IN THE
# ARIZONA COURT OF APPEALS
**DIVISION ONE**

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STATE OF ARIZONA, *Appellee*,

*v.*

JOE CUEN, *Appellant*.

No. 1 CA-CR 16-0168
FILED 6-20-2017

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Appeal from the Superior Court in Maricopa County
No. CR2011-008083-001
The Honorable Daniel J. Kiley, Judge

**AFFIRMED**

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COUNSEL

Arizona Attorney General's Office, Phoenix
By Michael O'Toole
*Counsel for Appellee*

Wendy L. Mays, Phoenix
*Counsel for Appellant*

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**MEMORANDUM DECISION**

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

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**T H U M M A**, Judge:

**¶1** Defendant Joe Cuen appeals his conviction and resulting sentence for sexual assault, arguing the superior court erred in denying his motion to suppress deoxyribonucleic acid (DNA) evidence and his motion to dismiss the case on statute-of-limitations grounds. Having shown no reversible error, his conviction and sentence are affirmed.

## FACTS[1] AND PROCEDURAL HISTORY

**¶2** In 1993, K.R. was kidnapped, physically and sexually assaulted, and then pushed from a moving vehicle. She was taken to a hospital where she provided a limited description of the assailant. Police officers preserved certain clothing the victim was wearing. In 2005, when resources became available to conduct DNA testing in unsolved cases, acid phosphatase tests on the victim's jeans were positive for semen. In 2006, the Phoenix Police Department matched the DNA profile obtained from the semen on the victim's jeans with Cuen's DNA profile, obtained in conjunction with his 2004 and 2005 felony convictions. Those convictions were then vacated in 2007.

**¶3** In 2011, Cuen was indicted for the 1993 assault and charged with kidnapping, a Class 2 felony (Count 1); sexual assault, a Class 2 felony (Count 2); sexual abuse, a Class 5 felony (Count 3); and aggravated assault, a Class 6 felony (Count 4). The State alleged Cuen had prior felony convictions. Before trial, Counts 1, 3 and 4 were dismissed on statute-of-limitations grounds, a ruling that is not at issue here. The court found Count 2, sexual assault, was not barred by the statute of limitations.

**¶4** In 2012, pursuant to a court order, an additional DNA sample was taken from Cuen. Testing confirmed that Cuen's DNA profile matched the DNA profile from the semen collected from the victim's jeans.

**¶5** Before trial, Cuen moved to suppress the DNA evidence, claiming it was illegally obtained because it was collected as a result of the 2004 and 2005 convictions that were vacated in 2007. After oral argument,

[1] This court "view[s] the facts in the light most favorable to sustaining the jury's verdict and resolve[s] all reasonable inferences against [Cuen]." *State v. Lopez*, 209 Ariz. 58, 59 ¶ 2 (App. 2004).

the superior court denied Cuen's motion. The court noted the applicable statute, Arizona Revised Statutes (A.R.S.) § 13-610 (2017),[2]

> required action on the part of the Defendant in order to expunge a DNA profile from the State's DNA Index System; this does not occur automatically upon the granting of post conviction relief. If a petition to expunge records were filed, it would have been done after the initial match which led to the prosecution in the current case.

Cuen's motion to suppress the DNA evidence obtained after the 2011 indictment was denied on a similar basis.

**¶6** A jury found Cuen guilty of sexual assault, and the court sentenced him to a presumptive term of 10.5 years in prison. This court has jurisdiction over Cuen's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031 and 13-4033(A).

## DISCUSSION

### I. The Superior Court Properly Denied Cuen's Motion To Suppress DNA Evidence.

**¶7** Cuen argues that use of his DNA sample violated the Fourth Amendment prohibition of unreasonable search and seizure. *See* U.S. Const. amend IV. Cuen claims he "made the request for expungement of

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[2] Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated. A.R.S. § 13-610(A) states that

> [w]ithin thirty days after a person is sentenced to the state department of corrections [for a felony conviction] . . . , the state department of corrections shall secure a sufficient sample of blood or other bodily substances for deoxyribonucleic acid testing and extraction from the person . . . . The state department of corrections shall transmit the sample to the department of public safety.

his record [in December 2011] and pursuant to the statute, his record should necessarily have been expunged and any resulting identification of his identity likewise suppressed." This court reviews de novo the denial of a motion to suppress based on a purely legal issue. *State v. Nissley*, 241 Ariz. 327, 330 ¶ 9 (2017). As applicable here, Cuen has shown neither a constitutional nor a statutory basis for suppression of the DNA evidence.

**¶8** The collection and maintenance of DNA records as a consequence of a felony conviction is permissible under the Fourth Amendment as "no more than an extension of methods of identification long used in dealing with persons under arrest." S*ee Maryland v. King*, 133 S. Ct. 1958, 1977 (2013). As such, Cuen fails to demonstrate a constitutional violation occurred when the State collected and preserved a DNA sample pursuant to his 2004 and 2005 felony convictions. Similarly, because the 2011 DNA sample was obtained pursuant to court order, the State did not act unreasonably in collecting that sample.

**¶9** As noted by the superior court, expungement of a DNA profile is not automatic but, instead, required Cuen to act. His first petition to expunge records was filed, coincidentally, on the same day in 2011 he was indicted in this case. The DNA sample was originally collected in 2005 pursuant to felony convictions that were vacated in 2007. The DNA match based upon the semen sample from the victim's jeans and Cuen's DNA profile was completed in 2006, before he was eligible to seek expungement. As such, Cuen has failed to demonstrate a statutory basis for suppression of the DNA collected in 2005. For these reasons, Cuen has shown no error in denial of his motion to suppress DNA evidence.[3]

## II. The Superior Court Properly Found The Sexual Assault Charge Was Not Time-Barred.

**¶10** Cuen argues his prosecution for sexual assault was time-barred.[4] He asserts that the superior court should have included the time

[3] Cuen does not claim on appeal that the post-indictment 2011 DNA collection was in violation of state statute. He only argues that, "but for the DNA match [from the 2005 collection], [his] identity would never had been known," thus, he would have never been indicted.

[4] Cuen filed a hand-written brief attempting to supplement the filings of his appellate counsel on this issue; however, Cuen has not waived his right to counsel on appeal and is not entitled to hybrid representation, meaning his

between the commission of the offense (July 1993) and the enactment of A.R.S. § 13–107(E) (July 1997), toward the total limitations period, meaning the indictment was filed two years too late under the seven-year limitations period in place at the time of the offense. Cuen also argues that the superior court erred in applying A.R.S. § 13–107(A) as later amended, which eliminated the statute of limitations for sexual assault offenses. When, as here, the underlying facts are not in dispute, the application of the statute of limitations is a question of law, which is reviewed de novo. *State v. Aguilar*, 218 Ariz. 25, 30 ¶ 15 (App. 2008).

**¶11** At the time of the sexual assault, A.R.S. § 13-107(B) provided for a seven-year limitations period for all class two through class six felonies. The period commenced when the State discovered that the offense had been committed. A.R.S. § 13-107(B). The statute was amended, however, effective July 1997, when A.R.S. § 13-107(E) was added. Ariz. Sess. Laws, ch. 135, § 1; *see State v. Gum*, 214 Ariz. 397, 401 ¶ 13 & n.5 (App. 2007). As amended in July 1997, the subsection provides "[t]he period of limitation does not run for a serious offense [defined to include sexual assault] . . . during any time when the identity of the person who commits the offense . . . is unknown." A.R.S §§ 13-107(E), -706.

**¶12** Cuen concedes that A.R.S § 13–107(E) applies here. Cuen argues, however, that the statute only tolled the limitations period once it became effective, so that the time between the commission of the offense and the enactment of § 13–107(E) should count toward the total limitations period. Thus, he argues the State had three years to indict him after discovering his identity, and by waiting five years to do so, it exceeded the limitations period by two years.

**¶13** The plain language of the statute does not support Cuen's argument. *See State v. Hansen*, 215 Ariz. 287, 289 ¶ 7 (2007) ("[T]he best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction."). The critical language of the statute, which Cuen concedes applies, states that "[t]he period of limitation *does not run . . . during any time* when the identity of the person who commits the offense . . . is unknown." A.R.S § 13-107(E) (emphasis added). In *State v. Aguilar*, this court indicated that if a charge was not "time-barred when subsection (E) took effect," subsection (E) arguably "provided a new, seven-year 'period of limitation' that was unaffected by the time between the date the offense . . . w[as]

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additional brief will not be considered. *See State v. Dixon*, 226 Ariz. 545, 553 ¶ 39 (2011).

committed and the amendment's effective date." 218 Ariz. at 37 ¶ 43 n.7. *Aguilar*, relying on *Gum*, 214 Ariz. 397, then concluded that subsection (E) applied to all offenses for which the limitations period had not expired on the amendment's effective date. 218 Ariz. at 31, 39 ¶¶ 22, 51. Moreover, *Aguilar* held the limitations period did not start to run until a defendant's identity was actually known. *Id*. at 37 ¶ 49.

**¶14** Regarding application of A.R.S. § 13–107(A), that provision as amended in 2001 and 2002 states "[a] prosecution for . . . any violent sexual assault pursuant to § 13-1423 . . . may be commenced at any time." 2001 Ariz. Sess. Laws, ch. 183, § 1; 2002 Ariz. Sess. Laws, ch. 219, § 6. Applying the *Aguilar* analysis, regardless of whether A.R.S. § 13–107(E) mandates tolling or extending the period of limitations, because it is undisputed that Cuen's seven-year limitations period had not expired in 1997, when subsection (E) was enacted, or in 2001, when subsection (A) was amended to eliminate the limitations period, the prosecution for sexual assault was not time barred. *See Gum,* 214 Ariz. at 404-405 ¶¶ 27-28 (holding because the limitations defense had not vested and was "unexpired" at the time of a statutory amendment that extended limitations period, there is no constitutional violation in applying amendment). As such, Cuen has not shown the court erred in denying his motion to dismiss based on statute-of-limitations grounds.

## CONCLUSION

**¶15** Cuen's conviction and resulting sentence are affirmed.


AMY M. WOOD • Clerk of the Court
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