

ARIZONA SUPERIOR COURT, PIMA COUNTY

JUDGE: HON. CHARLES S. SABALOS

CASE NO. **CR-20051908**

DATE:

August 04, 2005

STATE OF ARIZONA

VS.

CHRISTINA JUNGERS

R U L I N G

UNDER ADVISEMENT RULING RE: LOWER COURT APPEAL

The State of Arizona appeals from an order of the Pima County Justice Court suppressing the results of a blood draw in a prosecution for driving under the influence of alcohol. The Justice Court suppressed the evidence on the basis that the blood draw violated the Fourth and Fourteenth Amendments to the United States Constitution because the manner in which the blood was extracted from Defendant/Appellee Chris Tina Jungers [hereinafter "Jungers"] was not in conformity with established phlebotomy safety protocols and unreasonably increased the risk of injury.

On the night of January 27, 2003, Pima County Sheriff's Deputy Phaneuf stopped the vehicle being driven by Jungers for failure to stop at a stop sign. Upon smelling what he believed to be the odor of alcohol on Jungers, Deputy Phaneuf determined to have Jungers submit to a blood sample as part of his subsequent investigation. The Pima County Sheriff's Department has sent some of its officers to a short course on venipuncture (as distinct from the broader field of phlebotomy) tailored exclusively to police officers so that they can perform blood extractions themselves without the assistance of medical personnel. Accordingly, Phaneuf transported Jungers to the parking lot of the Pima County Sheriff's Department main office on Benson Highway so that Deputy Curtin could withdraw the blood, although

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Kino Hospital was nearby. Phaneuf and Curtin did not take Jungers into the station where there were chairs for her to sit on. Instead, Jungers was required to stand next to the trunk of a police car at midnight in a parking lot with her arm resting on the trunk, even though Curtin knew Jungers had a broken foot. Additionally, although Curtin knew that Jungers was taking blood-thinning medication, he did not hold a pressure bandage over the extraction site for the full recommended period of time.

Jungers moved to suppress the results of the blood draw, contending that the warrantless extraction of her blood was an unreasonable search and violated her rights to due process in violation of the Fourth and Fourteenth Amendments to the United States Constitution. The trial court held an extensive evidentiary hearing in which the State presented several witnesses expert in phlebotomy. From their testimony the trial court concluded that many phlebotomy standards and protocols are designed to minimize the risk of harm to the person whose blood is being taken. Among those standards is that persons whose blood is being drawn are to be seated and their arms supported to minimize the risk of “the person becoming dizzy, fainting, falling, or experiencing a sudden drop in blood pressure leading to a convulsion.” Lower court opinion at 2. It was uncontroverted that the police officers learned these requirements during their training. The lower court further found that even in the best of circumstances, unexpected problems can arise during a blood extraction and in a medical setting, trained personnel are present to deal with medical emergencies.

The record of the hearing on Jungers’s motion to suppress evidence established the following:

- 1) Curtin knowingly disregarded the safety protocol requiring him to seat Jungers at the time of her blood extraction, a violation of protocol which increased the risk of harm to Jungers because she was suffering from a broken foot;
- 2) Curtin could not recall whether he sanitized the trunk area before placing Jungers’s arm on the trunk to extract her blood;
- 3) The blood-thinning medication Jungers was taking increased her risk of excessive bleeding and

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her clotting time;

- 4) Curtin placed pressure over the puncture wound for thirty seconds rather than his normal ten seconds. However, he should have held the pressure over the wound for fully one minute to minimize the risk of harm to Jungers due to the blood thinner;
- 5) The supervisor of the program, Sgt. Theel, has never taken phlebotomy training (Transcript of proceedings at 219, 228);
- 6) There is no quality control program for the phlebotomists and there is no mechanism for re-training in the event of problems (Tr. 241);
- 7) Two people have actually fainted while deputies were extracting their blood (Tr. 198);
- 8) The officers decided amongst themselves they would ignore the protocol to have drawees sit simply because it was easier for the officers to perform the blood draw in that manner; (Tr. 242-43, 251-52), and,
- 9) The State offered no other compelling reason requiring the abandonment of the safety protocols.

The trial court suppressed the results of Jungers' warrantless blood extraction on the basis that it unreasonably subjected her to the risk of harm and, therefore, violated her constitutional rights. The court recognized the strong interest society has in obtaining evidence of crimes, particularly evanescent evidence such as blood alcohol evidence. However, balancing that interest against the increased risk of harm presented by the process in this case, the court concluded the evidence could not be admitted. The trial court found that the outdoor setting increased the inherent risk of mishap because poor lighting, noise, dust, wind, and passing traffic could cause the drawee to jerk or move during the draw. The increased risks from mishaps include the possibilities of pain or even injury due to flinching, dizziness, fainting, drop in blood pressure, falling, and the possibilities of needles being torn out of or puncturing the vein or introducing air into the vein. Given that Jungers presented an already increased risk due to her broken foot and blood medication, the trial court found there was a safe and reasonable alternative

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available in that the officer could as easily have taken her to a nearby hospital for the draw as taking her to the police station parking lot; and further, having her stand, placing her arm on a potentially unsanitized trunk lid, and failing to hold pressure over the wound for the requisite period of time unnecessarily increased the risks to Jungers. The trial court also pointed out that the officers could easily have remedied the lack of a seat by carrying a simple, inexpensive beach chair for use in blood draws where the suspects presented no additional risk factors as Jungers did. Because the State failed to meet the applicable standard of care, it put Ms. Jungers at an "unnecessary and unreasonable risk." Lower court opinion at 3. The State voluntarily dismissed the prosecution below and now appeals the trial court's ruling.

This Court is compelled to defer to determinations of fact where they are supported by competent evidence in the record and not clearly erroneous. The court views evidence in the light most favorable to upholding the ruling. *State v. May*, 112 P.3d 39, 2005 WL 1314882 (App. Div. 2 June 3, 2005).

Determinations of law are reviewed *de novo*.

"An 'abuse of discretion' is discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *Torres v. North American Van Lines, Inc.*, 135 Ariz. 35, 40, 658 P.2d 835, 840 (App.1982). Even if we would have acted differently under the same circumstances, we nevertheless will affirm the trial court's decision if it did not "exceed [] the bounds of reason by performing the challenged act." *Toy v. Katz*, 192 Ariz. 73, 83, 961 P.2d 1021, 1031 (App.1997); *see also Quigley v. Tucson City Court*, 132 Ariz. 35, 37, 643 P.2d 738, 740 (App.1982) ("A difference in judicial opinion is not synonymous with 'abuse of discretion.'").

Englert v. Carondelet Health Network, 199 Ariz. 21, 27, 13 P.3d 763, 769 (App. 2000), *rev. den.* (2001).

The record here supports the trial court's finding that requiring Jungers to stand in the parking lot for the blood draw when she had a broken foot and failing to hold a pressure bandage over the puncture site for the appropriate period of time when there was a ready alternative in Kino Hospital unnecessarily

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increased the risk of injury to her.

Fourth Amendment analysis of blood draws begins with *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966), which held that a blood draw is a search within the meaning of the Fourth Amendment. *Schmerber* approved as consistent with the Fourth Amendment a blood draw taken by a physician in a hospital setting, but the decision was limited on its face to clinical settings; the Supreme Court expressly declined to state what rules would apply in a non-clinical setting such as in a police station. The Supreme Court expressly noted that to “tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.” 384 U.S. at 771-72, 86 S. Ct. at 1836, 16 L.Ed.2d at 920. The touchstone is whether the search is reasonable. No other case with precedential value has decided the exact questions before the Court today. However, last month, Division Two issued a decision in *State v. May*, 112 P.3d 39, 2005 WL 1314882 (App. Div. 2 June 3, 2005), in which the court advised in *dicta* that the trial court had not abused its discretion in admitting blood draw results where the blood was drawn by an officer at roadside. The *May* case does not control the outcome here because the portion addressing this issue was *dicta*, the question *May* decided was merely whether the trial court had abused its discretion in ruling that the risk presented on *May*’s facts was not significantly increased, and *May*’s facts differ from the facts here in a significant way in that Jungers was more susceptible to potential injury than May due to her broken foot and blood thinning medication and the officers’ failure to take proper precautions as to these conditions. Equally significant, the Court of Appeals did not approve wholesale the practice of police officers drawing blood rather than clinicians, and while drawees were standing in outside or field conditions. Having found that the risks were unnecessarily increased, the trial court did not abuse its discretion in ruling that the extraction of blood here was an unreasonable search.

This case also is distinguishable on its facts from cases cited in *May*. In *People v. Esayian*, 112 Cal. App.4th 1031, 5 Cal. Rptr.3d 542 (2003), the blood draw was conducted by a phlebotomist

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supervised by a nurse at a detention center. In *State v. Sickler*, 488 N.W.2d 70 (S.D. 1992), a law officer who also was a registered nurse with expanded training did the blood draw with the suspect seated. The court there specifically found that medical protocols reasonably were followed and there was no threat to the suspect's health or safety. To similar effect is *State v. Daggett*, 250 Wis.2d 112, 640 N.W.2d 546 (App. 2002), *rev. den.*, in which a physician drew the blood in the booking room of the jail. None of these cases compels reversal on the facts before this Court.

The State directs a substantial portion of its briefing to whether Deputy Curtin was qualified to draw the blood based on his training but the trial court did not make an explicit ruling on whether he was qualified to extract blood. The Court notes that Arizona has no licensing procedures for phlebotomists giving medical care. Similarly, the Arizona statutes do not specify who falls within the ambit of persons authorized to take a blood sample for DUI purposes, or more precisely stated, whether the statutes authorize a law enforcement officer with proper training to take a sample, or whether only actual medical personnel can take a sample. A.R.S. § 28-1388(A) provides in part:

If blood is drawn under § 28-1321, only *a physician, a registered nurse or another qualified person* may withdraw blood for the purpose of determining the alcohol concentration or drug content in the blood. The qualifications of the individual withdrawing the blood and the method used to withdraw the blood are not foundational prerequisites for the admissibility of a blood alcohol content determination made pursuant to this subsection.

Emphasis added. The appellate courts have interpreted this language to permit phlebotomists and medical assistants to draw blood samples without supervision of a physician or nurse where such persons are sufficiently competent by reason of their training or experience in drawing blood. *State v. Carrasco*, 203 Ariz. 44, 49 P.3d. 1140 (App. 2002); *State v. Olcavage*, 200 Ariz. 582, 30 P.3d 649 (2001). But those decisions involved actual medical personnel and are of no assistance where the issue is whether a police officer who does not otherwise have significant medical training can draw blood under the statute.

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Rules of statutory construction could reasonably lead to the conclusion that the words in context, “physician, a registered nurse or another qualified person,” are meant to limit the type of person who is qualified under the statute to health care practitioners and that police would not qualify, and Jungers certainly devoted a large portion of argument below to other reasons why police officers cannot qualify. However, the Court finds that the state of the record is such that the issue of the qualification of police officers to draw blood in the field is not properly before the Court, and the resolution of this issue is not necessary in view of the fact that the trial court’s ruling was based on the unreasonably risky circumstances in which Jungers’ blood was extracted from her body. The Court finds that the trial court did not abuse its discretion in suppressing the results of the blood sample taken from Jungers and therefore, affirms the trial court’s decision.

IT IS ORDERED the matter is remanded to the Pima County Justice Court for further proceedings consistent with this order.

HON. CHARLES S. SABALOS

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