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SUPREME COURT OF ARKANSAS

No. CR09-872

GREGORY FORRESTER,
APPELLANT,

VS.

STATE OF ARKANSAS,
APPELLEE,

Opinion Delivered June 17, 2010

APPEAL FROM THE BENTON
COUNTY CIRCUIT COURT,
NO. CR2008-789-1,
HON. ROBIN FROMAN GREEN,
JUDGE,

AFFIRMED.

JIM HANNAH, Chief Justice

Gregory Paul Forrester appeals an order and judgment of the Benton County Circuit Court convicting him of violating Arkansas Code Annotated section 5-65-103 (Supp. 2007), operating a motor vehicle while intoxicated. Forrester asserts that the circuit court erred in denying his motion to dismiss based on denial of his right to advice of counsel. We affirm the decision of the circuit court. Our jurisdiction is pursuant to Arkansas Supreme Court Rule 1-2(b).

Shortly after midnight on December 1, 2007, Officer Bryan Hanna of the Rogers Police Department pulled Forrester over because one of his taillights was not working. Hanna testified that Forrester took a long time to pull over and that Forrester's eyes were glassy and he smelled of intoxicants. Forrester was arrested, transported to the police station,

presented with an implied consent rights form, and asked to submit to a breathalyzer test.¹ Forrester refused to take the test and was then transported to the Benton County jail. According to Forrester, within five minutes of his arrival at the jail, he requested an opportunity to call counsel and was refused. Forrester asserts that he made an additional request to call counsel that was also denied.

In the circuit court, Forrester moved for suppression of the evidence the State collected at the time of his arrest, and he also moved for dismissal. He argued that by denying him his right to contact counsel, he was denied the opportunity to gather exculpatory evidence. The circuit court, citing *Hudgens v. State*, 324 Ark. 169, 919 S.W.2d 939 (1996) as “directly on point,” overruled Forrester’s objections and denied his motion to suppress and motion to dismiss.

On appeal, Forrester argues that the circuit court “erred in denying his motion to dismiss for violation of the right to communicate with counsel.” Forrester asserts that because he was not allowed to contact counsel, he was unaware of the legal and practical consequences of refusing to take the breathalyzer test. He argues more specifically that,

¹ Pursuant to Arkansas Code Annotated section 5-65-202(a) (Repl. 2005), any person operating a motor vehicle impliedly consents to submit to a chemical test to determine alcohol or controlled substance level in his or her breath or blood. Refusal to submit to the chemical test may result in suspension or revocation of the person’s driver’s license by the Office of Driver Services. See Ark. Code Ann. § 5-65-205 (Supp. 2007). A finding of intoxication at the time of arrest may result in suspension or revocation of the person’s driver’s license by the Office of Driver Services. See Ark. Code Ann. § 5-65-104 (Repl. 2005).

because he was denied the opportunity to speak with counsel, he was unaware that he should (1) attempt to rescind his refusal to submit to the breathalyzer test, (2) have blood and urine tests taken, (3) have a qualified person give the standardized sobriety tests anew, (4) have the sobriety tests video taped and audio taped, (5) have someone come to the jail to observe him, (6) have photographs taken of his eyes and facial expressions, and (7) obtain an examination by a physician.

Forrester first addresses the right to counsel. He asserts the right to counsel arose after the test was offered and he was jailed and refused permission to contact counsel. He admits that there is no right to confer with counsel prior to taking the breathalyzer test. This court so held in *Hudgens*, 324 Ark. at 173, 919 S.W.2d at 941 (citing *Marx v. State*, 291 Ark. 325, 724 S.W.2d 456 (1987)). In *Marx*, this court relied on *Wells v. State*, 285 Ark. 9, 684 S.W.2d 248 (1985), and the analysis in *Wells* more specifically assists us in this case. In that case, this court concluded that the pretrial procedure of submitting to a breathalyzer test is not a critical stage in the criminal proceedings subject to the right to counsel because it is a scientific test that presents minimal risk that counsel's absence might derogate from the defendant's right to a fair trial. *Wells*, 285 Ark. at 12, 684 S.W.2d at 249 (quoting *United States v. Wade*, 388 U.S. 218, 227–28 (1967) and citing *Holmberg v. 54-A Judicial District Judge*, 231 N.W.2d 543 (Mich. Ct. App. 1975) (applying *Wade* to a breathalyzer test)). Clearly, there was no right to counsel at the time the breathalyzer test was offered. And Forrester offers no convincing

authority or argument for the proposition that counsel's absence at the time he was jailed might derogate from his right to a fair trial.²

Forrester next argues that he had a right to gather exculpatory evidence under the United States Constitution, the Arkansas Constitution, and Arkansas Rule of Criminal Procedure 8.3.³ Citing *Hudgens*, he states that, while he had no right to be let out of jail to obtain exculpatory evidence, he did have the right to have others come to the jail to collect such evidence. This court in *Hudgens* stated that because Hudgens refused the breathalyzer test, he had no right to an independent test. *Hudgens*, 324 Ark. at 174, 919 S.W.2d at 941. But, Forrester did not request an opportunity to gather exculpatory evidence. As such, the issue of whether a separate due-process right arises under the United States Constitution and the Arkansas Constitution is moot and need not be addressed. *See, e.g., Allison v. Lee County Election Comm'n*, 359 Ark. 388, 198 S.W.3d 113 (2004).

Affirmed.

CORBIN, J., not participating.

² Forrester argues on appeal that the refusal to submit to the breathalyzer test resulted in prejudice in that it gave rise to "an inference at trial that the reason he did not take the test was that he thought himself to be intoxicated." The refusal to submit to a chemical test can be properly admitted as circumstantial evidence showing a knowledge or consciousness of guilt. *Medlock v. State*, 332 Ark. 106, 109, 964 S.W.2d 196, 198 (1998). But, Forrester does not develop this argument. Failure to develop an argument precludes our review on the issue on appeal. *See Davis v. State*, 374 Ark. 368, 375, 291 S.W.3d 164, 169 (2009).

³ Arkansas Rule of Criminal Procedure 8.3 concerns informing a defendant of certain rights at the first appearance. Because Forrester was being held in jail for operating a motor vehicle while intoxicated pending sobriety and release, he could not be in jail awaiting trial. No first appearance is at issue, and Rule 8.3 is inapplicable.