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

STATE OF ARIZONA, Appellant, v. CHRISTOPHER DANIEL ERLANDSEN, Appellee.	)	1 CA-CR 09-0175 DEPARTMENT B **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2006-112048-001 DT

The Honorable Steven K. Holding, Judge Pro Tempore

VACATED AND REMANDED

Andrew P. Thomas, Maricopa County Attorney — Phoenix
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Attorneys for Appellant

Jeffrey Mehrens, Attorney at Law — Phoenix
Attorney for Appellee

B A R K E R, Judge

¶1 The State appeals the trial court's order dismissing two counts of aggravated driving while under the influence of intoxicating liquors or drugs ("DUI") against Appellee

Christopher Daniel Erlandsen. For the following reasons, we vacate the trial court's order and remand the case.

Facts and Procedural History

¶2 At 11:01 p.m. on March 3, 2006, Officer Gabrych of the Surprise Police Department arrested Erlandsen for drunk driving. He was charged with two counts of aggravated DUI, both class four felonies. The following facts come from the evidentiary hearing held on Erlandsen's motion to dismiss.

¶3 Erlandsen was taken into custody and transported to the Surprise Police Department. After Erlandsen refused a breathalyzer test and requested an attorney, he was placed in a room alone and given a phonebook and a telephone to call an attorney. Erlandsen remained in the room for approximately one hour. During that time period he talked "with an attorney or whomever" about a breath test. According to Erlandsen, this is because he was originally told "they were going to do breath."

¶4 While Erlandsen was in the room, Officer Gabrych wrote a search warrant for a sample of Erlandsen's blood and submitted it to the Maricopa County Superior Court. The court authorized a search warrant for Erlandsen's blood at approximately 3:10 a.m., and the warrant was served on Erlandsen at 3:23 a.m. At 3:23 a.m., Officer Washburn, a phlebotomist for the Surprise Police Department, drew a sample of Erlandsen's blood. Prior to the blood draw, another officer told Erlandsen that Officer

Washburn would take two vials of blood, one for the State to analyze and one for Erlandsen to independently test.

¶5 After Officer Washburn obtained the first vial and was beginning to obtain the second vial, Erlandsen's arm slightly moved. Officer Washburn testified this movement caused the needle to come out of Erlandsen's vein. Officer Washburn then terminated the blood draw and did not attempt to reinsert the needle for the second vial of blood because of his personal policy to avoid multiple sticks to the person giving the blood. Officer Washburn adopted this policy because he did not believe "it's within my privy to continue to put needles in him."

¶6 When Erlandsen knew police officers were going to draw a sample of his blood, he requested an independent blood test. Erlandsen reiterated this request during and after the blood draw. Officers told Erlandsen that he would have an opportunity for an independent test after they obtained a sample pursuant to the search warrant. When the blood draw was finished, Officer Washburn told Erlandsen he had thirty minutes to have an independent blood test performed. Officer Washburn offered Erlandsen a phonebook and told him a telephone would be provided to him in another room. Erlandsen declined a phonebook and was led out of the room where the blood draw was conducted. Erlandsen testified he was taken to a "holding tank," a room with no telephone, and then transported to jail. Officer

Washburn testified that Erlandsen was provided a telephone. Officer Washburn also testified that had Erlandsen made contact with a phlebotomist within the thirty minutes, officers would have waited to transport him to jail until after the phlebotomist took the independent sample of blood. Erlandsen arrived at the Maricopa County 4th Avenue Jail between 4:20 a.m. and 4:30 a.m.

¶7 Erlandsen filed a motion to dismiss the charges. After the evidentiary hearing described above, the trial court granted Erlandsen's motion to dismiss the charges with prejudice. The trial court ruled that Erlandsen was denied due process of law because (1) the Surprise Police Department failed to draw a second vial of blood, and (2) the Surprise Police Department gave him an unreasonable amount of time to conduct an independent test. The State timely filed a notice of appeal.

¶8 We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 13-4031 (2001) and -4032(1) (Supp. 2009).

Discussion

¶9 "We review an order granting a motion to dismiss criminal charges for an abuse of discretion or for the application of an incorrect legal interpretation." *State v. Lemming*, 188 Ariz. 459, 460, 937 P.2d 381, 382 (App. 1997). We defer to the trial court's factual findings but review issues of

law *de novo*. *State v. Winegar*, 147 Ariz. 440, 445, 711 P.2d 579, 584 (1985). Statutory interpretation and due process claims are issues of law that we review *de novo*. *State v. Patterson*, 222 Ariz. 574, 575, ¶ 5, 218 P.3d 1031, 1032 (App. 2009); *Mack v. Cruikshank*, 196 Ariz. 541, 544, ¶ 6, 2 P.3d 100, 103 (App. 1999).

1. Number of Blood Vials

¶10 In its ruling, the trial court stated:

> The first concern of major importance is a lack of a second vial in the initial blood draw. The primary reason for a second vial, in this Court's opinion, is for the first vial to be verified through independent testing; this was not available for the Defendant and therefore that issue, in and of itself, violates the Defendant's due process rights.

The State argues the trial court abused its discretion and misapplied the law because police are not required to draw two vials of blood.

¶11 When police have reasonable grounds to believe a person has been driving while under the influence of alcohol or drugs, A.R.S. § 28-1388 allows a qualified person to "withdraw blood for the purpose of determining the alcohol concentration or drug content in the blood." A.R.S. § 28-1388(A) (2004); *see also* A.R.S. § 28-1321(A)(1) (Supp. 2009). Our statutes, however, are silent on the amount of blood or number of vials that must be drawn.

¶12 Erlandsen contends he has a right to a separate vial of blood drawn by the police for his independent testing under *Baca v. Smith*, 124 Ariz. 353, 604 P.2d 617 (1979). In *Baca*, the Arizona Supreme Court held that when breath testing completely destroys the sample of breath, the police must inform the suspect of his right to a separate breath sample for independent testing. *Id.* at 356, 604 P.2d at 620. If the suspect requests a separate breath sample, then a police officer must use the field collection kit to collect and preserve a separate breath sample for the suspect to independently test. *Id.* The court recognized that "the right to test incriminating evidence where the evidence is completely destroyed by testing becomes all the more important because the defense has little or no recourse to alternate scientific means of contesting the test results." *Id.*

¶13 The Arizona Supreme Court declined to extend *Baca* to blood samples and blood testing. *State v. Kemp*, 168 Ariz. 334, 336, 813 P.2d 315, 317 (1991). The issue in *Kemp* was "whether a legitimate distinction may be drawn between blood testing and breath testing so that the due process standards established by this court in *Baca v. Smith*, 124 Ariz. 353, 604 P.2d 617 (1979), and its progeny need not be applied in blood testing cases." *Id.* at 334, 813 P.2d at 315. The supreme court concluded that there is a considerable distinction between breath testing and blood testing because blood testing, unlike the breath testing

in *Baca*, typically does not destroy the entire sample of blood. *Id.* at 336, 813 P.2d at 317. Accordingly, the court held "that the due process clause, as applied in DWI cases, can legitimately have two standards – one for breath testing cases and one for blood testing cases." *Id*.

¶14 Here, the record shows Officer Washburn drew one vial of Erlandsen's blood. There is no evidence in the record that all of the blood was consumed by the State's testing of it.[1] Indeed, in his brief on appeal, Erlandsen does not contest that there is blood available for testing; only that he should be entitled to his own independent sample. No evidence at the hearing suggested Erlandsen's blood sample was tampered with in any manner. As our cases hold, "blood testing by gas liquid chromatography, the method generally used by laboratories in Arizona . . . usually does not consume or destroy the whole sample." *Id*.

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[1] In its response to Erlandsen's motion to dismiss the State indicated:

> Officer Washburn was able to remove 8 milliliters of defendant's blood. The State has spoken with Criminalist Laura Mueller who indicates that she only used about 1 milliliter of blood in conducting her analysis. Therefore, there is at least 7 milliliters of blood left for the defendant to test, more than enough needed for testing.

However, neither party put on any evidence at the hearing with regard to these assertions.

¶15 In determining the appropriate due process standard for blood testing cases, our supreme court indicated that "[g]enerally speaking, the denial of due process is a denial of 'fundamental fairness, shocking to the universal sense of justice.'" *Id*. (quoting *State v. Velasco*, 165 Ariz. 480, 487, 799 P.2d 821, 828 (1990) (citation omitted)). In *State ex. rel. Dean v. City Court of Tucson*, the Arizona Supreme Court discussed the due process standard applicable to DUI defendants. 163 Ariz. 510, 789 P.2d 180 (1990). Like *Kemp*, the *City Court* case discussed the standard from *Baca*. The question was whether a breath sample, as contrasted with a blood sample, needed to be preserved to satisfy the due process guarantees of the Arizona Constitution. *Id*. at 514, 789 P.2d at 184. The court rejected the notion that only a replicate breath sample would suffice. *Id*. It held that "[a]ny method that is 'reasonably reliable' will suffice." *Id*.

¶16 In *City Court*, the blood test at issue was "a single blood sample." *Id*. at 511, 789 P.2d at 181. "[D]efendants were advised that *a sample of blood* would be preserved for later testing by all parties." *Id*. at 512, 789 P.2d at 182 (emphasis added). The supreme court specifically found that this provision of a single blood sample satisfied the due process requirement.

> Here, the defendants were offered the choice of replicate breath testing with no breath sample preserved, or a blood test *at state expense*, where the sample would be preserved and available to the defendant for independent testing. . . . Because the reason defendants are given a sample is to allow them to challenge the accuracy of the state's evidence, it is irrelevant whether the sample given is a breath sample or a blood sample, as long as it is "reasonably accurate."

Id. at 514, 789 P.2d at 184 (italics in original, underlining added). As noted above, there is no evidence in the record before us that the blood sample taken was not preserved for testing by Erlandsen. There is likewise no evidence in the record that testing of the blood sample preserved would not produce a "reasonably accurate" result. *Id*. Nor is there any evidence in the record that the method used here was not "reasonably reliable." *Id*. Accordingly, the trial court erred in determining that Erlandsen's due process rights were violated.

2. Reasonable Opportunity for an Independent Test

¶17 The trial court relied upon the asserted lack of a reasonable opportunity for an independent test as a second violation of Erlandsen's due process rights. The State argues the trial court abused its discretion and misapplied the law in finding Erlandsen's due process rights were violated because

Erlandsen had a reasonable opportunity to obtain an independent test. The trial court ruled:

> The Second major concern the Court has is the Defendant's inability to obtain an independent blood test. This Court believes that due to the limitations placed by the Surprise Police Department on the amount of time the Defendant would have to arrange for and have and [sic] independent tester at the Surprise facility is unreasonable. Therefore, the Defendant did not have a reasonable opportunity or "fair chance" for an independent test.

The trial court accurately identified the legal standard as being a "reasonable opportunity or 'fair chance' for an independent test." *See Kemp*, 168 Ariz. at 336, 813 P.2d at 317 ("[W]e held in *Montano*[2] that '[t]he Due Process Clause of the Arizona Constitution guarantees to DWI suspects *a* "*fair chance* [] to obtain independent evidence of sobriety essential to his defense *at the only time it [is] available*."'") (emphasis in original). However, the trial court erred because it (1) failed to consider the total time available to arrange for an independent test and (2) there was no factual support for the lack of a "fair chance" to obtain an independent test.

a. Time Available for an Independent Test

¶18 The trial court stated that Erlandsen's due process rights were violated "due to the limitations" that the police

[2] *Montano v. Superior Court*, 149 Ariz. 385, 719 P.2d 271 (1986).

placed on the amount of time for Erlandsen to arrange for a test. The only limitation referenced in the record is to the thirty-minute time period that started when Erlandsen's blood was drawn and he requested a test. It is apparent that it is this thirty-minute time period that the trial court found unreasonable. On the facts of this case, the trial court erred in considering that the applicable time period began when Erlandsen's request for a blood test was made.

¶19 Arizona Revised Statutes § 28-1388 guarantees a suspect "a reasonable opportunity" to obtain an independent blood test, and police cannot unreasonably interfere with this opportunity. *See Mack*, 196 Ariz. at 546, ¶ 15, 2 P.3d at 105. Section 28-1388(C) states:

> The person tested shall be given a reasonable opportunity to arrange for any physician, registered nurse or other qualified person of the person's own choosing to administer a test or tests in addition to any administered at the direction of a law enforcement officer. The failure or inability to obtain an additional test by a person does not preclude the admission of evidence relating to the test or tests taken at the direction of a law enforcement officer.

A.R.S. § 28-1388(C). In jurisdictions with similar statutes, some courts have concluded that "person tested" establishes a timing requirement in which a suspect does not have a right to obtain an independent test until the suspect has been tested by

police. *People v. Mankowski*, 329 N.E.2d 266, 270 (Ill. App. Ct. 1975); *People v. Einset*, 405 N.W.2d 123, 125 (Mich. Ct. App. 1987); *State v. Lewis*, 221 S.E.2d 524, 526 (S.C. 1976); *State v. Choate*, 667 S.W.2d 111, 112 (Tenn. Crim. App. 1983).

¶20 In *Smith v. Cada*, 114 Ariz. 510, 562 P.2d 390 (App. 1977), we expressly refused to adopt this interpretation because it does not comport with constitutional due process considerations in Arizona.[3] *Id.* at 512-13, 562 P.2d at 392-93. The constitutional right at issue in offenses involving intoxication is the suspect's due process right to collect exculpatory evidence of his sobriety at the time he was detained for the alleged offense so that he can have a fair trial. *Id.* ("[I]t is a denial of due process to deny one charged with an offense involving intoxication the right to obtain at his own expense a blood or other scientific test for the purpose of attempting to establish his sobriety *at the crucial time*.") (emphasis added). "[P]erson tested" in § 28-1388 refers to the suspect and does not make administration of a police blood test a condition precedent to the suspect's reasonable opportunity to collect independent evidence, nor is it the triggering event (at least on the facts here) as to when the court must consider

[3] The relevant statute in *Cada*, A.R.S. § 28-692(F), was the predecessor to A.R.S. § 28-1388(C) and allowed the "person [t]ested" to obtain an independent test. *Cada*, 114 Ariz. at 511-12, 562 P.2d at 391-92.

whether a "fair chance" has been given to obtain an independent blood test.

¶21 Because of the facts in this case, we need not decide whether the triggering event for the time period begins when the suspect is first apprehended, when a test is first sought by the State, or when the suspect is advised of his opportunity to contact counsel or obtain independent evidence. Erlandsen testified at the hearing as follows:

> Q. Before the blood draw began, you were given an hour or so, more than an hour, to make some phone calls, correct?
>
> A. Yes. Before the blood draw, yes, I was put into a room.
>
> Q. At any time during that period, did you phone a phlebotomist to come and take your blood?
>
> A. At that point I was told -- I was given a phone to contact my attorney. I didn't know that I was going to be giving a blood draw at that point.
>
> Q. You didn't know you were going to be getting a blood draw?
>
> A. Correct.

On redirect from his own counsel, he testified as follows:

> Q. Originally, did the police offer you or tell you that they wanted breath or blood?
>
> A. They originally told me they were going to do breath.

> Q. So when you were talking with an attorney or whomever, at that point you believed they wanted a breath test, correct?
>
> A. That is correct?

Officer Gabrych also testified:

> Q. So that first hour he had, you did tell him this is part of your opportunity to arrange for an independent sample, he was just in there talking to an attorney, presumably, if you know?
>
> A. That's correct.

¶22 Thus, by Erlandsen's testimony, we infer his reason for not contacting a phlebotomist during the hour prior to the blood test is that he thought the State only wanted a breath test, not a blood test. This is not, however, a legally acceptable basis for a suspect to decline to take action to gather exculpatory evidence. The test the State chooses to utilize does not limit a suspect's ability to gather exculpatory evidence of his own choosing. As was stated in *McNutt v. Superior Court*, 133 Ariz. 7, 648 P.2d 122 (1982), dismissal of a case is only appropriate when "the state's action foreclosed a fair trial by *preventing petitioner* from collecting exculpatory evidence no longer available." *Id*. at 10, 648 P.2d at 125 (emphasis added). The State's choice of tests does not prevent, or limit, a suspect's ability to gather evidence. In *McNutt*, our supreme court found the violation of a suspect's Sixth Amendment right to counsel prevented the suspect from collecting

exculpatory evidence. *Id.* at 9-10, 648 P.2d at 124-25. Although the ruling was predicated on the Sixth Amendment, the court noted:

> [I]n a DWI investigation, it is crucial for both the state and the defendant to gather evidence relevant to intoxication *close in time to when the defendant allegedly committed the crime*. Otherwise, any alcohol that may have been in the blood will have decomposed before the blood can be tested.

Id. at 10 n.2, 648 P.2d at 125 n.2 (emphasis added). Erlandsen clearly had this opportunity beginning an hour before and one-half hour after the blood draw.

¶23 As noted earlier, "[t]he Due Process clause of the Arizona Constitution guarantees to DWI suspects 'a fair chance to obtain independent evidence of sobriety.'" *Montano*, 149 Ariz. at 389, 719 P.2d at 275 (quoting *Smith v. Ganske*, 114 Ariz. 515, 517, 562 P.2d 395, 397 (App. 1977)). Here, the trial court erred when it considered the police blood draw as the event triggering Erlandsen's reasonable opportunity for independent testing. As demonstrated by Erlandsen's own testimony, he had at least an hour prior to the blood draw when he knew of the prospect of breath testing and had contact with an attorney "or whomever" and chose not to take any action. *See State v. Transon*, 186 Ariz. 482, 485, 924 P.2d 486, 489 (App. 1996) (finding "[t]he sincerity of appellee's argument [that police interfered with his right to collect exculpatory

evidence] is, at best, highly suspect in light of the fact that appellee twice refused to take a breathalyzer test"). Thus, on the record here, the trial court erred in determining that Erlandsen did not have a "fair chance" to obtain an independent test.

b. Absence of Facts

¶24 Even if the trial court had not used an erroneous triggering event for the applicable time period, the trial court abused its discretion because no evidence supported the ruling that the thirty-minute time period was unreasonable. Our cases have established no *per se* rule that a suspect lacks a reasonable opportunity for an independent test based solely on the number of minutes allotted to obtain an independent test in combination with the suspect's geographical location and the time of day. *See Van Herreweghe v. Burke*, 201 Ariz. 387, 389, ¶¶ 5-6, 36 P.3d 65, 67 (App. 2001) (holding bail schedule statute did not interfere with suspect's reasonable opportunity); *State v. Bolan*, 187 Ariz. 159, 161, 927 P.2d 819, 821 (App. 1996) (finding general scheduling and transportation difficulties in collecting exculpatory evidence do not deny suspect of reasonable opportunity to do so); *Amos v. Bowen*, 143 Ariz. 324, 328, 693 P.2d 979, 983 (App. 1984) (finding officer's two-hour delay in voluntarily transporting suspect to hospital unreasonably interfered with suspect's reasonable opportunity

for an independent test); *Ganske*, 114 Ariz. at 517, 562 P.2d at 397 (holding jail unreasonably interfered with suspect's opportunity to collect independent evidence when it told suspect's friend suspect was not at jail).

¶25 Unless we are willing to accept the notion that the court may take judicial notice of what surrounds the Surprise Police Department (a proposition we are not inclined to accept), we have absolutely no basis in this record to know whether or not a phlebotomist was available to Erlandsen within the time period allotted. For all we know, there may be a twenty-four hour on-call medical facility within minutes of the police department from which such services can be provided. Erlandsen also had resources not available to most suspects because his wife and cousin are phlebotomists; yet, the record is silent on their availability to conduct a blood test.

¶26 It is apparent to us that the trial court was persuaded by Erlandsen's argument, but it is equally apparent that there are no facts in this record to support it. Accordingly, the trial court erred, on the factual record before us, in determining that a thirty-minute time period provided an insufficient opportunity to obtain an independent blood test.

Conclusion

¶27 For the reasons stated above, we vacate the order dismissing the DUI charges and remand this matter to the trial court. On remand, if these issues are reurged, they may be taken up only after a new evidentiary hearing.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
SHELDON H. WEISBERG, Judge