

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

GARY L SHUPE

v.

JEFFERY CRAIG MEHRENS (001)

NEAL W BASSETT

PHX CITY MUNICIPAL COURT

PHX MUNICIPAL PRESIDING JUDGE

REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 14433175-01, -04, -05.

Defendant-Appellant Jeffery Craig Mehrens (Defendant) was convicted in Phoenix Municipal Court of DUI. Defendant contends the trial court erred in denying the following motions: (1) Motion To Dismiss, which alleged the officer did not have probable cause to arrest him; and (2) Motion To Suppress the blood test results because nobody told him he was under arrest for DUI. Defendant further contends as follows: (1) He was not guilty of A.R.S. § 28-662 because the other driver involved in the collision only spoke Spanish; (2) the judge did not specifically state he was guilty of failure to yield; (3) the trial court did not give him his right of allocution; and (4) A.R.S. § 28-1381(A)(2) is unconstitutional because a person is unable to testify what his or her BAC was at the relevant time. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

July 23, 2013, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); failure to yield while turning left, A.R.S. § 28-772; and leaving the scene of a collision involving an unattended vehicle, A.R.S. § 28-664(A). On August 14, 2013, the State filed an Amendment to Misdemeanor Complaint charging Defendant with leaving the scene of a collision involving damage to a vehicle, A.R.S. § 28-662(A)(2) and (B). Also on August 14, 2013, the State filed an Allegation of Prior Conviction alleging Defendant had previously been convicted of driving under the influence on August 18, 2010, for offenses he committed on September 26, 2008.

On March 27, 2014, Defendant's attorney filed the following motions: Motion To Suppress/Dismiss contending the officers did not have reasonable suspicion to detain Defendant, and Motion To Suppress Blood Test Results contending Defendant was not arrested for driving under the influence. On November 17, 2014, Defendant's attorney filed a Motion To Dismiss DUI Charges for Lack of Probable Cause To Arrest.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

The trial court began with taking testimony on Defendant's Motion To Suppress/Dismiss (reasonable suspicion to detain) and Motion To Dismiss (lack of probable cause to arrest). (R.T. of Aug. 5, 2014, at 7–8.) Jesse Martori testified he was northbound on 7th Street near Camelback Road on July 23, 2013. (*Id.* at 21.) He heard a collision and immediately called 9-1-1, the time of the call being 3:26 p.m. (*Id.* at 21–23.)

Jesus Hernandez testified he was going south on 7th Street on July 23, 2013, in a 2001 Dodge Ram pickup truck. (R.T. of Aug. 5, 2014, at 28–29.) As he approached the intersection with Camelback Road, the light was green, so he proceeded through the intersection. (*Id.* at 29.) As he did so, a red vehicle turned left in front of him and collided with his vehicle. (*Id.* at 30.) The impact caused Jesus to have some aches and pains, and it totaled Jesus's vehicle. (*Id.* at 35.) The driver of the red vehicle got out and asked Jesus to move his vehicle. (*Id.* at 30.) That driver did not give Jesus any information, such as name, insurance, registration, or telephone number. (*Id.* at 32.) After Jesus moved his vehicle, he saw the other driver walking away down Camelback Road. (*Id.* at 31.) The officers later brought a person to the scene, whom Jesus identified as the driver of the other vehicle. (*Id.* at 34–35.)

Federico Hernandez testified he was riding in the vehicle with his brother Jesus on July 23, 2013. (R.T. of Aug. 5, 2014, at 44.) They were southbound on 7th Street approaching the intersection with Camelback Road, and the light was green. (*Id.* at 45.) As they were going through the intersection, another vehicle turned left in front of them and collided with their vehicle. (*Id.* at 45–46.) Federico identified Defendant as the driver of the other vehicle. (*Id.* at 47.) He said Defendant told them to move their vehicle out of the intersection. (*Id.* at 49.) Defendant did not, however, give them any information, such as insurance or registration. (*Id.* at 48–49.) The officers later brought Defendant to the scene, and Federico identified him as the driver of the other vehicle. (*Id.* at 51.)

Officer Victoria Beighle testified she was the first officer to arrive at the scene of the collision. (R.T. of Aug. 6, 2014, at 5–7.) She was dispatched at 3:29 p.m. and arrived at 3:32 p.m. (*Id.* at 8, 30–31.) She saw a maroon Maserati with extensive front end damage and the keys still in the ignition, parked in the curb lane on 7th Street just south of Camelback Road, but did not see the driver of that vehicle. (*Id.* at 8–9, 52.) She said the two most common reasons why a driver, after being in a collision, leaves the scene and leaves the vehicle with the keys in the ignition are (1) the vehicle is stolen or (2) the driver is drunk. (*Id.* at 9–10.)

Several people were in the area and told Officer Beighle that the driver had run eastbound on Camelback Road, and Officer Beighle noted that the time was 3:35 p.m. (R.T. of Aug. 6, 2014, at 10, 54–55.) The people told Officer Beighle that the driver was a white male wearing a red shirt and white shorts, so at 3:48 p.m. she put out an attempt to locate alert (ATL) over the radio. (*Id.* at 10, 40.) She looked for the driver of the other vehicle and found him sitting in the truck about 40 feet south of the Maserati. (*Id.* at 11.) She asked him about the other driver, and he described him as wearing a red shirt and white shorts and having blond hair. (*Id.* at 12.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

Officer Beighle next spoke to a witness, Kyle Miller, who said the driver of the maroon sports car got out of the vehicle, walked towards the driver of the truck and pointed south, and then returned to his vehicle and tried to drive it out of the intersection. (R.T. of Aug. 6, 2014, at 12–13, 32–33, 50.) The driver then got out of the vehicle, and Mr. Miller and several others helped push it out of the intersection. (*Id.* at 13.) The driver then started talking on his cell phone, and when Officer Beighle arrived, the driver left the area by walking east through the crosswalk, then past the Chevron Station on the southeast corner, and then past the church to the east. (*Id.* at 13–14, 34.)

Officer Beighle ran the license plate information and determined the vehicle was registered to Jeffery Mehrens. (R.T. of Aug. 6, 2014, at 14.) Officer Beighle then put out a second ATL giving more of a description. (*Id.*) Chelsea Porter, who was at the Chevron Station, began waiving at Officer Beighle. (*Id.* at 15–16.) Ms. Porter told Officer Beighle that she saw Defendant get out of the Maserati and yell at the driver of the truck, who then moved the truck out of the intersection. (*Id.* at 16, 35.) She saw Defendant get back in the Maserati, and when he could not drive it out of the intersection, he tried to push it out, whereupon several others assisted. (*Id.* at 16.) Ms. Porter said Defendant was then talking on his cell phone. (*Id.* at 36.) Officer Beighle then spoke to several other witnesses, who said Defendant ran away, but the witnesses otherwise did not want to get involved in the investigation. (*Id.* at 16–17.)

Officer Beighle went back to the driver of the truck (Jesus) and had a more detailed conversation. (R.T. of Aug. 6, 2014, at 17.) Jesus described going through the intersection on a green light and having the maroon sports car turn left in front of him. (*Id.* at 19.) He said Defendant never gave him any information, such as name, registration, insurance, or telephone. (*Id.* at 19–20.)

At 3:52 p.m., which was 20 minutes after Officer Beighle had arrived at the scene, she learned Officer Whittington had located and detained Mr. Mehrens. (R.T. of Aug. 6, 2014, at 20–21, 41, 47.) Defendant appeared to Officer Whittington to be intoxicated, so Officer Whittington handled that part of the investigation as a DUI, while Officer Beighle continued to handle the collision investigation. (*Id.* at 21–23.) Officer Whittington returned Defendant to the scene of the collision, and both Jesus and Federico identified him as the driver of the other vehicle. (*Id.* at 23–24.) At that point, Officer Beighle considered Defendant to be under arrest for both hit and run and DUI. (*Id.* at 27.)

Officer Brian Whittington testified that, on July 23, 2013, he received a request to locate a driver who had fled eastbound on foot from a collision at 7th Street and Camelback Road. (R.T. of Aug. 5, 2014, at 70–72.) The person was described as a white male wearing a red shirt, white shorts, and white sunglasses. (*Id.* at 71.) The caller gave the license number of the vehicle, which was a Maserati registered to Jeffery Mehrens. (*Id.* at 72–73.) Officer Whittington then obtained a MVD photograph of Defendant. (*Id.* at 73.) Officer Whittington drove east on Camelback, turned south on 8th Place but did not see anyone, and so turned around and went north on 8th Place. (*Id.* at 74.) For some reason, Officer Whittington decided to check this area again and so went south on 8th Place, and this time saw Defendant come out from behind some trees or bushes and walk north on 8th Place. (*Id.* at 74–75, 94.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

Officer Whittington attempted to contact Defendant by pulling his fully-marked Phoenix Police Tahoe directly in front of him, but Defendant walked onto the curb and around the Tahoe. (R.T. of Aug. 5, 2014, at 75–76, 81.) Officer Whittington got out of the Tahoe and told Defendant several times to stop, but Defendant continued to walk north toward Camelback Road. (*Id.* at 76, 81, 103.) Officer Whittington then grabbed Defendant’s arm, but Defendant pulled his arm away. (*Id.* at 76.) Officer Whittington had to place Defendant in handcuffs, which was at 3:52 p.m. (*Id.* at 76, 98, 103.) After Officer Whittington asked Defendant several times what his name was, Defendant finally said his ID was in his pocket. (*Id.* at 76–77.) Defendant also said he was an experienced criminal defense attorney and was versed in DUIs, and that he had been arrested several times. (*Id.* at 107, 108–09.) Officer Whittington advised Defendant that he was being detained for investigation of a hit-and-run collision. (*Id.* at 83, 85, 97.) Mr. Miller and Ms. Porter were brought to the area and identified Defendant as the driver of the other vehicle. (R.T. of Aug. 6, 2014, at 47–49.) After Mr. Miller and Ms. Porter identified Defendant, Officer Whittington advised him that he was under arrest for hit and run. (R.T. of Aug. 5, 2014, at 86–87, 89, 104.) Officer Whittington acknowledged he never advised Defendant that he was under arrest for DUI. (*Id.* at 89–91.) Officer Whittington believed he could have cited Defendant for failure to obey an officer. (*Id.* at 104.)

While Officer Whittington was in contact with Defendant, he noticed the odor of intoxicating beverage coming from him and that he had bloodshot, watery eyes. (R.T. of Aug. 5, 2014, at 106–07.) Officer Whittington asked Defendant to perform some field sobriety tests, but Defendant refused. (*Id.* at 107.) Officer Whittington then had Defendant transported to the Mountain View Precinct Station where his attorney (Mr. Thompson) met him. (*Id.* at 107, 109, 113.)

Sergeant Eric Wyckoff testified he was the patrol supervisor out of the Mountain View Precinct on July 23, 2013, and responded to a collision at 7th Street and Camelback Road. (R.T. of Aug. 6, 2014, at 56–57.) He was told the driver of one of the vehicles had walked away going east on Camelback Road, so he began looking in that area for the driver. (*Id.* at 58–59.) When he heard that Officer Whittington had located the suspect on 8th Place, he drove to that location. (*Id.* at 59–60.) When he got there, he saw that Officer Whittington had detained a person who was later identified as Jeffery Mehrens. (*Id.* at 61.) Sergeant Wyckoff then brought Mr. Miller and Ms. Porter to the area to see if they could identify the person detained, which they did. (*Id.* at 63–65.)

Sergeant Wyckoff and Officer Whittington discussed Defendant’s condition, specifically that Officer Whittington noted an odor of alcohol coming from Defendant, that he had bloodshot, watery eyes, and was not steady on his feet. (R.T. of Aug. 6, 2014, at 66.) Based on that information, they decided to place Defendant under arrest for DUI. (*Id.* at 66–67.) Defendant asked to call his attorney, and he was allowed to do so. (*Id.* at 68–69.) The matter then continued forward as a DUI investigation. (*Id.* at 70.)

....

....

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

The State presented no other witnesses; Defendant's attorney played portions of the 9-1-1 call; the trial court reviewed a portion of Officer Beighle's testimony; and then the trial court heard arguments from the attorneys. (R.T. of Aug. 6, 2014, at 72–77, 78–82, 82–90, 90–93.) The trial court ruled that the officers "did have reasonable suspicion to detain the Defendant and probable cause to arrest the Defendant." (*Id.* at 93.) It found that Defendant was under arrest when Officer Whittington placed him in handcuffs and placed him in the patrol vehicle on 8th Place. (*Id.*) The trial court noted the witnesses who observed the interaction between Defendant and Jesus saw nothing "that sounds remotely close to satisfying the requirements of Arizona Law after an auto collision." (*Id.*) The trial court also noted that "detention is also authorized by ARS section 28–1594, for both possible civil and criminal traffic violations." (*Id.* at 94.) The trial court then denied Defendant's "Motion To Suppress or Dismiss for Unlawful Stop or Detention and Motion To Dismiss for Lack of Probable Cause to Arrest." (*Id.*)

The trial court proceeded with Defendant's third motion, which was Defendant's Motion To Suppress Blood Test Results. (R.T. of Aug. 6, 2014, at 94–95.) Defendant's attorney stated the issue was "whether or not Mr. Mehrens was placed under arrest for DUI, which would then trigger the admin per se." (*Id.* at 97.) Defendant's attorney later confirmed with the trial court that all the testimony presented for the first two motions would be incorporated in the third motion. (*Id.* at 115–17.)

Officer Matt Andrews testified that, on July 23, 2013, his supervisor, Sergeant Wyckoff, told him to respond to assist in a DUI investigation. (R.T. of Aug. 6, 2014, at 98–100.) He was then told to go to the police station in order to conduct a blood draw. (*Id.* at 101.) Officer Andrews said the other officers told him Defendant was under arrest and they suspected he was under the influence or impaired by alcohol while driving the vehicle. (*Id.* at 120–22.) When he met with Defendant at the station, he read the admin per se to him verbatim and explained it to him. (*Id.* at 103.) On the form there were two boxes that he checked, one stating there was probable cause to believe the person was involved in a collision and the other that there was probable cause to believe the person was operating a vehicle while impaired. (*Id.* at 104.) After Defendant claimed not to understand the admin per se form, Officer Andrews explained it again several times and allowed Defendant to contact his attorney, after which Defendant consented to the blood draw, which was done at 5:30 p.m. (*Id.* at 106–11.) Sergeant Wyckoff then testified and said Defendant was placed under arrest and that he "believe[d] that it was a DUI situation on top of the hit and run." (*Id.* at 135.)

The attorneys then made their arguments to the trial court. (R.T. of Aug. 6, 2014, at 144–46, 146–52, 152–53.) The trial court again found that Defendant was under arrest when Officer Whittington placed him in handcuffs in the patrol vehicle on 8th Place. (*Id.* at 156.) It found Officer Whittington told Defendant he was under arrest for hit and run, and that no officer told Defendant he was under arrest for DUI. It ruled, however, that whether a person is under arrest is an objective determination, and objectively Defendant was under arrest for both hit and run and DUI, and thus denied Defendant's motion. (*Id.* at 157.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

On November 17, 2014, Defendant's attorney filed a Motion To Dismiss DUI Charges for Lack of Probable Cause To Arrest contending that, at the time the trial court found Defendant was objectively under arrest for DUI, the officers did not have sufficient facts to support probable cause to arrest Defendant for DUI. At the hearing on that motion, the trial court stated it was going to consider all the previous testimony it heard in August on that matter. (R.T. of Dec. 8, 2014, at 16.)

The State again presented the testimony of Officer Beighle. (R.T. of Dec. 8, 2014, at 17–18.) When the prosecutor asked her if the PBT was administered to Defendant prior to the time a citation was issued to him, Defendant's attorney objected on the basis that the PBT was administered to him after the blood draw. (*Id.* at 18–19.) The trial court overruled the objection stating it was going "to allow the testimony for the purpose of this hearing only." (*Id.* at 19.) Defendant's attorney then objected on the basis that the evidence would need to come in either through the statutory method or through expert testimony. (*Id.* at 19–20.) The trial court overruled that objection because it was admitting that testimony only for the purposes of the present hearing to determine probable cause. (*Id.* at 20.) Officer Beighle said she was aware of the PBT result of 0.134 BAC prior to the time she issued Defendant the citation for violating A.R.S. § 28–1381(A)(2). (*Id.*)

The State again presented the testimony of Officer Andrews. (R.T. of Dec. 8, 2014, at 21–22.) When the prosecutor asked Officer Andrews if he knew when the PBT instrument was calibrated, Defendant's attorney objected on the basis of foundation and hearsay. (*Id.* at 22–23.) The trial court allowed Defendant's attorney to voir dire the witness, and Officer Andrews said "we take them to the person that calibrates them and we stand there while they do it." (*Id.* at 23.) Defendant's attorney then objected on the basis of hearsay, and the trial court overruled that objection. (*Id.*) Officer Andrews then said the instrument was calibrated on June 21, 2013. (*Id.*)

The State presented no further testimony, and Defendant's attorney presented no witnesses. (R.T. of Dec. 8, 2014, at 24.) After the attorneys made their argument to the trial court, the trial court denied Defendant's Motion as follows:

Based upon the evidence presented in this matter and the case law, the motion to dismiss DUI charges for lack of probable cause to arrest filed November 17th, is denied. (R.T. of Dec. 8, 2014, at 31.)

At the trial in this matter, the State presented the testimony of Jesse Martori, who said that, on July 23, 2013, at about 3:26 p.m., he was on 7th Street approaching Camelback Road when he heard and then saw a collision at the intersection. (R.T. of Dec. 9, 2014, at 17.) He immediately called 9-1-1. (*Id.* at 18, 20.)

Jesus Hernandez testified that, on July 23, 2013, at 3:26 p.m., he was on 7th Street approaching the intersection with Camelback Road, and the light was green. (R.T. of Dec. 9, 2014, at 23–24.) As he was going through the intersection, a red vehicle turned left in front of him and collided with his truck. (*Id.* at 24–25.) The driver of the red vehicle got out and told him to move his truck out of the intersection. (*Id.* at 25–26.) He identified Defendant as the driver of the red vehicle. (*Id.*)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

at 26–27.) Defendant did not give Jesus any identifying information, such as name, address, or registration. (*Id.* at 27–28.) Jesus’s brother, Federico, testified he was riding with Jesus when the collision occurred, and that the light was green when they went through the intersection. (*Id.* at 41–42.) He identified Defendant as the driver of the other vehicle and said Defendant never gave them any identifying information, such as name or insurance. (*Id.* at 43, 45.)

Officer Beighle testified that, on July 23, 2013, she received a dispatch at 3:29 p.m. to investigate a collision at 7th Street and Camelback Road. (R.T. of Dec. 9, 2014, at 48–50.) She was able to contact Jesus, but the driver of the other vehicle was not there. (*Id.* at 52–53.) She said several witnesses said the other driver was “running, he’s running that way” heading east. (*Id.* at 55.) She then put out an ATL over the radio. (*Id.* at 56.)

Laney Muldrow testified he was the manager of the Chevron Station at 7th Street and Camelback Road, and on July 23, 2013, at 3:26 p.m., he heard the sound of a collision. (R.T. of Dec. 9, 2014, at 147–48.) He saw the driver of the maroon vehicle and others pushing the vehicle out of the intersection. (*Id.* at 151.) After that, the driver walked east through the crosswalk and walked past the female police officer who was walking west through the crosswalk, and kept walking east. (*Id.* at 154–57.)

Officer Whittington testified that, on July 23, 2013, he responded to the area of 7th Street and Camelback Road to investigate a collision and to look for a driver who had left the scene. (R.T. of Dec. 9, 2014, at 120–21.) He located Defendant on 8th Place south of Camelback Road. (*Id.* at 125–27.) He placed Defendant under arrest and at 4:53 p.m. had him transported to the police station for a blood draw. (*Id.* at 132–33.)

Sergeant Wyckoff testified he was on duty on July 23, 2013, and was called to investigate a collision that had occurred at 7th Street and Camelback Road. (R.T. of Dec. 9, 2014, at 81, 83.) When discussing the offense of failing to yield when turning left, Sergeant Wyckoff said the statute made no reference to the color of the light at the intersection. (*Id.* at 85, 86.)

Officer Andrews testified that, on July 23, 2013, he drew Defendant’s blood at 5:30 p.m. (R.T. of Dec. 9, 2014, at 91, 97.) Amanda Gallegos testified she was a forensic scientist in the toxicology section of the Phoenix Crime Laboratory and that she tested the sample of Defendant’s blood, the results of which showed a BAC of 0.1336 and 0.1353, which she rounded down to 0.133. (R.T. of Dec. 10, 2014, at 6, 9, 15–17.) She said that would give a range of between 0.126 and 0.140. (*Id.* at 17.) Because the driving ended at 3:25 p.m. and the blood draw was at 5:30 p.m., relating the results back to the time of driving would mean “[t]here’s not going to be a significant amount of change in the alcohol concentration within a 5- or 6-minute period of time.” (*Id.* at 21.) If anything, the alcohol concentration would increase “very slightly.” (*Id.* at 22.)

After that testimony, the State rested. (R.T. of Dec. 10, 2014, at 49.) Defendant’s attorney made a motion for judgment of acquittal, which the trial court denied. (*Id.* at 49–50.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

Defendant first presented the testimony of Chester Flaxmayer, and then Defendant testified. (R.T. of Dec. 10, 2014, at 50, 100.) Defendant said he did not have to go to the office on July 23, 2013, so he went to the gym and then to Durant's for lunch, which is at Central and Virginia. (*Id.* at 101.) He arrived there at about 2:30 p.m., and sat at the bar. (*Id.* at 101, 104.) Along with his food, Defendant order a martini. (*Id.* at 102.) He said that, in preparation for this litigation, he had determined that a martini at Durant's was the equivalent of four standard drinks. (*Id.* at 103, 164.) He said he finished his food and the first martini at about 3:00 p.m. and ordered a second martini. (*Id.* at 105.) After he started drinking his second martini, several people came in, sat at the bar, and started talking to him. (*Id.*) Because Defendant did not feel like talking to strangers, he said he "finished my drink quickly, settled my tab, and left." (*Id.* at 106.) Because he considered himself an "experienced drinker," he felt it was safe for him to drive after drinking the two martinis, and that "it's not uncommon to have a martini or two martinis and drive." (*Id.* at 107.)

Defendant had to get his dry cleaning at Central and Camelback Road, so he went east to 7th Street, went north toward Camelback Road, and was turning left to go back to Central when the collision occurred. (R.T. of Dec. 10, 2014, at 108–09.) After the collision, Defendant went to the driver of the other vehicle and noted he was speaking Spanish. (*Id.* at 110–11.) Defendant told the driver to move his truck out of the intersection, and then he went back to his vehicle. (*Id.* at 111–13, 174.) After some people helped Defendant push his vehicle out of the intersection, he did not see the truck anymore, so he did not give any information to the other driver. (*Id.* at 114–17.)

Defendant then used his cell phone to call his girlfriend. (R.T. of Dec. 10, 2014, at 118.) Because of the noise at the intersection, he walked east past the Chevron Station, past the church, past the pet hospital, and past the ice cream shop, and then walked south on 8th Place. (*Id.* at 119–20, 149–50.) He said he was then heading back to the scene of the collision when Officer Whittington encountered him and placed him under arrest. (*Id.* at 120–22.)

In rebuttal, Officer Beighle testified that, when she arrived, Defendant's vehicle and Jesus's truck were about 20 feet apart. (R.T. of Dec. 10, 2014, at 176.) The trial court then gave the jurors the final instructions. (*Id.* at 182–88.) After deliberating, the jurors found Defendant guilty of the (A)(2) charge and not guilty of the (A)(1) charge. (R.T. of Dec. 11, 2014, at 5–6.) The trial court then found Defendant guilty of the leaving the scene charge and responsible for the failure to yield charge. (*Id.* at 11.)

The trial court later held the sentencing hearing. (R.T. of Feb. 10, 2015, at 5.) After hearing the State's evidence, the trial court found the State had proved Defendant had a prior DUI conviction. (*Id.* at 34–35.) The trial court imposed the mandatory minimum sentence for a second offense non-extreme DUI. (*Id.* at 41.) For the civil traffic count, the trial court went "with the standard bond card amount" of \$171. (*Id.* at 45.) For the other offense, the trial court imposed a find of \$500 plus surcharges. (*Id.*) When the trial court asked if there was anything further, Defendant's attorney said there was not. (*Id.* at 46.)

On that same day, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12–124(A).

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

II. ISSUES:

1A. *Did the trial court apply the correct evidentiary rules during the suppression hearing.*

Defendant contends the trial court incorrectly believed the Rules of Evidence did not apply for the hearing on Defendant's Motion To Dismiss DUI Charges for Lack of Probable Cause To Arrest and the admission of evidence of the preliminary breath test (PBT). The Rules of Evidence provide as follows:

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

Rule 104(a), ARIZ. R. EVID. The preliminary question for the trial court to determine on Defendant's Motion To Dismiss DUI Charges was whether the police officers had probable cause to arrest Defendant for DUI. Because this was a preliminary question, "the court [was] not bound by evidence rules."

The question thus was not whether the State's evidence was sufficient to prove Defendant guilty of DUI beyond a reasonable doubt, it was whether the information known to the police officers was sufficient to give them probable cause to arrest Defendant for DUI. Thus, a different standard of proof applied:

. . . Although an officer's reliance on a mere "hunch" is insufficient to justify [an investigatory] stop, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.

United States v. Arvizu, 534 U.S. 266, 274 (2002) (citations omitted).

The officer, of course, must be able to articulate something more than an "inchoate and unparticularized suspicion or 'hunch.'" The Fourth Amendment requires "some minimal level of objective justification" for making the stop. That level of suspicion is considerably less than proof of wrongdoing by a preponderance of the evidence.

United States v. Solow, 490 U.S. 1, 7 (1989) (citations omitted); *accord*, *Illinois v. Wardlaw*, 528 U.S. 119, 123 (2000).

This is in keeping with the purpose of a PBT, which is to establish probable cause to arrest:

A. A law enforcement officer who has reasonable suspicion to believe that a person has committed a violation of § 28-1381 or 28-1382 may request that the person submit to a preliminary breath test or tests *before an arrest*.

B. In addition to a breath test or tests, the officer may require that the person submit to further testing pursuant to § 28-1321.

C. The director of the department of public safety shall adopt rules prescribing the approval of quantitative preliminary breath testing devices.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

A.R.S. § 28–1322 (emphasis added). If the results of the PBT, either alone or in conjunction with other information, give probable cause to arrest, the officer may then arrest the person and have the person take the BAC test or tests as provided in A.R.S. § 28–1321(A) and (B), and the results of those tests are what the State may use to attempt to prove the person guilty beyond a reasonable doubt.

The question then was whether the information received from the PBT was sufficiently reliable to give the officers probable cause to arrest Defendant. Officer Andrews testified the PBT instrument was calibrated on June 21, 2013, which was 32 days prior to Defendant’s arrest on July 23, 2013, and that he observed the person doing the calibration checks. Thus, the evidence supported the trial court’s consideration of the results of the PBT. Moreover, the result of the PBT testing was a BAC of 0.134, while the results of the blood test showed Defendant’s BAC was 0.133, which showed the PBT instrument was operating correctly.

1B. *Did the trial court abuse its discretion in determining the officers had probable cause to arrest Defendant for hit and run.*

Defendant contends the trial court abused its discretion in determining the officers had probable cause to arrest Defendant for hit and run. In reviewing a trial court’s ruling on a motion to dismiss or suppress, an appellate court is to defer to the trial court’s factual determinations, including findings based on a witness’s credibility and the reasonableness of inferences the witness drew, but is to review *de novo* the trial court’s legal conclusions. *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 75, 81 (2004); *State v. Gonzalez-Gutierrez*, 187 Ariz. 116, 118, 927 P.2d 776, 778 (1996); *State v. Olm*, 223 Ariz. 429, 224 P.3d 245, ¶ 7 (Ct. App. 2010).

The evidence presented showed the officers knew the following when they arrested Defendant:

1. A collision had occurred causing damage to both vehicles.
2. Defendant spoke briefly to the other driver and told him to move his truck.
3. Defendant was able (with help) to push his vehicle out of the intersection.
4. As soon as Officer Beighle arrived, Defendant left walking down Camelback Road.

Defendant contends the officers did not have probable cause to arrest because Jesus Hernandez had not yet told them that Defendant had not given him the required information. The trial court found that the witnesses who observed the interaction between Defendant and Jesus saw nothing “that sounds remotely close to satisfying the requirements of Arizona Law after an auto collision.” (R.T. of Aug. 6, 2014, at 93.) The evidence supported the trial court’s finding that the officers had probable cause to believe Defendant left the scene of the collision without giving the other driver the required information.

2. *Did the trial court abuse its discretion in determining the officers had placed Defendant under arrest for DUI when they asked him to perform the blood test.*

Defendant contends the trial court abused its discretion in determining the officers had placed Defendant under arrest for DUI when they asked him to perform the blood test. As noted above, in reviewing a trial court’s ruling on a motion to dismiss or suppress, an appellate court is to defer to

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

the trial court's factual determinations, including findings based on a witness's credibility and the reasonableness of inferences the witness drew, but is to review *de novo* the trial court's legal conclusions. *Moody* at ¶¶ 75, 81; *Gonzalez-Gutierrez*, 187 Ariz. at 118, 927 P.2d at 778; *Olm* at ¶ 7.

The test of whether a person is under arrest is an objective test:

Whether the defendant has been arrested is to be tested by the objective evidence and not by the subjective belief of the parties. It is clear that the subjective intent of the officer is not controlling on the issue of whether an arrest occurred; rather, the issue rests upon an evaluation of all the surrounding circumstances to determine whether a reasonable man innocent of any crime would have thought he was being arrested if he had been in defendant's shoes.

State v. Ault, 150 Ariz. 459, 464, 724 P.2d 545, 550 (1986); accord, *State v. Rowland*, 172 Ariz. 182, 184, 836 P.2d 395, 397 (Ct. App. 1992); *State v. Whitman*, 232 Ariz. 60, 301 P.3d 226, ¶ 36 (Ct. App. 2013), *vacated on other grounds*, 234 Ariz. 565, 324 P.3d 851 (2014). The trial court recognized this in its ruling. (R.T. of Aug. 6, 2014, at 157.) By the time Defendant was taken to the police station, the officers had noted a odor of alcohol coming from Defendant, that he had blood-shot, watery eyes, and was not steady on his feet. This was sufficient to give the officers probable cause to arrest Defendant for DUI. Additionally, the PBT showed Defendant's BAC was 0.134. Thus, the trial court did not abuse its discretion in determining the officers had placed Defendant under arrest for DUI when they asked him to perform the blood test.

Defendant contends, however, that he was not under arrest for DUI because no officer told him he was under arrest for DUI, and thus the officers did not have the right to ask him to perform the BAC test or tests authorized by the statute, which provides as follows:

A. A person who operates a motor vehicle in this state gives consent . . . to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for any offense arising out of acts alleged to have been committed in violation of this chapter or § 4-244, paragraph 34 while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or drugs. . . .

A.R.S. § 28-1321(A). Adopting Defendant's argument would require this Court to rewrite that statute as follows:

A. A person who operates a motor vehicle in this state gives consent . . . to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for any offense arising out of acts alleged to have been committed in violation of this chapter or § 4-244, paragraph 34 while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or drugs **and the officer advises the person that he or she is under arrest for a DUI offense**. . . .

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

A.R.S. § 28–1321(A) (wording in *bold italics* added). The Arizona Court of Appeals has said the following:

Our Legislature did not choose this particular language, however, and we are “not at liberty to rewrite the statute under the guise of judicial interpretation.”

New Sun Business Park, LLC v. Yuma County, 221 Ariz. 43, 209 P.3d 179, ¶ 16 (Ct. App. 2009), quoting *State v. Patchin*, 125 Ariz. 501, 502, 610 P.2d 1062, 1063 (Ct. App. 1980). This Court is thus not at liberty to rewrite the statute as Defendant suggests.

3. *Was the evidence sufficient to show that Defendant was guilty of leaving the scene of a collision.*

Defendant contends the State did not present sufficient evidence to show that he was guilty of leaving the scene of a collision. In addressing the issue of the sufficiency of the evidence, the Arizona Supreme Court has said the following:

We review a sufficiency of the evidence claim by determining “whether substantial evidence supports the jury’s finding, viewing the facts in the light most favorable to sustaining the jury verdict.” Substantial evidence is proof that “reasonable persons could accept as adequate . . . to support a conclusion of defendant’s guilt beyond a reasonable doubt.” We resolve any conflicting evidence “in favor of sustaining the verdict.”

State v. Bearup, 221 Ariz. 163, 211 P.3d 684, ¶ 16 (2009) (citations omitted). When considering whether a verdict is contrary to the evidence, this court does not consider whether it would reach the same conclusion as the jury, but whether there is “a complete absence of probative facts to support its conclusion.” *State v. Mauro*, 159 Ariz. 186, 206, 766 P.2d 59, 79 (1988). The applicable statute provides in part as follows:

A. The driver of a vehicle involved in an accident resulting only in damage to a vehicle that is driven or attended by a person shall:

1. Immediately stop the vehicle at the scene of the accident or as close to the accident scene as possible but shall immediately return to the accident scene.

2. Remain at the scene of the accident until the driver has fulfilled the requirements of § 28–663 [to give the required information]. . . .

A.R.S. § 28–662. In the present matter, Jesus Hernandez testified that Defendant’s vehicle collided with his vehicle and that Defendant never gave him any information, such as name, insurance, registration, or telephone number. (R.T. of Dec. 9, 2014, at 43, 45.) This Court concludes the evidence was sufficient to support the conviction.

Defendant contends, however, he was not required to give the required information to Jesus because Jesus spoke Spanish and thus Defendant was not able to communicate with him. Defendant is essentially asking this Court to add the following language to the statute:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

A. The driver of a vehicle involved in an accident resulting only in damage to a vehicle that is driven or attended by a person shall:

1. Immediately stop the vehicle at the scene of the accident or as close to the accident scene as possible but shall immediately return to the accident scene.

2. Remain at the scene of the accident until the driver has fulfilled the requirements of § 28–663 [to give the required information], ***unless the other driver speaks Spanish, in which case the driver does not have to fulfill the requirements of § 28–663.*** . . .

A.R.S. § 28–662 (wording in ***bold italics*** added). Again, as noted above, courts are “not at liberty to rewrite the statute under the guise of judicial interpretation.” *New Sun Business Park* at ¶ 16. If Defendant would like the statute rewritten, he will have to ask the Arizona Legislature to do so. This Court would observe, however, that rewriting the statute in this manner would probably make it unconstitutional.

4. *Was the evidence sufficient to show that Defendant was guilty of failure to yield while turning left.*

Defendant contends the State did not present sufficient evidence to show that he was guilty of failure to yield while turning left. The applicable statute provides as follows:

The driver of a vehicle within an intersection intending to turn to the left shall yield the right-of-way to a vehicle that is approaching from the opposite direction and that is within the intersection or so close to the intersection as to constitute an immediate hazard.

A.R.S. § 28–772. The evidence presented was that Defendant was within the intersection when he turned left in front of an oncoming vehicle, which resulted in the collision. The evidence was sufficient to support the conviction.

Defendant contends, however, that this Court must vacate his conviction because the trial court stated as follows:

If you’re making the turn, someone running a red light would not cause a failure to yield ticket. But I find the Defendant ran the light.

(R.T. of Dec. 11, 2014, at 11.) As noted above, the color of the light for the intersection is not an element of the offense. The trial court’s statement therefore is surplusage.

5. *Did Defendant waive any issue about the lack of allocution by failing to object.*

Defendant contends this Court must remand this matter because the trial court did not give him his right of allocution. In the present matter, Defendant never made an objection with the trial court. Absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991); *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). Fundamental error is limited to those rare cases that involve error that (1) goes to the foundation of the defendant’s case, (2) and takes from the defendant a right essential to the defendant’s defense, and (3) is of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). Thus, in order to obtain a resentencing because a denial of a defendant's right of allocution, the defendant must show that the defendant would have had something of significance to present. *State v. Hinchey*, 181 Ariz. 307, 890 P.2d 602 (1995) (because the defendant did not object when the trial court sentenced him without giving him his right of allocution and failed to give any indication that he would have had anything to say if he had been allowed to speak, the defendant failed to state a reason for a resentencing).

In the present matter, Defendant has given no indication of what he would have said to the trial court if the trial court had given him the right of allocution. Moreover, a review of this Court's files shows Defendant has had the following previous DUI matters:

1. LC 2004–000193: Defendant's driver's license suspended for 12 months for refusal to take blood test on October 31, 2003.
2. LC 2008–000857: Defendant's driver's license suspended for 24 months for refusal to take blood test on September 26, 2008.
3. LC 2010–000184: Defendant found guilty of A.R.S. § 28–1381(A)(1) & (A)(2), and responsible for driving at a speed not reasonable and prudent, A.R.S. § 28–701(A), for driving on September 26, 2008.

Further, a review of this Court's files shows that, in CR 2009–121952, Defendant pled guilty to aggravated assault on a police officer, a class 6 undesignated offense. In light of these prior problems with the legal system, it is hard to see what Defendant could have said in allocution that would have been positive.

6. *Is A.R.S. § 28–1381(A)(2) unconstitutional.*

Defendant contends A.R.S. § 28–1381(A)(2) “violates the federal and state constitutional rights to testify because it is impossible for a defendant to testify to his blood alcohol level.” (Defendant's Opening Brief at 13.) Defendant's complaint is not with A.R.S. § 28–1381(A)(2), it is actually with the following rule of evidence, which provides as follows:

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

Rule 602, ARIZ. R. EVID. Because Defendant has not presented any argument why Rule 602 is unconstitutional, he has waived this issue.

Defendant contends that the “problem with substituting the testimony of an expert for a defendant is that jurors are wary of experts, believing that experts will be under pressure to give their clients what they are looking for.” (Defendant's Opening Brief at 15.) It appears that, if the jurors are of that mind set, they would believe that “[defendants] will be under pressure to give [themselves] what they are looking for.”

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000495-001 DT

04/13/2016

Finally, Defendant contends the “most basic aspect of a defendant’s right to testify is his right to testify that he is innocent.” (Defendant’s Opening Brief at 14.) In the present matter, Defendant so testified:

Q. [by Defendant’s attorney]: Did—do you believe that [0.126 to 0.140] was your blood alcohol concentration 2 hours earlier when you were driving?

A. [by Defendant]: Course not.

(R.T. of Dec. 10, 2014, at 127.)

A. [by Defendant]: I at no point did I have alcohol to a point where there was any possibility I was over the legal limit or impaired.

(R.T. of Dec. 10, 2014, at 166.) Thus, to the extent Defendant had the constitutional “right to testify that he is innocent,” Defendant did so. It’s just that he did not have the constitutional right to have the jurors believe that testimony.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court did not err in denying Defendant’s Motion To Dismiss (probable cause to arrest) and Motion To Suppress (blood test results). This Court further finds the evidence was sufficient to show Defendant was guilty of A.R.S. § 28–662 and A.R.S. § 28–772. Finally, this Court concludes Defendant waived any issue concerning his right of allocution, and that Defendant has failed to show A.R.S. § 28–1381(A)(2) is unconstitutional.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal 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

041320161630•

NOTICE: LC cases are not under the e-file system. As a result, when a party files a document, the system does not generate a courtesy copy for the Judge. Therefore, you will have to deliver to the Judge a conformed courtesy copy of any filings.