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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THE STATE OF ARIZONA, Appellee, v. EDWARD DELANO HOPKINS, Appellant.	2 CA-CR 2012-0125 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20112192001

Honorable Howard Hantman, Judge

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Diane Leigh Hunt
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Robb P. Holmes
Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, Edward Hopkins was convicted of two felony counts of aggravated driving with a blood alcohol concentration ("BAC") greater than .08, and two

misdemeanor counts of driving under the influence of alcohol ("DUI"). He was sentenced to time served on the misdemeanor DUI charges and partially mitigated, concurrent, two-year prison terms on the felony BAC violations. On appeal, Hopkins challenges his aggravated DUI convictions on the ground his Sixth Amendment right to confront a witness was violated. *See* U.S. Const. amend. VI. For the reasons stated below, we affirm three of the convictions and vacate one misdemeanor count.

Factual Background and Procedural History

¶2 "We view the facts in the light most favorable to sustaining the jury's verdict[s]." *State v. Joseph*, 230 Ariz. 296, n.1, 283 P.3d 27, 29 n.1 (2012), *cert. denied*, ___ U.S. ___, 133 S. Ct. 936 (2013). In June 2011, Pima County Sheriff's Deputy Daniel Jelineo stopped Hopkins's vehicle after observing two moving violations as Hopkins left a bar around 12:45 a.m. Hopkins, the driver, exhibited signs of intoxication and unsuccessfully performed two field sobriety tests. He was arrested, admitted he had consumed "two to three beers," and consented to a blood draw. The blood sample was later tested and reflected a BAC of .201.

¶3 At trial, Hopkins moved to preclude the test results, arguing his constitutional right to confront an adverse witness had been violated because criminalist Andrew Singer, who had assisted in preparing the blood sample for analysis, was not scheduled to testify and his role in the testing would be recounted by criminalist Seth Ruskin. Ruskin testified that at the lab, Singer had retrieved the sample from refrigeration, opened the outer box containing the sealed and labeled blood vials, visually

inspected and photographed the blood-kit materials, selected one of the two vials for testing, and recorded his observations. Ruskin explained he had then reviewed Singer's report; inspected the inner and outer boxes in which the tested and untested vials of Hopkins's blood were conveyed; confirmed the untested vial was labeled, vacuum-sealed, and undamaged; tested the blood; and generated his own report containing the BAC result. Singer did not testify at trial. The trial court ultimately denied Hopkins's motion to suppress after hearing testimony and argument,[1] and he was convicted and sentenced as described above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶4 Hopkins asserts the judgment of guilt should be set aside, arguing the introduction of his BAC test results without the testimony of both criminalists involved in processing his blood sample violated the Confrontation Clause. Such challenges are reviewed *de novo*. *State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006). "[T]he Confrontation Clause prohibits the admission of testimonial evidence from a declarant who does not appear at trial unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant." *State v. King*, 213

[1]The state suggests Hopkins's motion, made on the first day of trial, should have been precluded as untimely. *See* Ariz. R. Crim. P. 16.1(b) ("motions shall be made no later than 20 days prior to trial, or at such other time as the court may direct"), (c) (untimely motions shall be precluded). Although the trial court questioned the motion's timeliness, it ultimately considered the merits. Trial courts have discretion to hear and rule on untimely motions. *State v. Colvin*, 231 Ariz. 269, ¶ 7, 293 P.3d 545, 547 (App. 2013). We therefore consider Hopkins's argument. *See id.* ¶ 8.

Ariz. 632, ¶ 17, 146 P.3d 1274, 1279 (App. 2006), *citing Crawford v. Washington*, 541 U.S. 36, 68 (2004); *see also* U.S. Const. amends. VI, XIV. Laboratory reports containing testimonial certifications made for the purpose of proving a particular fact at trial are testimonial in nature and are subject to Sixth Amendment confrontation. *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 311 (2009).

¶5 Hopkins argues the BAC result should not have been admitted without Singer's testimony, relying heavily on *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705 (2011). Hopkins interprets that decision to require suppression of his BAC results because Singer, who did not testify, "acted upon and took part in the testing process of [his] blood samples" and because Singer's notes were "an essential, integral part of [Ruskin's] lab report."

¶6 In *Bullcoming*, the prosecutor sought to introduce a forensic laboratory report through the in-court testimony of an analyst who had not personally performed or observed the subject test or signed the certification. *Id.* at ___, 131 S. Ct. at 2709-10. The Court held that surrogate testimony, in which one analyst testifies to the findings and accuracy of a report completed by another analyst, violates a defendant's right "to be confronted with the analyst who made the certification." *Id.* at ___, 131 S. Ct. at 2710. Contrary to Hopkins's suggestion, however, *Bullcoming* does not require that all possible chain-of-custody witnesses testify to satisfy the Confrontation Clause. Instead, the Court clarified, "'It is up to the prosecution,' . . . 'to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony *is* introduced must (if the

defendant objects) be introduced live.'" *Id.* at ___ n.2, 131 S. Ct. at 2712 n.2, *quoting* *Melendez-Diaz*, 557 U.S. at 311 n.1.

¶7 Here, Hopkins cross-examined Ruskin, who had independently verified the condition and identity of Hopkins's blood vial, personally tested the sample, and prepared and certified the BAC report. In addition, Ruskin testified he had trained Singer and had reviewed and verified Singer's notes and photos before testing the sample. *See id.* at ___, 131 S. Ct. at 2722 (Sotomayor, J., concurring in part) (*Bullcoming* holding does not address hypothetical case in which "supervisor who observed an analyst conducting a test testified about the results or a report about such results"). Ruskin was not a "surrogate witness" as described in *Bullcoming*, but qualified as the analyst who made the certification regarding Hopkins's BAC result. And Ruskin's testimony alone was sufficient to establish the chain of custody to support the court's admission of the BAC results and thereby satisfied Hopkins's confrontation rights.[2]

¶8 The state points out that Hopkins was convicted of two identical misdemeanor DUI offenses, in violation of double jeopardy. We agree and therefore

[2]Hopkins also suggests Singer's testimony was necessary for him to expose "irregularities" in the integrity of the blood samples and challenge the reliability of the testing procedure. But while the state must comply with the Confrontation Clause in introducing evidence, a defendant has the right to call witnesses to challenge that evidence. *See* U.S. Const. amend VI (accused shall enjoy right "to have compulsory process for obtaining witnesses in his favor"); *State v. Carlos*, 199 Ariz. 273, ¶ 16, 17 P.3d 118, 123 (App. 2001) (defendant may call witness whose testimony is "'relevant and material to the defense'"), *quoting Washington v. Texas*, 388 U.S. 14, 23 (1967). Although Singer's testimony was not required under the Confrontation Clause, Hopkins could have subpoenaed Singer, himself, had he determined Singer's testimony was necessary or useful for his defense.

vacate one of those convictions. *See State v. Powers*, 200 Ariz. 123, ¶ 16, 23 P.3d 668, 672 (App. 2001) (vacating one of two convictions for identical offenses for violation of double jeopardy).

Disposition

¶9 For the foregoing reasons, we affirm Hopkins's convictions and sentences for count one, DUI; count two, aggravated driving with a BAC of .08 or more while license is suspended; and count four, aggravated driving with a BAC of .08 or more having committed or been convicted of two or more prior DUI violations. Hopkins's conviction and the sentence imposed on count three, misdemeanor DUI, are vacated.

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

CONCURRING:

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

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