

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-130260-001 DT

03/29/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

ANDREA L KEVER

v.

JAMES WAYNE REPULLO (001)

LAWRENCE KOPLOW

REMAND DESK-LCA-CCC
UNIVERSITY LAKES JUSTICE COURT

RECORD APEAL RULING / REMAND

Lower Court Case Number TR 2011-130260.

Defendant-Appellant James Wayne Repullo (Defendant) was convicted in the University Lakes Justice Court of with driving under the influence and driving under the extreme influence. Defendant contends the trial court erred in denying his Motion To Dismiss, which alleged trying him on two of the three charges would violate the provisions against double jeopardy. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

Note: The convictions in this matter were the result of two trials, each lasting 2 days: December 9 and 12, 2011, and March 16 and 21, 2012. Defendant has attached to his Opening Memorandum an Appendix, which consists of the four days of trial transcripts. Those transcripts are four to a page, thus the type size so small that it is difficult to read. This Court has, however, used the four-to-a-page transcripts from Defendant's Appendix in determining this appeal.

The University Lakes Justice Court has sent full-size versions of the transcripts to this Court, but has sent only the two transcripts for First Trial: Day 1, December 9, and Day 2, December 12. Those two volumes do not, however, contain a complete transcript of the proceedings from the First Trial.

The volume for the second day, December 12, appears to be complete, ending on page 143, and is the same as the four-to-a-page transcript in Defendant's Appendix. The volume for the first day, December 9, is not complete. According to the four-to-a-page transcript in Defendant's Appendix, the transcript of December 9 has 202 pages. The first 58 pages of the December 9 (full size) transcript are the same as the first 58 pages of the four-to-a-page transcript in Defendant's Appendix. The pages beginning with page 59 and ending with page 143 are from the December 12 day of trial, and are the same as page 59 through 143 of the December 12 (full size) transcript. Thus, the December 9 transcript supplied to This Court by the University Lakes Justice Court is missing pages 59 through 202 of the December 9, 2011, proceedings. And this Court has no full-size versions of the transcripts for the second trial.

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As noted above, this Court has used the four-to-a-page transcripts from Defendant's Appendix, and those four-to-a-page transcripts are presently contained in this Court's record. This Court's record does not, however, contain a complete set of full-page transcripts, as discussed above, and will not contain a complete set of full-page transcripts unless either of the parties takes the necessary steps to have the University Lakes Justice Court supply a complete set of full-page transcripts to this Court.

May 6, 2011, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); and driving under the extreme influence, A.R.S. § 28-1382(A)(1) (0.15 or more). The first trial began on December 9, 2011, with Judge Don E. Calender presiding. After jury selection and opening statements, Sergeant Christopher Dowell testified he was on duty on May 6, 2011. (R.T. of Dec. 9, 2011, at 115-17.) At approximately 2:13 a.m., a vehicle changed lanes without signaling and came so close that he had to brake to avoid colliding with that vehicle. (*Id.* at 117-18, 150.) He activated his emergency lights to make a traffic stop, and the vehicle pulled over and stopped. (*Id.* at 118-19.) He identified Defendant as the driver of that vehicle. (*Id.* at 117.) After noting signs of alcohol impairment, Sergeant Dowell arrested Defendant for DUI. (*Id.* at 119-25, 151.)

Officer Dallas Cox testified he was on duty on May 6, 2011, and administered the Intoxilyzer test to Defendant. (R.T. of Dec. 9, 2011, at 159-63.) The State offered in evidence the check-list Officer Cox used for Defendant [Exhibit 3] and Defendant's attorney made no objection, so the trial court admitted it. (*Id.* at 163.) The State offered in evidence the printout from the Intoxilyzer test for Defendant [Exhibit 4] and Defendant's attorney made no objection, so the trial court admitted it. (*Id.* at 165-66.) The results of those tests were BAC readings of 0.189 and 0.195. (*Id.* at 167.) Officer Cox also testified about the calibration checks he had done on the Intoxilyzer machine. (*Id.* at 166.)

Sergeant Paul White testified about the calibration checks that had been done on the Intoxilyzer machine. (R.T. of Dec. 9, 2011, at 177-81.) He said those checks indicated the machine was operating properly. (*Id.* at 181.) The State then rested. (*Id.* at 182.)

Defendant's attorney then made a motion for judgment of acquittal for the charges based on the BAC test readings, contending the State had not introduced any evidence that the 30-day and 90-day maintenance checks had been done on the Intoxilyzer machine. (R.T. of Dec. 9, 2011, at 195.) The prosecutor objected, noting Defendant's attorney had not objected to the admission of the printout from the Intoxilyzer test for Defendant [Exhibit 4] or the results of those tests, thus those matters were part of the evidence for the jurors to consider and Defendant's objection was therefore untimely. (*Id.* at 195-96.) The prosecutor further noted there was a statute on point and asked Judge Calender for time to research the issue. (*Id.* at 195-99.) Defendant's attorney said he had no problem with the trial court's giving the parties time to brief the issue. (*Id.* at 199.) Judge Calender then said the parties could work on the issue over the weekend. (*Id.*) In the court's Calendar Events and Hearings, there is no notation of either a motion for judgment of acquittal or a ruling.

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The morning of the following Monday, the prosecutor filed a written Response to Defendant's motion for judgment of acquittal. When the parties reconvened that Monday, Defendant's attorney acknowledged the statute had changed and he had been unaware of the change, so his motion for judgment of acquittal was without merit. (R.T. of Dec. 12, 2011, at 2–3.) He argued, however, that Judge Calender had, albeit mistakenly, granted the motion for judgment of acquittal and thus any further trial on the charges based on the BAC test readings would violate the provision against double jeopardy. (*Id.* at 3.) Judge Calender clarified, stating he had not ruled on Defendant's motion for judgment of acquittal that Friday and instead told the parties to research the issues over the weekend, and thus planned to rule on the issue that Monday morning. (*Id.* at 3–4.) Defendant's attorney again presented his position that Judge Calender had ruled on the motion for judgment of acquittal, and the prosecutor again presented her position that Judge Calender had not ruled on the motion. (*Id.* at 5–6.) Judge Calender reiterated that he had not made a final ruling on Friday and then ruled, denying Defendant's motion for judgment of acquittal. (*Id.* at 7.) At some point, Judge Calender wrote on the State's Response, "Rule 20 Motion—Denied after O/A on 12–12–11, D. Calender."

Defendant then testified, followed by Chester Flaxmayer. (R.T. of Dec. 12, 2011, at 8, 65.) After the defense rested, the State called Sergeant White in rebuttal. (*Id.* at 112, 116.) The State then rested. (*Id.* at 120.) After the trial court instructed the jurors and the attorneys made their final arguments, the jurors began their deliberations. (*Id.* at 124, 128, 131, 137, 140.)

While the jurors were deliberating, the trial court discovered the exhibits given to the jurors had inadvertently included the Alcohol Influence Report, which had not been admitted in evidence. (R.T. of Dec. 12, 2011, at 142–43; R.T. of Mar. 16, 2012, at 4.) Defendant's attorney made a motion for a mistrial, which the trial court granted. (R.T. of Dec. 12, 2011, at 142–43; R.T. of Mar. 16, 2012, at 4.)

Prior to the second trial, Defendant's attorney filed a written Motion To Dismiss for Double Jeopardy and/or Prosecutorial and Judicial Misconduct. At the start of the second trial, which was before Judge Caryl Parker, Defendant's attorney noted when he made the motion for a mistrial because of the Alcohol Influence Report being given to the jurors, he had reserved whether to ask for the subsequent dismissal to be with or without prejudice. (R.T. of Mar. 16, 2012, at 4, 6.) To the extent Defendant's attorney was making a motion to dismiss on that basis, Judge Parker denied that motion. (*Id.* at 12.)

For his Motion To Dismiss for Double Jeopardy, Defendant's attorney contended Judge Calender had, in fact, granted his motion for judgment of acquittal on the Friday of the first trial, and thus any further trial on the charges based on the BAC test readings would violate the provision against double jeopardy. (R.T. of Mar. 16, 2012, at 12–14, 15.) The prosecutor argued Judge Calender had not ruled on Defendant's motion for judgment of acquittal on Friday and had instead ruled on that motion the following Monday. (*Id.* at 14, 15.) Judge Parker ruled Judge Calender had not granted the motion for judgment of acquittal for the charges based on the BAC readings:

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There is no written record of dismissal of charges B and C. That's why we are proceeding de novo this morning.

(R.T. of Mar. 16, 2012, at 15.) Judge Parker therefore denied Defendant's motion to dismiss based on his claim of double jeopardy. (*Id.*)

The State presented the same witnesses as at the first trial and then rested. (R.T. of Mar. 16, 2012, at 96 [Dowell]; at 160 [Cox]; at 182 [White]; at 197 [State rests].) Defendant's attorney made no objection to the State's exhibit. (*Id.* at 167.) Defendant's attorney made a motion for judgment of acquittal, which the trial court denied. (*Id.* at 200, 201.)

Defendant testified, and then Chester Flaxmayer testified. (R.T. of Mar. 21, 2012, at 3 [Defendant]; at 35 [Flaxmayer].) At the close of that testimony, Defendant's attorney renewed his motion for judgment of acquittal. (*Id.* at 91.) After closing arguments and instructions, the jurors retired. (*Id.* at 93, 96, 102, 108.) After deliberations, the jurors found Defendant guilty of all three DUI charges. (*Id.* at 108–09.) On April 26, 2012, the trial court imposed sentence. On April 27, 2012, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUE: DID THE TRIAL COURT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO DISMISS.

Defendant contends Judge Parker abuse her discretion in denying his Motion To Dismiss. An appellate court reviews a trial court's ruling on a motion to dismiss for an abuse of discretion. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶ 75 (2004); *State v. Espinoza*, 229 Ariz. 421, 276 P.3d 55, ¶ 15 (Ct. App. 2012). In the present case, Judge Parker ruled Judge Calender had not granted the motion for judgment of acquittal for the charges based on the BAC readings, finding that there was no written record of dismissal of charges based on the Intoxilyzer test results. (R.T. of Mar. 16, 2012, at 15.) This Court's review of the record supports Judge Parker's ruling. This Court has been unable to find anything in writing stating Judge Calender had granted the motion for judgment of acquittal. To the contrary, the only writing this Court has been able to find is Judge Calender's notation on the State's Response, "Rule 20 Motion—Denied after O/A on 12–12–11, D. Calender." Moreover, Judge Calender specifically stated on the record that he had not ruled on Defendant's motion for judgment of acquittal on Friday, December 9, 2011. The record therefore supports Judge Parker's ruling, thus she did not abuse her discretion in denying Defendant's Motion To Dismiss.

This Court notes the State's attorney has confessed error on this issue. An appellate court is not required to accept the State's confession of error. *Arizona Minority Coal. v. Arizona Indep. Redrist. Comm'n*, 211 Ariz. 337, 121 P.3d 843, ¶ 100 n.28 (Ct. App. 2005); *State v. Dominguez*, 192 Ariz. 461, 967 P.2d 136, ¶ 7 (Ct. App. 1998); *State v. Sanchez*, 174 Ariz. 44, 45, 846 P.2d 857, 858 (Ct. App. 1993). In the present case, the State's attorney neither cited to the December 12, 2011, transcript where Judge Calender stated that he did not rule on Defendant's motion

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for judgment of acquittal on Friday, December 9, nor discussed the March 16, 2012, transcript where Judge Parker found Judge Calender had not dismissed any charges and therefore denied Defendant's Motion To Dismiss. Instead, the State's attorney has filed a Response Memorandum only three sentences long accepting Defendant's attorney's statement that Judge Calender did grant the motion for judgment of acquittal. In light of the problems with the transcripts discussed above, this Court questions whether the State's attorney even read the transcripts. This Court therefore declines to accept the State's confession of error.

III. CONCLUSION.

Based on the foregoing, this Court concludes Judge Parker did not abuse her discretion in denying Defendant's Motion To Dismiss.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the University Lakes Justice Court.

IT IS FURTHER ORDERED remanding this matter to University Lakes Justice Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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