

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000297-001 DT

09/26/2011

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
H. Beal
Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

JACE JAMES JOHNSON (001)

BRIAN F RUSSO

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2010-009316.

Defendant-Appellant Jace James Johnson (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Dismiss, which alleged the conduct of the officers violated his right to counsel. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On March 27, 2010, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2), speed not reasonable and prudent, A.R.S. § 28-701(A), and improper right turn, A.R.S. § 28-751(1). Prior to trial, Defendant filed a Motion To Dismiss that alleged the conduct of the officer violated his right to counsel.

At the hearing on Defendant's motion, Officer Keith English testified Sergeant Zobel stopped Defendant at 2:30 a.m. on March 27, 2010. (R.T. of Nov. 17, 2010, at 5, 10-11.) Sergeant Zobel then called Officer English to do the DUI investigation. (*Id.* at 5-6, 10-12.) As a result of the various tests, Officer English placed Defendant under arrest at 2:51 a.m., and at 2:55 a.m., read him the Admin Per Se advisement. (*Id.* at 13.) Defendant asked to speak to his attorney, so Officer English gave Defendant his Blackberry phone, moved the handcuffs so Defendant's hands were in front of him, and at 3:01 a.m. placed him in the police car. (*Id.* at 6-7, 13-16.) At 3:11 a.m., Officer English opened the vehicle door and again read Defendant the Admin Per Se advisement. (*Id.* at 8, 16.) Defendant said he needed to get a telephone number from his wallet, so Officer English gave Defendant his wallet, from which Defendant removed a credit card sized card. (*Id.* at 16-17.) At 3:16 a.m., Officer English again placed Defendant in the police car to make his call. (*Id.* at 7, 17.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000297-001 DT

09/26/2011

At 3:22 a.m. (52 minutes after the stop), Officer English was concerned about the time it would take to obtain Defendant's blood sample within the 2-hour window, so Officer English decided Defendant had to terminate the call. (R.T. of Nov. 17, 2010, at 17–20, 27, 34–35.) Further, Officer English knew Defendant would have an opportunity at the jail to call his attorney. (*Id.* at 20.) Officer English thus opened the door and told Defendant to end his telephone call. (*Id.* at 17.) Defendant made no complaint, nor did he make any request for anything else. (*Id.* at 20.)

Once they arrived at the jail, at 4:03 a.m. (by the jail videotape) or 4:05 a.m. (by Officer English's watch) Officer English placed Defendant in the jail telephone room, which had in it telephones, telephone books, and instructions on how to make telephone calls. (R.T. of Nov. 17, 2010, at 21–22.) Defendant made no requests, such as asking for his cell phone or any telephone numbers. (*Id.* at 23, 36.) Officer English looked through the window and saw Defendant making a call on the telephone, which ended at 4:27 a.m. by the jail videotape. (*Id.* at 22–23, 31–33.)

At 4:07 a.m., Officer English began the paperwork for a telephonic search warrant; at 4:19 a.m., he was placed under oath; and at 4:23 a.m., he received the search warrant. (R.T. of Nov. 17, 2010, at 24–25, 27–28.) When Officer English served the search warrant on Defendant at 4:27 a.m., Defendant made no requests or complaints, nor did he ask to make any other telephone calls. (*Id.* at 25–26.) The blood draw then took place at 4:28 a.m., which was 1 hour and 58 minutes after Defendant had been driving. (*Id.* at 26.) At 5:18 a.m., Officer English read Defendant the *Miranda* warnings, and Defendant asked to have his attorney present. (*Id.* at 9.)

The parties stipulated that Defendant spoke to an attorney names Michael Troncellito during the telephone call from 3:16 a.m. to 3:22 a.m. (R.T. of Nov. 17, 2010, at 40–41.) Defendant testified he did not talk to Mr. Troncellito during the telephone call from 4:03 a.m. to 4:27 a.m. because he did not have his cell phone. (*Id.* at 43.) He agreed Officer English gave him his cell phone when he first placed him in the police car. (*Id.* at 49.) He further agreed Officer English got the business card for him when he asked for it. (*Id.* at 49–50.) He acknowledged he was able to make both telephone calls in private in the police car. (*Id.* at 50.) He admitted he used the telephone in the jail to make telephone calls, and the calls lasted 24 minutes. (*Id.* at 51–52.) He admitted he never told anyone at the jail he wanted to have a sample of his blood collected. (*Id.* at 53–54.) He said he tried to contact Mr. Troncellito after he was released from the jail, but he was not able to reach him. (*Id.* at 54.)

After hearing arguments from counsel, the trial court found Defendant had three opportunities to talk to an attorney. (R.T. of Nov. 17, 2010, at 64.) It found Officer English had curtailed the call to Mr. Troncellito, but found this was because that call was at the point when it was disrupting the investigation, and that in fact Officer English was able to obtain a sample of Defendant's blood only 2 minutes before the 2-hour window was to close. (*Id.* at 63–64, 66.) The trial court found Defendant had 24 minutes in the jail telephone room during which he could have called an attorney. (*Id.* at 64.) The trial court thus found Officer English's actions were reasonable, and therefore denied Defendant's Motion To Dismiss. (*Id.* at 64–65.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000297-001 DT

09/26/2011

Defendant later submitted the matter on the record, and the trial court found Defendant had committed all charged offenses. (R.T. of Jan. 12, 2011, at 6.) The trial court then imposed sentence. (*Id.* at 7–9.) On January 14, 2011, 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 OFFICER DID NOT VIOLATE DEFENDANT’S RIGHT TO COUNSEL.

Defendant contends the trial court erred in finding Officer English did not violate his right to counsel. In reviewing a trial court’s ruling on a motion to dismiss or 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 Dismiss.

To determine whether the trial court was correct in finding the officer did not violate Defendant’s right to an attorney, it is necessary to determine which right to an attorney applied to Defendant. Several provisions grant to a defendant a right to an attorney. The Sixth Amendment to the United States Constitution 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.

U.S. CONST. amend 6. The Sixth Amendment right to counsel does not attach, however, until after the initiation of formal charges. *Moran v. Burbine*, 475 U.S. 412, 431 (1986); *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 he was released from custody, thus from the time Defendant was stopped by Sergeant Zobel until he was released from custody, 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.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000297-001 DT

09/26/2011

The Arizona Constitution also grants to a defendant the right to counsel:

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 from the time Defendant was stopped by Sergeant Zobel until he was released from custody, Defendant's right to an attorney under Article 2, Section 24 had not yet attached, so there could be no violation of the right to counsel under the Arizona Constitution.

The Fifth Amendment to United States Constitution does not grant to a defendant the right to an attorney, but instead provides in part as follows:

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 (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." 384 U.S. at 469. The Court thus held that, in order to effectuate a suspect's constitutional right to remain silent, the suspect needs the assistance of an attorney. The Court further discussed that concept:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000297-001 DT

09/26/2011

[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). The Court thus made it clear the right to an attorney it was describing in *Miranda* was only the right to have an attorney present during custodial interrogation. In the present case, no officer subjected Defendant to custodial interrogation, so there could be no violation of the right to counsel under *Miranda*.

Finally, the Arizona Supreme Court has promulgated 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. The Arizona Supreme Court has further stated, "in a criminal DUI case, the accused has the right to consult with an attorney, if doing so does not disrupt the investigation." *State v. Juarez*, 161 Ariz. 76, 80, 775 P.2d 1140, 1144 (1989). Because the right to an attorney is a substantive right, the Arizona Supreme Court could not, by enacting Rule 6.1(a), grant to a defendant the substantive right to an attorney. To the extent this rule is a restatement of the rights to counsel granted by the Sixth Amendment and Article 2, Section 24, those rights do not come into effect until the State has brought formal charges against a defendant. But that rule also provides that a defendant may "consult in private with an attorney . . . as soon as feasible after a defendant is taken into custody." If a defendant is taken into custody before the State has brought formal charges against the defendant, that right to an attorney is not derived from either the Sixth Amendment or Article 2, Section 24, but is instead a procedural component of a defendant's due process right to obtain evidence:

Appellee also correctly asserts that a right to counsel component is contained within Arizona's constitutional Due Process Clause. The right to counsel is an extension of the doctrine that defendants have the right to gather independent exculpatory evidence. Arizona's Due Process Clause guarantees DUI suspects "a fair chance to obtain independent evidence of sobriety essential to his defense at the only time it [is] available." Numerous Arizona cases have found due process violations where police conduct interfered with a defendant's right to gather evidence of sobriety before the evidence naturally dissipates. The right to a fair chance to gather exculpatory evidence includes reasonable access to counsel.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000297-001 DT

09/26/2011

Transon, 186 Ariz. at 485, 924 P.2d at 489 (citations omitted). 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, once Officer English placed Defendant under arrest and read him the Admin Per Se advisement, Defendant asked to speak to his attorney, thereby invoking his right to an attorney under Rule 6.1(a). Officer English accommodated that request by giving Defendant his Blackberry phone, moving the handcuffs so Defendant's hands were in front of him, and at 3:01 a.m. placing him in the police car. (*Id.* at 6–7, 13–16.) At 3:11 a.m., Officer English opened the vehicle door and again read Defendant the Admin Per Se advisement, and this time Defendant said he needed to get a telephone number from his wallet, which Officer English did for Defendant. Again, Officer English placed Defendant in the police car to make his call. Finally, once Officer English and Defendant arrived at the jail, Officer English placed Defendant in the telephone room, and Defendant again used a telephone. The record thus supports the trial court's finding that Officer English gave Defendant the right "to consult in private with an attorney . . . as soon as feasible after a defendant is taken into custody, [and] at reasonable times thereafter . . ."

Defendant contends, however, Officer English interfered with his right to counsel because he stopped the second telephone call at 3:22 a.m. The trial court noted the right to consult with an attorney exists as long as it does "not disrupt the investigation," and found that continuing the telephone call further would have disrupted that investigation. The record shows that, even with stopping the telephone call at 3:22 a.m., Officer English was able to obtain Defendant's blood sample only 2 minutes before the 2-hour window closed. The record thus supports the trial court's finding, and therefore the trial court properly denied Defendant's Motion To Dismiss.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly denied Defendant's Motion To Dismiss.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Scottsdale Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Scottsdale Municipal 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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