁴ Generally, we will not overturn a trial court's ruling on a motion to dismiss absent an abuse of discretion. *State v. Rosengren*, 199 Ariz. 112, 115-16, ¶ 9, 14 P.3d 303, 306-07 (App. 2000). An abuse of discretion is an exercise of discretion that is "manifestly unreasonable, or exercised on untenable grounds or for untenable reasons." *State v. Sandoval*, 175 Ariz. 343, 347, 857 P.2d 395, 399 (App. 1993). "[W]e presume that the [trial] court was aware of the relevant law and applied it correctly in arriving at its ruling." *State v. Moody*, 208 Ariz. 424, 449, ¶ 81, 94 P.3d 1119, 1144 (2004).

¶8 In light of the overwhelming evidence of Geneeha's intoxication, we do not reach the issue of whether Geneeha was

³ We cite the current version of the applicable statutes because no revisions material to this decision have since occurred.

⁴ At the outset we note that Geneeha's Opening Brief does not argue that his rights were violated pursuant to the Fifth or Sixth Amendments. Therefore, these arguments are waived and we will not consider them. See *State v. Guytan*, 192 Ariz. 514, 520, ¶ 15, 968 P.2d 587, 593 (App. 1998).

deprived of his right to counsel. See *State v. Canez*, 202 Ariz. 133, 151, ¶ 51, 42 P.3d 564, 582 (2002) (appellate court may affirm trial court if correct for any reason); see also *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (stating that when a lower court comes to the proper conclusion for the wrong reason we are obliged to affirm the ruling). Even if Geneeha's right to counsel was violated, we are satisfied that any error did not impact the verdict and thus was harmless error. When evidence is erroneously admitted, the error is harmless if other evidence of guilt is overwhelming. See *State v. Weaver*, 158 Ariz. 407, 409, 762 P.2d 1361, 1363 (App. 1988).

¶19 The State charged Geneeha with Count One, aggravated driving while under the influence of an intoxicating liquor as a third offense within eighty-four months and, Count Two, aggravated driving with a blood alcohol content of .08 or more as a third offense within eighty-four months. Driving under the influence of an intoxicating liquor requires the State to show that Geneeha's ability to drive was "impaired to the slightest degree" while under the influence of intoxicating liquor. A.R.S. § 28-1381(A)(1) (Supp. 2009). Count Two requires the State to show that Geneeha had a BAC of .08 or more while driving or within two hours of driving. A.R.S. § 28-1381(A)(2). Because both counts were aggravated, the State was required to prove

that Geneeha had two prior violations of A.R.S. § 28-1381 within the previous eighty-four months.

¶10 Before being placed under arrest, Geneeha performed a portable breath test that indicated a blood alcohol content of .198. Officer O.W.'s report provides that he observed Geneeha's truck swerve out of his traffic lane multiple times and that a passenger in Geneeha's truck bed signaled that Geneeha had been drinking. When Officer O.W. initiated the traffic stop, Geneeha stumbled out of his truck, had a strong odor of liquor, and admitted drinking four cans of beer. Geneeha stipulated and admitted that he has two prior misdemeanor DUI offenses committed within seventy-two months of the current offense date. Accordingly, the overwhelming evidence supports Geneeha's convictions and sentences. We conclude any error in the admission of the results of the two breathalyzer tests administered after Officers O.W. informed Geneeha of his *Miranda* rights did not contribute to the verdicts and was therefore harmless.

CONCLUSION

¶11 For the foregoing reasons, we affirm Geneeha's convictions and sentences.

/s/

PATRICK IRVINE, Presiding Judge

CONCURRING:

/s/

MICHAEL J. BROWN, Judge

/s/

DONN KESSLER, Judge