Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-065385-001 DT 05/07/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

v.

SYDNEY TYLOR TRAN (001)

ANDREA L KEVER

JOSHUA BLAKE MAYES

HIGHLAND JUSTICE COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2012–065385.

Defendant-Appellant Sydney Tylor Tran (Defendant) was convicted in the Highland Justice Court of driving under the influence and driving with drugs or metabolite in his system. Defendant contends the trial court erred in denying his Motion To Suppress, which alleged the conduct of the officers violated his right to consult with counsel. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On March 14, 2012, the State filed a Complaint charging Defendant with driving under the influence, A.R.S. § 28–1381(A)(1), and driving with drugs or metabolite in his system, A.R.S. § 28–1381(A)(3). Prior to trial, Defendant filed a Motion To Suppress for Violation of Defendant's 6th Amendment Right to Counsel.

At the hearing on Defendant's motion, Sergeant James Lahti testified the events began on March 18, 2011, with a radio call of a collision that sounded like an impaired driving type case. (R.T. of Aug. 7, 2012, at 7–8, 24.) The first one to arrive at the scene was Officer De Manzo, who had almost run into Defendant because he was walking in the middle of the street. (*Id*. at 9, 37.) Sergeant Lahti arrived at 12:10 a.m. at the scene where a vehicle had driven through a fence and hit a tree, and saw Officer De Manzo talking to Defendant. (*Id*. at 8–9, 23.) Sergeant Lahti smelled the odor of alcohol and asked Defendant how much he had to drink, and Defendant said he had a couple of "car bongs" of beer. (*Id*. at 11, 25.) Defendant also said he had gotten some bad marijuana and he felt his problems were not from the alcohol, but were from the bad marijuana, which was causing him to have a bad high or a bad trip. (*Id*. at 12.)

Sergeant Lahti attempted to have Defendant perform the HGN test, but Defendant could not keep his eyes focused on the stimulus. (R.T. of Aug. 7, 2012, at 12.) When Sergeant Lahti asked Defendant to perform the standardized field sobriety tests, Defendant said, "Let's go," and walked out into the street. (*Id*. at 13, 37.) As a result, Sergeant Lahti and Officer De Manzo had to grab Defendant's arms and pull him back onto the sidewalk. (Id. at 13.) Defendant dropped to the ground and said he needed to lie down, and then passed out. (*Id*. at 13, 25.) Sergeant Lahti rubbed Defendant's sternum with his flashlight, which is usually extremely uncomfortable and will cause a conscious person to react, but Defendant did not react at all. (*Id*. at 13, 26.) Sergeant Lahti and Officer De Manzo then decided to call the paramedics. (*Id*.)

Just before the paramedics arrived, Defendant opened his eyes and sat up. (R.T. of Aug. 7, 2012, at 14.) Sergeant Lahti decided to place Defendant under arrest, so he read Defendant the *Miranda* rights, and Defendant said he wanted to talk to his attorney. (*Id*. at 14, 26.)

Once the paramedics arrived, they began asking Defendant what had happened. (R.T. of Aug. 7, 2012, at 15.) Defendant said he had been going about 70 miles per hour and had been in a collision. (*Id*.) They asked Defendant if he wanted to go to the hospital and he said he did, so they took him to Banner Gateway Hospital. (*Id*. at 15–16.) While Defendant was in the hospital, he was in his room by himself. (*Id*. at 31.) He had his cell phone and was using it, and the hospital rooms had telephones in them. (*Id*. at 20–21, 23, 33–34.) At one point when Defendant went into the bathroom, he began to vomit. (*Id*. at 19.) At 1:31 a.m., Sergeant Lahti read to Defendant the Admin Per Se/Implied Consent Affidavit and asked him if he would submit to a blood draw and Defendant said he would. (*Id*. at 20, 35.) Officer Wilson then conducted the blood draw. (*Id*. at 19, 35.)

Officer Jeffrey Barnett testified he was at the hospital with Defendant and Sergeant Lahti, and Defendant never asked for any assistance in using the telephone. (R.T. of Aug. 7, 2012, at 39–40, 41.) Officer Barnett knew there were telephones in the rooms because he had been there "countless times over the last three years." (*Id*. at 47–48.) The officers had given Defendant permission to call whomever he wanted. (*Id*. at 46.) Officer Barnett saw Defendant using his own cell phone, but was using it to call a friend and arrange for a ride from the hospital rather than to call an attorney. (*Id*. at 40–41, 44, 45–46.) Officer Barnett said, if Defendant had been talking to an attorney, he would have given him "[a]bsolute and 100 percent privacy." (*Id*. at 45.) He said they checked on Defendant because, "[g]iven the fact that he was vomiting, we typically want to check on people." (*Id*. at 47.)

The State then rested, and Defendant presented no witnesses. (R.T. of Aug. 7, 2012, at 50.) After hearing arguments of counsel, the trial court took the matter under advisement. (*Id*. at 62.) The trial court later denied Defendant's Motion by written order:

> On August 7, 2012, this Court held an evidentiary hearing on Defendant's Motion To Suppress. Defendant cites a 6th Amendment violation, claiming that he was deprived of the right to consult with an attorney prior to the removal of a blood sample. The Court took the matter under advisement.

> The Court has reviewed the record, the written arguments, and the cited cases. The Court now makes its determination.
>
> The Court heard the testimony of Officers Lahti and Barnett. Mr. Tran was taken into custody and transported to the hospital under clear and evident medical distress. The testimony supports State's argument that Mr. Tran was in possession of his personal cell phone during his time at the hospital emergency room. Mr. Tran was given his Miranda warnings. Testimony was given that Mr. Tran at one point actually did place, or attempt to place a call while at the hospital. Mr. Tran was often in the examination room by himself and could have at any time requested that the door be closed to ensure a private conversation.
>
> The Court finds the testimony of Officers Lahti and Barnett consistent and credible and that Mr. Tran had ample opportunity to consult with counsel. The Court further finds Defendant's cited cases factually distinct. Based on the evidence provided, the Court finds no 6th Amendment violation.
>
> IT IS THEREFORE ORDERED that Defendant's motion is DENIED.

(Ruling on Motion, dated Aug. 27, 2012.) On September 7, 2012, the parties submitted the matter, and on September 10, 2012, the trial court found Defendant guilty of both charges. (Ruling and Court Order, dated Sep. 10, 2012.) On September 18, 2012, the trial court imposed sentence. On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN FINDING THE OFFICERS DID NOT VIOLATE DEFENDANT'S RIGHT TO CONSULT WITH COUNSEL.

Defendant contends the trial court erred in finding the officers did not violate his right to consult with counsel. In reviewing a trial court's ruling on a motion to suppress, an appellate court is to defer to the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review de novo the trial court's legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010). Based on this Court's review of the record, this Court concludes the trial court properly denied Defendant's Motion To Suppress.

In his Motion To Suppress, Defendant contended the officers violated his right to counsel under the following: the Sixth Amendment to the United States Constitution; Article 2, Section 24 of the Arizona Constitution; and Rule 6.1(a) of the Arizona Rules of Criminal Procedure. In order to determine whether the trial court was correct in finding that the officers did not violate Defendant's right to an attorney, it is necessary to determine which right to an attorney Defendant invoked. Several provisions grant to a defendant the right to an attorney.

A. *The Sixth Amendment to the United States Constitution.*

The Sixth Amendment grants to a defendant the right to counsel as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence [*sic*].

U.S. CONST. amend 6. The Sixth Amendment right to counsel does not attach, however, until after the initiation of formal charges. *Davis v. United States*, 512 U.S. 452, 456–57 (1994) ("The Sixth Amendment right to counsel attaches only at the initiation of adversary criminal proceedings, and before proceedings are initiated, a suspect in a criminal investigation has no constitutional right to the assistance of counsel"); *State v. Martinez*, 221 Ariz. 383, 212 P.3d 75, ¶ 11 (Ct. App. 2009) ("The Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated.'"), *quoting Fellers v. United States*, 540 U.S. 519, 523 (2004). As stated by the Court, "[T]he right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *Brewer v. Williams*, 430 U.S. 387, 398 (1977), *quoting Kirby v. Illinois*, 406 U.S. at 682, 689 (1972). In the present matter, the State did not file any charges against Defendant until after the events in question took place. Thus, at the time of the events in question, Defendant's right to counsel under the Sixth Amendment had not yet attached, so there could be no violation of a Sixth Amendment right to counsel.

In the present case, the trial court found Defendant had a right to counsel under the Sixth Amendment, but found the officers did not violate that right to counsel. As discussed above, because the State had not initiated formal charges against Defendant at the time of the events in question, Defendant's right to counsel under the Sixth Amendment had not yet attached. The trial court was therefore incorrect in finding Defendant's Sixth Amendment rights had attached. An appellate court is, however, obligated to affirm the trial court when any reasonable view of the facts and law might support the judgment of the trial court, even when the trial court has reached the right result for the wrong reason. *State v. Canez*, 202 Ariz. 133, 42 P.3d 564, ¶ 51 (2002); *State v. LaGrand*, 153 Ariz. 21, 29, 734 P.2d 563, 571 (1987); *City of Phoenix v. Geyler*, 144 Ariz. 323, 330, 697 P.2d 1073, 1080 (1985); *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984); *State v. Chavez*, 225 Ariz. 442, 239 P.3d 761, ¶ 5 (Ct. App. 2010); *State v. Rumsey*, 225 Ariz. 374, 238 P.3d 642, ¶ 4 (Ct. App. 2010). Because this Court has concluded the trial court was correct in its decision that the officers conduct did not interfere with Defendant's right to counsel, this Court must affirm the trial court.

B. *Article 2, Section 24 of the Arizona Constitution.*

In his Motion To Suppress, Defendant contended the officers violated his right to counsel under Article 2, Section 24 of the Arizona Constitution, which provides as follows:

> In criminal prosecutions, the accused shall have the right to appear and defend in person, and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to meet the witnesses against him face to face, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed, and the right to appeal in all cases; and in no instance shall any accused person before final judgment be compelled to advance money or fees to secure the rights herein guaranteed.

ARIZ. CONST. art. 2, § 24. Although this Court is not aware of any case that holds this right to counsel under the Arizona Constitution does not attach until after the initiation of formal charges, in *State v. Transon*, 186 Ariz. 482, 924 P.2d 486 (Ct. App. 1996), the court stated as follows:

> We have been unable to locate any authority for appellee's assertion that Arizona's right to counsel is broader than the federal right. Where, as here, the language of the federal and state constitutional provisions are substantially similar, we will use the same standard to analyze both provisions.[2]
>
> [2] *Compare* U.S. Const. amend. VI ("the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.") *with* Ariz. Const. art. 2, § 24 ("the accused shall have the right to appear and defend in person, and by counsel . . .").

186 Ariz. at 485 & n.2, 924 P.2d at 489 & n.2. Because both the Sixth Amendment and Article 2, Section 24 use the term "the accused," and because both provisions contain essentially the same rights, this Court concludes a defendant's right to counsel under the Arizona Constitution does not attach until after the initiation of formal charges. Thus, at the time of the events in question, Defendant's right to counsel under Article 2, Section 24 had not yet attached, so there could be no violation of the right to counsel under the Arizona Constitution.

C. *The Fifth Amendment to United States Constitution and Miranda.*

Sergeant Lahti placed Defendant under arrest and read him the *Miranda* rights. The Fifth Amendment to United States Constitution does not grant to a defendant the right to an attorney, but instead provides a defendant has the right to remain silent:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

U.S. CONST. amend 5. In *Miranda v. Arizona*, 384 U.S. 436, 469 (1966), the Court held "the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today." The Court made clear this was not a constitutional right to an attorney, but was instead a procedure it created to protect the Fifth Amendment privilege against self-incrimination:

> The right to counsel established in *Miranda* was one of a "series of recommended 'procedural safeguards' . . . [that] were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected."

Davis, 512 U.S. at 457, *quoting Michigan v. Tucker*, 417 U.S. 433, 443–44 (1974). The Court further emphasized this procedure applied only during a custodial interrogation:

> [W]e now hold that when an accused has invoked his right to have counsel present during *custodial interrogation*, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.

Edwards v. Arizona, 451 U.S. 477, 484 (1981) (emphasis added).

In the present matter, Sergeant Lahti read Defendant the *Miranda* rights, which are:

(1) You have right to remain silent.
(2) Anything you say may be used as evidence against you.
(3) You have the right to the presence of an attorney before and during questioning.
(4) If you cannot afford an attorney, an attorney will be appointed for you.

384 U.S. at 444. Defendant asked to talk to his attorney, which meant he was exercising his right to have an attorney present during questioning. The officers, however, never conducted a custodial interrogation, thus Defendant did not have the right to an attorney pursuant to *Miranda.*

It is true the paramedics and hospital personnel questioned Defendant, and he made statements to them. There was no showing, however, that these persons were acting as agents of the police. Moreover, *Miranda* warnings are not required when the purpose of the questioning is for the safety of the public, the officer involved, or the suspect. *State v. Londo*, 215 Ariz. 72, 158 P.3d 201, ¶¶ 5–11 (Ct. App. 2006) (officers arrested defendant after he sold cocaine; while in custody, defendant started to sway, vomit, and froth from mouth; officer asked defendant if he had swallowed cocaine, and defendant admitted he had; court held defendant's statement was admissible despite lack of *Miranda* warnings because medical emergency existed). Because the questioning in this case was the result of a medical emergency, *Miranda* does not apply.

D. *Rule 6.1(a) of the Arizona Rules of Criminal Procedure.*

In his Motion To Suppress, Defendant contended the officers violated his right to counsel under Rule 6.1(a) of the Arizona Rules of Criminal Procedure, which provide in part as follows:

> A defendant shall be entitled to be represented by counsel in any criminal proceeding . . . . The right to be represented shall include the right to consult in private with an attorney, or the attorney's agent, as soon as feasible after a defendant is taken into custody, at reasonable times thereafter, and sufficiently in advance of a proceeding to allow adequate preparation therefor.

Rule 6.1(a), ARIZ. R. CRIM. P. Based on that rule, the Arizona Supreme Court has held a suspect has the right to consult with an attorney prior to deciding whether to take a BAC test, provided that consultation does not disrupt an ongoing investigation by the police. *State v. Juarez,* 161 Ariz. 76, 80, 775 P.2d 1140, 1144 (1989). This right to an attorney under Rule 6.1(a) is not self-effectuating, and instead comes into effect only when a defendant asserts the right to an attorney:

> [A]ppellee's right to counsel [under Rule 6.1(a)] cannot be infringed upon unless appellee actually asks for an attorney.

Transon, 186 Ariz. at 486, 924 P.2d at 490. In the present case, when Sergeant Lahti read Defendant the Admin Per Se/Implied Consent Affidavit and asked him whether he would submit to a blood draw, Defendant never asked to consult with an attorney prior to deciding whether to do so. Because Defendant did not ask to consult with an attorney, the officers did not interfere with Defendant's right to consult with an attorney. The trial court therefore properly denied Defendant's Motion To Suppress.

As noted above, when Sergeant Lahti placed Defendant under arrest and read him the *Miranda* rights, Defendant asked to talk to his attorney. Defendant contends this request for an attorney pursuant to *Miranda* serves as an invocation of the right to consult with counsel pursuant to Rule 6.1(a). In *State v. Uraine,* 157 Ariz. 21, 754 P.2d 350 (Ct. App. 1988), the Arizona Court of Appeals rejected the reverse of that argument. In that case, the officer arrested the defendant for DUI and read him the *Miranda* warnings, and the defendant said he would answer questions. The officer then read the defendant the Admin Per Se form, and the defendant said he did not want to take a BAC test until he talked to his lawyer. The court held the trial court correctly ruled that the defendant's "request to talk to counsel was, in effect, a limited request to see an attorney before he decided whether or not he would take a breath test." 157 Ariz. at 22, 754 P.2d at 351. The court then held as follows:

> The facts in this case supported the trial judge's conclusion that, as in [*Connecticut v.*] *Barrett,* the invocation of the appellant's right to counsel was a limited one. The testimony elicited at the motion to suppress hearing unequivocally showed that appellant asked to speak to a lawyer before making a decision whether he would submit to a breath test. This occurred immediately after he was advised of the implied consent law. The appellant's limited invocation of the right to counsel did not operate as a request for counsel for all purposes, and appellant specifically stated he understood his *Miranda* warnings and agreed to answer questions. The trial court did not err in denying appellant's motion to suppress evidence.

157 Ariz. at 22, 754 P.2d at 351. At the point when Sergeant Lahti read Defendant the *Miranda* rights, Sergeant Lahti had said nothing about the implied consent to submit to a BAC test, nor had he asked Defendant whether he would consent to that test. Thus, Defendant's invocation of the right to counsel pursuant to *Miranda* was a limited one: the request to have an attorney present during any questioning. This Court therefore concludes Defendant's request for an attorney pursuant to *Miranda* and did not serve as a request for an attorney pursuant to Rule 6.1(a).

Moreover, assuming Defendant's request to talk to his attorney before and during questioning could be construed as a request to consult with an attorney prior to deciding whether to take a BAC test when Sergeant Lahti asked him an hour later, the trial court correctly ruled the officers' conduct did not interfere with Defendant's right to consult with an attorney. The record shows Defendant had with him his cell phone and was using it. Further, the record shows Defendant's hospital room had a telephone in it. Defendant has made no claim that he wanted to talk to his attorney prior to deciding whether to submit to the blood draw, but that the officers somehow interfered with his wishes.

As such, Defendant's case is different than *State v. Penny*, 229 Ariz. 32, 270 P.3d 859 (Ct. App. 2012). The defendant there asked to consult with attorney before deciding whether to take blood test; the officer placed defendant in telephone room; the defendant advised the officer the yellow pages for attorneys had been removed from telephone book; and the officer told defendant that was not his (the officer's) problem. The court there held trial court did not abuse discretion in finding officer had interfered with defendant's right to consult with attorney. *Penny* at ¶¶ 9–13. In the present case, Defendant made no requests if the officers, and thus there was nothing for the officers to refuse. The reasoning in *Penny* therefore does not apply to Defendant.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly ruled that the officers did not interfere with Defendant's right to consult with an attorney prior to deciding whether to take a BAC test and therefore properly denied Defendant's Motion To Suppress.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Highland Justice Court.

IT IS FURTHER ORDERED remanding this matter to the Highland Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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