

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000141-001 DT

05/24/2013

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA

KENT C KEARNEY

v.

DAVID BENJAMIN CHASE (001)

DAN W MONTGOMERY

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 20119014731.

Defendant-Appellant David Benjamin Chase (Defendant) was convicted in Phoenix Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Dismiss or Suppress, which alleged the officers interfered with his right to obtain an independent blood test. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On June 23, 2011, the State filed a Misdemeanor Complaint charging Defendant with Count 1, driving under the influence while impaired, A.R.S. § 28-1381(A)(1); Count 2, driving with a BAC of 0.08 or more, A.R.S. § 28-1381(A)(2); Count 3, driving under the extreme influence, A.R.S. § 28-1382(A)(1) (0.15 or more); and Count 4, driving on a suspended license, A.R.S. § 28-3473(A). Prior to trial, Defendant filed a Motion To Dismiss or Suppress alleging the officers interfered with his right to obtain and independent blood test.

At the hearing on Defendant's motion, the parties stipulated as follows:

1. [On June 7, 2011] at 1:00 a.m., Defendant was taken from Northern Command Station, 3rd Street and Union Hills, to Central Booking, 3443 South Central.
2. At 3:35 a.m., Defendant was booked at the 4th Avenue Jail.
3. Defendant never requested to use a telephone after being booked in jail.
4. Defendant never requested jail staff to assist in obtaining an independent test.
5. On June 7, 2011, at 11:00 a.m., Defendant was released from Jail.

(R.T. of Oct. 16, 2012, at 3-4.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000141-001 DT

05/24/2013

Officer Jerry Schuiteboer testified he was on duty on June 6, 2011, working in the DUI van. (R.T. of Oct. 16, 2012, at 28.) Officer Blanco brought Defendant to the DUI van. (*Id.* at 39.) At 12:33 a.m. on June 7, Officer Schuiteboer read Defendant the *Miranda* rights, whereupon Defendant refused to answer any questions and asked to talk to an attorney. (*Id.* at 29, 36.) At 12:39, Defendant was able to contact David Cantor's office and talk to an attorney. (*Id.* at 29.) At 12:43 a.m., Officer Schuiteboer allowed Defendant to walk into the parking lot where he was out of earshot. (*Id.* at 30.) At 12:48, Defendant returned to the van with the attorney still on the telephone, told the officers he would agree to take their BAC test, and requested an independent blood test. (*Id.* at 30–31.) After Defendant ended the call with the attorney, he asked Officer Schuiteboer what an independent test was. (*Id.* at 31.) It appeared to Officer Schuiteboer that the attorney did not explain to Defendant exactly the procedure he would have to follow. (*Id.* at 39.) Officer Schuiteboer told Defendant he would be taken to the Maricopa County jail, and he would have to ask staff there for the independent test. (*Id.* at 31–33, 35.) Officer Schuiteboer did not recall telling Defendant the test would cost \$450.00. (*Id.* at 32.) Officer Schuiteboer never told Defendant he would take him anywhere, and never told him a nurse or someone would meet him at the jail. (*Id.*) Because Defendant was driving under the influence with a suspended license, that was a potential felony offense, so Defendant had to be booked into jail. (*Id.* at 37–38.) At about 1:00 a.m., Defendant was released from the DUI van and taken to the jail. (*Id.* at 33.)

Priscilla Bowman was employed by the Maricopa County Sheriff's Officer at the 4th Avenue jail. (R.T. of Oct. 16, 2012, at 40–41.) She said if a suspect is booked into jail and requests an independent blood test, they will take the suspect to a room with a telephone and telephone books and allow the suspect to make calls to arrange for that test. (*Id.* at 42–43.) When the requested person arrives, they take that person to the room where the suspect is, and a detention officer observes while the blood is drawn. (*Id.* at 43.) She acknowledged Defendant was booked into jail at 3:35 a.m. and said there was no record of his making a request to any staff members for an independent test. (*Id.* at 43–44.) She said if a suspect asked to make a telephone call, they would make a working telephone available. (*Id.* at 46.)

Defendant testified he was arrested for DUI between 11:15 and 11:45 p.m. on June 6, 2011. (R.T. of Oct. 16, 2012, at 5.) After being taken to a station in north Phoenix, he called an attorney named David, and the officers allowed him to have a private conversation with that attorney. (*Id.* at 6, 17.) The attorney told him to agree to take the State's BAC test and to request an independent test. (*Id.* at 7.) While the attorney was still on the telephone, Defendant went into the DUI van, told the officers he would agree to take their BAC test, and requested an independent blood test. (*Id.* at 7, 20, 23.) Defendant did not ask the attorney about the process for obtaining an independent blood test. (*Id.* at 20.) Defendant said Officer Schuiteboer told him a blood test would cost about \$450.00. (*Id.* at 7.) Once Officer Schuiteboer explained about an independent test, Defendant never asked him to explain the exact procedure he must follow and did not ask for a telephone to call and arrange for an independent test. (*Id.* at 11, 13, 22.) After the blood draw, Defendant was taken to a holding cell where he spent what he thought was 1½ to 2 hours. (*Id.* at 7–8.)

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000141-001 DT

05/24/2013

Defendant was then placed in a DUI van and taken to the 4th Avenue jail. (R.T. of Oct. 16, 2012, at 8.) During this time, none of the officers talked to him about an independent blood test, but he never asked any of them about an independent test. (*Id.* at 8, 15.) He expected that, once he got to the jail, a nurse or someone would take him to a hospital for the blood test. (*Id.* at 9, 16.) Defendant never asked anyone in the jail about an independent test. (*Id.* at 12.) He thought he spent about 1½ to 2 hours in that cell. (*Id.* at 9–10.) At about 6:00 a.m., he was taken to be fingerprinted. (*Id.* at 10.) He said some of the other inmates told him he would be there for 48 to 72 hours. (*Id.*) There was a telephone in the cell that did not work, but he never asked to use one that did work. (*Id.* at 10, 18.)

After hearing arguments, the trial court denied Defendant's Motion To Dismiss or Suppress, issuing a detailed and well-reasoned written ruling, which it read into the record:

I have considered the evidence presented at the evidentiary hearing. And I am now prepared to rule on Defendant's Motion to Suppress—I'm sorry—To Dismiss or Suppress (Interference with Right To Obtain Independent Sample). The issue this Court must decide is whether the State unreasonably interfered with the Defendant's reasonable efforts to obtain independent exculpatory evidence, specifically, an independent test.

The relevant facts presented at the evidentiary hearing are as follows:

1. On June 6th 2011, at 11:18 p.m., the Defendant was stopped. He ultimately was arrested for a felony DUI because his license had been suspended.
2. At 12:28 a.m., Officer Blanco brought the Defendant to the Northern command station so that Officer Jerry Schuiteboer, a qualified phlebotomist, could draw blood.
3. At 12:33 a.m., after being advised of his *Miranda* warnings, the Defendant requested to speak to an attorney. The Defendant had given his cell phone to a friend. Therefore at 12:37 a.m., the police gave him a phone and a phone book so that he could contact an attorney. At 12:39 a.m., the Defendant spoke to an attorney with David Cantor's office. At 12:42 a.m., the Defendant requested privacy. And at 12:43 a.m., he was allowed to leave the DUI van and walk some distance away into the parking lot so that the police could still see him but not hear what he was discussing with the attorney.
4. At 12:48 a.m., the Defendant returned to the van while still on the phone with an attorney. The Defendant told Officer Schuiteboer, I will submit to a blood test—to the blood test and I want to have an independent blood test taken.
5. After ending the phone call with the attorney, the Defendant was asked—the Defendant asked the officer to explain what an independent blood test was. The officer advised the Defendant of his right to an independent chemical test. The officer also explained that, because the Defendant was going to be booked

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000141-001 DT

05/24/2013

into the Maricopa County jail, he would have to make the arrangements there and should ask jail staff there for assistance in securing an independent blood test. The Defendant testified that he was told the cost would be about \$450. The officer could not remember if he told the Defendant the cost but admitted that he had been told by someone at the jail that it would cost about \$450 to have a nurse called to the jail to draw blood.

6. At 12:55 a.m., Officer Schuiteboer drew the Defendant's blood.
7. At 1:00 a.m., the Defendant was transported from the Northern command station at 3rd Street and Union Hills to Central booking at 3443 South Central.
8. The Defendant was booked into the Fourth Avenue jail at 3:35 a.m.
9. The parties stipulate that Defendant never requested to use a phone after he had been booked at the jail nor did he ask jail staff to assist him in obtaining an independent test.

I'll reprint this, Counsel, after I take out a couple of the typos.

10. The Defendant admitted that he had never asked for his attorney's or any other officer's help in securing an independent blood test. He was unfamiliar with the procedures and thought his request alone was sufficient to put the burden on the police to take him to a hospital or arrange for a nurse to draw his blood at some point.
11. After using the phone to call an attorney, he never again asked to use one, nor did he ask any other questions about securing an independent test. The Defendant claimed that the phone in his cell at the Fourth Avenue Jail was not working but admitted that he never asked to use any other phone nor did he tell the guards that the phone was not working.
12. The Defendant admitted that he had been drinking that night and that alcohol impairs judgment and memory.
13. Maricopa County Detention Officer Priscilla Brown [*sic*] testified that if an inmate were to request an independent chemical test at the jail, staff would explain the procedures, make a phone call for him, and allow the inmate to make any necessary arrangements. When the person arrived to draw the blood, that person and the inmate would be taken to a private place for the blood draw with a detention officer standing by. This information then would be noted in the jail's logbook. Officer Brown [*sic*] testified that there was no record of the Defendant requesting independent chemical test at the jail.
14. The Defendant was released from jail on June 7th 2011, at 11:00 a.m.
15. The Defendant called the attorney upon his release, but only to tell him that he would not be retaining his services.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000141-001 DT

05/24/2013

Law.

The State may not unreasonably interfere with the Defendant's reasonable attempts to obtain independent exculpatory evidence. *Smith v. Cada*. In *Cada* the State had denied the Defendant the opportunity to contact his attorney or effectuate bail according to the established master bail schedule, even though he had immediately available funds to do so, thus preventing him from being able to obtain independent evidence of sobriety. The State's actions deprived the Defendant of a fair trial and due process of law requiring dismissal of his DUI charges. While the State is not required to provide the accused with a free blood test or to release him from custody without bail, it may not unreasonably interfere with an accused's reasonable attempts to secure at his own expense a blood or other scientific test for the purpose of attempting to establish evidence of a sobriety at or near the crucial time under consideration.

Similarly, in *Amos v Bowen*, the Court of Appeals determined that, when a Defendant had requested an independent blood test, law enforcement officers may not reasonably [*sic*] interfere with any efforts to obtain that blood sample at the only time it was available. Amos had been arrested for a DUI and requested an independent blood test. The officer took it upon himself to transport Amos to a hospital but then became involved in an unrelated emergency situation in route. After a more than 2-hour delay, during which time Amos was required to remain inside the police car, Amos changed his mind about wanting the blood test. Because the police conduct interfered with the Defendant's right to exculpatory evidence for both the DUI and alcohol concentration charges, then § 28-692(A) & (B), at the only time the evidence was available given the eroding nature of such evidence, the proper remedy was dismissal of those charges.

The case at bar is distinguishable from both *Cada* and *Bowen* in that although the Defendant indicated that he wanted an independent chemical test, not only did the State not interfere with any reasonable efforts to secure one, the Defendant admitted that he made no effort to obtain an independent blood test in the first place. The officer said nothing to make the Defendant believe that he would make the arrangements on his behalf, and in fact told the Defendant that he would have to make the arrangements himself and instructed him to let the jail staff know that he wanted an independent blood test when he was booked into the Fourth Avenue Jail. The Defendant was even given a phone and a phone book and allowed to call an attorney. Surely if the Defendant was confused about the process, he could have asked the attorney to make the necessary arrangements for him. Whether the Defendant had been given bad advice by his attorney or came to the erroneous assumption on his own that he only had to mention that he wanted an independent blood test and the State would arrange one for him, the fault does not lie with the State. The law does not require the officer to undertake those arrangements on the Defendant's behalf. The Defendant could have had someone come to the jail to draw his blood or had his attorney make those arrangements, but chose not to do so.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000141-001 DT

05/24/2013

Under the circumstances, this Court cannot find that the State unreasonably interfered with any reasonable efforts to obtain independent exculpatory evidence and the Defendant's Motion to Dismiss or Suppress is denied.

(R.T. of Oct. 16, 2012, at 55–62.)

Defendant submitted the matter on the record, which included a Report on the Examination of Physical Evidence showing testing of Defendant's blood sample gave readings of 0.1927 and 0.1934. (R.T. of Oct. 16, 2012, at 62.) The trial court found Defendant guilty of Counts 1 and 3, dismissed Counts 2 and 4, and imposed sentence. On that same day, 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 FINDING THE OFFICERS DID NOT UNREASONABLY INTERFERED WITH ANY REASONABLE EFFORTS TO OBTAIN INDEPENDENT EXCULPATORY EVIDENCE.

Defendant contends the trial court abused its discretion in finding the officers did not unreasonably interfere with his efforts to obtain independent exculpatory evidence. 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).

A defendant must be given a reasonable opportunity to arrange for an additional BAC test. *State v. Bolan*, 187 Ariz. 159, 161, 927 P.2d 819, 821 (Ct. App. 1996). A defendant does not have the right to immediate release from custody for the purpose of obtaining an additional BAC test. *Van Herreweghe v. Burke*, 201 Ariz. 387, 36 P.3d 65, ¶ 6 (Ct. App. 2001). Further, it is the defendant's responsibility to arrange for an additional BAC test, which the defendant may discharge with the assistance of an attorney or others. *Van Herreweghe* at ¶ 10. The officers are not required to take the initiative or even to assist in procuring any evidence on behalf of a defendant. *Van Herreweghe* at ¶ 10. The officers must not, however, unreasonably interfere with a defendant's efforts to obtain exculpatory evidence. *Amos v. Bowen*, 143 Ariz. 324, 328, 693 P.2d 979, 983 (Ct. App. 1984).

In the present case, the record supports the trial court finding that the officers did not interfere with Defendant's right to obtain an additional BAC test. When Defendant asked to talk to an attorney, the officers immediately provided Defendant with a telephone and a telephone book, and Defendant was able to speak to an attorney, who told Defendant to request an independent BAC test. When Officer Schuiteboer realized the attorney had failed to explain to Defendant exactly the procedure he would have to follow, he told Defendant he would be taken to the Mari-

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000141-001 DT

05/24/2013

copa County jail, and he would have to ask staff there for the independent test. Immediately upon the completion of the blood draw, Defendant was taken to the 4th Avenue Jail. Thus, the record fully supports the trial court's finding that those officers did not interfere with Defendant's right to obtain an additional BAC test.

Priscilla Bowman testified about the procedures in place at the 4th Avenue Jail if a suspect asks for an additional BAC test. She also testified Defendant never told anyone at the jail he wanted an additional BAC test. Because the record supports the trial court's finding that Defendant never asked anyone at the jail for an additional BAC test, the record fully supports the trial court's finding that those officers did not interfere with Defendant's right to obtain an additional BAC test.

Defendant cites *Amos* for authority. In that case, Amos requested an additional BAC test, and Officer Carrillo volunteered to transport him to a hospital for that test. En route to the hospital, Officer Carrillo received a call of a woman being assaulted, so he went to the scene to provide assistance. That resulted in Officer Carrillo's being assaulted by the assailant, but he was ultimately able to place the assailant under arrest. Those efforts resulted in a 2-hour delay, and by that time, Amos had decided he no longer wanted the additional BAC test. Based on those facts, the court concluded Officer Carrillo unreasonably interfered with Amos's attempts to secure an additional blood sample:

The affirmative conduct of the police clearly violated [Amos's] right to obtain exculpatory evidence, as measured by the "fair chance" standard of *Smith v. Ganske*, supra. It is undisputed that [Amos] was detained in the police car while Officer Carrillo was engaged in other duties relating to the assault incident. Although Officer Carrillo properly stopped to intercede in the matter, the delay reasonably caused [Amos] to change his mind as far as wanting a test. Whether arrangements could have been made by Officer Carrillo for someone else to transport [Amos] for the test or to relieve him from further attendance at the scene of the assault is a matter we need not speculate upon.

Amos, 143 Ariz. at 328, 693 P.2d at 983. The difference between Defendant's situation and Amos's situation is that Amos requested an additional BAC test and the officer proceeded to take Amos to get that test, but then kept Amos in the police car for 2 hours and did not make alternative arrangements for Amos to get that test, thus actively preventing Amos from getting the test. In the present case, no officer actively prevented Defendant from getting the additional BAC test. Defendant contends the officer could have done more for him, but as noted above, "Police officers are not required to take the initiative or even to assist in procuring any evidence on behalf of a defendant." *Van Herreweghe* at ¶ 10. The record thus fully supports the trial court's finding that the officers did not interfere with Defendant's right to obtain an additional BAC test.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2013-000141-001 DT

05/24/2013

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court correctly found the officers did not interfere with Defendant's right to obtain an additional BAC test and therefore properly denied Defendant's Motion To Dismiss or Suppress.

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

052820131010•