IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

LUIS ARMANDO PERAZA,
Appellant.

No. 2 CA-CR 2015-0284
Filed May 18, 2016

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NOT FOR PUBLICATION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)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20143182001
The Honorable Teresa Godoy, Judge Pro Tempore
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

Law Offices of Cornelia Wallis Honchar, P.C., Tucson
By Cornelia Wallis Honchar
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Vásquez authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Miller concurred.

V Á S Q U E Z, Presiding Judge:

¶1 Following a jury trial, appellant Luis Peraza was convicted of aggravated driving under the influence (DUI) and aggravated driving with an alcohol concentration of .08 or more, both while his license was suspended, revoked, or restricted. The trial court sentenced him to concurrent, ten-year terms of imprisonment. Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), stating she has reviewed the record and has found "[n]o arguable question of law" to raise on appeal and asking us to search the record for fundamental error.

¶2 In a supplemental pro se brief, Peraza raises several claims. He first argues that the arresting officer deprived him of his right to counsel by failing to allow him to contact an attorney upon his arrest. The trial court denied Peraza's motion to suppress and dismiss based on this claim, determining that Peraza's behavior had "hindered the ongoing investigation." Because this issue presents "'a mixed question of fact and law implicating constitutional questions,'" the trial court's ruling "'is reviewed de novo.'" *State v. Rumsey*, 225 Ariz. 374, ¶ 4, 238 P.3d 642, 645 (App. 2010), *quoting State v. Hackman*, 189 Ariz. 505, 508, 943 P.2d 865, 868 (App. 1997). "In reviewing the court's ruling, 'we consider only the evidence presented at the suppression hearing and view the facts in the light most favorable to sustaining the . . . ruling.'" *State v. Peraza*, 239 Ariz. 140, ¶ 4, 366 P.3d 1030, 1034 (App. 2016), *quoting State v. Gonzalez*, 235 Ariz. 212, ¶ 2, 330 P.3d 969, 970 (App. 2014) (alteration in *Peraza*).

¶3 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 Cty. 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. *See 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 570, 744 P.2d at 671, *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, ¶¶ 5, 9, 238 P.3d at 645-46 (no deprivation when suspect spoke to lawyer, who arrived late). In this case, Peraza "implicitly waived any right to counsel through his unreasonable behavior." *State v. Coven*, 236 Ariz. 393, ¶ 15, 340 P.3d 1101, 1106 (App. 2015). Peraza's arguments to the contrary amount to a request for this court to reweigh the arresting officer's credibility. But viewed in the light most favorable to the ruling, the evidence was sufficient to establish Peraza had been angry and aggressive, hindering the officer's investigation and causing the officer to have safety concerns about freeing him from confinement to use a telephone book or make a call.

¶4 Peraza also claims the officer destroyed video and audio recordings of his arrest and the trial court should have dismissed the charges against him on that basis. Peraza does not cite us to any information in the record about these recordings. But we note that the record suggests Peraza's initial contact with the lawyer was not recorded and the court ordered a *Willits*[1] instruction based on the officer's "failure to preserve the recording of the

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[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

transport of . . . Peraza." Thus, the issue here is not a matter of the state violating its disclosure obligations, as Peraza contends, citing *Brady v. Maryland*, 373 U.S. 83 (1963), but rather a matter of evidence that had been lost, apparently due to the officer's failure to associate the recording with a case, making it subject to routine destruction. Peraza has not explained how the court abused its discretion in determining that a curative instruction was the appropriate remedy for the state's failure to maintain the evidence. *See State v. Lopez*, 156 Ariz. 573, 575, 754 P.2d 300, 302 (App. 1987).

¶5 Peraza also alleges the trial court did not allow him to testify at the evidentiary hearing on the motion to suppress. He does not direct us to anything in the record that supports this claim, and, indeed, the transcript of the hearing at which the officer testified shows the court asked if there were any witnesses on Peraza's behalf, and his counsel responded in the negative.

¶6 We likewise reject Peraza's claim that the trial court erred in allowing the state to present a rebuttal witness, apparently based on Peraza's inability to properly investigate or prepare for the witness due to untimely disclosure. While Rule 15.1(h), Ariz. R. Crim. P., requires the state to disclose all witnesses who may be called in rebuttal, "it is obviously unreasonable to require the [s]tate to list in advance of trial and prior to the presentation of the defendant's case the names of all potential rebuttal witnesses, since the prosecution can rarely anticipate what course the defense will pursue." *State v. Sullivan*, 130 Ariz. 213, 216-17, 635 P.2d 501, 504-05 (1981). Further, the failure to disclose a witness does not automatically mean the witness should be precluded. *State v. LaBarre*, 115 Ariz. 444, 448 n.2, 565 P.2d 1305, 1309 n.2 (App. 1977). Regarding the substance of the testimony, the witness was a passenger in Peraza's car, although he could not identify Peraza. The pertinent rebuttal testimony was limited to a description of the driver's ethnicity, hair color, and body type. Peraza has not established the court erred in allowing the testimony.

¶7 Viewed in the light most favorable to sustaining the verdicts, the evidence was sufficient to support the jury's findings of guilt. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App.

1999). The evidence presented at trial showed Peraza had been driving a vehicle and, when stopped by officers, exhibited cues of impairment on field-sobriety tests and had an alcohol concentration of .251, a level sufficient to cause impairment. He was on release on bond pending trial on other charges, and his driver's license was suspended and revoked. We further conclude the sentences imposed are within the statutory limits. *See* A.R.S. §§ 13-703(C), (J); 13-708(D); 28-1383(A)(1), (L)(1).

¶8 Pursuant to our obligation under *Anders*, we have searched the record for fundamental, reversible error and have found none. *See State v. Fuller*, 143 Ariz. 571, 575, 694 P.2d 1185, 1189 (1985) (*Anders* requires court to search record for fundamental error). Therefore, Peraza's convictions and sentences are affirmed.