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*** Electronically Filed ***
07/13/2012 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CR2011-110536-001 DT 07/10/2012

HONORABLE BRUCE R. COHEN

CLERK OF THE COURT
T. Gatz
Deputy

STATE OF ARIZONA S LEE WHITE

v.

PATRICK MCLEOD NISSLEY (001) LAWRENCE I KAZAN

UNDER ADVISEMENT RULINGS

This Court is called upon to rule on various motions. In so doing, the Court has considered the arguments of counsel, the pleadings filed and the findings from the evidentiary hearing (where applicable).

MOTION TO SUPPRESS

Defendant is seeking suppression of the blood test results, which are alleged to have established the presence of methamphetamines and morphine in Defendant's blood stream soon after the incident. To address this issue, the Court is compelled to make findings of fact and conclusions of law.

The issue is controlled in large part by ARS Section 28-1388(E). In pertinent part, it provides that "…*if a law enforcement officer has probable cause to believe that a person has violated section 28-1381 and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes*."

There is a threshold question relating to the probable cause prong. Toward that end, the Court heard testimony from various first-responders following the collision that occurred on November 2, 2010. Each had a somewhat different perspective but there were inherent similarities to their versions of events.

It is established that the medical aid providers on scene encountered Defendant behind the wheel of his vehicle. Defendant exhibited significant injuries consistent with an automobile accident, and there was the presence of substantial amounts of blood, identifiable wounds and suggestions of head trauma suffered by Defendant. He was combative when encountered by medical care providers at the scene. Defendant made numerous comments to first-responders, including "leave me alone," "don't touch me," "fuck-off," and "I'm fine. Just go away." He was also physically aggressive (flailing arms and attempted punches) in fending off the medical assistance. At least one paramedic indicated that such combative behavior is not uncommon for someone who suffered head trauma.

Throughout this process, first-responders were attempting to assess the level of injury as well as Defendant's orientation to time, place and event. Despite the repeated inquiries, Defendant never responded directly to the questions. It was then determined that the injuries noted as well as the inability to determine the level of head trauma required transport to the hospital.

At or about the time in which the medical assessment was being made, various first-responders and law enforcement personnel found hypodermic needles in or near the vehicle driven by Defendant. None of the officers observed any vials of insulin but it is clear that none sought such evidence as they were tending to the medical emergency. Additionally, at least one officer (Deborah Henshrot) noted that Defendant appeared disoriented, delirious and "on something."

The accident scene itself is also relevant to this determination of probable cause. The evidence presented is consistent with the preliminary opinions of Officer Plotnik that Defendant had been driving at a high rate of speed just prior to impact of the vehicles. This was supported by the location of debris, distance travelled by Defendant's vehicle after impact, as well as damage to the involved vehicles.

As held in State v Aleman, 210 Ariz. 232, 237, 109 P.3d. 571 (2005), “probable cause exists if the collective knowledge of the officers establishes that they had ‘reasonably trustworthy information of facts and circumstances which are sufficient in themselves to lead a reasonable [person] to believe an offense ... has been committed and that the person to be arrested ... did commit it.’ *State v. Richards*, 110 Ariz. 290, 291, 518 P.2d 113, 114 (1974). Officer Plotnik had been advised of at least significant portions of the information set forth above and, along with her personal observations on scene, concluded that there was probable cause to believe that Defendant had violated ARS Section 25-1381 or related statutes. This Court finds that there is sufficient evidence to support her probable cause finding. Accordingly, this prong of the statutory requirements has been met.

The second element of the subsection (E) of the statute relates to the purpose in securing the blood samples. The statute references "any reason" and, as applied herein, the necessary medical care of Defendant at the hospital meets this prerequisite. *State v. Cocio,* 147 Ariz. 277, 286, 709 P.2d 1336, 1345 (1985).

There is a caveat, however, in applying ARS Section 28-1388(E). It is required that the person must be receiving medical treatment voluntarily for that statute to allow a warrantless blood draw. State v Estrada, 209 Ariz. 287, 100 P.3d 452 (2004). This presents the pivotal issue in this analysis.

The facts in *Estrada* are of importance. Following a one car auto accident, Estrada was first encountered by law enforcement to be rendering medical aid to the passenger from his vehicle. The officer did not detect any signs of intoxication but was of the opinion that Estrada required medical care of his own. Estrada was convinced by the first responders to be taken to the hospital and was transported by ambulance. While on route, Estrada changed his mind and in a clear and unambiguous manner, stated that he was not interested in receiving medical care of any nature. He attempted to exit the ambulance. There was then contact between the arresting officer and the paramedics relating to Estrada's refusal to submit to medical care, at which time the officer handcuffed Estrada to the gurney and he was transported, against his will, to the hospital. A blood draw was taken and a sample was provided to law enforcement. The trial court then suppressed the blood test results and the suppression was upheld on appeal.

As applied herein, *Estrada* stands for the proposition that "an officer cannot obtain blood for law enforcement purposes under ARS § 28-1388(E) when the person is subjected to medical treatment that the person has expressly rejected." at 455. The remainder of the discussion in *Estrada* is of importance, but is not central to the issue presented herein.

The commentary from the *Estrada* provides insight into the determination of what constitutes sufficient rejection of medical care to overcome the statutory authorization under ARS § 28-1388 (E). They noted that "Estrada had been forcibly taken to the hospital" (at 454) and, when referring to the rejection of medical treatment, used phrases such as "against his will" (at 455), "expressly rejected" (at 455) and "clearly and expressly" (at 456).

This Court has painstakingly reviewed the record to assess whether Defendant's actions rose to the level of "express rejection" of medical care contemplated by *Estrada*. In so doing, the Court has not only weighed the presentation of the various witnesses, but also the tape recording secured by Officer Plotnik at the hospital. Throughout the recording, there were numerous comments and sounds from Defendant that included "it hurts," "ow fuck, ow fuck, ow fuck, no" as well as repeated moans expected from someone in great pain. None of the contents

of the recording from the hospital would rise even near to the level of express rejection of medical care.

The noted actions of Defendant at the scene of the accident are subject to interpretation that could include resistance to touch due to pain or a delirious state of mind. While it is also possible to interpret Defendant's actions and words to be a rejection of medical care, they do not rise to a clear and unambiguous rejection and are certainly not of the level of rejection voiced by Estrada.

Based upon the foregoing, it is the finding of this Court that law enforcement secured the blood sample in accordance with ARS Section 28-1388(E) and that the actions of Defendant did not constitute an express refusal to submit to medical treatment sufficient to mandate that a warrant be secured. As such, the Motion To Suppress is denied.

Given this ruling, the Court does not need to address other arguments relating to the use of the blood evidence, such as the State's arguments relating to the good-faith exception (ARS Section 13-3925) or the "inevitable discovery doctrine." Additionally, Defendant's arguments relating to Officer Plotnik's failure to complete the required hospital form for the blood draw is not fatal since the proper completion and execution of the form is not required by statute. The Court has, however, considered Defendant's arguments relating to the incomplete form as it may impact the determinations made above.

TESTIMONY OF ERIC HUDSPETH

The Court is informed that Mr. Hudspeth is among those who allegedly witnessed Defendant's driving leading up to and through the collision that ensued. He was previously deposed, at which time defense counsel was able to cross-examine the witness. Subsequent thereto, it was determined that Mr. Hudspeth was experiencing medical related issues and may not have been available for the previously scheduled trial. Since then, the trial date has been reset and for August 9, 2012.

The determination of this issue is deferred until it can be determined whether Mr. Hudspeth will be available to testify in person at the August, 2012 trial. In the interim, the Court has directed the State to disclose by July 31, 2012 whether they believe Mr. Hudspeth will be able to appear in person at trial or whether they intend to move forward with their Motion relating to use of the video deposition.

If the State pursues use of the video deposition, they should be prepared to address concerns noted by the Court, which include whether the video deposition will sufficiently allow

the jury to assess credibility of Mr. Hudspeth as well as whether use of the video deposition serves to deny Defendant inquiry into any purported drug issues of Mr. Hudspeth (which appears not to have been known at the time of the video deposition).

MOTION FOR COURT ORDER CONTROLLING STATE'S WITNESS

Defendant asserts that Officer Plotnik of the Paradise Valley Police Department engaged in obstructive behaviors during her testimony at the June 18, 2012 evidentiary hearing in this matter. This Court does not share the beliefs of defense counsel. Further, if any witness engages in behaviors in front of a jury as alleged by defense counsel, such more appropriately goes to the determination of credibility, which is reserved for the jury to address. On the other hand, there is also the risk that the alleged behaviors could negatively impact the defense presentation.

Notwithstanding the assertions made on behalf of Defendant, this Court is not making any finding against Officer Plotnik. Rather, in an effort to reduce the potential issues at trial before the jury, the State is asked to confirm for Officer Plotnik that she shall be expected to directly answer questions posed by defense counsel at trial and to avoid narratives, unless sought.

MOTION IN LIMINE TO PRECLUDE EXPERT OPINION TESTIMONY

Defendant seeks an order restricting Dr. Frederic Kramer from testifying about the effects of methamphetamines and morphine on an individual or on defendant. According to the information presented at oral argument, Dr. Kramer has acknowledged that he is not an expert on these substances but believes that based upon his medical knowledge and review of NHTSA fact sheets, he is able to testify as to the impact the substances may have on a person.

This Court has considered the applicable case law and rules of evidence. From that, the Court concludes that there appears to be sufficient foundation to allow Dr. Kraemer to provide opinion testimony as to the impact of these substances on a person. The concerns raised by Defendant are issues for the jury in determining the weight to give to any opinion testimony of Dr. Kraemer.

MOTION IN LIMINE RE: 404(B) EVIDENCE

The State is seeking the right to present evidence relating to a prior automobile accident involving Defendant in which it is alleged that he was experiencing a hypoglycemic event. It is the State's theory that this serves as "notice" to Defendant of the impact of his diabetic condition. They reason that with that notice, Defendant's actions in this incident can be viewed as reckless disregard on the part of Defendant at the time of his driving leading up to this incident.

The Court cannot disagree with the general analysis of the State. However, there are significant factual links between the prior accident and this incident that have not yet been established. For example, there is no showing that Defendant had knowledge of an alleged hypoglycemic event during the moments preceding this incident. Further, while Defendant has alleged "medical emergency" as a defense in this matter, the nature of that alleged emergency has not yet been presented. As such, the probative value of the prior accident cannot yet be determined and must be precluded under Rule 403.

Accordingly, the State's use of the 404(B) evidence is denied, without prejudice. The State may re-urge its motion during the trial of this matter, based largely on the evidence presented and positions asserted by Defendant.

The Court must also address a legal issue that has been raised. Defendant asserts that allowing the State to allege reckless disregard in the context of a hypoglycemic event (rather than as a function of ingestion of methamphetamines and morphine) is tantamount to allowing the State to amend its original charges. This Court is not yet in a position to assess this argument as the basis for potentially allowing the 404(B) evidence has not been established. However, it is the preliminary view of the Court that the argument as to knowledge of hypoglycemia and the alleged element of "reckless disregard" are not inconsistent and would not automatically serve to amend the original complaint.

This case is eFiling eligible: http://www.clerkofcourt.maricopa.gov/efiling/default.asp. Attorneys are encouraged to review Supreme Court Administrative Order 2011-140 to determine their mandatory participation in eFiling through AZTurboCourt.