

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

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THE STATE OF ARIZONA,  
*Appellee,*

*v.*

VICTOR MANUEL CABALLERO,  
*Appellant.*

No. 2 CA-CR 2014-0055  
Filed October 21, 2014

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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NOT FOR PUBLICATION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.

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Appeal from the Superior Court in Pima County  
No. CR20114143  
The Honorable Paul E. Tang, Judge

**AFFIRMED**

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COUNSEL

Thomas C. Horne, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
By Kathryn A. Damstra, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Isabel G. Garcia, Pima County Legal Defender  
By Robb P. Holmes, Assistant Legal Defender, Tucson  
*Counsel for Appellant*

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**MEMORANDUM DECISION**

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

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M I L L E R, Presiding Judge:

¶1 Victor Caballero was convicted after a jury trial of two counts of aggravated driving with an illegal drug or its metabolite in his system, and sentenced to concurrent, presumptive terms of ten years' imprisonment. On appeal, he argues the trial court erred by denying his motions to suppress and preclude results of blood alcohol and drug tests due to a violation of his right to counsel and a flawed chain of custody. He also contends the court abused its discretion by imposing a presumptive rather than a mitigated prison term based on Caballero's drug and alcohol history. For the following reasons, we affirm.

**Factual and Procedural Background**

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). In August 2010, a patrol officer noticed a car with its license plate light out and pulled it over. The driver identified himself as Caballero. The officer could smell alcohol, and Caballero told the officer he had one beer. The officer asked Caballero to get out of the car and noticed that his speech was slurred. An assisting officer observed that Caballero had glassy eyes and was swaying; further, he saw cold, open beers in the car. Another officer conducted a horizontal gaze nystagmus (HGN) test on Caballero and noted four out of six possible cues, but Caballero refused other field sobriety tests. Caballero was arrested, and blood tests revealed cocaine and its metabolite, as well as a blood alcohol content of .027. He was charged with two counts of aggravated

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driving under the influence of alcohol and two counts of aggravated driving with an illegal drug in his body.<sup>1</sup>

¶3 Caballero failed to appear at his first trial, and a mistrial was declared. The second trial proceeded in absentia. The jury acquitted him on the two counts of aggravated driving under the influence of alcohol but found him guilty of the remaining counts. He was arrested several months later and sentenced as described above; this appeal followed.<sup>2</sup>

**Right to Counsel**

¶4 Caballero contends the trial court erred in not suppressing his blood test results because he was denied an opportunity to consult privately with an attorney before the test was administered. Whether evidence should have been suppressed as a result of a deprivation of counsel is a mixed question of fact and law that implicates constitutional questions, which we review de novo. *State v. Rumsey*, 225 Ariz. 374, ¶ 4, 238 P.3d 642, 644-45 (App. 2010). We limit our review of the facts to those presented at the

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<sup>1</sup>The charges were aggravated because Caballero's license was suspended and revoked and because he had two convictions for driving under the influence within the last seven years. See A.R.S. § 28-1383(A)(1), (2).

<sup>2</sup> Section 13-4033(C), A.R.S., prohibits a defendant from appealing "if the defendant's absence prevents sentencing from occurring within ninety days after conviction." Although Caballero was not arrested until 97 days after the verdicts were rendered, § 13-4033(C) applies "only if the defendant has been informed he could forfeit the right to appeal if he voluntarily delays his sentencing for more than ninety days." *State v. Bolding*, 227 Ariz. 82, ¶ 20, 253 P.3d 279, 285 (App. 2011). Caballero asserts "the record does not indicate that [he] was provided notice that if he absented himself more than 90 days that he would lose the right to appeal," and the state does not contend otherwise. Moreover, the trial court informed Caballero at sentencing that he had a right to appeal. We therefore consider his appeal.

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suppression hearing and view them in the light most favorable to upholding the trial court's factual findings. *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). We defer also to the trial court's determinations of witness credibility. *State v. Gerlaugh*, 134 Ariz. 164, 167, 654 P.2d 800, 803 (1982).

¶5 Before trial, Caballero moved to suppress the blood test results and evidence of his refusal to voluntarily submit to a blood test. Caballero and Officer Honomichl testified at the suppression hearing. Honomichl testified that after he had performed the HGN test, and Caballero had refused other field sobriety tests, he read Caballero his *Miranda*<sup>3</sup> rights and told him he was under arrest for driving under the influence. Honomichl said Caballero had asked to call an attorney and he had offered to provide him with a cell phone and phone book, but Caballero said he knew the phone number. The officer stated when he handed Caballero a phone,<sup>4</sup> Caballero said, "[J]ust do what you got to do; I will call him later." Honomichl testified he was standing next to Caballero at the time; he said he never offered Caballero a private place to make a phone call because Caballero had said he would "call his attorney later." Honomichl further testified that he read the "Admin Per Se" advisory to Caballero, and Caballero refused to submit to tests. Honomichl then drove Caballero to the police station, obtained a search warrant, and drew Caballero's blood. The officer said Caballero did not ask for an attorney again.

¶6 Caballero testified that Honomichl had handed him a phone, but that he did not recall being offered a phone book. He said he did not have his attorney's phone number and he told the officer that. Caballero further testified he decided not to call his attorney because he did not have the number and did not have a private place to speak.

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<sup>3</sup>*Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>4</sup>Honomichl could not recall if the phone he offered was his own or Caballero's.

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¶7 The trial court denied the motion to suppress, concluding that even if Caballero had not known his attorney's phone number, as he testified, he could have used the phone book Officer Honomichl had offered or Caballero could have called information. The court also concluded the need for privacy for the call never arose because Caballero had declined the offer to call his attorney.

¶8 Caballero argues on appeal that he was denied the right to private consultation with an attorney as codified in Rule 6.1(a), Ariz. R. Crim. P., which is based on the Sixth Amendment to the United States Constitution and Article 2, section 24 of the Arizona Constitution. *State v. Juarez*, 161 Ariz. 76, 80-81, 775 P.2d 1140, 1144-45 (1989). He argues Officer Honomichl did not cooperate with his request for counsel, and that he gave up trying because he was discouraged by the officer's actions.<sup>5</sup>

¶9 Caballero cites several cases to support his argument, but all are factually distinguishable. In contrast with the cases Caballero cites, he does not contend that the officer failed to offer him a phone or that he did not know how to operate the phone that was offered. *See State v. Rosengren*, 199 Ariz. 112, ¶¶ 4, 10, 14 P.3d 303, 306-07 (App. 2000) (officer refused to allow defendant to call father, an out-of-state attorney); *State v. Sanders*, 194 Ariz. 156, ¶ 8, 978 P.2d 133, 135 (App. 1998) (officer failed to provide call-back number for attorney); *cf. State v. Carlson*, 199 P.3d 885, 887-88 (Or. Ct. App. 2008) (officer did not know how to operate phone). Indeed, Caballero testified that he was offered a phone. Any dispute between the witnesses about whether Caballero actually had his attorney's phone number or was offered a phone book was resolved by the trial court, and we will not disturb that finding. *See State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007).

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<sup>5</sup>Caballero also argues, for the first time on appeal and without developing the argument, that any waiver of the right to counsel was not "voluntary, knowing, and intelligent." He did not raise this argument below or argue on review that fundamental error occurred; therefore, the issue is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008).

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¶10 Caballero also relies on *State v. Holland*, 147 Ariz. 453, 455-56, 711 P.2d 592, 594-95 (1985), to argue he was not offered privacy for his phone call. In that case, our supreme court held that an officer's refusal to leave the room violated the defendant's right to private consultation with counsel. *Id.* Although there is no dispute in the record that Honomichl did not offer to step away while a phone call was made, Honomichl testified that he "never got that far," because Caballero refused the phone and said he would talk to his attorney later. The trial court concluded the need for privacy never arose, and we defer to its factual findings, which are supported by the record and are not clearly erroneous. *See Rosengren*, 199 Ariz. 112, ¶ 9, 14 P.3d at 307. The court did not err in finding Caballero had withdrawn his request for an attorney or in denying Caballero's motion to suppress.

**Chain of Custody**

¶11 Caballero next argues the trial court erred by denying his motion in limine to preclude the use of the blood test results based on lack of foundation. He contends the state's failure to call as a witness the first person to test Caballero's blood for alcohol content created a break in the chain of custody, precluding admission of the blood test results.

¶12 We review a trial court's conclusion that evidence has an adequate foundation for an abuse of discretion. *State v. McCray*, 218 Ariz. 252, ¶ 8, 183 P.3d 503, 507 (2008). The sufficiency of an evidentiary foundation is governed by Ariz. R. Evid. 901(a), which requires "evidence sufficient to support a finding that the item is what the proponent claims it is." A party seeking to authenticate evidence based on a chain of custody "must show continuity of possession, but it need not disprove every remote possibility of tampering." *McCray*, 218 Ariz. 252, ¶ 9, 183 P.3d at 507, quoting *State v. Spears*, 184 Ariz. 277, 287, 908 P.2d 1062, 1072 (1996). The state need not call every person who had an opportunity to handle a piece of evidence. *Id.* ¶ 9. If evidence of the chain of custody is incomplete or in conflict with other evidence, those concerns go to the weight of the evidence, not its admissibility. *Id.* ¶ 15.

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¶13 A Tucson Police Department criminalist had performed the first blood alcohol test but she retired and was not included on the state's witness list for trial. Instead, the state called criminalist Terry Gallegos, who had retested the blood and intended to testify as to her results.<sup>6</sup> Caballero filed a motion in limine to prevent admission of the blood test results due to a gap in the chain of custody, which the trial court denied.

¶14 On appeal, as he did below, Caballero contends the state could not establish that the blood had not been tampered with or altered because the first criminalist had broken the evidence seals to perform tests, and only she could testify that she followed proper protocols. But Caballero's suggestion that the evidence could have been tampered with at some point is not sufficient to show a break in the chain of custody. He does not contend that the criminalist actually tampered with the blood or point to any evidence that she may have failed to follow protocol. Gallegos explained the laboratory's procedures; further, Caballero's blood sample was properly resealed when she received it. The trial court did not abuse its discretion in admitting the blood test results. *See State v. Hurles*, 185 Ariz. 199, 206-07, 914 P.2d 1291, 1298-99 (1996) (no error in admitting fingerprint cards where officer who took fingerprints did not testify, and testifying officer stepped away during actual fingerprinting process); *see also McCray*, 218 Ariz. 252, ¶¶ 8-15, 183 P.3d at 507-08 (inconsistent testimony on procedures and packaging of samples, and inconsistent test results do not establish tampering).

**Presumptive Sentence**

¶15 Finally, Caballero argues the trial court improperly considered his addiction to drugs and alcohol as an aggravating circumstance when it balanced sentencing factors. We will not

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<sup>6</sup>Having a testifying witness re-test the blood was necessary to avoid a Confrontation Clause violation. *See Bullcoming v. New Mexico*, \_\_\_ U.S. \_\_\_, \_\_\_, 131 S. Ct. 2705, 2715 (2011) (state's introduction of testimonial laboratory report through in-court testimony of analyst who did not perform or observe testing violated Confrontation Clause).

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disturb a trial court's sentence within the statutory range absent an abuse of discretion. *State v. Jenkins*, 193 Ariz. 115, ¶ 25, 970 P.2d 947, 953 (App. 1998). A court abuses its discretion if it does not adequately investigate the facts relevant to sentencing. *Id.*

¶16 In support of his argument, Caballero relies on the following statement by the trial court at sentencing:

And that's the thing that bothers me and concerns me the most, is that notwithstanding this . . . previously you had three felonies, thirteen misdemeanors, five of them were alcohol related, you continue this kind of conduct. That's what worries me because at some point I've got to consider, notwithstanding the wonderful support by your family members, that I've got to protect the community.

But the court never stated that it had considered addiction itself to be an aggravating factor; it did not list any aggravating factors at all. Additionally, the court's concern focused on Caballero's extensive criminal history, which included his alcohol-related crimes, and whether he was a danger to the community.

¶17 When evidence is presented to support mitigation, the trial court is required only to consider it, and need not find mitigating factors. *State v. Carbajal*, 177 Ariz. 461, 463, 868 P.2d 1044, 1046 (App. 1994). Further, when a trial court does find aggravating and mitigating factors, it is not required to deviate from the presumptive sentence. *See State v. Risco*, 147 Ariz. 607, 610, 712 P.2d 454, 457 (App. 1985); *see also* A.R.S. § 13-703(G) (court sentencing person as category three repetitive offender "may impose a mitigated or aggravated sentence" after making appropriate findings). Here, the court stated that it was considering in mitigation, "[Caballero's] family support, his remorse, as expressed in his letters, as well as his expression of responsibility." It did not identify any aggravating circumstances, but only voiced the concerns noted above. The court did not abuse its discretion in finding mitigating circumstances were insufficient to justify a

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sentence less than the presumptive term, *see Risco*, 147 Ariz. at 610, 712 P.2d at 457, or in considering Caballero's alcohol-related criminal history along with those circumstances.

**Disposition**

¶18 For the foregoing reasons, we affirm Caballero's convictions and sentences.