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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THE STATE OF ARIZONA, Appellee, v. JON RICHARD MARBLE, Appellant.	2 CA-CR 2011-0272 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20103511001

Honorable Jose H. Robles, Judge Pro Tempore

AFFIRMED IN PART
VACATED IN PART AND REMANDED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Jon Marble was convicted of driving with a blood alcohol content of .08 or more and aggravated driving under the influence while his license was suspended. On appeal, he argues the trial court erred in denying his motion to dismiss based on police officers' interference with his right to counsel and his motion to suppress based on the officers' illegally arresting him. For the following reasons, we affirm in part, vacate in part, and remand for the trial court to determine the appropriate remedy.

Factual and Procedural Background

¶2 We consider only the evidence presented at the evidentiary hearing on the motions to dismiss and suppress, and we view it in the light most favorable to upholding the trial court's rulings. *See State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 306-07 (App. 2000). Marble was seen getting out of the driver's side of a truck that had been involved in a one-vehicle roll-over accident. He fled the scene. When police officers later found him, they arrested him for driving while intoxicated (DUI). After his arrest, Marble asked to speak to his attorney but was not allowed to do so. The court determined probable cause supported Marble's arrest and his right to counsel was not violated "considering his flight, from the scene of a collision of a vehicle registered in his name, delayed and hampered the DUI investigation," and denied Marble's motions to suppress and dismiss.

¶3 Marble subsequently was tried and convicted of driving with a blood alcohol content of .08 or more and aggravated driving under the influence while his

license was suspended. The trial court placed him on concurrent, five-year terms of probation with conditions of incarceration, the longest term of which was four months. Marble appeals from these convictions.

Denial of the Right to Counsel

¶4 Marble first argues the trial court erred by denying his motion to dismiss based on the police officers' interference with his right to counsel after he had requested to speak with his attorney. We review a trial court's decision to deny a motion to dismiss for an abuse of discretion, deferring to its factual findings, but reviewing its legal conclusions de novo. *See State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 306-07 (App. 2000). "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). We may affirm the court's ruling on any basis supported by the record. *See State v. Wassenaar*, 215 Ariz. 565, ¶ 50, 161 P.3d 608, 620 (App. 2007).

¶5 Rule 6.1(a), Ariz. R. Crim. P., provides a suspect with "the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after [he] is taken into custody." This rule recognizes a suspect's right to counsel under both the federal and state constitutions. *Kunzler v. Pima Cnty. Superior Court*, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987). Under these principles, police violate a DUI suspect's rights if

they do not give the suspect a reasonable opportunity to consult with counsel. *See State v. Sanders*, 194 Ariz. 156, ¶ 8, 978 P.2d 133, 135 (App. 1998) (right to counsel violated when police refused suspect's request for station's phone number to give attorney); *State v. Penney*, 229 Ariz. 32, ¶ 15, 270 P.3d 859, 863 (App. 2012) (right to counsel violated when police gave suspect phone book missing attorney listings). Additionally, when a DUI suspect invokes his right to counsel, usually "police cannot interfere with [the suspect's] reasonable efforts to communicate with an attorney." *Martinez v. Superior Court*, 181 Ariz. 467, 468, 891 P.2d 934, 935 (App. 1994).

¶6 However, police may interfere with a suspect's access to an attorney if allowing such access would unduly delay the DUI investigation. *Id*. at 468, 891 P.2d at 935; *see also Kunzler*, 154 Ariz. at 569, 744 P.2d at 670 (only when suspect's exercise of right to counsel will hinder ongoing investigation may right "give way in time and place to the investigation by the police"). If police refuse to allow a DUI suspect to exercise his right to counsel, the state must prove the police investigation would have been impeded had the suspect been allowed to consult with counsel when requested. *Penney*, 229 Ariz. 32, ¶ 13, 270 P.3d at 862; *see also Rumsey*, 225 Ariz. 374, ¶ 8, 238 P.3d at 645.

¶7 Here, the trial court implicitly found, and the state does not dispute, that Marble requested he be allowed to contact an attorney. The court denied the motion to dismiss because Marble's flight from the scene of the accident had delayed the investigation. In doing so, the court applied an incorrect standard of law when evaluating Marble's motion. The correct standard to apply is whether the investigation would have

been delayed had Marble been allowed to speak with his counsel, not whether Marble's flight from the scene of the crash delayed the investigation. *See Penney*, 229 Ariz. 32, ¶ 13, 270 P.3d at 862. Therefore, the court erred as a matter of law by using an incorrect standard. *See State v. Smith*, 208 Ariz. 20, ¶¶ 19-20, 90 P.3d 221, 226-27 (App. 2004).

¶8 Furthermore, the record does not contain any evidence that allowing Marble to make a phone call to his attorney would have delayed or impeded the investigation. Deputy Monge arrested Marble, placed him in the patrol car and read him his *Miranda* rights. Marble invoked his right to remain silent, refused the blood draw and asked to speak to an attorney. Monge remained by the patrol car while other officers continued the investigation. When Monge was asked if he knew of any reason Marble did not speak to an attorney, he responded: "I couldn't tell you." He then testified that they arrived at the hospital at 2:53 a.m.[1] and did not get the warrant until 3:54 a.m. No evidence suggests that allowing Marble to call his attorney during that sixty-one-minute window would have delayed or impeded the investigation. Accordingly, as a matter of law, the police unduly interfered with Marble's right to counsel without justification. *See Penney*, 229 Ariz. 32, ¶ 13, 270 P.3d at 862.

¶9 Because the police interfered with Marble's right to counsel, we must determine what remedy should have followed. Marble argues that, because his right to counsel was violated, *Sanders* requires dismissal as a matter of law. 194 Ariz. 156, ¶ 9,

[1]At trial, officers testified they had arrived at Marble's girlfriend's house at 2:53 a.m. However, when reviewing a ruling on a motion to dismiss, we consider only the evidence presented at the evidentiary hearing. *See Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d at 307.

978 P.2d at 135. But in *Rosengren*, we restricted the *Sanders* language: "[D]espite the broad language in *Sanders*, dismissal is not the exclusive or automatic remedy for a denial of the right to counsel, even in cases in which the defendant's alleged intoxication is essential to proving the offense." 199 Ariz. 112, ¶ 18, 14 P.3d at 309. Rather, for dismissal to have been an appropriate remedy for a violation of Marble's right to counsel, evidence must also have shown that police conduct interfered with his ability to gather exculpatory evidence. *See State v. Keyonnie*, 181 Ariz. 485, 487, 892 P.2d 205, 207 (App. 1995). Accordingly, his claim based on *Sanders* fails.

¶10 Even though dismissal is not mandated as a matter of law, it nonetheless could be the correct sanction. The state argues, however, that even if Marble's right to counsel had been violated, the correct remedy would have been suppression of the test results rather than dismissal. The state notes Marble did not assert in his opening brief that the alleged violation of his right to counsel deprived him of an opportunity to obtain exculpatory evidence about his level of intoxication. According to the state, Marble presented such exculpatory evidence at the hearing in the form of his girlfriend's testimony. In his reply brief, Marble states for the first time his "defense was that [he] was not driving, not that he was not intoxicated, so suppression of the blood test would not serve as any relevant sanction."

¶11 Suppression is an appropriate remedy if the evidence only shows the police conduct interfered with Marble's right to counsel but did not impede his ability to collect exculpatory evidence. *See Keyonnie*, 181 Ariz. at 487, 892 P.3d at 207. As our supreme

court explained, "DUI investigations are unique because of the evanescent nature of blood- and breath-alcohol evidence, and . . . [the d]enial of counsel may deprive a defendant of an opportunity to obtain exculpatory evidence" relevant to intoxication while that evidence is still available. *State v. Moody*, 208 Ariz. 424, ¶ 69, 94 P.3d 1119, 1142 (2004); *Rosengren*, 199 Ariz. 112, ¶ 12, 14 P.3d at 307-08 (exculpatory evidence of intoxication unique in DUI because of evanescent nature of blood-alcohol evidence). And courts must narrowly tailor remedies for a violation of a defendant's right to counsel to avoid infringing on society's interest in administering criminal justice. *Penney*, 229 Ariz. 32, ¶ 17, 270 P.3d at 863.

¶12 The trial court did not address the issue of remedy because it did not find a violation of Marble's right to counsel. And evidence related to Marble's defense that he was not driving does not have the same evanescent nature as independent evidence concerning his intoxication. Accordingly, we vacate the trial court's denial of Marble's motion to suppress and remand for the court to consider the issue of remedy. *See id.* ¶¶ 19-20.

Arrest

¶13 Marble next argues the trial court erred by denying his motion to suppress based on an allegedly illegal arrest. He claims the officer had no right to arrest Marble for leaving the scene of the accident and therefore exceeded the community caretaker function by arresting him. Because Marble did not raise this argument on these grounds below, he has forfeited the right to seek relief for all but fundamental, prejudicial error.

See State v. Kinney, 225 Ariz. 550, ¶ 7, 241 P.3d 914, 918 (App. 2010) (to preserve argument for appeal, defendant must make sufficient argument below to allow trial court opportunity to provide remedy); *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683-84 (App. 2008) (when party fails to object properly, we review solely for fundamental, prejudicial error).

¶14 In determining whether fundamental error occurred, we first determine if any error occurred. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). We review the denial of a motion to suppress for an abuse of discretion. *See State v. Zamora*, 220 Ariz. 63, ¶ 7, 202 P.3d 528, 532 (App. 2009). In doing so, "[w]e defer to the trial court's factual findings that are supported by the record and not clearly erroneous," *State v. Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d 303, 307 (App. 2000), but "to the extent its ultimate ruling is a conclusion of law, we review de novo," *Zamora*, 202 Ariz. 63, ¶ 7, 202 P.3d at 532.

¶15 We first note that Marble's argument regarding the community caretaker function is irrelevant here because the situation immediately became a stop under *Terry v. Ohio*, 392 U.S. 1, 30 (1968), or a warrantless arrest based on probable cause. Under *Terry*, police officers may make limited investigatory stops without probable cause if they have an articulable, reasonable suspicion that a suspect is involved in criminal activity based on the totality of the circumstances. *State v. Teagle*, 217 Ariz. 17, ¶ 20, 170 P.3d 266, 271-72 (App. 2007). A *Terry* stop can include handcuffing the individual. *See State v. Blackmore*, 186 Ariz. 630, 633-34, 925 P.2d 1347, 1350-51 (1996). "A

warrantless arrest is lawful if it is supported by probable cause." *State v. Diaz*, 222 Ariz. 188, ¶ 3, 213 P.3d 337, 339 (App. 2009), *vacated in part on other grounds*, 224 Ariz. 322, ¶ 18, 230 P.3d 705, 708 (2010). A police officer has probable cause to arrest when reasonably trustworthy information and circumstances would lead a reasonable person to believe that a suspect has committed an offense. *Id.* The information officers use to establish probable cause may be based on the collective knowledge of all of the officers involved in the case. *State v. Keener*, 206 Ariz. 29, ¶ 15, 75 P.3d 119, 122 (App. 2003).

¶16 Monge was given permission to enter Marble's girlfriend's house in order to speak with Marble. Although Monge immediately placed Marble in handcuffs, that action was reasonable, because Monge determined Marble matched the description of the individual who fled after being seen getting out of the driver's side of the vehicle involved in a one-vehicle roll-over, and exhibited signs of being intoxicated. And another officer had spoken to Marble's girlfriend who stated Marble had called her to pick him up, refused to tell her where his truck was, and said he had "screwed up." Additionally, a third officer determined Marble's license had been suspended. Based on these circumstances, Monge had probable cause to believe Marble had committed the offense of driving while intoxicated. Accordingly, although the officer arrested Marble without a warrant, the arrest was legal because it was supported by probable cause, *see Diaz*, 222 Ariz. 188, ¶ 3, 213 P.3d at 339, and the trial court did not err in denying Marble's motion to suppress. Thus, no error occurred, much less fundamental error.

Conclusion

¶17 For the foregoing reasons, we affirm in part, vacate in part, and remand for the trial court to determine the appropriate remedy. Additionally, the court shall make any appropriate orders concerning Marble's convictions based on the remedy chosen.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed August 15, 2012.