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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROSALIO DELGADO BELTRAN, Appellant.	)	2 CA-CR 2011-0157 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20100750001

Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Kathryn A. Damstra
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Appellant

K E L L Y, Judge.

¶1 Rosalio Beltran was convicted of two counts of aggravated driving under the influence (DUI) and three counts of endangerment after he hit another vehicle from behind with his truck. The trial court sentenced Beltran to enhanced, presumptive, concurrent ten-year prison terms on the DUI convictions and to time served for the endangerment counts. In the sole issue he raises on appeal, Beltran maintains the court erred in denying his motion to suppress the results of blood testing that showed he had an alcohol content of .20 at the time of driving.

¶2 "We review the denial of a motion to suppress for an abuse of discretion, considering only the evidence presented at the suppression hearing, and viewing the facts in the light most favorable to sustaining the ruling." *State v. Manuel*, 574 Ariz. Adv. Rep. 4, ¶ 11 (Dec. 21, 2011) (citations omitted). "Whether evidence should have been excluded as the result of a deprivation of counsel is 'a mixed question of fact and law implicating constitutional questions. As such [the court's determination] is reviewed de novo.'" *State v. Rumsey*, 225 Ariz. 374, ¶ 4, 238 P.3d 642, 644-45 (App. 2010), *quoting State v. Hackman*, 189 Ariz. 505, 508, 943 P.2d 865, 868 (App. 1997) (alteration in *Rumsey*).

¶3 After Beltran hit the other vehicle with his truck, he walked away from the scene and University of Arizona police officer George Eppley arrested him. Beltran was transported to a police station and Eppley took him to "the Intoxilyzer area" to conduct breath testing. Beltran refused the test and Eppley admonished him pursuant to Arizona's implied consent law. Beltran repeated that he was refusing the test. Beltran told Eppley he wanted to contact a friend who was an attorney and gave him a phone number. When

the attorney did not answer, Eppley gave Beltran a current phone book, and the two made "several" attempts to contact an attorney, but none of the attempts were successful and one of the listed numbers Beltran had tried had been disconnected. After eighteen minutes, Eppley indicated Beltran would have to make a decision as to whether or not to submit to testing, and Beltran "declined any further options to contact a lawyer." A warrant was then obtained and another officer drew Beltran's blood for alcohol-content testing, "just short of two hours" after Eppley's first contact with Beltran.

¶4 Beltran moved to suppress "any and all evidence regarding [his] DUI investigation" because of "police interference with the right to counsel." The trial court denied Beltran's motion, concluding Beltran's "right to counsel was not interfered with" because the officer "stopped his investigation for 18 minutes so that the defendant could make multiple phone calls in an attempt to get an attorney." The court noted that although Beltran ultimately had been unsuccessful in contacting an attorney, that failure did not "represent a violation of any right to counsel."

¶5 "Arizona courts have established the rule that someone accused of DUI has the right to assistance of counsel in determining whether to submit to a breathalyzer test as long as speaking to counsel does not interfere with the investigation." *State v. Transon*, 186 Ariz. 482, 484, 924 P.2d 486, 488 (App. 1996); *see also* Ariz. R. Crim. P. 6.1 (general right to counsel); *State v. Juarez*, 161 Ariz. 76, 81, 775 P.2d 1140, 1145 (1989). And, the police generally may not unreasonably interfere with a suspect's right to counsel. *See Kunzler v. Superior Court*, 154 Ariz. 568, 569-70, 744 P.2d 669, 670-71

(1987). Beltran contends Eppley did not do "enough to honor [his] request for counsel"; specifically, he maintains Eppley "failed to provide him with an up-to-date phone book."

¶6 As noted above, however, Eppley testified he had provided Beltran with a current phone book, and Beltran introduced no evidence to dispute that testimony. He simply contends now that the phone book must have been out of date because, when they attempted to call one attorney's listing, the number was disconnected. But that alone does not show the book was not current. And, in any event, Eppley testified that in addition to the attorney Beltran had originally requested and the attorney whose number had been disconnected, he and Beltran had attempted to contact several other attorneys.

¶7 Thus, Beltran's case is distinguishable from those on which he relies. *See e.g.*, *State v. Holland*, 147 Ariz. 453, 455-56, 711 P.2d 592, 594-95 (1985) (officer refused to leave room while defendant spoke with attorney); *State v. Rosengren*, 199 Ariz. 112, ¶¶ 4-5, 14 P.3d 303, 306 (App. 2000) (officer refused to let defendant talk to attorney father); *State v. Sanders*, 194 Ariz. 156, ¶ 8, 978 P.2d 133, 135 (App. 1998) (officer refused to give defendant call-back number to give attorney); *State v. Carlson*, 199 P.3d 885, 887-88 (Or. Ct. App. 2008) (officer used jail phone incorrectly and therefore could not contact requested attorney). Here we cannot say that Eppley interfered with Beltran's right to counsel, that it was unreasonable to attempt to call other lawyers rather than to "call information . . . or use the Internet" to obtain a correct number for the attorney whose number was disconnected, or that Eppley otherwise failed to "provide the suspect with reasonable means of contacting a lawyer." *State v. Penney*, No. 1 CA-CR 10-0766, ¶ 15, 2012 WL 272686 (Ariz. Ct. App. Jan. 31, 2012) (right to

counsel violated when officer gave defendant phone book missing yellow pages for attorneys); *see also Holland*, 147 Ariz. at 455, 711 P.2d at 594 (state may not, "without justification, prevent access between a defendant and his lawyer, if available, in person or by telephone, when such access would not unduly delay the [DUI] investigation and arrest"). The trial court therefore did not abuse its discretion in denying Beltran's motion to suppress.

¶8 Beltran's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge