Michael K. Jeanes, Clerk of Court
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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000012-001 DT 06/15/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

v.

ANIBAL ROLON (001)

STEPHANIE OLOHAN

JONATHAN JOSEPH GOEBEL

GOODYEAR MUNICIPAL COURT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2010–05104.

Defendant-Appellant Anibal Rolon (Defendant) was convicted in Goodyear Municipal Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Dismiss, which contended the State was required to preserve for Defendant a second sample of his blood. For the reasons stated below, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On October 23, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); speed not reasonable and prudent, A.R.S. § 28–701(A); and improper left turn, A.R.S. § 28–751(2). Prior to trial, Defendant's attorney filed a Motion To Dismiss contending the charges should be dismissed because the State was able to obtain only one vial of Defendant's blood.

At the hearing on Defendant's motion, Officer Manzano testified he was on duty on October 23, 2000, working in the area a 14600 West Indian School Road. (R.T. of Aug. 31, 2011, at 7.) The parties stipulated Officer Manzano arrested Defendant for DUI at 11:50 p.m. At 12:17 a.m., Officer Manzano read Defendant the Admin Per Se/Implied Consent Affidavit, and Defendant agreed to submit to testing. (*Id*. at 9–10.) At 12:35 a.m., Defendant submitted to a breath test, and at 1:05 a.m., Defendant submitted to a blood test. (*Id*. at 10–11.) At 1:29 a.m., after the blood test, Officer Manzano read to Defendant the Duplicate Sample Advisory and Destruction Notice. (*Id*. at 11–12.) That form advised Defendant of the following: (1) Defendant had the right to arrange for an independent test in addition to the test administered by the police; (2) Defendant or his attorney had the right to obtain the results of the State's test after the State

had analyzed the sample of Defendant's blood; (3) Defendant or his attorney had the right to obtain a portion of the blood the State had analyzed for Defendant's own independent analysis; and (4) if the prosecutor's office did not receive a request within 100 days for a portion of the blood the State had analyzed, any and all blood obtained from Defendant would be destroyed. (State's Exhibit 1, *id*. at 13–14.) Officer Manzano said Defendant never requested to have that additional test. (*Id*. at 14.) At 2:19 a.m., Defendant was released from custody and released to a friend. (*Id*. at 15.)

Officer Whittington testified he obtained a blood sample from Defendant at about 1:00 a.m. on October 24, 2000. (R.T. of Aug. 31, 2011, at 30–31.) He said he placed the needle into Defendant's arm, inserted the tube into the holder, obtained a full tube of blood, and removed that tube from the holder. (*Id*. at 34–35.) He then inserted a second tube into the holder and obtained a splash of blood, but then Defendant moved his arm with the result that the needle came out of his arm and air was sucked into the tube. (*Id*. at 35–38, 44, 49.) At that point, Officer Whittington did not attempt to obtain any more blood from Defendant because it would have involved taking a new blood kit and obtaining the needle/holder, preparing a new site for insertion, inserting that second needle into Defendant's arm, and inserting another tube into the holder. (*Id*. at 38–39.) Because doing a blood test may cause injury to the person, doing a second test would present the possibility of injuring Defendant. (*Id*. at 45, 54–55.) Officer Whittington said Defendant never requested to have an additional test. (*Id*. at 42.)

Mike Sloneker testified he was a criminalist for the Arizona Department of Public Safety. (R.T. of Aug. 31, 2011, at 60.) He said the tube of Defendant's blood had 10 milliliters of blood in it, that he removed about 2 milliliters for his testing, and thus about 8 milliliters of blood remained. (*Id*. at 66–67, 69–72, 81–82, 84.) He said he could have done 32 mores tests on that 8 milliliters of blood. (*Id*. at 72.) He said the results of his testing showed Defendant had a BAC of 0.110. (*Id*. at 80.)

Defendant's witness then testified. (R.T. of Aug. 31, 2011, at 95–104.) After hearing arguments of the attorneys, the trial court denied Defendant's motion to dismiss. (*Id*. at 121–22.) The parties then submitted the matter on the record, and on September 28, 2011, the trial court found Defendant guilty of the two DUI charges and responsible for the two civil traffic violations, 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 ERR IN RULING THE STATE WAS NOT REQUIRED TO OBTAIN A SECOND SAMPLE OF DEFENDANT'S BLOOD FOR HIS TESTING.

Defendant contends the State was required to obtain a second sample of his blood for his independent testing. In *Montano v. Superior Court*, 149 Ariz. 385, 719 P.2d 271 (1986), the court held as follows:

> The state has no obligation, apart from *Baca*, to actually gather evidence for a suspect, but in the absence of the implied consent law it must provide suspects a fair chance to gather evidence by informing them of their right to testing.

149 Ariz. at 391, 719 P.2d at 277. In *Baca v. Smith*, 124 Ariz. 353, 604 P.2d 617 (1979), which was a breath test case, the court held as follows:

> We conclude after considering these and other cases that the right to test incriminating evidence where the evidence is completely destroyed by testing becomes all the more important because the defense has little or no recourse to alternate scientific means of contesting the test results, and, therefore, when requested, the police must take and preserve a separate sample for the suspect by means of a field collection unit.

124 Ariz. at 356, 604 P.2d at 620. Thus, the right to a "second sample" only existed when the State took an actual sample of the defendant's breath and tested that sample, and when the testing destroyed that breath sample. In *State v. Kemp*, 168 Ariz. 334, 813 P.2d 315 (1991), the Arizona Supreme Court held the rule for breath test cases (such as *Baca*) did not apply in blood test cases:

> The State in this case requests that we reexamine the rules established by this line of cases, arguing that *California v. Trombetta* has overruled our decisions requiring that a defendant be given a breath sample. We decline the State's invitation to reexamine the rules in breath testing cases because this is not a breath testing case; rather, it is a case involving blood testing.
>
> Having declined the State's invitation to reexamine the rule that a DWI defendant must be given a breath sample for independent testing, we must now determine whether the rule in breath testing cases should also apply in blood testing cases. We believe that legitimate distinctions exist between breath testing and blood testing and, therefore, that the rule for breath testing cases need not be extended to blood testing cases.
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> . . . .
>
> . . . Thus, the rationale used in *Montano* is not present in a blood testing case because blood, when properly stored and maintained, is still available for testing by the defendant at the time of trial. This availability lessens the need for law enforcement officials to advise a DWI suspect that he may obtain, for independent testing, a portion of the blood sample being tested by the law enforcement agency.
>
> We believe that the due process clause, as applied in DWI cases, can legitimately have two standards—one for breath testing cases and one for blood testing cases.

168 Ariz. at 335–37, 813 P.2d at 316–18 (citations omitted). In 1992, the Arizona Legislature enacted a statute providing the State did not have to preserve a second sample if the State administered duplicate breath tests:

> If a law enforcement officer administers a duplicate breath test and the person tested is given a reasonable opportunity to arrange for an additional test pursuant to subsection C of this section, a sample of the person's breath does not have to be collected or preserved.

A.R.S. § 28–1388(B). In *Moss v. Superior Court*, 175 Ariz. 348, 857 P.2d 400 (Ct. App. 1993), the Arizona Court of Appeals upheld the constitutionality of that statute:

> Given the reliability and accuracy of replicate testing with an Intoxilyzer 5000, we do not believe that due process or fundamental fairness requires the state to provide defendants with breath samples.

175 Ariz. at 352, 857 P.2d at 404; *accord, State v. Bolan*, 187 Ariz. 159, 161–62, 927 P.2d 819, 821–22 (Ct. App. 1996); *see also State ex rel. Dean v. City Court of Tucson*, 163 Ariz. 510, 514–15, 789 P.2d 180, 184–85 (1990).

Defendant appears to be intermixing the concepts of (1) a defendant's Sixth Amendment right to confront and attack the State's evidence and thereby negate the State's proof and (2) a defendant's Fourteenth Amendment due process right to gather affirmative evidence to provide proof for a possible defense. Examples of the defendant's right to confront and attack the State's evidence are shown in the following ***breath*** test cases:

> Destruction of the [breath] ampoule deprives the defendant of a crucial source of evidence with which to attack the validity of the test reading and hence the presumption [of intoxication].

Scales v. City Court of Mesa, 122 Ariz. 231, 234, 594 P.2d 97, 100 (1979).

> We conclude . . . that the right to test incriminating evidence where the evidence is completely destroyed by testing becomes all the more important because the defense has little or no recourse to alternate scientific means of contesting the test results, and, therefore, when requested, the police must take and preserve a separate [breath] sample for the suspect by means of a field collection unit.

Baca, 124 Ariz. at 356, 604 P.2d at 620. In a ***blood*** sample case, however, the right to confront and attack the State's evidence is maintained by the defendant's ability to test the State's evidence:

> Thus, the rationale used in *Montano* is not present in a blood testing case because blood, when properly stored and maintained, is still available for testing by the defendant at the time of trial. . . .
>
> . . . Thus, we hold that law enforcement officers, when obtaining a blood sample pursuant to A.R.S. § 28–692(M), need not advise the suspect of his right to obtain a portion of the same sample for independent testing, at least when the sample taken by law enforcement officers will still be available for testing by the defendant at the time of trial.

Kemp, 168 Ariz. at 336–37, 813 P.2d at 317–18. In the present case, the State used for testing only 2 milliliters of the 10 milliliters of Defendant's blood it obtained, thus there remained 8 milliliters of Defendant's blood that he could have tested. That satisfied Defendant's Sixth Amendment right to confront and attack the State's evidence.

For the defendant's Fourteenth Amendment due process right to gather affirmative evidence to prove a possible defense, the United States Supreme Court has held "the Due Process Clause of the Fourteenth Amendment does not require that law enforcement agencies preserve breath samples in order to introduce the results of breath-sample tests at trial." *California v. Trombetta*, 467 U.S. 479, 491 (1984), *accord, Moss,* 175 Ariz. at 352, 857 P.2d at 404. As noted above, the Arizona Supreme Court has stated "[t]he state has no obligation . . . to actually gather evidence for a suspect . . . ." *Montano*, 149 Ariz. at 391, 719 P.2d at 277; *accord, State v. Ramos*, 155 Ariz. 153, 154, 745 P.2d 601, 602 (Ct. App. 1987). Instead, the Arizona Legislature has provided a defendant with the opportunity and means of obtaining affirmative proof to support a possible defense by granting to a defendant the right to obtain an additional, independent chemical blood test. A.R.S. § 28–1388(C). In the Duplicate Sample Advisory and Destruction Notice, the State advised Defendant of this right to obtain that additional test. The State thus was not required to preserve for Defendant a second sample of his blood for his testing.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court correctly held State was not required to preserve a sample of Defendant's blood for his testing, and thus correctly denied Defendant's Motion To Dismiss.

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

IT IS FURTHER ORDERED remanding this matter to the Goodyear 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

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