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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THE STATE OF ARIZONA, Appellee, v. NGANG JONKOR NGANG, Appellant.	2 CA-CR 2008-0424 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200700578

Honorable Wallace R. Hoggatt, Judge

AFFIRMED

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E S P I N O S A, Presiding Judge.

¶1 After a jury trial, Ngang Jonkor Ngang was convicted of aggravated driving under the influence of an intoxicant (DUI) while his license was suspended. He was

sentenced to four months' incarceration and five years' supervised probation. He appeals on a number of grounds, none requiring reversal.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the conviction, drawing all reasonable inferences in favor of the jury's verdict. *See State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). One evening in April 2007, a Sierra Vista police officer responded to numerous reports of a red Ford Escort being driven erratically. He located the vehicle parked outside a convenience store with the windshield wipers operating despite there being no rain. The officer approached Ngang, who was standing outside the car, and informed him of the reckless driving reports. After noticing Ngang's speech was slurred and his breath smelled of alcohol, the officer told him he was not free to leave. Ngang nonetheless got in the car and drove to a nearby apartment complex with the officer in pursuit. At the complex, Ngang fled on foot, but the officer, with the assistance of other officers, apprehended him. Ngang resisted, kicking and struggling with the officers, who eventually used an electronic Taser to subdue him before transporting him to the police station. Due to his combativeness, Ngang was not offered any field sobriety tests.

¶3 At the police station, he was informed of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). Thereafter, Ngang admitted drinking and then driving after his friends had warned him he was too intoxicated to drive. An officer then attempted to test Ngang's intoxication level using an Intoxilyzer breath-testing machine, but the machine encountered radio frequency interference, which invalidated the test result. The officer

restarted the machine and received a diagnostic-test error message, which, he testified, meant he either had to restart the machine again or abandon the Intoxilyzer and obtain a sample of Ngang's blood for analysis. Before the officer could do either, Ngang refused any further testing. The officer read him the implied consent warning under A.R.S. § 28-1321, offered him a copy of his rights, and did not attempt to conduct any further testing.

¶4 Ngang was charged with five counts: driving while impaired to the slightest degree with a suspended license, driving with an "alcohol concentration" (AC) greater than .08 with a suspended license, driving while impaired to the slightest degree with two prior DUI convictions, driving with an AC greater than .08 with two prior DUI convictions, and resisting arrest. The state later voluntarily dismissed the two charges that required proof of Ngang's AC. And, because the state lacked sufficient evidence of the two prior DUI convictions, the court also dismissed the charge for driving while impaired to the slightest degree with two prior DUI convictions. At the conclusion of his trial, the jury acquitted Ngang of resisting arrest but found him guilty of driving while impaired while his license was suspended.

Discussion

Failure to Dismiss DUI Charge

¶5 Ngang first contends the trial court abused its discretion when it denied his motion to dismiss the aggravated DUI charge based on a violation of his due process rights under the Arizona Constitution and the Sixth and Fourteenth Amendments to the United

States Constitution.[1] He argues that, because officers "knew at the time the blood alcohol evidence was collected that the results were invalid and unreliable" and "chose not to offer him another test, or even to advise him of his right to an independent test," the officers "knowingly interfered with [his] ability to obtain potentially exculpatory evidence."

¶6 We review a trial court's denial of a motion to dismiss for an abuse of discretion, *State v. Stuart*, 168 Ariz. 83, 85, 811 P.2d 335, 337 (App. 1990), but review *de novo* any questions of law presented, *Mack v. Cruikshank*, 196 Ariz. 541, ¶ 6, 2 P.3d 100, 103 (App. 1999). And we are bound by the trial court's findings of fact unless the findings are clearly erroneous. *Id*.

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[1]At the outset, we disregard several portions of Ngang's argument. Although he claims officers violated his rights under article II, § 24 of the Arizona Constitution and the Sixth Amendment to the United States Constitution, he has failed to make any specific arguments related to these provisions, nor has he cited any cases discussing them. Therefore, we do not address these claims and confine our review to the asserted due process violation. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) ("'Opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised. Failure to argue a claim usually constitutes abandonment and waiver of that claim.'"), *quoting State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989). Similarly, he has failed to distinguish between his federal and state due process claims. He asserts officers "violat[ed] . . . the Due Process Clauses of the United States and Arizona Constitutions" and cites the Fourteenth Amendment to the United States Constitution but fails to cite the Arizona Constitution or argue how it may compel a different analysis or result. We do not independently examine due process under our state constitution except to the extent the cases Ngang has cited refer to it. *See State v. Dean*, 206 Ariz. 158, n.1, 76 P.3d 429, 432 n.1 (2003) (when party asserts violation of Arizona Constitution but cites only federal constitution and no state constitutional analysis, decision limited to federal claim). Finally, in his opening brief, he cites *Lyon v. Fell*, No. 2 CA-SA 2008-0015 (memorandum decision filed Aug. 27, 2008), extensively. But that depublished decision is no longer a citable authority, and we disregard the portions of his argument relying on it. *See* Ariz. R. Crim. P. 31.24 (prohibiting citation of unpublished decisions).

¶7 Under the Due Process Clause of the Fourteenth Amendment, defendants are entitled to blood alcohol test results produced by reasonably reliable testing devices. *See Mack*, 196 Ariz. 541, ¶¶ 9-10, 12, 2 P.3d at 104; *State v. Sanchez*, 192 Ariz. 454, ¶ 7, 967 P.2d 129, 132 (App. 1998). If a defendant's rights in this regard are violated, the defendant is entitled to dismissal of all DUI charges, not just those charges that rely on his or her blood alcohol test. *Sanchez*, 192 Ariz. 454, ¶ 11, 967 P.2d at 132-33. But a due process violation warranting dismissal only occurs when officers knowingly and in bad faith subjected the defendant to testing using an unreliable device. *Mack*, 196 Ariz. 541, ¶¶ 24-25, 2 P.3d at 107-08.

¶8 Here, Ngang has failed to show the officers knowingly attempted to obtain a test result on an unreliable machine. *See State v. O'Dell*, 202 Ariz. 453, ¶¶ 12-13, 46 P.3d 1074, 1078-79 (App. 2002) (defendant has burden to show due process violation). Although he claims they "knew at the time the evidence was collected that the results were invalid and unreliable," he can point to no evidence the machine was defective or that officers used it despite any known unreliability. *See Mack*, 196 Ariz. 541, ¶¶ 24-25, 2 P.3d at 107-08. As outlined above, radio frequency interference (RFI) disrupted the first test. Arizona cases illustrate that, although RFI may invalidate a specific test result, that does not indicate the device is faulty. *See State v. Velasco*, 165 Ariz. 480, 485, 799 P.2d 821, 826 (1990) (Intoxilyzer results "considered extremely accurate" partially because machine detects RFI to prevent use of invalid result); *Moss v. Superior Court*, 175 Ariz. 348, 352-53, 857 P.2d 400, 404-05 (App. 1993) (Intoxilyzer's ability to recognize RFI an example of machine's

sophistication, accuracy, and reliability). Thus, an RFI report bolsters rather than detracts from the reliability of a particular machine.

¶9 Ngang also points to the Intoxilyzer's issuance of a diagnostic error report following the initial, invalid test result as evidence the Intoxilyzer was unreliable. But at the hearing on Ngang's motion to suppress, the officer operating the machine testified that when an Intoxilyzer reports a diagnostic test error, the next required step is rebooting the machine. That the officer did not have a chance to do so before Ngang withdrew his consent to testing does not establish the machine was faulty. Additionally, the officer testified the machine was maintained by the police department and, to the best of his knowledge, was working correctly the day Ngang was arrested. The court expressly found there was no bad faith on the part of the officer. Because Ngang has not shown the state employed an unreliable testing device, much less that it did so knowingly and in bad faith, the trial court correctly determined Ngang's due process rights were not violated and he was not entitled to dismissal of his DUI charge based on the officer's attempted use of the Intoxilyzer. *See Mack*, 196 Ariz. 541, ¶¶ 24-25, 2 P.3d at 107-08.

¶10 Ngang further asserts the officers violated his due process rights, warranting dismissal of his DUI charge, by failing to inform him of his right to obtain an independent test. However, "officers are only required to [do so] if they do not invoke the implied consent law to test the suspect's [blood alcohol]" and "need not so advise a DUI suspect who refuses to submit to a test." *Mack*, 196 Ariz. 541, ¶ 14, 2 P.3d at 105. Because the officers here invoked the implied consent law in their attempt to test Ngang's alcohol level, they were

not required to inform him of his right to obtain an independent test. *See State v. Ramos*, 155 Ariz. 153, 155, 745 P.2d 601, 603 (App. 1987) (state not required to inform suspect of right to independent test unless state chooses not to invoke implied consent law). Accordingly, because Ngang was not entitled to be informed of his right to obtain an independent test, the trial court did not err in refusing to dismiss the DUI charge based on the officer's failure to do so.

Failure to Provide a Translator

¶11 Ngang next contends the trial court erred by denying his request for the assistance at trial of an interpreter who spoke Dinka, his native language. "Appointment of an interpreter is within the sound discretion of the trial judge and '. . . the test of an abuse of discretion is whether or not such failure [to appoint one] has hampered the defendant in any manner in presenting his case fairly to the jury.'" *State v. Grubbs*, 117 Ariz. 116, 119, 570 P.2d 1289, 1292 (App. 1977), *quoting Viliborghi v. State*, 45 Ariz. 275, 283, 43 P.2d 210, 214 (1935) (alteration in *Grubbs*).[2] A trial court is "in the best position to determine whether a defendant possesses the requisite degree of fluency in the English language so that his right to confront witnesses, right to cross-examine those witnesses and right to competent counsel will not be abridged." *State v. Natividad*, 111 Ariz. 191, 194, 526 P.2d 730, 733 (1974).

[2]Ngang cites only federal cases and statutes, which set forth the standards and considerations employed by federal circuit courts in reviewing a trial court's refusal to appoint an interpreter. However, we are not bound by the rulings of federal circuit courts, *see State v. Montano*, 206 Ariz. 296, n.1, 77 P.3d 1246, 1247 n.1 (2003), and instead rely on our own state's case law to resolve this matter.

¶12 Ngang requested an interpreter on the first day of trial, but after a hearing the court concluded an interpreter was unnecessary. The court considered testimony from the arresting officer, who discussed Ngang's ability to comprehend and answer questions. It also considered his prior interactions with the court and his own attorney's statements that she had consistently been able to communicate with him in English. *See State v. Gourdin*, 156 Ariz. 337, 338-39, 751 P.2d 997, 998-99 (App. 1988) (appellant's contention he could not understand proceeding undercut by participation in court and answering questions including query whether he read, signed, and understood plea agreement). Additionally, the court recognized that Ngang might require more time to process information due to possible language issues and thus gave his counsel express permission to request a recess if Ngang was having difficulty understanding anything. The court's careful consideration of the facts before it is evident, and we cannot say its denial of an interpreter was an abuse of discretion. *Cf. Natividad*, 111 Ariz. at 194-95, 526 P.2d at 733-34 (remanding for determination of nature and severity of defendant's language difficulty when no clear evidence trial court ruled on matter).

Confrontation Clause

¶13 Finally, relying on the Supreme Court's recent decision in *Melendez-Diaz v. Massachusetts*, __ U.S. __, 129 S. Ct. 2527 (2009), Ngang argues the trial court violated his confrontation rights under the Sixth Amendment when it admitted a copy of a Motor Vehicle Division (MVD) abstract without the accompanying testimony of an MVD employee. Normally, "[w]e review evidentiary rulings that implicate the Confrontation Clause de novo."

State v. Bocharski, 218 Ariz. 476, ¶ 33, 189 P.3d 403, 412 (2008). However, as the state points out, Ngang failed to object on these grounds to the admission of this document.[3] When a party does not make a specific objection below, he or she forfeits all but fundamental error review. *See State v. Cleere*, 213 Ariz. 54, ¶ 8, 138 P.3d 1181, 1184 (App. 2006). And the party asserting error must argue fundamental error in the court of appeals to preserve the issue. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 18, 185 P.3d 135, 140 (App. 2008) (absent argument trial court committed fundamental error, defendant "cannot sustain his burden in a fundamental error analysis"). Ngang has not argued nor even mentioned fundamental error, and we therefore disregard this claim.[4]

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[3]We recognize that Ngang would have been unable to cite *Melendez-Diaz* at his evidentiary hearing, due to its recency, and do not penalize him for his failure to argue this case below. Even without the guidance of *Melendez-Diaz*, however, Ngang could have asserted his confrontation rights, yet he failed to do so. Moreover, as the state points out, not only did Ngang fail to assert any a Confrontation Clause argument, he arguably invited the error he now alleges. During the hearing, he conceded he "[did not] have a problem with the MVD abstract being submitted to the jury," and he specifically and successfully argued to preclude the testimony of an MVD records custodian—the very witness he now maintains he had a right to confront. "This court has long held that 'a defendant who invited error at trial may not then assign the same as error on appeal.'" *Moody*, 208 Ariz. 424, ¶ 111, 94 P.3d at 1148, *quoting State v. Endreson*, 109 Ariz. 117, 122, 506 P.2d 248, 253 (1973).

[4]Even were we to consider this argument, it is unlikely we would find the admission of the abstract to be error, much less fundamental error. *Melendez-Diaz* involved forensic affidavits stating that material seized from a defendant was cocaine. __U.S. at __, 129 S. Ct. at 2531. Concluding the analysts' affidavits were "testimonial statements" under *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held that the defendant had the right to confront the analysts who had tested the cocaine. *Id*. at__, 129 S. Ct. at 2532. Unlike the analysts' reports in *Melendez-Diaz*, the MVD records here "are required to be kept by statute and exist independently of any criminal prosecution." *State v. King*, 213 Ariz. 632, ¶ 25, 146 P.3d 1274, 1280 (App. 2006). In *Melendez-Diaz*, the Court noted the distinction that public records "prepared specifically for use at [a defendant's] trial" are testimonial, whereas

Disposition

¶14 For the foregoing reasons, Ngang's conviction and sentence are affirmed.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

J. WILLIAM BRAMMER, JR., Judge

business and public records "created for the administration of an entity's affairs and not for the purpose of establishing or proving some fact at trial . . . are not testimonial" and thus do not implicate the Confrontation Clause. __U.S. at __, 129 S. Ct. at 2539-40. Accordingly, *Melendez-Diaz* does not upset our holding in *King* that the admission of a defendant's MVD records does not violate the Confrontation Clause. 213 Ariz. 632, ¶¶ 24-26, 146 P.3d at 1280.