DIVISION ONE
FILED: 01/03/2012
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-1028
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
FRANCISCO JAVIER SANTOS BARAJAS,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-130961-001 DT

The Honorable Randall H. Warner, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General — Phoenix
By Katia Mehu, Assistant Attorney General
Attorneys for Appellee

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

O R O Z C O, Judge

¶1 Francisco Javier Santos Barajas (Defendant) appeals his conviction and sentence for aggravated assault arising out of a motor vehicle accident. Before trial, Defendant filed a motion

to exclude certain statements and physical evidence, which the trial court denied. He argues the trial court erred in denying his motion because officers: (1) interviewed him and performed breathalyzer tests without informing him of his *Miranda*[1] rights to remain silent and consult an attorney; and (2) performed the tests without obtaining a warrant, in violation of the Fourth Amendment to the United States Constitution. For the reasons set forth herein, we affirm Defendant's conviction and sentence.

PROCEDURAL AND FACTUAL HISTORY

¶2 The truck Defendant was driving crossed over the center line and collided head-on with a vehicle traveling in the opposite direction. The other driver suffered severe injuries in the accident.

¶3 When officers arrived, Defendant was standing near his truck, which had sustained extensive damage. In response to questioning, Defendant told officers that he was the owner of the truck and had been driving when the accident occurred. Defendant also displayed behavior that led officers to believe he was intoxicated. After he was unable to perform field sobriety tests, Defendant was arrested for driving under the influence (DUI) and transported to a police substation. There, Defendant

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966).

was advised regarding Arizona's implied consent law[2] and agreed to submit to breathalyzer tests to determine his blood alcohol concentration (BAC). Defendant was never advised of his rights to remain silent and consult an attorney, pursuant to *Miranda*.

¶4 Officers arrested Defendant for DUI, but he was subsequently indicted by the grand jury on one count of aggravated assault, a class 3 dangerous felony. Before trial, Defendant filed a motion to suppress statements he made during his arrest, claiming the statements were made in violation of his *Miranda* rights. After an evidentiary hearing on the motion, at which Defendant also sought to suppress the results of the breathalyzer tests, the trial court ruled that officers did not violate Defendant's *Miranda* rights because his statements were made before he was in custody and the tests were administered with his consent.

¶5 A jury found Defendant guilty, and Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9,

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[2] Arizona's implied consent law, Arizona Revised Statutes (A.R.S.) section 28-1321.A (2010), provides that:

> A person who operates a motor vehicle in this state gives consent . . . to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for any offense arising out of acts alleged to have been committed in violation [of the DUI statutes].

of the Arizona Constitution and A.R.S. §§ 12-120.21.A.1 (2003), 13-4031 (2010), and 13-4033.A.1 (2010).

DISCUSSION

¶6 Defendant contends the trial court erred in denying the motion to suppress his statements and test results. We review a trial court's findings of fact and ruling on a motion to suppress for an abuse of discretion, *State v. Spears*, 184 Ariz. 277, 284, 908 P.2d 1062, 1069 (1996), but review constitutional and legal conclusions de novo. *State v. Gay*, 214 Ariz. 214, 217, ¶ 4, 150 P.3d 787, 790 (App. 2007). To the extent Defendant argues the evidence should have been suppressed based on exclusionary rule principles, we review those issues de novo as well. *State v. Hackman,* 189 Ariz. 505, 508–09, 943 P.2d 865, 868–69 (App. 1997). However, we consider "only the evidence presented at the hearing on the motion,"[3] which we view "in the light most favorable to sustaining the trial court's ruling." *Gay*, 214 Ariz. at 217, ¶ 4, 150 P.3d at 790.

Miranda warnings

¶7 Defendant first argues the statements[4] and test results should have been suppressed because he was not advised of his

[3] Defendant did not testify at the suppression hearing. The only evidence presented at the hearing was the testimony of the arresting police officer (Officer M.).

[4] Although Defendant appears to argue on appeal that statements made after his arrest should have been suppressed,

constitutional rights to remain silent and consult an attorney, pursuant to *Miranda*.[5] We review de novo whether the statements and test results should have been suppressed. *See Gay*, 214 Ariz. at 217, ¶ 4, 150 P.3d at 790; *Hackman*, 189 Ariz. at 508–09, 943 P.2d at 868–69.

¶8 *Miranda* warnings are required when a person is subjected to custodial interrogation. *Edwards v. Arizona*, 451 U.S. 477, 485–86 (1981) ("The Fifth Amendment right identified in *Miranda* is the right to have counsel present at any custodial interrogation."); *State v. Ramirez,* 178 Ariz. 116, 123, 871 P.2d 237, 244 (1994). A person is in custody when he or she is under arrest or when his or her "freedom of movement is restrained to a

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that issue is not properly before us because Defendant did not move to suppress his post-arrest statements. In fact, at the hearing on the motion to suppress, Defendant's counsel specifically stated that Defendant sought only to suppress statements given before the arrest, at the scene of the accident, because officers did not question Defendant at the police station after the arrest. Consequently, we analyze Defendant's argument only as it pertains to pre-arrest statements made at the scene of the accident. *See State v. Brita,* 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988).

[5] Defendant also argues that he should have been allowed to consult an attorney pursuant to Arizona Rule of Criminal Procedure 6.1.a. Because he did not raise this argument below, *see State v. Moreno-Medrano,* 218 Ariz. 349, 354, ¶ 17, 185 P.3d 135, 140 (App. 2008), and does not develop this argument on appeal, we do not address Defendant's Rule 6.1.a claim. *See* Ariz. R. Crim. P. 31.13.c(1)(vi) (appellant's brief "shall contain the contentions of the appellant . . . and the reasons therefor"); *State v. Cons*, 208 Ariz. 409, 416, ¶ 18, 94 P.3d 609, 616 (App. 2004) (claim waived where defendant failed to develop argument in brief); *State v. Sanchez,* 200 Ariz. 163, 166, ¶ 8, 24 P.3d 610, 613 (App. 2001) (same).

degree associated with formal arrest." *Ramirez,* 178 Ariz. at 123, 871 P.2d at 244 (citation omitted); *see also United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (a person is in custody if, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave").

¶9 When a person is not in custody, however, police are free to ask general questions of that person without giving warnings under *Miranda*. *Florida v. Bostick*, 501 U.S. 429, 434–35 (1991); *State v. Pettit*, 194 Ariz. 192, 195, ¶¶ 15-16, 979 P.2d 5, 8 (App. 1998). In addition, "[n]eutral, nonaccusatory questioning in furtherance of a proper preliminary investigation is permissible under *Miranda.*" *Pettit*, 194 Ariz. at 195, ¶ 16, 979 P.2d at 8. Furthermore, "officers have authority to detain and question persons, whether motorists or pedestrians, without providing *Miranda* warnings when they have a reasonably articulable suspicion of criminal activity." *Id.* at ¶ 15 (*citing Berkemer v. McCarty*, 468 U.S. 420, 436-41 (1984)). It is only when "police have both reasonable grounds to believe that a crime has been committed and reasonable grounds to believe that the person they are questioning is the one who committed it" that roadside investigative questioning becomes a custodial interrogation for purposes of *Miranda*. *Id.* (*citing State v. Tellez*, 6 Ariz. App. 251, 256, 431 P.2d 691, 696 (1967)).

¶10 In this case, when officers arrived at the accident scene, Defendant was standing next to his truck but began to walk away after their arrival. When officers asked him to stop, Defendant stopped walking and turned around. Officers then approached Defendant and asked him a series of questions. These questions included whether Defendant was injured, if the truck belonged to him and if he had been driving. Defendant responded affirmatively to the questions and expressed his desire to return home. Officer M. testified that Defendant voluntarily cooperated with the questioning and that officers did not use physical force or coercion to restrain Defendant. We conclude this line of investigatory questioning did not require *Miranda* warnings because it was pre-arrest, preliminary, neutral and non-accusatory and Defendant was not in custody at the time. *See Pettit*, 194 Ariz. at 195, ¶ 16, 979 P.2d at 8.

¶11 Similarly, Defendant was not entitled to *Miranda* warnings before the administration of the breathalyzer tests.[6] *See State v. Lee*, 184 Ariz. 230, 233-34, 908 P.2d 44, 47-48 (App. 1995) (holding that *Miranda* warnings are not required prior to

[6] Defendant contends that because he was eventually charged with aggravated assault, and not DUI, the implied consent statute is not applicable and he should have received *Miranda* warnings before the breathalyzer tests were administered. Defendant cites no authority, however, that the nature of the offense charged changes the analysis of whether a suspect is entitled to receive *Miranda* warnings before the administration of a breathalyzer test.

requesting that a defendant submit to a breathalyzer test because such test results do not implicate the right against self-incrimination); *Tornabene v. Bonine ex rel. Ariz. Highway Dep't*, 203 Ariz. 326, 337, ¶ 33, 54 P.3d 355, 366 (App. 2002) ("in view of the non-testimonial nature of chemical breath testing, even criminal suspects are not entitled to presence of counsel during the test") (citations omitted).[7]

¶12 Defendant cites *State v. Juarez,* 161 Ariz. 76, 775 P.2d 1140 (1989) and *Saenz v. Rodriguez*, 163 Ariz. 386, 788 P.2d 119 (App. 1989) for the proposition that he should have been advised of his right to consult an attorney before the tests were administered. However, those cases stand for the more limited rule that if a defendant asks to speak with an attorney before taking a breathalyzer test, he has that right so long as it does not interfere with an ongoing investigation. *Juarez*, 161 Ariz. at 80, 775 P.2d at 1144; *Saenz*, 163 Ariz. at 388, 788 P.2d at 121. *See also McNutt v. Superior Court*, 133 Ariz. 7, 9-10, 648 P.2d 122, 124-25 (1982). As noted in *Lee*, those cases do not hold that a suspect is entitled to receive *Miranda* warnings

[7] To the extent Defendant argues he should have received *Miranda* warnings immediately upon his arrest, *Lee* makes clear that, absent custodial interrogation, police have no affirmative duty to inform defendants of their right to counsel. 184 Ariz. at 234, 908 P.2d at 48.

before the administration of a breathalyzer test. 184 Ariz. at 233-34, 908 P.2d at 47-48.

¶13 Because Defendant does not contend that he asked to consult an attorney, and Officer M. testified that Defendant did not request to speak with an attorney, we conclude that the rule announced in *Lee* applies. *See State v. Thornton*, 172 Ariz. 449, 453, 837 P.2d 1184, 1188 (App. 1992) ("The minimum required for invoking the right to counsel is a statement that shows a desire for an attorney during custodial interrogation."). Accordingly, the trial court did not err when it concluded that Defendant was not entitled to *Miranda* warnings before the administration of the breathalyzer tests.

Warrant requirement

¶14 Defendant next argues the results of the breathalyzer tests should have been suppressed because officers did not obtain a warrant prior to administering the tests, which are searches under the Fourth Amendment.[8] Police generally may not perform a search without a warrant supported by probable cause, *see* U.S. Const. amends. IV, XIV, and evidence obtained as the result of an illegal search generally must be suppressed. *Wong Sun v. United States,* 371 U.S. 471, 485 (1963). Police are not required to

[8] Although Defendant did not raise this argument below, we address it because he claims fundamental error on appeal. *See State v. Henderson*, 210 Ariz. 561, 567-68, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005).

obtain a warrant before administering a breathalyzer test if the suspect consents to the search. *Carrillo v. Houser*, 224 Ariz. 463, 466-67, ¶ 19, 232 P.3d 45, 1248-49 (2010). Nevertheless, in order for police to perform a warrantless breathalyzer test, "the arrestee must unequivocally manifest assent to the testing by words or conduct." *Id*. We review a court's decision "for abuse of discretion if it involves a discretionary issue, but review constitutional issues and purely legal issues de novo." *State v. Booker*, 212 Ariz. 502, 504, ¶ 10, 135 P.3d 57, 59 (App. 2006).

¶15 On appeal, Defendant does not argue that he did not consent to the breathalyzer test. Indeed, the uncontroverted testimony indicates that he did consent. Officer M. testified that he read Defendant a police description of Arizona's implied consent law (the admin per se form). Officer M. also testified that although he is not a certified translator, he speaks Spanish and was able to read to Defendant the Spanish version of the admin per se form. In addition, he testified that Defendant was also allowed to examine the Spanish written version of the admin per se form. Officer M. testified that Defendant read the admin per se form and acknowledged his consent by telling officers that he would comply. Defendant also acknowledged his consent by nodding that he would comply. Officer M. further testified that Defendant's consent was voluntary.

¶16 Furthermore, Defendant does not dispute that he understood the admin per se form. Accordingly, we find that Defendant "unequivocally manifest[ed] assent to the testing" by verbally and physically agreeing to comply after having been informed of Arizona's implied consent law. *See Carrillo*, 224 Ariz. at 467, ¶ 19, 232 P.3d at 1249. Because Defendant consented to the tests, a warrant was not required pursuant to the implied consent law. *See* A.R.S. § 28-1321; *Carrillo*, 224 Ariz. at 466-67, ¶ 19, 232 P.3d at 1248-49.

CONCLUSION

¶17 For the reasons set forth above, we affirm Defendant's conviction and sentence.

/S/
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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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DIANE M. JOHNSEN, Presiding Judge

/S/
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PATRICK IRVINE, Judge