IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MICHAELANGELO GUTIERREZ GARCIA,
Appellant.

No. 2 CA-CR 2012-0206
Filed November 6, 2013

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NOT FOR PUBLICATION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

Appeal from the Superior Court in Pima County
No. CR20110247001
The Honorable Deborah Bernini, Judge

AFFIRMED IN PART; VACATED IN PART

COUNSEL

Thomas C. Horne, Arizona Attorney General
by Joseph T. Maziarz, Section Chief Counsel, Phoenix
and Amy Pignatella Cain, Assistant Attorney General, Tucson

Counsel for Appellee

Isabel G. Garcia, Pima County Public Defender
by Scott A. Martin, Assistant Legal Defender, Tucson

Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Howard and Judge Brammer[1] concurred.

V Á S Q U E Z, Presiding Judge:

¶1 After a jury trial, Michaelangelo Garcia was convicted of assault and four counts of aggravated driving under the influence (DUI). The trial court sentenced him to mitigated, concurrent prison terms, the longest of which is three years. On appeal, Garcia argues the court erred by denying his motion to dismiss on the ground that the state violated his right to counsel during the DUI investigation. For the reasons that follow, we vacate the court's criminal restitution order but otherwise affirm the convictions and sentences.

Factual Background and Procedural History

¶2 We view the evidence in the light most favorable to sustaining Garcia's convictions. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 2, 185 P.3d 135, 137 (App. 2008). After drinking alcohol at a co-worker's house late one evening in January 2011, Garcia drove his car with his wife, her friend, and her friend's son as

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[1]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 Administrative Order No. 2012-101 filed December 12, 2012.

passengers. Garcia and his wife, V.G., got into a heated argument and physical altercation about his erratic driving. V.G. pulled the keys out of the ignition and the car coasted to a stop. V.G. then attempted to get out, but Garcia restarted the engine and sped off with V.G. hanging out the door. Garcia continued driving, dragging V.G. until her friend pushed her out of the car. The friend and her son also jumped out of the car. A City of Tucson police officer was "flagged down by some citizens" who had seen Garcia driving erratically with "a female hanging out of the door." Officers later stopped Garcia's vehicle and conducted a DUI investigation.

¶3 When officers informed Garcia they intended to conduct a blood draw, Garcia stated he wanted to speak with his attorney. Officers continued the investigation while Sergeant Michael Dietsch attempted to locate a telephone number for Garcia's attorney, Rafael Gallego. Dietsch eventually located a number and placed a call to Gallego's office. Dietsch listened to a voicemail recording instructing the caller to leave a message. However, Dietsch testified he did not hear the portion of the message providing an alternate number for reaching Gallego. Garcia declined to leave a message for Gallego or to contact a different attorney. Officer Christopher Morin explained that Garcia was "extremely uncooperative" and "antagonistic" during the entire encounter, including while Dietsch was on the telephone.

¶4 Garcia was charged with aggravated assault, two counts of endangerment, and four DUI-related offenses. Before trial, he moved to "dismiss all charges with prejudice due to the [s]tate's interference with [his] right to counsel" during the DUI investigation. After a suppression hearing, the trial court denied the motion. At trial, the jury could not reach a verdict on the endangerment charges, but found Garcia guilty of assault, the lesser-included offense of aggravated assault; aggravated DUI while his license was suspended, revoked, or restricted; aggravated DUI while a minor was present; aggravated driving with an alcohol concentration of .08 or more while his license was suspended,

revoked, or restricted; and aggravated driving or actual physical control while under the extreme influence of liquor (.15) while a minor was present. The court sentenced him as described above, and this appeal followed.[2] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Motion to Dismiss

¶5 Garcia argues the trial court erred by denying his motion to dismiss "based on the [s]tate's interference with [his] right to counsel." He maintains that because Gallego had a twenty-four-hour alternative telephone number, Sergeant Dietsch's failure to call that number warranted dismissal of the case. We generally review a court's denial of a motion to dismiss during a suppression hearing for an abuse of discretion, *State v. Mangum*, 214 Ariz. 165, ¶ 6, 150 P.3d 252, 254 (App. 2007), limiting our analysis to the evidence presented at that hearing, *State v. Canales*, 222 Ariz. 493, ¶ 2, 217 P.3d 836, 837 (App. 2009). "We defer to the trial court's factual findings unless clearly erroneous" but review its legal conclusions de novo. *State v. O'Dell*, 202 Ariz. 453, ¶ 8, 46 P.3d 1074, 1077-78 (App. 2002). And, because the issues surrounding the right to counsel are "'mixed question[s] of fact and law implicating constitutional questions,'" we review the court's conclusions to those issues de novo as well. *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).

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[2]Garcia filed a notice of appeal twenty days after entry of the trial court's judgment and sentencing minute entry. Because the time to file begins to run when the minute entry is filed, *State v. Whitman*, 232 Ariz. 60, ¶ 10, 301 P.3d 226, 229 (App. 2013), his appeal is timely. *See* Ariz. R. Crim. P. 31.3.

¶6 Rule 6.1(a), Ariz. R. Crim. P., provides that a suspect has "the right to consult in private with an attorney . . . as soon as feasible [when] taken into custody." *See Kunzler v. Pima Cnty. Superior Court*, 154 Ariz. 568, 569, 744 P.2d 669, 670 (1987). And in the context of DUI investigations, a suspect may invoke the right to counsel before submitting to a blood draw. *State v. Juarez*, 161 Ariz. 76, 79-80, 775 P.2d 1140, 1143-44 (1989). Once invoked, the state must provide him a reasonable opportunity to consult with an attorney, so long as that contact does not "'interfere unduly with the matter at hand.'" *Kunzler*, 154 Ariz. at 569-70, 744 P.2d at 670-71, *quoting McNutt v. Superior Court*, 133 Ariz. 7, 9, 648 P.2d 122, 124 (1982) (right limited if its exercise significantly delays or disrupts investigation). If officers make reasonable efforts to place the suspect in contact with counsel, however, their obligation ends, and the suspect is left to either utilize or waive the assistance. *See Juarez*, 161 Ariz. at 81, 775 P.2d at 1145 (no deprivation where suspect telephoned friend instead of counsel); *Rumsey*, 225 Ariz. 374, ¶ 9, 238 P.3d at 645-46 (no deprivation where suspect spoke to lawyer, who got lost en route to police station).

¶7 The evidence at the suppression hearing supports the trial court's conclusion that the officers "went above and beyond what we expect them to do under the circumstances." While the "DUI squad" conducted its investigation and kept Garcia from stumbling away from the scene, Sergeant Dietsch attempted to place Garcia in contact with an attorney. He retrieved a cellular telephone and current telephone directory from his own vehicle and asked Garcia if he wished to call a particular attorney. At Garcia's instruction, Dietsch searched for Gallego's number in both the yellow and white pages, but was unsuccessful. Garcia next told Dietsch to call Garcia's mother despite the late hour, stating she had the attorney's number. When Dietsch finally obtained and called Gallego's office number he received a voicemail recording. Dietsch

twice asked Garcia if he wanted to leave a message, or if he would like to call another attorney, but Garcia declined.[3]

¶8 At the suppression hearing, the parties stipulated Gallego's voicemail recording included an alternate, twenty-four-hour telephone number to reach him. Dietsch, however, testified he did not hear that part of the message. The trial court found that if Dietsch "did not hear [the number,] it wasn't because [he] didn't make every effort and attempt to listen to the full message." Instead, the court concluded that Garcia's "seriously disruptive behavior" during the investigation "interfered with [Dietsch's] ability to assist him."

¶9 Garcia first disputes the trial court's finding that his actions prevented Dietsch from hearing the alternate number. But reasonable evidence in the record supports this finding. Dietsch testified that he listened to the full message while standing a car's length away from the investigation. Near the end of the recording, he asked if Garcia wanted to leave a message, but Garcia only "blur[t]ed out some obscenities" in response. Officer Morin testified that during the entire encounter, including "while Dietsch was on the phone attempting to contact an attorney," Garcia was loud, "extremely uncooperative," and using "numerous vulgarities." Thus, the court did not abuse its discretion by inferring that Garcia's disruptive behavior prevented Dietsch from hearing the details of the attorney's voicemail recording. *See O'Dell*, 202 Ariz. 453, ¶ 8, 46 P.3d at 1077-78.

[3]The trial court noted that Sergeant Dietsch "made phone calls to the office it appears two times." However, Dietsch testified that he only started to "redial the number to see if [Garcia] wanted to leave a message[, but Garcia] said no, he d[id]n't want to leave a message."

¶10 Next, Garcia insists Dietsch was under a legal obligation to call the alternate number listed in the voicemail.[4] However, the right to counsel only requires the state to act reasonably under the circumstances, recognizing that some obstructions are outside its control. *Kunzler*, 154 Ariz. at 569, 744 P.2d at 670; *see also Rumsey*, 225 Ariz. 374, ¶ 9, 238 P.3d at 645-46 (reasonable to continue investigation after inviting attorney at scene to police station, when "[none] of the officers . . . knew where [the attorney] had gone and when, or even whether, he would arrive"). Here, Dietsch testified he simply did not hear a portion of the voicemail recording and that "had [he] heard" the alternate number, he reasonably "would . . . have called that number and . . . proceeded through whatever avenues [he] could to obtain Mr. Gallego." The trial court credited that testimony and concluded Dietsch did not hear the alternative number because of Garcia's disruptive behavior.

¶11 We agree with the trial court's determination that the officers made "every effort" to honor Garcia's right to consult an attorney during the investigation. Thus, we conclude the court did not err by denying the motion to dismiss. *See Mangum*, 214 Ariz. 165, ¶ 6, 150 P.3d at 254.

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[4]Garcia cites several cases from other jurisdictions to support this proposition. *E.g.*, *People v. Cole*, 681 N.Y.S.2d 447 (Just. Ct. 1998). However, the courts of Arizona "are not bound by the decisions of other states." *Ramsey v. Yavapai Family Advocacy Ctr.*, 225 Ariz. 132, ¶ 32, 235 P.3d 285, 294 (App. 2010). And, these cases are distinguishable in any event. Dietsch extinguished all reasonable means of fulfilling Garcia's wishes that were known to him at that time, unlike the officers in these out-of-state cases. *See State v. Pierce*, 280 P.3d 1158, ¶ 41 (Wash. Ct. App. 2012); *City of Tacoma v. Myhre*, 648 P.2d 912, 914 (Wash. Ct. App. 1982).

Criminal Restitution Order

¶12 Garcia has not raised the issue on appeal, but we find fundamental error in the sentencing minute entry, which states "all fines, fees, assessments and/or restitution are reduced to a Criminal Restitution Order [CRO], with no interest, penalties or collection fees to accrue while the defendant is in the Department of Corrections." *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650-51 (App. 2007) ("Although we do not search the record for fundamental error, we will not ignore it when we find it."). "[T]he imposition of a CRO before the defendant's probation or sentence has expired 'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009). This is so even when, as here, the trial court delayed the accrual of interest. Nothing in A.R.S. § 13-805,[5] which governs the imposition of CROs, "permits a court to delay or alter the accrual of interest when a CRO is 'recorded and enforced as any civil judgment' pursuant to § 13-805(C)." *Lopez*, 231 Ariz. 561, ¶ 5, 298 P.3d at 910.

Disposition

¶13 For the foregoing reasons, we vacate the CRO but otherwise affirm Garcia's convictions and sentences.

[5]The legislature has amended § 13-805 three times in recent years. 2012 Ariz. Sess. Laws, ch. 269, § 1; 2011 Ariz. Sess. Laws, ch. 263, § 1 and ch. 99, § 4. None of the changes are material to our decision. 2005 Ariz. Sess. Laws, ch. 260, § 6; *see Lopez*, 231 Ariz. 561, n.1, 298 P.3d at 910 n.1.