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

LC2010-137767-001 DT 08/27/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA SHAHEEN P TORGOLEY

v.

ETHAN ALLAN BLACKABY (001) CAMERON A MORGAN

REMAND DESK-LCA-CCC
UNIVERSITY LAKES JUSTICE COURT

RECORD APPEAL RULING / REMAND

Lower Court Case Number TR 2010–137767.

Defendant-Appellant Ethan Blackaby (Defendant) was convicted in the University Lakes Justice Court of driving under the influence. Defendant contends the trial court erred in denying his Motion To Dismiss, which alleged the State held him in violation of his right to bail. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On July 19, 2010, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and driving under the extreme influence, A.R.S. § 28–1382(A)(1). Prior to trial, Defendant filed a Motion To Dismiss alleging the officer did not advise him of the bail schedule.

At the hearing on Defendant's motion, Officer Jackie Allen testified she was on duty on July 19, 2010, as a patrol officer for the Arizona Department of Public Safety. (R.T. of Jan. 14, 2011, at 8.) The events here began when a citizen made a 911 call advising that a person was at milepost 12 on the 202 freeway driving a vehicle with a front tire missing, and thus driving on the rim with sparks flying off the wheel. (*Id.* at 93–94.) At about 8:10 p.m., Officer Allen located the vehicle at milepost 7, saw the sparks flying off the wheel, and stopped the vehicle. (*Id*. at 6, 19–20, 25, 94.) She identified Defendant as the driver. (*Id*. at 5.) She determined he had slurred speech and bloodshot watery eyes, and there was an odor of alcohol coming from him. (*Id*. at 21, 28.) When asked, Defendant did not seem to be aware the tire was missing from the wheel of his vehicle. (*Id*. at 22.) At this point, Officer Allen thought this was possibly a DUI situation. (*Id*. at 23.) When Officer Allen asked Defendant to get out of the vehicle, he had difficulty shutting the door behind him, had difficulty with his balance standing and walking, and stumbled out into the traffic lane of the freeway. (*Id*. at 23–24.) Officer Allen had to run out into the traffic lane and

pull Defendant back to the side of his car. (*Id*. at 25.) She had to hold him up with one hand to keep him from falling over while she performed the HGN test, which showed six out of six cues. (*Id*. at 26–27.) Because of Defendant's balance problems and his previous staggering out into the traffic lane, Officer Allen thought it was best not to give him any other field sobriety tests. (*Id*. at 27, 39–40, 52.) Because of the HGN results and Defendant's balance problems, Officer Allen placed Defendant under arrest, which was at 8:20 p.m. (*Id*. at 6, 27–28.) Because of Defendant's balance problems standing and walking, Officer Allen had to hold him up while they walked to her vehicle. (*Id*. at 28.) When she finally got him into the back seat of her vehicle, he could not sit up straight and fell over, so she had to climb into the back seat and help him so he could sit up. (*Id*. at 29.) She said she had made 75 to 100 DUI arrests, and had never seen anybody exhibit such extreme balance problems. (*Id*. at 28–29.)

Because of the difficulties Officer Allen was having with Defendant, she called ahead to the station so other deputies could help get Defendant out of the vehicle and into the station. (R.T. of Jan. 14, 2011, at 32–33.) Once Officer Allen got Defendant into the station, she read him the *Miranda* warnings at 8:34 p.m. and the Admin Per Se/Implied Consent Affidavit at 8:50. (*Id*. at 7–8, 30.) Defendant was placed on a stool next to the Intoxilyzer machine, but he fell off the stool. (*Id*. at 33–35.) The officers then got a chair with a back so Defendant would not fall off again. (*Id*. at 35.) Defendant was given the Intoxilyzer test, which gave readings of 0.181 and 0.189. (*Id*. at 9, 30.) Officer Allen told Defendant the results of the test, but Defendant thought she said the reading was 0.081. (*Id*. at 48, 60.) Defendant disagreed with the reading, told Officer Allen she had not done enough tests, and asked for more tests. (*Id*. at 11, 37, 49, 94–95.) Defendant told Officer Allen he could run a 6-minute mile, and from that and the way Defendant made his statement, she understood him to mean she had not done enough field sobriety tests on the freeway where she had stopped him. (*Id*. at 11, 17, 37–39, 47–48.) This took place before Officer Allen read to Defendant the Independent Test Advisory. (*Id*. at 11, 31, 38.) Officer Allen told Defendant she did not do any more field sobriety tests on the freeway due to her concerns for Defendant's safety. (*Id*. at 52.) Defendant never asked to make a telephone call, never said anything about a blood test or an independent test, never asked how to obtain a blood or urine test, and never asked to call his physician. (*Id*. at 38, 41.) Officer Allen said, if Defendant had asked for an independent test, she would have provided him with a telephone and telephone book and given him the opportunity to call someone. (*Id*. at 52, 54–55.)

Officer Allen then took Defendant to the 4th Avenue Jail. (R.T. of Jan. 14, 2011, at 11–12, 41–42.) She told him he would be booked into jail and later he would see a judge, but said nothing about what would happen when he was booked and when he saw a judge. (*Id*. at 12, 45.) She did not tell Defendant about bail amounts or release conditions. (*Id*. at 12, 15–16, 18, 43.) She said the DPS Directive was that officers were to have all those persons arrested for misdemeanor DUI booked into jail. (*Id*. at 13–14, 42, 47.) She said once a suspect is booked and taken into the jail, they are the responsibility of the Maricopa County Sheriff and no longer the responsibility of DPS. (*Id*. at 45–46.)

Defendant testified and acknowledged he was having problems with his vehicle, and was going to pull off the road at about the same time Officer Allen stopped him. (R.T. of Jan. 14, 2011, at 57–58, 70–71, 83–84.) He attributed his balance problems to the medication he was taking. (*Id*. at 58–60, 61.) He said he had been taking blood pressure medication for 30 years and cholesterol medication for 20 years. (*Id*. at 67.) He said Officer Allen told him the results of the Intoxilyzer test, but he thought she said the reading was 0.081. (*Id*. at 60, 80.) Defendant contended he told Officer Allen he wanted more tests, but acknowledged talking about physical tests and telling her that he ran a 6-minute mile. (*Id*. at 63–64, 78.) He said she told him she was going to take him to the County Jail, but acknowledged she did not tell him what would happen once he got there. (*Id*. at 64.) He said no one told him about bonding out of jail. (*Id*. at 65.) He said, once he was released, he did not go to a hospital because he was "feeling fine," and he did not think about getting a blood test because he "wanted to go home." (*Id*. at 66, 78.)

After the testimony, Defendant's attorney contended holding Defendant to see a judge without informing him of his right to bail and the bail amount violated his due process rights. (R.T. of Jan. 14, 2011, at 100–01.) Defendant's attorney also contended Defendant asked for an additional independent BAC test, and that the officer refused to allow him to get such a test. (*Id*. at 101–04.) After hearing from the prosecutor and again from Defendant's attorney, the trial court ruled the officer was not required to inform Defendant of his right to bail or the bail amount. (*Id*. at 120.) On the issue of a request for further testing, the trial court said there was a conflict in the testimony and it would have to resolve the issue of credibility. (*Id*. at 121.) The trial court then found Defendant did not make a sufficiently clear request for a test:

> The defendant's own testimony starts telling me that [his request] was not clear. . . . So his—basically, his version—his testimony today further confuses the issue.
>
> I'm confused after hearing all of the evidence what, if anything, he was asking for, and—and that's having an extended period of time to go over the legal issues at stake here. I think it would be inappropriate for me to say, well, I can't understand what he was asking for, but the officer should have. I can't understand clearly what he was asking for, having heard the testimony.
>
> Therefore, I don't believe there is an obligation on the part of the State. And, mind you, I qualify that with the fact that I don't sit here and wait for some magic words. If it is reasonably asserted to law enforcement that, hey, I'd like a second sample. He could have held up the paper and said I want one of these, and I would accept that as his request for an independent sample. We don't have that. It's well, I want some more tests. The officer said that occurred right after the Intoxilyzer test, the defendant disputed that. But I'm finding that, number one, the defendant's blood alcohol level; number two, his inconsistent statements here versus there, as well as his statement of I remember most of it, tells me his memory is—is not credible in—in this hearing.

> Another thing that—that really drew my attention was the fact that he was asked when released did you want to go to the hospital to get that sample; he said I wasn't even thinking of that. Now, what that tells me is that this is an issue that has come up subsequent to the booking and not something that was brought up during the booking.
>
> So, to me, the overwhelming evidence in our evidentiary hearing is that the defendant did not effectively assert his request for an independent sample. And the State did not make that available to him to get an independent sample, because they had no idea that he was making that request. And that is my finding and, therefore, my ruling is to deny the motion.

(R.T. of Jan. 14, 2011, at 123–25.)

Defendant then submitted the matter on the record. (R.T. of Jan. 14, 2011, at 125.) The trial court found Defendant guilty of all three DUI charges and imposed sentence. On February 10, 2011, 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. ISSUES.

A. *Is there a due process requirement that law enforcement personnel advise a person arrested of the right to bail and the bail amount.*

Defendant contends there is a due process requirement that law enforcement personnel advise a person arrested of the right to bail and the bail amount so the person could be released and thereby obtain an independent BAC test. Defendant does not, however, cite any case that specifically imposes such a requirement. The Arizona Court of Appeals has said, however:

> The Arizona courts have never held that a defendant's right to gather exculpatory evidence mandates his immediate release.

Van Herreweghe v. Burke, 201 Ariz. 387, 36 P.3d 65, ¶ 6 (Ct. App. 2001) And although a defendant has a due process right to obtain an independent BAC test, the courts have held there is no due process requirement that law enforcement personnel advise a defendant of the right to obtain such a test:

> We have consistently held that police are not obliged to inform DUI suspects of their right to independent testing. *See, e.g., Miller*; *Ramos*; *White*.

State v. Superior Court (Norris), 179 Ariz. 343, 345, 878 P.2d 1381, 1383 (Ct. App. 1994).

> Defendant also argues that the trial court should have dismissed the charge against him because the officers did not advise him of his right to an independent blood alcohol test. We conclude that the officers were not required to inform defendant of his right to an independent test under the circumstances of this case.

State v. Vannoy, 177 Ariz. 206, 209, 866 P.2d 874, 877 (Ct. App. 1993).

> [D]ue process does not require that a suspect be advised of his right to an independent test where the state has invoked the implied consent law.

State v. Miller, 161 Ariz. 468, 470, 778 P.2d 1364, 1366 (Ct. App. 1989).

> Defendant's next argument is that the police were required to inform defendant of his right to an independent blood test. We disagree. This court has recently held that there is no such requirement.

State v. White, 155 Ariz. 452, 455, 747 P.2d 613, 616 (Ct. App. 1987).

> Ramos was not advised of his right to obtain an independent test. The statute, however, contains no requirement that such advice be given.

State v. Ramos, 155 Ariz. 153, 155, 745 P.2d 601, 603 (Ct. App. 1987). In light of the fact there is no due process requirement that law enforcement personnel advise a defendant of the right to obtain an independent BAC test, this Court concludes there is no due process requirement that law enforcement personnel advise a defendant of the right to bail and the bail amount so the person could be released and thereby obtain an independent BAC test.

Defendant contends, however, that such a requirement is implied in the following statute imposing the obligation to establish a master bail schedule:

> A. The defendant, at any time after arrest, and before conviction, shall be admitted to bail, if bailable.
>
> B. The magistrate shall:
>
> 1. Prepare a schedule of traffic violations not involving the death of a person or any felony traffic offense, listing specific bail for each violation.
>
> 2. Designate a deputy other than a law enforcement officer and a specific location at which the deputy shall, during hours when the court is not open, set the amount of bail in accordance with the foregoing schedule and collect such bail, or accept proper bail bonds in lieu thereof, for and on behalf of the court.

A.R.S. § 22–424. For three reasons, this Court disagrees with Defendant's contention.

First, A.R.S. § 22–424 appears in Title 22, Chapter 4, which applies to Municipal Courts, which are city and town courts. A.R.S. § 22–401. This matter arose in the University Lakes Justice Court, and Justice Courts are governed by Title 22, Chapters 1, 2, and 3. Bail in Justice Court is governed by the following statute, which provides only as follows:

> The defendant, at any time after arrest, and before conviction, shall be admitted to bail.

A.R.S. § 22–314. This statute thus contains only the language in A.R.S. § 22–424(A), and does not contain the language in A.R.S. § 22–424(B) imposing the obligation to establish a master bail schedule. Because A.R.S. § 22–424 in general and A.R.S. § 22–424(B) in particular does not apply in Justice Court, Defendant is not entitled to relief under A.R.S. § 22–424(B).

Second, even assuming A.R.S. § 22–424(B) did apply in Justice courts, this Court does not agree the Arizona Legislature somehow implied that a law enforcement officer must inform a defendant of the right to bail and the bail amount. In A.R.S. § 22–424(B)(2), the legislature specifically provided the magistrate must designate a person "other than a law enforcement officer" to set and collect bail or bail bonds. It does not seem consistent that the Arizona Legislature would include some unstated implication that a law enforcement officer would then be required to inform a defendant of the right to bail and the bail amount.

Third, such an interpretation would require this Court to re-write the statute, which is the province of the Arizona Legislature and not the courts. Defendant's interpretation would require this Court to re-write A.R.S. § 22–424(B)(2) to read as follows with one of the possible alternatives:

> Designate a deputy other than a law enforcement officer and a specific location at which the deputy shall, during hours when the court is not open, set the amount of bail in accordance with the foregoing schedule and collect such bail, or accept proper bail bonds in lieu thereof, for and on behalf of the court. The [arresting officer] [transport to station officer] [station officer] [BAC test administration officer] [transport to jail officer] [jail booking officer] [jail detention officer] shall then inform the defendant of the right to bail and the bail amount.

If there is to be placed upon a law enforcement officer the obligation to so inform a defendant, this Court concludes it should be for the legislature to decide whether and upon whom to impose that requirement.

B. *Did the trial court abuse its discretion in finding Defendant did not make a sufficiently clear request for an additional independent BAC test.*

Defendant contends the trial court abused its discretion in finding Defendant did not make a sufficiently clear request for an additional independent BAC test. In reviewing a trial court's ruling on a motion to dismiss, 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 present case is similar to the following case:

> Defendant initially argues that the trial court should have dismissed the charge against him because his right to counsel was violated. At the hearing on the motion to dismiss, defendant testified that he asked to speak with his attorney prior to taking the breath test. He maintained that the police told him just to take the test. Two police officers testified that defendant did not ask to call an attorney.

> If defendant asked to speak with an attorney, he had a right to do so before taking the test. The conflicting testimony, however, created an issue of fact as to whether defendant actually made such a request. The responsibility of resolving factual disputes rests with the trial court. The trial court implicitly resolved the factual dispute in question against defendant in ruling that defendant had not been deprived of his right to counsel. Defendant does not claim that there is insufficient evidence to support such a finding. Under these circumstances, there is no basis for reversing the trial court's ruling.

Vannoy, 177 Ariz. at 209, 866 P.2d at 877 (citations omitted). In the present case, Defendant argues the trial court should have dismissed the charge against him because his right to an independent BAC test was violated. At the hearing on the motion to dismiss, Defendant testified he asked for an independent BAC test, and Officer Allen testified Defendant did not ask for an independent BAC test. This conflicting testimony created an issue of fact whether Defendant actually made such a request. The responsibility of resolving factual disputes rests with the trial court. The trial court resolved this factual dispute against Defendant in ruling Defendant had not made a sufficiently clear request for an additional independent BAC test. Defendant does not claim there is insufficient evidence to support such a finding. Under these circumstances, there is no basis for reversing the trial court's ruling.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court properly denied Defendant's Motion To Dismiss.

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

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

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

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

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