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

STATE OF ARIZONA, Plaintiff vs. Stephanie J. Parker, Defendant.	)	Dockets TR05049980 UNDER ADVISEMENT RULING

The question presented is whether a "butterfly" blood draw, done outside of a medical environment by a police officer phlebotomist subjected the defendant to an unreasonable seizure of her blood.

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.

The word "only" in A.R.S. 28-1388 seems to point to trained persons i.e. those familiar with and able to follow acceptable medical practices, protocol and precautions. The medical technologist and medical assistant in *Olcavage* and *Carrasco* were found qualified. *Schmerber, Chapel,* and *Esayian* all incorporate the concern that reasonableness is met where medical practices and procedures are adhered to.

Notwithstanding, the number of blood draws accomplished by this officer, he seemed unfamiliar with potential risks and was unfamiliar with or was not taught about the limitations of the butterfly technique. He asserted several times that there are no risks if it is done properly. He did not seem to be aware of or consider varying physical limitations that might be presented by various individuals. He treats them all the same though the butterfly technique may not be appropriate in most instances. We know from the officer's testimony that one elderly subject upon whom he performed the butterfly technique had a collapsed vein and had to be taken to Kino Hospital. This might mean that the officer did not understand the risk of the butterfly technique, or that he did not understand that age presents risks, or that, under his own logic

("There are no risks if you do it right") he performed the procedure improperly. In addition, he was unfamiliar with the issues of disease and disinfecting the environment and other concerns discussed by both Ms. Tankersley and Ms. Mass.

These experts both 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 Ms. Tankersley and Mass. 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. 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.

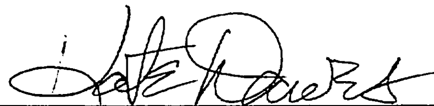
Here, though the officer is trained to draw blood through an accelerated course, he is not a medical practitioner nor does the officer's daily duties enrich his knowledge of the medical field and medical practices. His role when extracting blood is as a police officer gathering evidence. Although it does not appear that the officer was intending to hurt the defendant, nevertheless his primary objective was not a medical objective but rather law enforcement; his knowledge of risks and precautions regarding practices and procedures of drawing blood were limited. And another factor that generally may exist in DUI investigations is the potential for animosity between an officer and suspect. Although no animosity was apparent between this defendant and this officer, it is clear in relation to one another, they certainly had conflicting interests.

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 which would render a blood draw in these circumstances an increased risk. Added to this, the technique utilized was based on the officer's *preference* rather than on the consideration of the potential effect on this defendant. He was very candid that his choice of technique was the butterfly because he *prefers* it, he is *comfortable* with it. As noted, both experts, including Ms. Tankersley, the author of the textbook utilized in this officer's training, were clear that this should be done only when another technique has been ruled out and where there are very small veins.

Thus this non-standard procedure subjected the defendant to unjustified element of personal risk where the defendant was in pain for three days and had a resulting hematoma. 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 with limited understanding of the risks of the technique he was utilizing and other risks inherent in phlebotomy rendered this seizure unreasonable under the Fourth Amendment.

Motion to Suppress is granted.

Dated this 6th day of January, 2005.



Kate Dawes,
City Magistrate

Copy distributed to file Prosecutor Defense Counsel by on