

SUPERIOR COURT OF ARIZONA  
MARICOPA COUNTY

LC2015-000350-001 DT

10/26/2015

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT

J. Eaton

Deputy

STATE OF ARIZONA

SETH W PETERSON

v.

RANDON LEE MILLER (001)

DENNIS I WILENCHIK

REMAND DESK-LCA-CCC

SCOTTSDALE MUNICIPAL COURT

RECORD APPEAL RULING / REMAND

**Lower Court Case Number M-0751-TR-2014-000058.**

Defendant-Appellant Randon Lee Miller (Defendant) was convicted in Scottsdale Municipal Court of driving under the influence. Defendant contends (1) the trial court did not have jurisdiction, (2) he was not guilty of the (A)(3) charge because he was using marijuana as prescribed by a medical practitioner, and (3) the trial court precluded him from introducing evidence of outrageous government conduct. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On December 28, 2013, Defendant was cited for driving under the influence, A.R.S. § 28-1381(A)(1) & (A)(2); driving with drugs or metabolite in system, A.R.S. § 28-1381(A)(3); improper right turn, A.R.S. § 28-751(1); and driving without lights at night, A.R.S. § 28-922. On February 26, 2015, Defendant filed a Supplemental Notice of Defenses listing under "Other" as [Lack of] Jurisdiction. Prior to the start of the trial, both attorneys acknowledged Defendant had been driving southbound on Scottsdale Road and turned right onto Bell Road. (R.T. of Apr. 14, 2015, at 4, 5, 6.) Defendant's attorney submitted Defendant's Exhibit 1, which is a map from the Maricopa County Assessor's Office showing Parcel Visualization. (*Id.* at 5.) The prosecutor submitted State's Exhibit 1, which is an aerial photograph with a dotted line superimposed along the west side of Scottsdale Road, and a map with a red line west of Scottsdale Road. (*Id.* at 6-7.) After hearing arguments from the attorneys, the trial court ruled that Defendant's conduct occurred within the boundaries of the City of Scottsdale and thus it had jurisdiction over the charged offenses. (*Id.* at 8.)

Officer Wiley Adams testified he was on duty on December 28, 2013, and at 9:53 p.m. was stopped for a red light at the intersection of Scottsdale Road and Bell Road/Frank Lloyd Wright Boulevard, heading north in the left turn lane. (R.T. of Apr. 14, 2015, at 97, 100-01, 144.) He saw a white Hummer without its lights on headed south on Scottsdale Road in the right turn lane. (*Id.* at 101-03.) The vehicle turned right onto Bell Road, and as it did so, it made a wide right turn into the number 2 (middle) lane rather than into the number 3 (curb) lane. (*Id.* at 103.) When the light turned green, Officer Adams turned left, followed the vehicle, and made a traffic stop. (*Id.* at 104.)



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Phoenix City Limits for the area where the offense occurred.<sup>1</sup> That map shows the centerline of Scottsdale Road and shows the dividing line between the City of Phoenix and the City of Scottsdale is the west side of Scottsdale Road. It shows all of Scottsdale Road is entirely within the City of Scottsdale, the west side of Scottsdale Road being 40 feet from the centerline of Scottsdale Road where it crosses the Central Arizona Project Canal, continues at 40 feet until about 540 feet north of the Central Arizona Project Canal, and then widens to 65 feet from the centerline of Scottsdale Road. Because Scottsdale Road is entirely within the City of Scottsdale, the trial court correctly found that Defendant committed the offenses within the City of Scottsdale, and thus the court had jurisdiction.

B. *Did A.R.S. § 28–1381(D) apply to Defendant.*

Defendant contends A.R.S. § 28–1381(D) applied to him and thus he was not guilty of violating A.R.S. § 28–1381(A)(3). Subsection (D) provides as follows:

A person using a drug as prescribed by a medical practitioner licensed pursuant to title 32, chapter 7, 11, 13 or 17 is not guilty of violating subsection A, paragraph 3 of this section.

A.R.S. § 28–1381(D). As Defendant notes, the Arizona Court of Appeals has held A.R.S. § 28–1381(D) does not apply to the use of medical marijuana pursuant to a written certification under the Arizona Medical Marijuana Act. *Dobson v. McClennen*, 236 Ariz. 203, 337 P.3d 568, ¶ 14 (Ct. App. 2014). Thus, even if there had been any evidence to show Defendant was using medical marijuana pursuant to a written certification under the Arizona Medical Marijuana Act, it would not result in his being not guilty of violating A.R.S. § 28–1381(A)(3).

Defendant notes the Arizona Supreme Court has granted review of *Dobson*. No. CV 14–0313–PR (Oral Argument Oct. 1, 2015). Even if the Arizona Supreme Court were to hold contrary to the Arizona Court of Appeals, it would not benefit Defendant because Defendant did not present any evidence that he was using marijuana “as prescribed” by a licensed medical practitioner under A.R.S. § 28–1381(D). That section provides a defendant with an affirmative defense, thus the defendant has the burden of proving by a preponderance of the evidence the defendant used prescription drugs as prescribed by a licensed medical practitioner. *State v. Bayardi (Fannin)*, 230 Ariz. 195, 281 P.3d 1063, ¶¶ 2–23 (Ct. App. 2012) (court rejected defendant’s contention that this section provided either justification defense or defense denying element of charge; court concluded trial court erred in ruling this section created justification defense and that state had to prove beyond reasonable doubt defendant was not using prescription drugs as prescribed by medical practitioner; court held this established affirmative defense, thus defendant had burden of proving by preponderance of evidence he used prescription drugs as prescribed by licensed medical practitioner). In the present case, the only indication Defendant was authorized to use marijuana was the statement he made during sentencing, which is not evidence. (R.T. of Apr. 15, 2015, at 317.) Moreover, the extent of his statement was he did not have a valid Medical Marijuana Card when he committed this offense. But more importantly, because Defendant did not testify, he did not present any evidence he was using marijuana “as prescribed.” Thus, even if the Arizona Supreme Court were to hold that A.R.S. § 28–1381(D) applied to the use of marijuana under the Arizona Medical Marijuana Act, Defendant failed to present any evidence that he would come under that provision.

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<sup>1</sup> <https://www.phoenix.gov/cityclerksite/Documents/CityLimitsMapBook20150717.pdf>

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*C. Did the trial court abuse its discretion in excluding Defendant's evidence.*

Defendant contends trial court abused its discretion in excluding evidence of his previous interactions with the Scottsdale Police Department, claiming his "entire defense was based upon the Scottsdale Police as a unit illegally targeting him." (Appellant Opening Memorandum at 7, ll. 16–17.) This would be a claim of outrageous government conduct, which is grounded in due process principles and is to be resolved by the trial court as a matter of law before trial. *State v. Williamson*, 236 Ariz. 550, 343 P.3d 1, ¶ 10 (Ct. App. 2015). This is in contrast with entrapment, which is based on public policy considerations and is to be determined by the trier-of-fact in light of the evidence presented at trial. *Id.* Because a claim of outrageous government conduct is not a matter to be determined by the trier-of-fact in light of the evidence presented at trial, Defendant had no right to present such evidence during trial, and thus the trial court did not abuse its discretion in precluding such evidence.

As noted above, if Defendant had wanted to make a claim of outrageous government conduct, he should have raised that issue with the trial court for it to resolve as a matter of law before trial. Because he did not present that claim to the trial court prior to trial, he has waived review for all but fundamental error. *State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991) (absent fundamental error, failure to raise an issue at trial waives the right to raise the issue on appeal); *accord*, *State v. Gatliff*, 209 Ariz. 362, 102 P.3d 981, ¶ 9 (Ct. App. 2004). Fundamental error is limited to those rare cases that involve error going to the foundation of the defendant's case, error that takes from the defendant a right essential to the defendant's defense, and error of such magnitude that the defendant could not possibly have received a fair trial, and places the burden on the defendant to show both that error existed and that the defendant was prejudiced by the error. *State v. Soliz*, 223 Ariz. 116, 219 P.3d 1045, ¶ 11 (2009). Further, it is particularly inappropriate to consider an issue for the first time on appeal when the issue is a fact intensive one. *State v. Rogers*, 186 Ariz. 508, 511, 924 P.2d 1027, 1030 (1996); *State v. West*, 176 Ariz. 432, 440–41, 862 P.2d 192, 200–01 (1993); *State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988).

To establish a claim of outrageous government conduct, the defendant must show either (1) the government engineered and directed a criminal enterprise from start to finish, or (2) the government used excessive physical or mental coercion to induce the defendant to commit the crime. *Williamson* at ¶ 11. This is a fact intensive inquiry and thus is inappropriate for a court to consider for the first time on appeal. Moreover, on the record presented, Defendant has failed to show prejudice. Defendant was convicted of driving under the influence of alcohol, driving with a BAC over the legal limit, and driving with drugs in his system. There is no evidence in the record that "the government engineered and directed . . . from start to finish" Defendant's consumption of drugs and alcohol and his decision to drive after doing so, nor is there any evidence in the record that "the government used excessive physical or mental coercion to induce the defendant" to consume drugs and alcohol and drive after doing so. Because the record shows no outrageous government conduct, Defendant has failed to meet his burden of establishing prejudice.

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III. CONCLUSION.

Based on the foregoing, this Court concludes (1) Defendant committed the driving offense within the city limits of Scottsdale and thus the trial court had jurisdiction, (2) the defense provided by A.R.S. § 28-1381(D) did not apply to Defendant's use of marijuana, and even if it did, Defendant failed to present any evidence that he was using marijuana as directed, and (3) Defendant waived any claim of outrageous government conduct by failing to present that issue to the trial court prior to trial, and further, Defendant failed to establish a claim of fundamental error, including a failure to establish prejudice.

**IT IS THEREFORE ORDERED** affirming the judgment and sentence 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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