

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. NANETTE WARNER

CASE NO. **CR20051907**

DATE: July 29, 2005

STATE OF ARIZONA

VS.

ESEQUIEL RASCON JIMENEZ

RULING

IN CHAMBERS RULING on Appeal from Lower Court Ruling in Justice Court Case No. TR03-046204.

The State appeals from the trial court's ruling suppressing the evidence of the blood drawn from the defendant after a traffic stop and his arrest for driving under the influence in violation of A.R.S. §§ 28-1381(A)(1) and (2) and 28-1382(A). The trial court found that the blood draw in this case was the product of an unreasonable search and seizure violating the Fourth and Fourteenth Amendment of the U.S. Constitution.

STANDARD OF REVIEW

This Court review's the trial court's ruling suppressing evidence using an abuse of discretion standard and defers to the trial court's factual findings if supported by the record and not clearly erroneous. The trial court's legal conclusions are reviewed *de novo* by this Court.

LEGAL ANALYSIS

The trial court made detailed factual findings. Although these findings are not set out separately, but intertwined with the Court's analysis of the law, the trial court's findings are supported by the record and are not clearly erroneous.

The drawing of blood is a bodily invasion and thus, is considered a search under the Fourth Amendment of the U.S. Constitution. Therefore, before the blood is drawn, a suspect must consent to the

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blood draw or a search warrant must be obtained, absent exigent circumstances. *State v. Estrada*, 209 Ariz. 287, 100 P.3d 458 (App. 2004).

Although, in this case, the defendant consented to the taking of his blood, the issue is whether the search was conducted in a reasonable manner. If the search is conducted in an unreasonable manner, the evidence must be suppressed. In *Schmerber v. State of California*, 384 U.S. 757, 86 S.Ct. 1826 (1966), the U. S. Supreme Court discussed blood draws in connection with criminal investigations. The U.S. Supreme Court limited its affirmation of the blood draw in that case based “only on the facts of the present record.” In *Schmerber*, the blood extraction was taken by a doctor in a hospital environment. While not specifically stating the parameters which would give rise to unreasonable manner of performing a blood draw, the Court noted concerns if the blood was drawn by someone other than medical personnel or in a setting which “might be to invite an unjustified element of personal risk of infection or pain.” 384 U.S. at 771-772.

The most recent Arizona case on point is *State v. May*, 452 Ariz. Adv. Rep 3 (App. June 3, 2005). Based on the facts in that case, the Court of Appeals upheld the trial court’s ruling that the taking of the blood from the defendant following his arrest for a DUI did not violate the defendant’s Fourth Amendment rights. While the defendant in *May* contended that the search was unreasonable because the officer drew the defendant’s blood while standing, the Court of Appeals deferred to the trial court’s finding that “the possible increased risks associated with on-site testing did not render the blood draw here unreasonable [citation omitted]. The Court went on to say that “[b]ased on this record, we cannot say the trial court abused its discretion in doing so ruling.” 453 Ariz. Adv. Rep. at 4. However, the Court of Appeals did not find that standing blood draws passed scrutiny under the Fourth and Fourteenth Amendment.

In this case, the trial court found that the defendant consented to the blood draw. When the defendant exited his vehicle, he staggered and almost fell. The deputy directed the defendant to lean over the trunk of his patrol car with his knees slightly bent to have his blood drawn. When the deputy inserted the needle into the defendant’s arm, he leaned back or straightened up causing his arm to move. On the second attempt

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to draw blood, the defendant flinched, jerking his arm. Thus, instead of obtaining the standard two vials of blood for testing, only one partial vial was obtained.

The trial court further found that the procedures used by the deputy in this case violated the accepted protocol for drawing of blood. There is no dispute that the protocol for extraction of blood requires that the subjects be seated and have their arm supported. As supported by the record, the trial court cited numerous risks to persons who are standing when their is blood drawn, including risk of pain and serious injury if they were to become dizzy, faint or experience a sudden drop in blood pressure. Other medical problems could occur in connection with a blood draw. The trial court further noted that with the vacutainer method (as used in this case), the needle may draw in air. If the subject is standing, the subject may be injured by hitting his head on the ground if he fell because he fainted or was dizzy or the needle could be torn out of a vein or could hit a nerve.

The trial court further noted alternatives available to the officer, including taking the subject to a hospital for a blood draw or to having “a folding chair with arm supports to utilize as a phlebotomy chair” in the trunk of the patrol car.

Thus, although the Court of Appeals upheld the standing blood draw in the *May* case, it was subject to the narrow factual findings of that case. In this case, the trial court made different factual findings. In fact, the defendant did suffer negative effects of a standing blood draw. Specifically, he flinched and jerked his arm in one case and straightened himself up in another case, both of which caused the needle to pull out of his arm. In addition, the standard two vials of blood were not obtained because of the “standing” procedure. The need to follow strict protocols is especially important where a subject may be impaired due to the ingestion of alcohol or other substances causing them to be less physically and medically stable than a person who had not ingested such substances.

The trial court did not abuse its discretion in suppressing the evidence of the blood draw as the product of an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments.

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With respect to whether the officer was qualified to do the blood draw, no specific finding was made by the trial court. Under A.R.S. § 28-1381(A), the blood may be drawn by a “physician, registered nurse or other qualified person”. The case of *Pennartz ex.rel. Olcavage v. Pennartz*, 200 Ariz. 582, 30 P.3d 649 (2001) discusses the meaning of a qualified person within the context of a Title 28 blood draw. The Supreme Court notes that, “[b]ecause DUI draws do not involve diagnosis, treatment, or correction, nor do they involve surgery, they do not constitute the practice of medicine.” 200 Ariz. At 654, 30 P.3d at 587. In that case, there was no dispute that the phlebotomist who drew the blood at the jail, police station or command post was qualified. However the court did not address “the minimum threshold at which a professed phlebotomist becomes qualified” under A.R.S. §28-1388 (A). 200 Ariz. at 655, 30 P.3d at 588. In this case, the trial court makes no specific finding on the qualifications of arresting officer to draw blood. However, implicit in the trial court’s ruling was that the officer had received the necessary training and education to draw blood in connection with the DUI suspect, but concluded that the manner in which the blood was drawn violated the defendant’s Fourth Amendment rights. Because the trial court’s decision suppressing the evidence is affirmed, this court does not need to address whether the officer was “qualified” under the statute to draw blood.

IT IS THEREFORE ORDERED affirming the ruling of the trial court below granting the defendant’s Motion to Suppress.

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