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6 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
7 IN AND FOR THE COUNTY OF PIMA

8 THE STATE OF ARIZONA,)
9 Plaintiff,)
10 vs.)
11 Esequiel Rascon Jimenez,)
12 Defendant,)
13 _____)

14
15 RESPECTFULLY SUBMITTED this day of April, 2005.

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18 _____
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1 **Procedural Facts**

2 On October 5, 2003, Deputy Heath arrested Mr. Jimenez for driving under the influence. After
3 arresting Mr. Jimenez for Driving Under The Influence, Deputy Heath drew blood from Mr. Jimenez. The
4 State tested the blood with the intent of using the results against Mr. Jimenez at trial. Mr. Jimenez, by and
5 through his attorneys, filed his Motion to Suppress challenging the legality of the blood draw and seeking
6 suppression of all evidence arising from the blood draw. (Exhibit 1). A multi-day evidentiary hearing was
7 held on June 18-19, 2004. (Exhibit 2)¹. After the hearing, at the court’s request, both sides filed
8 memorandum. (Exhibit 3 and 4). On October 29, 2004, Justice Court issued a four page memorandum
9 ruling that the draw constituted a violation of Mr. Jimenez’s rights against unreasonable search and seizure
10 guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution. (Exhibit 5)². After
11 the trial court issued its ruling, the State dismissed this matter without prejudice and initiated this appeal.

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14 **Standard of Review**

15 The standard of review for a trial court's order suppressing evidence is clear abuse of discretion.
16 State v. Rosengren, 199, Ariz. 112, 14 P.3d 303 (App.2000). The court is to view the evidence in the
17 light most favorable to upholding the trial court's ruling and "defer to the trial court's factual findings
18 that are supported by the record and are not clearly erroneous." Rosengren, 199Ariz.112, ¶ 9, 14 P.3d at
19 307. It is the trial court that determines the credibility of the witnesses. State v. Ossana, 199 Ariz. 459,
20 18 P.3d 1258 (App.2001). The standard of review for the trial court's legal conclusions is de novo. Id.;

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23 ¹ In filing its opening brief, the State relied upon a transcript of hearing prepared by the Pima
24 County Public Defender’s Office. To counsel’s knowledge, the State has not requested an official
transcript of the hearing be prepared by the Justice Court transcriber. In filing this response Defendant
relies on this same transcript.

25 ² Hereafter referred to as “E5.”

1 State v. Flannigan, 194 Ariz. 150, 978 P.2d 127 (App.1998).³

2
3 **Summary of Facts**⁴

4 On October 5, 2005, Deputy Heath conducted a traffic stop on Mr. Jimenez. Deputy Heath
5 noticed signs of possible alcohol consumption and conducted a driving under the influence
6 investigation. Deputy Heath believed Mr. Jimenez to be intoxicated and arrested him. Even though
7 Deputy Heath believed Mr. Jimenez to be intoxicated and had noted that his balance appeared
8 compromised, he nonetheless elected to draw blood from Mr. Jimenez, in the field, with Mr. Jimenez
9 standing. Deputy Heath could have transported Mr. Jimenez to a hospital but chose not to because, in
10 his words, “we’re not required to do so.” (pp. 137-138, ll. 19-3) (p. 104, ll. 18-21).

12 In a parking lot located at Cardinal and Valencia, Deputy Heath had Mr. Jimenez stand at the
13 trunk of his patrol car while he attempted to draw blood. (p. 104, ll. 5-7; p. 106, ll. 10-22) . When
14 Deputy Heath inserted the needle into Mr. Jimenez’s arm, Mr. Jimenez, leaned back, prematurely
15 pulling the needle from the arm. (p. 118-119, ll. 11-10). Deputy Heath then attempted to draw blood a
16 second time from Mr. Jimenez. (pp. 119-120, ll. 21-7). During the second attempt, Mr. Jimenez looked
17 down at the needle and tube, and seeing blood entering into the tube, flinched. (p. 127, ll. 1-5). The
18 needle again prematurely pulled out of the arm and Deputy Heath was only able to obtain a partial vial
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21 ³ In its opening brief the State asserts the Standard of Review as being de novo for statutory
22 interpretation. The trial court’s decision in this matter, however, was not one of statutory interpretation
23 but was clearly stated as suppression based upon Fourth and Fourteenth Amendments of the United
24 States Constitution.

25 ⁴ Counsel has attempted to provide this court with a summary of the relevant facts in this case
but urges this honorable court to review the full 409 page E.H. transcript as brevity has forced counsel
to exclude from this section many facts and details which this court might find relevant to the issues
presented in this case.

1 of Mr. Jimenez's blood. (p. 127, ll. 7-10); (E5, p. 2). Deputy Heath asked Mr. Jimenez whether he
2 wanted to be stuck a third time so that an additional sample of blood could be obtained. Mr. Jimenez
3 declined Deputy's Heath offer to puncture him again. (p. 127, ll. 12-21) .
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6 **Risks and concerns associated with drawing blood**

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8 At the hearing, experts Tankersley and Mass testified about risks and concerns associated with
9 drawing blood. Ms. Tankersley testified that nausea is an issue in blood draws, that it is common for
10 people to become stressed out over having blood drawn. (Tankersley, pp. 22-23, ll. 22-1). Tankersley
11 also testified that stress from a blood draw may be severe enough to cause convulsions. (Tankersley, p.
12 39, ll. 9-10). Ms. Mass testified that nerve damage resulting in permanent injury can occur, (Mass, p.
13 315, ll. 14-18; p. 324, ll. 14-15). Mass additionally noted that arteries and veins can be nicked or
14 perforated leading to internal hemorrhaging and that tendons can be struck causing pain and injury.
15 (Mass, p. 315, ll 14-28; p. 324, ll. 17-20); (Mass, p. 402, ll. 6-10).
16

17 In conjunction with above noted testimony, the experts also testified about protocols and
18 precautions designed to prevent such harm. Expert Mass testified that following rules and protocols
19 significantly reduces risks of harm to both the person giving blood as well as the person drawing the
20 blood. (Mass, p. 327-328, ll. 24-5; p. 323, ll. 23-25). Expert Swetnam testified that while mistakes can
21 happen in any circumstance, rules and protocols are followed to lower the risk. (Swetnam, p. 278, ll.
22 17-22).

23 **Standard of Care and Protocols**

24 The number primary rule of standard of care is to do no harm. (Mass, p. 319, ll. 7-10)(Swetnam,
25 p. 280, ll. 1-3). A phlebotomist or person drawing blood should keep this standard of care in mind at all

1 times when conducting venipuncture. (p. 280, ll. 7-9). While the general overriding standard of care is
2 “do no harm,” there are specific protocols and procedures which are recognized by the industry. These
3 specific protocols have been formulated and placed in print by the National Committee for Clinical
4 Laboratory Standards (NCCLS). NCCLS membership is composed of members from professional
5 groups, governmental groups, industry groups, and consumer groups. These members provide input that
6 established the standards. As such, NCCLS is “the community” in that it includes people from
7 healthcare, government, and industry. The regulations which NCCLS provides for venipuncture *is* the
8 community standard. (Mass, pp.306-307, ll. 15-12; pp. 319-320, ll. 26-7).

11 **Pima County Sheriff’s Department and Standard of Care**

12 Pima County Sheriff’s phlebotomy program has standard operating procedures (SOPs). These
13 SOPs require that deputies doing venipuncture perform “phlebotomy duties in a manner consistent
14 with the *community standard of care for such practices....*” (pp. 320-323; pp. 230-231) (emphasis
15 added). Phlebotomy program supervisor, Sgt. Theel, who put together the phlebotomy program SOPs,
16 specifically noted that “there’s a certain accepted standard practices for actually drawing the blood from
17 a person’s body...” Sgt. Theel explained this standard of care requires his deputies draw blood “*[i]n a*
18 *manner that they were trained to obtain the blood from the body.*” (p. 231, ll. 3-11).

21 **Training on proper protocols**

22 Even though Pima County Sheriff’s Department mandates its officers follow the medically
23 accepted standard of care and despite the known dangers associated with drawing blood, Pima County
24 Sheriff’s Department nonetheless provided Deputy Heath with training which, by industry standards, is
25 insufficient. Deputy Heath indicated that he attended a short phlebotomy course taught at Phoenix

1 Community College for law enforcement officers. (p. 95, ll. 11-23; p. 96-97, ll. 23-7; p. 160, ll. 7-9).
2 The primary instructor of the course was Cathee Tankersley. (p. 96, ll. 13). The book used by the
3 officers was Phlebotomy Essentials, co-authored by Ms. Tankersley. (Tankersley, p.18, ll. 25-27; p.
4 97, ll. 8-22; p. 97, ll. 15-17). See Ruth McCall & Cathee M. Tankersley, Phlebotomy Essentials, (3rd ed,
5 2003). The course consisted of two days in the class room learning how to perform venipuncture. (p.
6 50, ll. 3-5). After two days of instruction, the deputies then were sent out to medical facilities where
7 they performed 100 blood draws. (p. 100, ll. 13-21). The 100 draws were all done with the patient
8 sitting in a phlebotomy or similar type chair. (p. 78, ll. 17-21)
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11 **The course is significantly shorter and less demanding than is phlebotomy training for medical**
12 **purposes.** . Deputy Heath testified that he is not nationally certified in phlebotomy. (pp. 175-176, ll.
13 21-1).

14
15 Mass testified that normally, when a student finishes a phlebotomy education program, they are
16 considered to merely have career entry competency. The employer then must ensure that the newly
17 hired phlebotomist has the competencies needed for the job they have been hired for. Upon being
18 hired, the individual still should go through an orientation and oversight period before being allowed to
19 work independently. (Mass, p. 304, ll. 1-5).

20
21 After Deputy Heath completed his compressed venipuncture course, Pima County Sheriff's
22 Department did not require or provide any additional training or orientation. Indeed, even though
23 Deputy Heath and other law officers attending the Phoenix College course only receive limited
24 instruction on how to draw blood in a clinical setting, the Pima County Sheriff's Department
25 nonetheless let him loose, in the field no less, without any further supervision, training, or competency

1 testing. (pp. 24-25, ll. 24-1); (xxxxxxxxxx).

2 In comparison, Ms. Swetnam, a Carondelet Heath Network administrator, testified
3 Carondelet demands either six months of phlebotomy experience or completion of a legitimate
4 phlebotomy program. Upon being hired, the new phlebotomist still must undergo orientation and a 160
5 hour internship before being considered fully trained. (Swetnam, pp. 255-256, ll.25-5).

6 Counsel asks this court to note that Deputy Heath and the rest of his needle wielding colleagues
7 elect to draw in the field without regard for the safety of the blood draw subject simply because they
8 believe they “they can.” They do this despite the fact clinical settings are safer then non-clinical
9 settings in that clinical settings are set up to deal with complications. Clinical settings have phlebotomy
10 chairs which provide stability for the arm, and a phlebotomy chair with an arm rest makes it safer for all
11 parties. (Tankersley, p. 74, ll. 1-8); (Tankersley, p. 58, ll. 1-5); (Swetnam, p. 277, ll. 7-8); (Swetnam, p.
12 277, ll. 14-18. p. 278-279, ll. 24-3).

14 15 *Standing Blood Draws*

16 All expert witnesses agreed that blood should not be drawn from a person who is standing.. Ms.
17 Tankersley testified that the course instructional materials specifically provided that blood draws should
18 *never* be done on individuals while they are standing. (Tankersley, p. 81, ll. 13-18); Ruth McCall &
19 Cathee M. Tankersley, Phlebotomy Essentials, 259 (3d ed, 2003); (E5, p. 2). Ms. Mass also testified
20 that performing a blood draw on a person while they are standing is not an acceptable procedure.
21 (Mass, p. 329, ll. 19-24). Ms. Swetnam testified that standing blood draws should be done only as a
22 last resort. (Swetnam, pp. 282-283, ll. 18-3).

24 Tankersley testified that blood should not be drawn from people while they are standing because
25 people may move or fall during the blood draw process. (Tankersley, p. 82, ll. 5-9). Mass noted that,

1 "people flinch because they're needle phobic." (Mass, p. 401, ll. 4-8). Swetnam testified that blood
2 draw subjects could get nervous. They could be scared. They could feel faint, and as a result, they
3 could pass out, fall, or sway. (Swetnam, p. 281, ll. 1-10). Ms. Mass also testified that drawing blood
4 from a person whom is believed to be intoxicated raises additional concerns. Ms. Mass testified:

5 [I]f they have trouble with balance, just walking, that means that, um, they may not be
6 able to hold their balance when they're standing or halfway kneeling. And they have
7 more susceptibility to, uh, dizziness, fainting.

8 (Mass, pp. 332-333, ll. 25-1).

9 Testimony is clear that Deputy Heath was aware that drawing blood with the subject standing is
10 not proper protocol. Deputy Heath recalled reading in the text book that blood draws should never be
11 done while the blood draw subject is standing. (p. 111, ll. 8-13; p. 112, ll. 5-11).

12
13 Deputy Curtin also testified he was aware that the text book indicated blood draws were never to be
14 done while a person is standing. (p. 194, ll. 6-8).

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17 Despite this, Heath testified that not only did he conduct the blood draws in this case while Mr. Jimenez
18 was standing, but that he has conducted most of his blood draws with the subjects standing by the trunk
19 of their patrol vehicles. (pp. 161-161, ll. 22-2. p. 135, ll. 22-23).

20 21 22 **Quality Assurance and Competency Testing**

23 Both Ms. Mass and Ms. Swetnam testified as to the importance of quality assurance in assuring
24 safe blood draws. Mass testified that it is fundamental to a phlebotomy program that there be some sort
25 of quality assurance program. (Mass, p. 343, ll. 22-25), and that the officers' training materials

1 extensively calls for oversight and quality control. (Mass, p. 345, ll. 5-9); See also Ruth McCall &
2 Cathee M. Tankersley, Phlebotomy Essentials, ch 2. (3d ed, 2003).

3 Mass testified that quality assurance is used to identify areas where improvements are necessary.
4 That is the ultimate goal of quality assurance. If no quality assurance program is in place, then the
5 organization will continue to have errors and ongoing techniques that may cause harm. (Mass, p. 381,
6 ll. 17-20).

7 Part of legitimate quality assurance program includes competency testing and continuing
8 training. (Mass, p. 344, ll. 1-3). Ms. Swetnam testified that Carondelet demands their phlebotomists to
9 have yearly competency testing. (p. 261, ll. 22-28; p. 274, ll. 16-30), and if a phlebotomist is found to
10 be making mistakes, the mistakes are documented and the phlebotomist are retrained. (p. 275, ll. 8-11).

11 Sgt. Theel supervises the Pima County Sheriff's Department phlebotomy program. (p. 218, l.
12 19). Sgt. Theel has not attended phlebotomy training. (p. 219, ll. 20-21; p. 228, ll. 17-19). Sgt. Theel
13 testified that Pima County Sheriff's Department has no quality control, oversight, or competency testing
14 program. (p. 241, ll. 10-18). Sgt. Theel randomly reviews police narrative reports of blood draws. (p.
15 234, ll. 8-18). The narratives are standard narratives officers prepare when they are involved in an
16 investigation. Sgt. Theel doesn't review all of the reports because in his opinion, it would take too
17 much time. (p. 234, ll. 13-18).

18 In regards to the narrative, officer "phlebotomists" are required to include a number of different
19 items/events in the narrative concerning blood draws. (p. 245, ll. 9-23). Sgt. Theel is aware that
20 deputies commonly do not include the information which the phlebotomy rules require. Sgt. Theel is
21 unconcerned about this as he looks at the reports and the items which should be included in the reports
22 from a procedural/prosecution position. (p. 248, ll. 3-12).

23 Sgt. Theel is also aware that his deputies disregard their training in regards to drawing blood
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1 from subjects while they are standing. (p. 242-243; pp. 251-252). Sgt. Theel indicated that this had been
2 a topic of discussion and that the deputies prefer to do the draws with the subjects standing. (pp. 242-
3 243). Sgt. Theel defended the deputies actions noting that it was easier for the deputies to do the blood
4 draws with the subjects standing. (pp. 251-252).

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