

**IN THE CITY COURT OF THE CITY OF TUCSON
COUNTY OF PIMA, STATE OF ARIZONA**

STATE OF ARIZONA,)	Dockets
Plaintiff)	
vs.)	Underadvisement
Alexandra Chlup)	
DEFENDANT,)	
Defendant.)	

The Fourth Amendment's function is not to prohibit all seizures, but to constrain *unreasonable* seizures. It is clear that the taking of blood is a seizure subject to the Fourth Amendment and that the taking of blood in a medical environment has been upheld. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct.1826 (1966). Forcible blood withdrawal has also been permitted. *State v. Clary* 196 Ariz. 610, 2P.3d 1255. *People v. Esayian* 5 Cal.Rptr.3d 542 indicates that *Schmerber* did not set any set any requirement that all blood be drawn in a medical setting, but *Esayian* did indicate that a blood draw is a medical procedure and must be conducted in keeping with medical requirements for such procedure as did the court in *U.S. v. Chapel* 55 F. 1416 indicating the procedures used to extract the sample of blood must still be reasonable and in accord with accepted medical practices.

A.R.S 28-1388 states only a physician, registered nurse or another qualified person may withdraw blood to determine b.a.c. levels. Medical technologists and medical assistants have been held qualified to draw blood. *State v. Olcavage* 200 Ariz 582 and *State v. Carrasco*, 203 Ariz 44.

State v. May, 453 Ariz. Adv. Rep.3 involved a police officer blood draw from a standing suspect at the back of a police car. The lower court found no Fourth Amendment violation. In dicta the Second Division of the Court of Appeals found no abuse of discretion in this finding.

However, many concerns remain in the situation presented here where the behavior of the defendant resulted in the phlebotomist law enforcement officer physically restraining and handcuffing her about twenty minutes before the blood draw. The officer indicated that the T.P.D procedures provide for a substitute officer to perform the blood draw if he so requests. He did not request a substitute officer because none was available. The record is silent as to his state of mind after the confrontation with this defendant. However, the blood draw for the defendant was painful and continued for a number of days after and she suffered a hematoma the size of a baseball which was visible for a number of days afterward.

Here, though the officer is trained to draw blood through an accelerated course, he is not a medical practitioner nor does the officer's daily duties enrich his knowledge of the medical field and medical practices. His role when extracting blood is as a police officer gathering evidence. In DUI investigations the potential for animosity between an officer and suspect is high. The officer's physical struggle with the defendant to get her handcuffed, and pinning her against the officer's vehicle is certainly indicative of some level of animosity between this defendant and this officer. Although it was suggested that the officer was engaged in street justice, there is no evidence here to support an *intentional* infliction of pain on the defendant. However, the objective disengagement required from such event would certainly be expected. Phlebotomists in a medical context are unlikely to have engaged in an emotionally charged physical

confrontation with the patient prior to the blood draw. Nor is it likely that such situation would be tolerated by the medical community. The potential for residual antipathy in the context of two opposing forces exist in a law enforcement blood draw where ,as here, a physical confrontation actually occurred.

Experts who have testified in previous cases before the undersigned agree that a quality assurance program is a must for any phlebotomy program. Supervision by a qualified person is a must. But these safeguards do not exist within the police department which is entrusted with the duty to investigate and gather evidence, not to render a standard of care commensurate with the medical community and with the safeguards discussed by the experts. The police department is on its own to determine the quality of what is occurring, where it is occurring, and upon whom it is occurring. But here, no records or observations are made to determine whether the quality of an officer's skill is in accordance to the medical standards. The officer's are not required to report any difficulties and in fact may not know the damage caused unless of course a law suit is filed. There is no overseeing agency as one would expect in a medical context. The T.P.D supervisor is not a phlebotomist, so the officers are basically on their own as well. In a medical context, it would be known if a phlebotomist was consistently causing pain and hematoma to patients.

The situation here presents exactly the concern set forth in *Schmerber* when the Court noted with respect to drawing of blood by police in a non medical environment: "To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain". All of the above factors raise just such a concern that these phlebotomy practices are not in accordance with established medical practices and render a blood draw in these circumstances an increased risk. The pain and injury to the defendant is further evidence that the increased risk was real.

Therefore, the court finds that the increased risk of this blood draw performed outside of a medical practices and procedures and environment, by an officer phlebotomist after having engaged in a physical confrontation with the defendant rendered this seizure unreasonable under the Fourth Amendment.

Motion to Suppress is granted.

Dated this 18th day of January, 2006 .



Kate Dawes
City Magistrate

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