

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000205-001 DT

06/05/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA
CARON CLOSE

KENNETH M FLINT

v.

HON. OREST JEJNA (001)
ALYSSA TITUS (001)

ADAM M SUSSER

SCOTTSDALE MUNICIPAL COURT
THE HONORABLE OREST JEJNA
JUDGE OF THE SCOTTSDALE
MUNICIPAL COURT
3700 N 75TH ST
SCOTTSDALE AZ 85252

UNDER ADVISEMENT RULING

Lower Court Case Number M-751-TR-2014-020400.

Defendant Alyssa Titus (Defendant) was charged in Scottsdale Municipal Court with driving under the influence and other civil traffic offenses. The State has brought this Petition for Special Action contending Judge Jejna abused his discretion in imposing, as a Rule 15 sanction, the preclusion of the State's evidence of Defendant's BAC as shown by the analysis of Defendant's blood sample. For the following reasons, this Court accepts special action jurisdiction, grants relief to the State, and vacates Judge Jejna's order precluding the State's evidence.

I. FACTUAL BACKGROUND.

On August 22, 2014, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); speed greater than reasonable and prudent, A.R.S. § 28-701(A); failure to stop for a stop sign, A.R.S. § 28-855(B); and failure to stop at a traffic signal, A.R.S. § 28-645(A)(3)(a). On August 27, 2014, Brian Sloan filed a Notice of Appearance as attorney for Defendant. On September 9, 2014, Mr. Sloan filed a Notice of Change of Judge, which was granted on September 11, 2014, and the matter was set for a Pre-Trial Conference on October 8, 2014, before Judge Jejna.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000205-001 DT

06/05/2015

On October 8, 2014, Mr. Sloan filed a motion to continue the pre-trial conference, which was granted and the matter reset for November 25, 2014. On November 25, 2014, Mr. Sloan filed a second motion to continue the pre-trial conference stating he was “awaiting ability to retest blood.” This motion was granted and the matter was set for a Case Management Conference on December 23, 2014. On December 23, 2014, Mr. Sloan filed a third motion to continue, stating Defendant wished to consider the plea offer. Judge Jejna granted the motion and set the matter for February 4, 2015.

On January 5, 2015, Mr. Sloan filed with Judge Jejna a Motion for Order To Produce Blood Vial for Retesting, which was dated December 31, 2014. In that Motion, Mr. Sloan “respectfully requests that the Court order the State to have its agents turn over a sample of the blood drawn from Ms. Titus from the date she was arrested.” (Motion, filed Jan. 5, 2014, at 1.) On January 8, 2015, the State filed a Response (dated January 7, 2015) stating the following:

The kit—with both tubes of blood—has been submitted to DPS. There has been no test performed on it yet.

(Response, filed Jan. 8, 2015, at 2, ll. 3–4.) The State therefore asked Judge Jejna to deny Defendant’s Motions as premature. On January 8, 2015, Judge Jejna entered the following Order:

Pursuant to Defense Motion filed on January 5, 2015,

IT IS ORDERED:

The court has reviewed the defendant’s Motion To Order The Disclosure of Defendant’s Blood. The Court also reviewed the plaintiff’s response. Based on the pleadings of both parties as well as the arguments and legal points presented; the Court hereby orders the crime lab in possession of the defendants [*sic*] blood to provide a sample of the defendants [*sic*] blood for analysis to the defense by January 16, 2015; or upon presentment of this order.

(Order, dated Jan. 8, 2015.)

On January 23, 2015, Mr. Sloan filed a Motion To Dismiss for Violation of Rule 15.1 & 15.7 (dated January 23, 2015) asking Judge Jejna to dismiss the charges with prejudice “due to the State’s failure to comply with the Order of this Court.” On January 29, 2015, the State filed a Response (dated January 28, 2015), and on January 29, 2015, Mr. Sloan filed a Reply (dated January 29, 2015). On February 23, 2015, the State filed its Initial Response to Defendant’s Motion To Dismiss. Attached to that Response as Exhibit 2 was the Arizona Department of Public Safety Scientific Examination Report, dated January 28, 2015, showing an analysis of Defendant’s blood sample gave a BAC of 0.110, and attached as Exhibit 4 was a Result Report, dated February 8, 2015, from Blood Alcohol Testing & Consulting LLC showing an analysis of Defendant’s blood sample gave a BAC of 0.111.

On March 3, 2015, Mr. Sloan filed a Motion To Withdraw As Counsel of Record, and on March 9, 2015, Adam Susser of the Weingart Firm filed a Stipulation for Substitution of Counsel. On March 16, 2015, Judge Jejna granted Mr. Sloan’s Motion To Withdraw As Counsel of Record.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000205-001 DT

06/05/2015

On April 29, 2015, Judge Jejna held the evidentiary hearing on Defendant's January 23, 2015, Motion To Dismiss for Violation of Rule 15.1 & 15.7. (R.T. of Apr. 29, 2015, at 4.) Defendant's attorney (Mark Weingart) noted "the blood was turned over," but that "it wasn't turned over by the time the Court said it was to be turned over." (*Id.* at 5.) Mr. Weingart then presented the testimony of Kirsten Grommes, who together with her husband, Michael Grommes, owned and operated Blood Alcohol Testing and Consulting, Michael being the forensic toxicologist and Kirsten being the administrative person who "pick[s] up the blood samples." (*Id.* at 6–7.) She said that "Attorney Brian Sloan sent over a request for us to pick up and test the blood for this case." (*Id.* at 7.) She said she received a copy of Judge Jejna's January 8, 2015, Order from Mr. Sloan on January 22 (which was a Thursday). (*Id.* at 11–12, 50–51.) She said she "was going to Scottsdale Police Department on [Friday] the 23rd, so I brought a copy of it with me to hand-deliver it." (*Id.* at 12; see also *id.* at 46–47, 51.) She gave the copy of Judge Jejna's Order to Carl Mahler, who was in the Property Division. (*Id.* at 12, 47.) She did not, however ask for the blood sample at that time. (*Id.* at 48.) She said that, on Tuesday January 27th, she sent an e-mail to the Property Division, and they responded "that the blood was still at DPS, and that we would need to wait until the blood came back from DPS before we would be able to pick it up." (*Id.* at 12–13.) In response, she contacted Mr. Sloan, who told her not to do anything. (*Id.* at 31–32.) She acknowledged she therefore did not make any attempt to contact the City Prosecutor's Office in an attempt to obtain the blood sample. (*Id.* at 19.) She further acknowledged the DPS crime lab completed its testing on Wednesday January 28th. (*Id.* at 24–25.) She said she was able to obtain the blood sample on February 6th, and then tested it on February 7th. (*Id.* at 29.)

When the prosecutor asked Ms. Grommes if the results of her testing were essentially the same as the results from DPS, Mr. Weingart objected on the basis of relevancy. (*Id.* at 30.) The following exchange then occurred:

THE COURT: Counsel, what's the relevance of that?

MR. FLINT: Well, Judge, you're determining whether or not you're going to suppress or preclude evidence. The nature of the results surely has some relationship to whether or not the Court is going to order suppression or—

THE COURT: Not really.

MR. FLINT: Okay. Well, then—

THE COURT: I thought the issue in this particular motion was the disregard of the Court's order.

(R.T. of Apr. 29, 2015, at 30.)

Mr. Weingart then presented the testimony of Kay Smith, who was the evidence control manager for the Scottsdale Police Department and was above Carl Mahler in the organization. (R.T. of Apr. 29, 2015, at 56–57.) She said that she and Mr. Mahler worked opposite shifts, so that Mr. Mahler covered Fridays and she and Misty Bogue covered Mondays. (*Id.* at 57–58.) Her understanding was Mr. Mahler had left Judge Jejna's Order on Ms. Bogue's desk for her to address on Monday January 26th. (*Id.* at 58.) Ms. Smith said what she did when she saw the Order:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000205-001 DT

06/05/2015

A. Well, I had questions, myself, on what to do, because it's not under our normal processes to even see a Court order. So I took the Court order and I went to my director's office, Steve Garrett, and asked him to advise me on whether or not we needed to provide a special run to DPS to pick up the blood.

(R.T. of Apr. 29, 2015, at 59–60.) Mr. Garrett said he would contact Caron Close and get back to her. (*Id.* at 60.) After Mr. Garrett spoke to Ms. Close, he advised Ms. Smith as follows:

A. So he told me that there wouldn't be a special run for this to go pick up bloods. That we would wait till the prosecution's testing with DPS was finished and return of the bloods from DPS, to then go out for the defense.

(R.T. of Apr. 29, 2015, at 61; see also *id.* at 80–81.) On Wednesday February 4th, they received the blood sample from the DPS crime lab. (*Id.* at 65.) They also received the report showing the DPS crime lab completed its testing on Wednesday January 28th. (*Id.* at 76.)

After this testimony, Mr. Weingart presented no further witnesses, and the State presented no witnesses. (R.T. of Apr. 29, 2015, at 90–91.) In argument, Mr. Weingart contended that “somebody needs to be sanctioned here.” (*Id.* at 91.) Mr. Flint argued that “[t]his is an issue of prejudice, Judge.” (*Id.* at 92.) He further argued “there is no clear evidence of a—of a defiance by the State to the Court's order.” (*Id.*) Judge Jejna again made it clear his concern was people were disrespecting his Order:

MR. FLINT: . . . Honestly, this is an issue that should be resolved from the legal issues that are involved here, whether there was any showing of prejudice.

THE COURT: I would agree with you. The only problem is this. It's now made of record that a Court order was submitted to SPD that was not followed, showing a disrespect to the Court.

MR. FLINT: Respectfully, Judge, I don't think there's been any showing of disrespect.

THE COURT: Well, somebody didn't follow the Court order.

(R.T. of Apr. 29, 2015, at 95.)

THE COURT: So how do I assure myself that the next time I issue an order for somebody to follow at SPD, that they actually do it?

(R.T. of Apr. 29, 2015, at 100.) The parties and Judge Jejna then discussed the sanction of contempt. (*Id.* at 107–13.) Judge Jejna suggested that the parties settle the case, possibly by means of a settlement conference. (*Id.* at 113–14.) Finally, Judge Jejna took the matter under advisement. (*Id.* at 115, 116.)

The parties were not able to settle the case, so Judge Jejna addressed the merits of Defendant's motion and found there had been a discovery violation. (R.T. of May 4, 2015, at 119, 124.) Judge Jejna stated he had considered the sanction of contempt, but chose not to impose that as a sanction. (*Id.* at 124.) Judge Jejna stated he considered the “least onerous sanction” was “precluding the blood test results in this particular case.” (*Id.* at 124–25.) He stated his purpose in imposing the sanction:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000205-001 DT

06/05/2015

The purpose of this sanction, for any appellate review would be to send a message to the Scottsdale Crime Lab that, if there is an order to be filed with a particular crime lab that, at a minimum, there should be a duty to respond, if not to provide the actual item in question that is being ordered, then to at least file a pleading with the Court, in accordance with the rule of law, so that an appropriate decision can be made on either lifting, modifying, or quashing the Court's order.

And, therefore, this *slight* sanction that the Court has levied is a message to the crime lab, so that the next time an order is received from any judge, from this Court, or otherwise, that they will be prepared to take appropriate legal action and to follow the rule of law as it is required in these circumstances.

(R.T. of May 4, 2015, at 125, emphasis added.) Judge Jejna clarified that he was not only precluding the State from using the blood test evidence from the DPS crime lab, he was precluding the State from using the results of the testing done by Defendant's chosen crime lab. (*Id.* at 126.) And again, Judge Jejna stated his purpose in imposing the sanction: "And I'm making it clear to the Scottsdale Crime Lab that they need to follow an order." (*Id.*)

The next day, the State filed a Petition for Special Action. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16, and A.R.S. § 12-124(A).

II. ISSUE: DID JUDGE JEJNA ABUSE HIS DISCRETION IN IMPOSING, AS A RULE 15 SANCTION,
THE PRECLUSION OF THE EVIDENCE OF DEFENDANT'S BAC.

The State contends Judge Jejna abused his discretion in imposing, as a Rule 15 sanction, the preclusion of the evidence of Defendant's BAC. A resolution of this issue involves determining whether there was a violation of Judge Jejna's Order, and if so, was preclusion the appropriate sanction.

A. *Was there a violation of Judge Jejna's Order.*

In order to determine whether there was a violation of Judge Jejna's Order, it is necessary to analyze the wording of that order, the operative language being as follows:

. . . [T]he Court hereby orders the crime lab in possession of the defendants [*sic*] blood to provide a sample of the defendants [*sic*] blood for analysis to the defense by January 16, 2015; or upon presentment of this order.

(Order, dated Jan. 8, 2015.) This Court concludes there are several problems with this order.

The first problem with this order is that it is directed to "the crime lab in possession of the defendants [*sic*] blood." A crime lab is typically not a party to a criminal proceeding, although the crime lab is considered to be under the control of the prosecutor. Such an order is typically directed to the prosecutor, as was requested by Defendant's attorney in his Motion for Order To Produce Blood Vial for Retesting, in which he "respectfully requests that the Court order the State to have its agents turn over a sample of the blood drawn from Ms. Titus from the date she was arrested." (Motion, filed Jan. 5, 2014, at 1.) Defendant's attorney even provided to Judge Jejna a proposed order, which ordered in part as follows:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000205-001 DT

06/05/2015

Good cause appearing, IT IS HEREBY ORDERED that Scottsdale Prosecutor shall order its lab, and/or repository of the blood vials to turn over a sample of Alyssa Titus's blood for testing

If Judge Jejna had signed that order, there would have been no doubt who the responsible party was.

The second problem with Judge Jejna's Order is that there were two crime labs involved. In his Response, Mr. Flint stated that the DPS crime lab had the blood samples: "The kit—with both tubes of blood—has been submitted to DPS." (Response, filed Jan. 8, 2015, at 2, ll. 3–4.) And the testimony presented was that no one ever presented a copy of Judge Jejna's Order to the DPS crime lab. Thus, the DPS crime lab could not be considered to have failed to follow Judge Jejna's Order, an order it never received.

Which brings up a third problem with Judge Jejna's Order: The Order directs the crime lab to provide the blood sample to the defense "by January 16, 2015; or upon presentment of this order," but it does not direct anyone to present the Order to the crime lab. At the hearing on Defendant's motion, Ms. Grommes testified that Defendant's attorney, Mr. Sloan, gave her a copy of the Order, and she then gave the copy to Mr. Mahler, who was in the Property Division of the Scottsdale Police Department. Thus, no one ever presented a copy of Judge Jejna's Order to the Scottsdale crime lab.

The fourth problem with Judge Jejna's Order is the operative date. The Order provides the crime lab is "to provide a sample of the defendants [*sic*] blood for analysis to the defense by January 16, 2015; or upon presentment of this order." As a practical matter, the crime lab would not be able to react to the Order until the order had been presented to the crime lab, thus the January 16th date is meaningless. If Judge Jejna wanted the defense to receive the blood sample by January 16th, he should have ordered the prosecutor to present the Order to the crime lab in sufficient time so that the crime lab could provide the blood sample to the defense by January 16th.

Further, to the extent Judge Jejna was concerned that the crime lab had not reacted to his Order by the stated date of January 16th, Ms. Grommes testified that Defendant's attorney, Mr. Sloan, did not give her a copy of the Order until January 22nd, which was 2 weeks after the January 8th date of the Order and 6 days after the January 16th date by which the defense was to receive the blood sample. Thus, if there was any unreasonable delay in providing the blood sample to the defense, part of that blame lies with Defendant's attorney, Mr. Sloan.

The fifth problem with Judge Jejna's Order is it is unclear exactly what sample of Defendant's blood the crime lab is to provide. The state has no obligation to actually gather evidence for a suspect. *Montano v. Superior Court*, 149 Ariz. 385, 391, 719 P.2d 271, 277 (1986); *accord, Mack v. Cruikshank*, 196 Ariz. 541, 2 P.3d 100, ¶ 15 (Ct. App. 1999). Due process does not require DUI suspects to be provided their own breath samples for independent testing. *State v. Storholm*, 210 Ariz. 199, 109 P.3d 94, ¶ 8 (Ct. App. 2005). Further, in *State v. Kemp*, 168 Ariz. 334, 813 P.2d 315 (1991), the court held as follows for blood samples:

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000205-001 DT

06/05/2015

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.

168 Ariz. at 336–37, 813 P.2d at 317–18. Thus, a defendant is not entitled to have the State provide him or her with a second sample of the blood. Instead, the State is only obligated to take the necessary steps to see that a sufficient portion of the sample remains after the State has done its testing so that the defendant can obtain a portion of that sample and perform his or her own tests. It is thus unclear from Judge Jejna’s Order whether he was ordering the crime lab to provide to the defense what remained of the sample after the crime lab completed its testing (which the State was required to do under *Kemp*), or whether Judge Jejna was ordering the crime lab to provide to the defense with a “second sample” (which the State is not required to do). And if Judge Jejna was ordering the crime lab to provide to the defense what remained of the sample after the crime lab completed its testing, the crime lab would not be able to do that until it completed its testing, which occurred on January 28, 2015, in this case.

It thus appears as follows. Neither the State of Arizona nor the prosecutor violated Judge Jejna’s Order because that Order did not order either the State of Arizona or the prosecutor to do anything. The DPS crime lab did not violate Judge Jejna’s Order because no one ever presented that Order to the DPS crime lab, nor was anyone ordered to do so. And although Ms. Grommes presented a copy of Judge Jejna’s Order to the Property Division of the Scottsdale Police Department on January 23rd, the Property Division did not receive the blood sample from the DPS Crime Lab until February 4th and provided that sample to Ms. Grommes on February 6th. It therefore appears the Scottsdale crime lab did not violate Judge Jejna’s Order. Because no entity or person violated Judge Jejna’s Order, Judge Jejna erred as a matter of law in imposing sanctions.

B. Was preclusion the appropriate sanction.

Assuming there was a violation of Judge Jejna’s Order, the question then is whether Judge Jejna abused his discretion in imposing as a sanction the preclusion of the State’s blood test evidence. Preclusion is a sanction of last resort, thus a trial court may not impose preclusion as a sanction unless it determines that no lesser sanction will remedy the discovery violation. *State v. Cota*, 229 Ariz. 136, 272 P.3d 1027, ¶ 59 (2012); *State v. Moody*, 208 Ariz. 424, 94 P.3d 1119, ¶ 114 (2004). In the present case, Judge Jejna considered preclusion a “slight sanction.” (R.T. of May 4, 2015, at 125.) As noted above, preclusion is considered to be the most extreme sanction. Judge Jejna therefore erred as a matter of law in concluding preclusion was a slight sanction.

If there is a discovery violation, the sanction imposed should be proportional to the harm caused and should be the least restrictive under the circumstances. *State v. Smith (Joe U.)*, 140 Ariz. 355, 359, 681 P.3d 1374, 1378 (1984) (because less stringent sanctions, such as granting a continuance, were available to effect the ends of justice, trial court erred in imposing preclusion as a sanction). In the present case, because the results of Defendant’s testing of her blood sample showed her BAC was 0.111, she was not prejudiced by the State’s BAC evidence showing her BAC was 0.110. To that extent, preclusion of the State’s BAC evidence was not necessary. Judge

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000205-001 DT

06/05/2015

Jejna stated the purpose of imposing preclusion as a sanction was “to send a message to the Scottsdale Crime Lab” “to follow an order.” (R.T. of May 4, 2015, at 125.) One of the available sanctions for a discovery violation is to hold “a witness, party, person acting under the direction or control of a party, or counsel in contempt.” Rule 15.7(a)(4), ARIZ. R. CRIM. P. Because Judge Jejna wanted to impose a sanction for what he perceived as the failure of a crime lab to follow his order, holding someone in contempt would have been the least restrictive sanction under the circumstances. Judge Jejna therefore erred in imposing preclusion as a sanction.

Judge Jejna did consider contempt as a possible sanction. (R.T. of Apr. 29, 2015, at 107–13; R.T. of May 4, 2015, at 124.) Judge Jejna was apparently under the impression that he would have had to go through a separate proceeding in order to impose contempt as a sanction:

So, if the defense is asking for a contempt proceeding, I think I have to refer this for an appropriate proceeding.

(R.T. of Apr. 29, 2015, at 108.) Judge Jejna said why he was rejecting that possible sanction:

. . . The Court has seriously considered the issue of potential sanction as it relates to contempt. Under the present circumstances, the Court does not find that the contempt process would be appropriate, and I’m referring to Rule 15.7(a)(4).

So the Court is making a conscious decision that, even though there may be contemptuous conduct by the State’s crime lab, or the city crime lab, in terms of responding to the order, or failing to do anything regarding the order, the Court has chosen not to take that particular sanction into consideration.

(R.T. of May 4, 2015, at 124.) Judge Jejna’s decision appears to be based on his conclusion that it would be less involved for the court to impose preclusion as a sanction rather than to go through a contempt hearing. But the concept of sanctions is that they should be the least restrictive on the parties and not necessarily the least restrictive on the trial court’s time. Judge Jejna therefore erred as a matter of law in considering the burden on the trial court’s time as the basis of his decision.

III. CONCLUSION.

Based on the foregoing, this Court concludes that, because of the way Judge Jejna worded his order, no one actually violated that order. This Court further concludes, to the extent there may have been a discovery violation, Judge Jejna failed to impose the least restrictive sanction under the circumstances.

IT IS THEREFORE ORDERED accepting special action jurisdiction.

IT IS FURTHER ORDERED vacating Judge Jejna’s order precluding the State’s evidence of Defendant’s BAC, as shown in the Scientific Examination Report from the Arizona Department of Public Safety, dated January 28, 2015.

IT IS FURTHER ORDERED vacating Judge Jejna’s order precluding the State from presenting as evidence the results of the blood test results as shown in the Report from Blood Alcohol Testing & Consulting LLC, dated February 8, 2015.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2015-000205-001 DT

06/05/2015

IT IS FURTHER ORDERED remanding this matter to the Scottsdale 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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