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

LC2015-000311-001 DT 09/10/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
J. Eaton
Deputy

STATE OF ARIZONA KENNETH M FLINT

v.

HONORABLE OREST JEJNA (001) CINDY CASTILLO
DAVID MATTHEW BRABEC (001)

REMAND DESK-LCA-CCC
SCOTTSDALE MUNICIPAL COURT

HIGHER COURT RULING / REMAND

Lower Court Case Number M–0751–TR–2014–024763.

Real Party in Interest David Matthew Brabec (Defendant) was charged in Scottsdale Municipal Court with driving under the influence. The State contends the trial court erred in denying its motion that it be allowed to introduce evidence that there was a sample of Defendant's blood available to test. For the following reasons, this Court vacates the order of the trial court.

I. FACTUAL BACKGROUND.

On October 18, 2014, Defendant was cited for driving under the influence, A.R.S. § 28–1381(A)(1) & (A)(2); and failure to control speed to avoid a collision, A.R.S. § 28–701(A). The officers tested Defendant's breath samples with an Intoxilyzer 8000, and the results were 0.122 and 0.126. (R.T. of Jul. 30, 2015, at 14, 52, 59.) In addition, Officer Nelson drew two tubes of Defendant's blood. (*Id.* at 43.) Officer McCann advised Defendant, and gave Defendant a document, stating one of the tubes would be available for Defendant to test, and Defendant signed that document. (*Id.* at 43–44, 47–49, 54–55.)

Because of the problems with the Scottsdale Crime Lab, the State personnel requested that the Arizona Department of Public Safety Crime Lab test the sample of Defendant's blood, this request being made on March 16, 2015. (R.T. of Jul. 30, 2015, at 31–32.) Because of the backlog at that Crime Lab, the sample of Defendant's blood was not taken there until June 24, 2015, and the results were not returned until July 22, 2015. (*Id.* at 21–22, 26, 32, 35–37.) The result of that testing showed Defendant's BAC was 0.127. (Arizona Dept. of Pub. Safety, Scientific Examination Report, dated Jul. 8, 2015.) The sample remained in the Property and Evidence Refrigerator from October 20, 2014, until June 24, 2015. (*Id.* at 22, 25, 38–39.) During that period, no one from the defense made any request to obtain the second sample for independent testing. (*Id.* at 23–24, 26, 28–29.)

Because the results of the testing of Defendant's blood sample were not available until July 22, 2015, the trial court precluded the State from offering in evidence the results of the blood testing. (R.T. of Jul. 30, 2015, at 5–6.) Prior to trial, the State filed a Motion in Limine asking that, if the defense attacked the accuracy of the State's breath test evidence, the State would be allowed to introduce evidence that Defendant's blood sample was available for testing, but that the defense never had it tested. (*Id.* at 9–10.) In the alternative, if the trial court was not willing to allow that evidence, the State asked the trial court to preclude any mention of the drawing of Defendant's blood sample. (*Id.* at 9–10.)

In ruling on the motion, the trial court assumed Defendant was going to challenge the breath sample. (R.T. of Jul. 30, 2015, at 16.) The trial court denied "the State's request to permit the State to discuss the availability of the second blood tube sample for retest." (*Id.* at 60.) The trial court granted the State's request that "no one . . . discuss or mention the blood samples at all." (*Id.*)

On July 30, 2015, the State filed a Petition for Special Action, and on that same day, this Court entered an Interlocutory Order Staying Proceedings in Scottsdale Municipal Court. On August 10, 2015, Defendant filed a Response, and on August 13, 2015, the State filed a Reply. This Court has jurisdiction pursuant to ARIZ. CONST. Art. 6, § 16.

II. ISSUE: UNDER WHAT CIRCUMSTANCES MAY THE STATE COMMENT ON THE FAILURE OF THE DEFENDANT TO TEST AVAILABLE EVIDENCE.

The State contends that, once Defendant has attacked, challenged, or called into question the validity or accuracy of its breath test evidence, it should be allowed to present evidence to the jurors that there was available to Defendant a sample of his blood that he could have tested, but did not do so, and that the State should be able to argue adverse inferences from the Defendant's failure to test that blood sample. In *State ex rel. McDougall v. Corcoran (Keen),* 153 Ariz. 157, 735 P.2d 767 (1987), the officers administered to the defendant a blood alcohol content test utilizing a gas chromatograph intoximeter Mark IV device, and the test results showed a 0.140 blood alcohol content. 153 Ariz. at 158, 735 P.2d at 768. The court described the trial proceedings as follows:

> Keen was advised of his right to have a sample of his breath preserved. Keen requested a sample, which was collected and impounded for safekeeping. Keen was advised how to obtain the sample for testing. He was then cited and released from custody.
>
> Prior to the trial in Phoenix Municipal Court, defense counsel moved in limine to preclude the prosecutor from mentioning the fact that Keen had obtained a breath sample for his own use. The trial court denied the motion. At trial, the prosecutor elicited testimony from the arresting officer that Keen had asked for and received such a breath sample. Later, Keen took the witness stand, and over defense objections, the prosecutor asked him during cross-examination whether he had received the breath sample. During the course of the trial, Keen challenged the validity of the State's test results.

> During closing argument the prosecutor stated: "We don't know in this case what happened with the second sample. You can wonder to yourself what did happen, if it was to his benefit, a reasonable inference would be that he would have brought that evidence forward to you, but he didn't in this case." Defense counsel made no objection. In rebuttal closing argument the prosecutor again commented on the second breath sample: "It's the same way why the second sample is not available to you, because it was in the defendant's control, and he chose not to give that information to you. The State should not be held accountable for what the defendant chooses not to put forth to you people." Defense counsel moved for a mistrial. The trial court denied the motion and instructed the jury that the defendant is not required to produce any evidence or to prove his innocence.

153 Ariz. at 158, 735 P.2d at 768. In holding that the actions of the prosecutor were permissible, the court said the following:

> Even where the defendant does not take the stand, the prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence. Such comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it. We believe that the prosecution's questions on cross-examination and its remarks in closing arguments were simply comments designed to draw reasonable inferences based on Keen's failure to present evidence relating to the breath sample. Although we do not have a complete trial transcript, it is apparent from defense counsel's closing statement that Keen had challenged the validity of the State's blood alcohol test results. It strikes us as elemental fairness to allow the State to comment upon the defense's failure to adduce potentially exculpatory evidence to which defendant had access when defendant is attacking the accuracy of the State's evidence.

153 Ariz. at 160, 735 P.2d at 770 (citations omitted). The court then stated its holding as follows:

> We hold, therefore, that when a DUI suspect requests and obtains a breath sample for his own use and challenges the accuracy of the State's test results at trial, the prosecutor may present evidence that the defendant was given a breath sample and comment on the defendant's failure to produce evidence concerning the test results, if any, of the defendant's sample.

153 Ariz. at 161, 735 P.2d at 771. Thus, the court held it was permissible to comment on the defendant's failure to produce evidence when a DUI suspect (1) requests and obtains a breath sample for his or her own use and (2) challenges the accuracy of the State's test results at trial. As noted above, however, the court stated it was permissible for the State "to comment upon the defense's failure to adduce potentially exculpatory evidence to which defendant had access." Thus, it is not clear whether comment is allowed when the defendant had ***access*** to potentially exculpatory evidence or only when the defendant has ***obtained*** that evidence.

From a review of other Arizona Supreme Court cases, it appears all that is required is that the defendant had access to potentially exculpatory evidence and that there is no requirement that the defendant has actually obtained that evidence. In *State v. Fuller,* 143 Ariz. 571, 694 P.2d 1185 (1985), the prosecutor made the following argument to the jurors:

> Defense counsel is trying to do the best he can to represent his client, and he's doing the best he can. However, the State has a lot of evidence. The defense has no duty to present evidence, that's true. They've presented no evidence, nothing positive. Their entire effort is to tear apart the State's case, to tell you that these eyewitnesses don't know what they saw. That's his purpose here today.

143 Ariz. at 573, 694 P.2d at 1187. The court rejected the defendant's claim that this was an impermissible reference to the defendant's failure to testify:

> Thus, under both Arizona and Federal law the test to judge impermissible comment upon a defendant's assertion of his fifth amendment right not to testify is "whether the language used was manifestly intended or was of such a character that the jury would naturally and necessarily take it to be a comment on the failure to testify." The prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify. An exception to this rule occurs when it appears that the defendant is the only one who could explain or contradict the state's evidence.
>
> We do not find the prosecutor's statement violative of appellant's fifth amendment rights. The comment reflected the prosecutor's opinion that the defense failed to present any positive or exculpatory evidence. It did not specifically refer to appellant's failure to take the stand. Furthermore, the instant case is not one where the defendant is the only one who could explain or contradict the state's evidence. Several people witnessed the robbery, and the robber had an accomplice. Moreover, the possibility of alibi witnesses always exists in cases, such as the instant one, where the defendant's identity is at issue.

143 Ariz. at 573, 694 P.2d at 1187 (citations omitted). In that case, to the extent the court was discussing specifics, it discussed live witnesses, so it did not address the present question, which is whether the State may comment on the defendant's failure to present physical evidence. Similarly, in *State v. West,* 176 Ariz. 432, 862 P.2d 192 (1993), the prosecutor commented on the defendant's failure to call two expert witnesses defendant had retained to assess his psychological condition. 176 Ariz. at 453–54, 862 P.2d at 213–14.

However, in *State v. Lehr,* 201 Ariz. 509, 38 P.3d 1172 (2002), the court was faced with physical evidence, specifically fingerprint evidence. Originally, the State's fingerprint expert (Karen Jones) was not able to make an identification of a fingerprint found at the crime scene, but because of improved identification technology in the intervening 3 years, Jones was able to match that fingerprint with defendant's fingerprint. On cross-examination, the defendant's attorney questioned Jones about her change of opinion and whether DNA comparisons had yielded inconclusive results. The following then transpired:

> On redirect, the prosecutor asked Jones whether the fingerprint cards containing prints which had been recovered from the crime scene were still on file. She answered that she believed they were. The prosecutor then asked, "[A]re there other experts outside the Phoenix Police Department that could look at these prints and verify or not verify those?" Defendant moved for a mistrial, and the motion was denied.

201 Ariz. at 522, 38 P.3d at 1185. The court rejected the defendant's claim that this was an impermissible comment on the defendant's failure to present evidence of a non-match and that this transformed the State's burden to prove guilt into the defendant's burden to prove innocence:

> We rejected a similar argument in *State ex rel. McDougall v. Corcoran.* There, we held that discussing a defendant's failure to produce evidence is permissible so long as it does not constitute a comment on his or her silence. We concluded that "[t]he inference that may be drawn from [the defendant's] failure to produce evidence—that the facts were unfavorable to him—is not unreasonable." We find no error.

201 Ariz. at 522, 38 P.3d at 1185 (citations omitted). Although the court did not address the question of access to evidence versus obtained evidence, it appears the defendant had not obtained copies of the fingerprint lifts and instead only had access to them.

The Arizona Court of Appeals has issued several opinions that discuss the defendant's failure to present potentially exculpatory evidence without specifically addressing the question of access to evidence versus obtained evidence. In *State v. McKinley*, 157 Ariz. 135, 755 P.2d 440 (Ct. App. 1988), which was a child molest case, the state had admitted in evidence the victim's underwear. The following then transpired:

> In addition, analysis of semen stains found on the victim's underwear showed a blood type and contained a PGM enzyme type matching McKinley's. As the expert testified, this evidence narrowed the possible suspects to only 15% of the population. This analysis was the result of a re-test; the initial results were unclear. The semen stains were preserved for independent testing by the defense, but no such tests were performed.

157 Ariz. at 137, 755 P.2d at 442. The court rejected the defendant's claim that the prosecutor's argument shifted the State's burden of proof:

> The prosecutor's argument to the jury that McKinley had the opportunity to independently test the semen samples and failed to do so did not shift the burden of proof to McKinley. That issue has been decided adversely to him in *State ex rel. McDougall v. Corcoran* where the court found such argument was not a comment on a defendant's silence if it constitutes rebuttal to the accused's challenge of the test results.

157 Ariz. at 138, 755 P.2d at 443 (citations omitted). Although the court did not address the access to evidence versus obtained evidence question, it appears the defendant never obtained the underwear for testing and that instead the defendant merely had access to that evidence.

In *State v. Herrera*, 203 Ariz. 131, 51 P.3d 353 (Ct. App. 2002), the issue involved the non-production of a video of the defendant as he was performing field sobriety tests:

> During closing argument, Herrera's attorney argued that Officer Bender's description of Herrera's performance on the field sobriety tests was unreliable and subjective. In doing so, counsel specifically mentioned a videotape of Herrera's field sobriety tests that had not been introduced into evidence but presumably would have given the jury an objective view of the tests. Ultimately, counsel stated, "[W]hen you consider the evidence that you have been given, *when you consider the evidence that you haven't been given,* when you apply the nature of the investigation that went on . . . you find that Mr. Herrera was not guilty of driving under the influence that night." (Emphasis added.) In rebuttal, the prosecutor commented, "[H]ad the video shown anything other than what Officer Bender testified to, [Herrera] would have showed you that video." Herrera contends the prosecutor's remark amounted to prejudicial misconduct. Prosecutorial misconduct is reversible error only if "the defendant has been denied a fair trial as a result of the actions of counsel."

Herrera at ¶ 18 (citations omitted). The court rejected the defendant's claim of error as follows:

> "[A]dvocates are ordinarily given wide latitude in closing argument." It is well settled that a "prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not phrased to call attention to the defendant's own failure to testify."
>
> Herrera clearly attacked the reliability of Bender's observations through the absence of the videotape. In fact, Herrera essentially invited the jury to consider the possible contents of that videotape in his favor. Under these circumstances, the prosecutor properly argued that Herrera could have presented the videotape to the jury had it contained exculpatory information.
>
> Contrary to Herrera's suggestion, the prosecutor's remark did not amount to burden shifting. The comment merely prevented Herrera from drawing a positive inference from evidence that he could have presented but did not. *See Corcoran (Keen)* ("Such comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it.").

Herrera at ¶¶ 19–21 (citations omitted). Again, the court did not specifically address the access to evidence versus obtained evidence question.

In *State v. Edmisten*, 220 Ariz. 517, 207 P.3d 770 (Ct. App. 2009), this issue involved commenting on the defendant's failure to call one of the officers as a witness:

> Edmisten next argues the prosecutor engaged in misconduct by addressing Edmisten's failure to call a certain witness to testify and thus confused the jury regarding who had the burden of proof. "It is well settled that a 'prosecutor may properly comment upon the defendant's failure to present exculpatory evidence, so long as the comment is not

> phrased to call attention to the defendant's own failure to testify.' " "Such comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." Our supreme court has stated: "It strikes us as elemental fairness to allow the State to comment upon the defense's failure to adduce potentially exculpatory evidence to which defendant had access when defendant is attacking the accuracy of the State's evidence."
>
> Here, a deputy testified that, after Edmisten was apprehended, the deputy had identified Edmisten as the person who had pointed a gun at him during the police chase. Edmisten offered evidence in an attempt to show the identification had never happened. The prosecutor merely pointed out during closing arguments that, although Edmisten had no burden to present any evidence or prove anything, he could have called another deputy who—according to the first deputy's testimony—had been present at the time of the identification. "Elemental fairness" allowed the state to comment on Edmisten's failure to call this "potentially exculpatory" witness. The state was not unreasonable in suggesting that Edmisten's failure to produce the witness gave rise to an inference that the witness's testimony would have been unfavorable to Edmisten. Because we conclude the state did not engage in prosecutorial misconduct, Edmisten cannot sustain his burden to show fundamental error.

Edmisten at ¶¶ 26–27 (citations omitted). Again, this involved live witnesses rather than the testing of physical evidence.

The one court of appeals case that did find error in the prosecutor's argument is *State v. Corona,* 188 Ariz. 85, 932 P.2d 1356 (Ct. App. 1997). In that case, the prosecutor noted the State had presented the testimony of its gang expert, but the defendant had not presented any contrary evidence:

> The State provided you with a gang expert who testified about the subculture of gangs. What motivates them. How they're composed. The activities that they do. They thrive on violence. The defense did not provide you with any expert who testified. . . . They did not provide you with an expert witness to counter what Detective Luebkin said.

188 Ariz. at 89, 932 P.2d at 1360. The defendant contended the trial court erred in failing to sustain his objection to the prosecutor's comment on his failure to call an expert witness, and the State contended under *Corcoran (Keen)* it was permitted to comment on the defendant's failure to present exculpatory evidence. The court rejected the State's argument as follows:

> In *Keen,* the supreme court held that the state could properly comment on a defendant's failure to introduce the results of testing a breath sample he had received after his arrest for driving under the influence of an intoxicant. The court found that "[s]uch comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." However, in *Gordon v. Liguori,* a medical malpractice case, this court held that

> the trial court did not err in precluding comment by the plaintiffs on the defendants' failure to call experts. One reason that the restriction on such comment was proper was "because defendants did not call the subject experts, the jury knew nothing about them and there was no need to explain why they did not testify." *See also Spraker v. Lankin* (court committed reversible error when it permitted defense counsel, in closing arguments, to comment on plaintiff's failure to call an expert who had been consulted, but who was not named as a witness and whose existence was not disclosed by the evidence at trial). This accords with the general rule that closing arguments must be based on facts that the jury is entitled to find from the evidence and not on extraneous matters not received in evidence. Because there was no mention during the trial that the defendant had retained or even consulted an expert witness on gangs, unlike *Keen* in which the defendant had received a sample for the very purpose of independent consultation, the prosecutor's comment was improper and the defendant's objection should have been sustained.

188 Ariz. at 89–90, 932 P.2d at 1360–61. It thus appears the basis of the court's reasoning was that "there was no mention during the trial that the defendant had retained or even consulted an expert witness on gangs," a fact that the court found controlling in *Edmisten*:

> Edmisten cites *State v. Corona* for the proposition that the state cannot comment on the defendant's failure to call an expert witness when no evidence has been presented that the defendant consulted an expert. In discussing a case addressing a similar issue, the court in *Corona* reasoned "the restriction on such comment was proper . . . 'because defendants did not call the subject experts, the jury knew nothing about them and there was no need to explain why they did not testify.' " But here, the jury heard evidence that another deputy was present when the testifying deputy identified Edmisten, and arguably there was a need to explain why the other deputy did not testify. The reasoning in *Corona* is therefore inapplicable.

Edmisten at ¶ 27 n.4 (citations omitted).

Although this Court has found no court of appeals opinions addressing the question of access to evidence versus obtained evidence in a DUI case, this Court has found two memorandum decisions with such a discussion. Both of these decisions were issued prior to January 1, 2015, and this Court is aware they are not to be cited as authority. *See* Rule 111(c), R. Ariz. Sup. Ct. This Court includes these decisions only to show the reasoning used by the particular judges who decided those cases.

In *State v. Patrou*, 2009 WL 4808797 (Memo. Decision, Ariz. Ct. App. Dec. 14, 2009), an officer drew two blood samples and informed the defendant that one was for him if he chose to seek an independent test. The State's test showed a BAC of 0.133; the defendant never sought to obtain the second sample and thus had no tests performed on that sample. The issue arose, and the court ruled, as follows:

> Before trial, Patrou moved to preclude any mention of the second blood sample, arguing that because the state preserved this evidence without his requesting it and because he never took possession of it, the state should be precluded from implying that Patrou's failure to test the other sample demonstrated the accuracy of the state's test results. Patrou cited no controlling authority, and the trial court denied the motion. It found the admissibility of the evidence did not "rise[ ] and fall[ ] on whether the defense physically picks up the second tube" and Patrou could not "void [the] issue by simply failing to take possession" of the blood sample. On appeal, Patrou contends the trial court erred in denying this motion, as well as his later motion for a new trial on the same ground. He argues he was prejudiced by references to the second blood sample in testimony and in the state's closing arguments because the statements invited the inference "that he would have tested it and disclosed the results if they were exculpatory and if he did not do so, then it could be assumed the results would have been inculpatory." This error, he argues, impermissibly shifted the burden of proof away from the state and warrants reversal. We disagree.
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> . . . .
>
> As the state points out, a prosecutor may "comment upon the defense's failure to adduce potentially exculpatory evidence to which defendant had access when defendant is attacking the accuracy of the State's evidence." *State ex rel. McDougall v. Corcoran.* Although Patrou attempts to distinguish *Corcoran,* emphasizing he "never requested the [additional blood] sample" and arguing the "state had equal access to the second sample" through which it could have verified the accuracy of the first sample, these arguments fail to meaningfully distinguish *Corcoran.* Neither the defendant's request for an additional sample nor the state's access to it was dispositive in *Corcoran.* Rather, our supreme court's holding in that case relied on "the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." Accordingly, the trial court here did not err in allowing the prosecutor and the state's witnesses to refer to the second blood sample, and it did not abuse its discretion in denying both Patrou's motion to preclude and his motion for new trial.

Patrou at ¶¶ 6, 8 (citations omitted).

In *State v. Wright,* 2011 WL 5027076 (Memo. Decision, Ariz. Ct. App. Oct. 21, 2011), the defendant was given breath tests, which showed his BAC was 0.180 and 0.188, and he was told he had the right to obtain an independent test. The court discussed the issue and ruled as follows:

> Wright filed a motion in limine seeking to preclude the state from introducing evidence he had been told he had the right to obtain independent testing of his BAC, arguing the state has the burden of establishing the elements of the charged offenses. He also argued evidence about independent testing would suggest to the jury that he had a burden to prove the breath tests had been inaccurate. The court denied the motion.

> Wright challenges that ruling on appeal, again contending the introduction of this evidence shifted the burden of proving his innocence and relieved the state of its burden of proving his guilt, which included the fact that his BAC exceeded .08. . . .
>
> Wright argues the evidence was not admissible, attempting to distinguish *State ex rel. McDougall v. Corcoran (Keen).* In that special action, which originated from a municipal court DUI conviction, the supreme court held it was not reversible error for the trial court to have permitted the state to introduce, over the defendant's objection, evidence the defendant had requested and obtained a sample of his breath, even though the defense had not introduced evidence about that sample and testing of it for BAC. Wright contends his case is more like *State v. Corona.* There, Division One of this court rejected the applicability of *Keen,* distinguishing it on the ground the defendant in that case had not retained his own expert on gang activity to refute evidence presented by the state, therefore the state could not comment on the defendant's failure to call a gang expert to testify at trial.
>
> In *Keen,* the court stated the general proposition that it is not error for the state to point out to a jury that the defendant had the right to obtain a separate breath sample for independent testing and that the jury could infer from the defense's failure to introduce the evidence of the test results that the results would not have been favorable. The court stated, "Even where the defendant does not take the stand, the prosecutor may properly comment on the defendant's failure to present exculpatory evidence which would substantiate defendant's story, as long as it does not constitute a comment on defendant's silence." The court added, "Such comment is permitted by the well recognized principle that the nonproduction of evidence may give rise to the inference that it would have been adverse to the party who could have produced it." . . .
>
> Here, the jury merely was told Wright had been informed he could obtain an independent blood test. As the state points out, it did not argue to the jury, as the state did in *Keen,* that they could draw any specific inferences from that fact.

Wright at ¶¶ 2–6 (citations omitted). The court then stated it did not have to determine whether *Corcoran (Keen)* or *Corona* controlled because, "even were we to conclude the trial court erred, we also conclude beyond a reasonable doubt that any such error would not have affected the outcome of the case." *Wright* at ¶ 8.

From a review of the above cases, this Court concludes the controlling case is *State v. Lehr* because (1) it is the most recent Arizona Supreme Court case on this subject and (2) it involved the testing of physical evidence (fingerprint evidence). This Court further concludes it is not necessary to show that Defendant had obtained the sample of his blood for testing; all that is necessary is to show that Defendant had access to that sample. Thus, based on *Lehr* and *Corcoran (Keen),* this Court concludes that, if Defendant in any way attacks, challenges, or calls into question the validity or accuracy of the State's breath test evidence, the State will be allowed to present evidence to the jurors that there was available to Defendant a sample of his blood that he could have had tested, but did not do so, and that the State will be able to argue adverse inferences from the Defendant's failure to test that blood sample.

This Court further notes the trial court distinguished *Corcoran (Keen)* because, in that case, the State presented ***blood*** test evidence and the defendant had a ***blood*** sample available for testing, while in this case, the State has ***breath*** test evidence and Defendant has a ***blood*** sample available for testing. This Court finds this to be a distinction without a difference. The issue in this case is Defendant's blood alcohol content, thus the ultimate ***fact*** the State must prove to the jurors is Defendant's blood alcohol content and not specifically whether the breath testing machine provided accurate results. The State will attempt to prove Defendant's blood alcohol content was 0.122 (or 0.126) and will do so by presenting evidence of the breath tests administered to Defendant. If Defendant attacks that evidence, he will most likely do so by claiming his blood alcohol content was not 0.122 (or 0.126) because the breath testing machine provided inaccurate results. The State would then be able to present evidence that Defendant had a sample of his blood he could have had tested, and argue that, if Defendant wanted to show his blood alcohol content was not 0.122 (or 0.126), he could have had that blood sample tested and thus present the results to the jurors.

III. CONCLUSION.

Based on the foregoing, this Court concludes that, if Defendant in any way attacks, challenges, or calls into question the validity or accuracy of the State's breath test evidence, the State will be allowed to present evidence to the jurors that there was available to Defendant a sample of his blood that he could have had tested, but did not do so, and that the State will be able to argue adverse inferences from the Defendant's failure to test that blood sample.

IT IS THEREFORE ORDERED vacating the ruling of the Scottsdale Municipal Court.

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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