**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
**See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24**

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

DIVISION ONE
FILED: 05-18-2010
PHILIP G. URRY,CLERK
BY: GH

STATE OF ARIZONA,
Appellee,
v.
ALLEN SHANE HAWS
Appellant.

1 CA-CR 09-0161

DEPARTMENT C

**MEMORANDUM DECISION**
(Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR 2007-167555-001 SE

The Honorable Teresa Sanders, Judge

**AFFIRMED**

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
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Julie A. Done, Assistant Attorney General
Attorneys for Appellee

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**K E S S L E R**, Judge

**¶1** Defendant Allen Shane Haws ("Defendant") appeals his conviction and sentence for two counts of sale or transportation of narcotic drugs in violation of Arizona Revised Statutes

("A.R.S.") sections 13-3408(A)(2) and (7) (2010).[1] For the reasons stated below, we affirm the Defendant's conviction and sentence.

**FACTUAL AND PROCEDURAL HISTORY**

**¶2** The State indicted the Defendant on two counts of sale or transportation of narcotic drugs in violation of A.R.S. sections 13-3408(A)(2) and (7). The Defendant pled not guilty and filed a motion to suppress drug evidence police seized from a padded envelope he mailed from Gilbert Mail Inc.

**¶3** At the suppression hearing, the parties stipulated to the superior court deciding the issue as a matter of law based on certain stated facts. The facts that counsel agreed upon indicate that the Defendant deposited a padded envelope for mailing at Gilbert Mail Inc. The clerk felt the envelope while it was still sealed and then opened it with her supervisor. After the envelope was unsealed the clerk identified that it contained pills, but did not know what kind of pills they were or whether they were contraband.

**¶4** Police were called to the scene. The clerk or her supervisor had repackaged the pills by the time police arrived, and the police reopened the package to view what the clerk had

[1] We cite to the current version of the statute because no material changes have occurred. *State v. Zamora*, 220 Ariz. 63, 66 n.4, ¶ 5, 202 P.3d 528, 531 n.4 (App. 2009).

viewed. The police saw the pills, but did not know what they were and could not distinguish them from candy or herbal supplements based on their appearance, although the State contended that the officers could infer that the pills were drugs based on the "totality of the circumstances". The officers removed the pills from the store and took them to a police station where they called a poison control hotline and learned that the markings on the pills indicated that they were hydromorphone and morphine.[2]

**¶5** Some form of laboratory testing subsequently took place, however, the record on the motion to suppress does not clearly indicate what testing took place. The defendant's motion alleges only that "objective testing" took place. During oral argument, the State hinted that some form of laboratory testing may have taken place but did not specify the nature of the tests or the time it took place.

**DISCUSSION**

**¶6** We review the superior court's ruling on a motion to suppress for an abuse of discretion. *State v. Cruz*, 218 Ariz. 149, 161, ¶ 47, 181 P.3d 196, 208 (2008). However, purely legal conclusions are reviewed *de novo*. *Zamora*, 220 Ariz. at 67, 202 P.3d at 532.

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[2] Hydromorphone and morphine are both Schedule II controlled substances. 21 C.F.R. § 1308.12(b)(1)(vii) & (ix).

**¶7** Any search or seizure conducted without a valid warrant is presumed unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). Parcels in the mail are subject to Fourth Amendment protection and the warrant requirement applies to them. *Walter v. United States*, 447 U.S. 649, 654 (1980) ("[S]ealed packages in the mail cannot be opened without a warrant."). The State has the burden of proving the validity of a warrantless search under a well established exception to the warrant requirement. *State v. Hendrix*, 165 Ariz. 580, 582, 799 P.2d 1354, 1356 (App. 1990) (holding that State has the burden of proving exigent circumstances). The State may rely on stipulated evidence to meet its burden of proof at a suppression hearing. Ariz. R. Crim. P. 16.3(d). However, the State must present evidence of any necessary fact for which it has not obtained a stipulation. Ariz. R. Crim. P. 16.2(b).

**¶8** We hold that the superior court erred in admitting evidence of the chemical testing of the pills because the State failed to meet its burden of proving that the testing was within the scope of the private search. However, we find that the error was harmless beyond a reasonable doubt and affirm the Defendant's conviction and sentence.

## I. The Initial Visual Inspection of the Pills Was a Legitimate Review of a Private Search

**¶9** The officers' initial visual inspection of the pills did not violate the Fourth Amendment because it was within the scope of a prior private search. One exception to the warrant requirement is the private search doctrine, which permits police to view the results of searches conducted by private parties. *United States v. Jacobsen*, 466 U.S. 109, 115 (1984). Once the private search is accomplished, police may view what the private searcher viewed without violating the Fourth Amendment. *Id.* at 117. For a police search to be justified by the private search doctrine, the police search must be no more expansive than the private search.

**¶10** In this case, a private actor opened the mail and visually examined the pills before calling the police. The initial police examination consisted merely of reopening the package and viewing the pills as the private actors already had, so it was no more intrusive than the private search and did not violate the Fourth Amendment. *See id.*

## II. When the Officers Saw the Pills, They Had Probable Cause to Seize Them

**¶11** Once the officers viewed the pills, the initial warrantless seizure did not violate the Fourth Amendment.[3] Officers viewing the results of a private search may temporarily seize items in the mail which they have probable cause to believe is contraband. *Jacobsen*, 466 U.S. at 120-22. *Jacobsen* found a warrantless seizure reasonable under the Fourth Amendment when officers reviewing a prior private search found a white powdered substance packaged in four bags and a tube and the circumstances indicated that the substance was almost certainly cocaine. *Id.* In this case, officers viewed loose pills sent overnight and deposited in the mail by a person appearing impaired by drugs. The superior court did not abuse its discretion by finding that the officers had probable cause to suspect that the pills were illegal drugs. Thus, the initial warrantless seizure of the drugs was reasonable under the Fourth Amendment.

## III. The State Failed to Prove that its Objective Test was Within the Scope of the Private Search

**¶12** The State failed to meet its burden of proving that the scope of the warrantless laboratory testing was *de minimis*.

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[3] The defendant did not argue that continuing to retain the pills without a warrant violated the Fourth Amendment, so we need not consider whether after some length of time the officers needed a warrant to continue the seizure.

The private search doctrine only shields searches that are within the scope of the private search. *Jacobsen*, 466 U.S. at 115. A *de minimis* test which reveals only the presence or absence of particular contraband is not a search and therefore does not expand the scope of the search. *Jacobsen*, 466 U.S. at 123. A test that reveals the exact nature of any compound tested is not *de minimis* and expands on the scope of a search that does not include chemical testing. *United States v. Mulder* 808 F.2d 1346, 1348 (9th Cir. 1987). The State failed to present evidence regarding the nature of its testing and therefore failed to prove that the test was *de minimis* and not an expansion of the private search.

**¶13** In *Jacobsen*, the test approved of was administered on the spot by placing a substance suspected of being cocaine into three vials. 466 U.S. at 111 n.1. Reactions between the substance and chemicals already in the vials cause a change in color, and if a certain sequence of colors appears, the officers know that the substance contains cocaine. *Id.* A negative result reveals only that the substance is not cocaine. *Id.* at 123. FBI agents administered the test on the spot after a private search of a package alerted them to a suspiciously packaged white powder. *Id.* at 111. The United States Supreme Court found that this test was a *de minimis* intrusion on the

privacy of the package owner and therefore not an expansion on the private search. *Id.* at 126.

**¶14** In *Mulder*, the private search consisted of a visual inspection of drugs. 808 F.2d at 1348. A later laboratory test confirmed that the drugs were controlled substances. *Id.* The test in that case took place several days after the private search, required removal to a government facility, and revealed the molecular structure and exact identity of the compound. *Id.* This search was not within the scope of the private search and was therefore invalid without a warrant or another recognized exception to the warrant requirement. *Id.* When the private party does not perform chemical testing, the legitimacy of the government's test is a fact-intensive inquiry centering on the extent of the intrusiveness of the chemical testing. *Id.; see also Jacobsen*, 466 U.S. at 115.

**¶15** Each party agreed that some form of laboratory testing on the pills took place, however the State failed to obtain a stipulation on the nature of the tests. Based on the record at the suppression hearing the State failed to prove that the laboratory testing was *de minimis* and would have been limited to revealing the presence or absence of the particular drugs that were found.

**¶16** The State argues that once the officers contacted poison control and learned that the markings on the pills

indicated controlled substances, Haws lost all privacy interest in the pills. We disagree. Labeling on a substance indicating that it is contraband does not obviate the need to obtain a warrant before officers can verify the label. *Walter*, 447 U.S. at 651. In *Walter,* the Supreme Court held that when FBI agents lawfully acquired possession of a film in the mail whose label indicated that it contained obscene material, they still had to obtain a warrant before they could screen the film to determine whether the contents were in fact obscene. The search violated the Fourth Amendment because it went beyond the scope of the private search, was not supported by a warrant, and was not justified by any exception to the warrant requirement. *Id.* at 657.

**¶17** This case is analogous to *Walter*. The officers' ability to identify the drugs by calling poison control and describing the markings on the pills does not obviate the need for a warrant or a valid exception to the warrant requirement to perform more intrusive tests any more than the explicit labels in *Walter*.

**¶18** The State also argues that "[o]nce physical evidence has been validly seized, it may be tested."[4] *State v. Cocio*, 147 Ariz. 277, 285, 709 P.2d 1336, 1346 (1985). We disagree. The broad language in *Cocio* emanates from a discussion related to a less intrusive test like the one in *Jacobsen*. We do not think *Cocio* intended to contradict *Jacobsen* and *Walter* by giving officers carte blanche to perform chemical tests on any evidence they seize.

**¶19** *Cocio* approved police use of a blood alcohol test on a sample the police had validly seized. *Id.* at 277, 283, 709 P.2d at 1338, 1344. The opinion makes no reference to the test revealing any information other than the amount of alcohol in the defendant's blood, and the sample was tested after the defendant had been involved in a vehicular collision that killed another person and officers had observed him and found that he appeared impaired. *Id.* at 285-86, 709 P.2d at 1346-47.

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[4] The State also cites *Illinois v. Andreas*, 463 U.S. 765 (1983) and *State v. Apelt*, 176 Ariz. 349, 861 P.2d 634 (1993) for the proposition that they may perform chemical testing on items seized under the plain view doctrine. *Andreas* merely permits the reopening of a container after the police first validly viewed it while it was open and then reseal it themselves. 463 U.S. at 771-72. *Apelt* permits seizure of evidence in plain view. 176 Ariz. at 362-64, 861 P.2d at 647-49. An officer's authority to seize evidence found in plain view is distinct from his authority to perform chemical testing on it once it is at rest in the State's hands. *See Jacobsen*, 466 U.S. at 114. Neither case sanctioned unlimited chemical testing on any item police permissibly seize.

**¶20** In support of its statement that the State can test evidence once it is validly seized, *Cocio* relied on *Jacobsen*. 147 Ariz. at 285, 709 P.2d at 1346. *Jacobsen* held a certain chemical test which reveals only the presence or absence of cocaine and is performed on subjects virtually certain to be cocaine does not violate the Fourth Amendment. 466 U.S. at 123. *Jacobsen* was applicable in *Cocio* because both cases involved chemical tests that merely confirmed information that was already obvious to the officer and revealed only the presence of a particular chemical. 466 U.S. at 123; 147 Ariz. at 285, 709 P.2d at 1346. Therefore, they were both reasonable under the Fourth Amendment because of the *de minimis* nature of the intrusion.

**¶21** *Cocio* also relied on two cases dealing with the taking of biological samples from criminal suspects. 147 Ariz. at 285, 709 P.2d at 1346 (citing *Cupp v. Murphy*, 412 U.S. 291 (1973); *Schmerber v. California*, 384 U.S. 757 (1966)). In *Cupp*, the Court held that the danger of a suspect destroying evidence under his finger nails was an exigency that justified collecting scrapings from under the suspect's nails without a warrant. 412 U.S. at 295-96. Although the facts of the case indicate that the police subsequently tested the samples without a warrant, it does not discuss whether the testing, apart from the collection, violated the Fourth Amendment. *Id.* at 292. The recitation of

the procedural history of the case indicates that the issue was waived because the defendant failed to raise it. *See id.*

**¶22** *Schmerber* approved an officer's extraction of blood (with the assistance of a doctor) from an intoxicated defendant because the metabolization of alcohol in the defendant's body was an exigent circumstance justifying an exception to the warrant requirement. 384 U.S. at 770-71. The decision indicates that the subsequent test revealed only the amount of alcohol in the defendant's blood. *See id.* at 759. It did not involve a broad test that would have revealed the exact nature of the blood and everything in it. Moreover, as the Court made clear, it was dealing with a specific factual situation. *Id.* at 772 ("[W]e reach this judgment only on the facts of the present record."). Testing bodily fluids subject to metabolization is wholly different than a search of papers or property. *Id.* at 767-68.

**¶23** Notwithstanding its occasional approval of minimally intrusive testing, the Supreme Court has articulated limitations on how deeply an officer may probe into validly seized evidence without a warrant. *Jacobsen*, 466 U.S. at 114-15 (limiting warrantless testing of evidence seized after a private search to that which is within the private search or only a *de minimis* expansion of the private search); *Walter*, 447 U.S. at 659 (holding that warrantless screening of film violated Fourth

Amendment even though warrantless seizure was permissible). In light of the nature of the facts before it and the prior holdings of the United States Supreme Court, we do not think the Arizona Supreme Court meant to sanction all testing of material validly in police hands regardless of the intrusiveness of the test. *Cocio*, like *Jacobsen*, allows *de minimis* intrusions into the contents of validly seized property. Because the State has failed to present evidence that its chemical testing was *de minimis*, we find that the superior court erred in admitting the results of the warrantless test.

**IV. The Erroneous Admission of Chemical Test Results Was Harmless Beyond a reasonable Doubt**

**¶24** The State contends that even if the admission of the laboratory test results was erroneous, it was harmless error because the evidence was cumulative to the testimony identifying the pills based on their markings. We agree. We will not reverse a conviction because of an erroneous suppression decision if the State proves beyond a reasonable doubt that the error was harmless. *State v. Davolt*, 207 Ariz. 191, 205, ¶ 39, 84 P.3d 456, 470 (2004). Admission of evidence which is cumulative to other admissible evidence is harmless. *State v. Dickens*, 187 Ariz. 1, 19, 926 P.2d 468, 486 (1996).

**¶25** The State's criminalist testified that prior to performing a chemical test, she looked up what the substances

were and found that the markings indicated morphine and hydromorphone. Cross-examination did not attempt to challenge the validity of relying on a pill's markings or the reliability of the reference work the State used. The inadmissible evidence was cumulative to uncontroverted admissible evidence and therefore harmless beyond a reasonable doubt.

**CONCLUSION**

**¶26** For the foregoing reasons we affirm Haws' conviction and sentence.

/S/
DONN KESSLER, Judge

CONCURRING:

/S/
PATRICK IRVINE, Presiding Judge

/S/
MICHAEL J. BROWN, Judge