DIVISION ONE
FILED: 12/16/10
RUTH WILLINGHAM, ACTING CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0762
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
	)	(Not for Publication –
JASON MARCHIONDO,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court of Yavapai County

Cause No. P-1300-CR-20090542

The Honorable Tina R. Ainley, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section

and

Sheila Polk, Yavapai County Attorney — Camp Verde
by Tanaaz R. Wheeler, Deputy County Attorney
Attorneys for Appellee

Gorence & Oliveros, P.C. — Albuquerque
by Robert J. Gorence

and

Law Offices of Lee Phillips, P.C. Flagstaff
by Lee Phillips
Attorneys for Appellant

T H O M P S O N, Judge

¶1 Jason Marchiondo appeals his misdemeanor conviction for driving with a drug or its metabolite in his body. He argues that the trial judge erred in denying his motion to suppress evidence and in failing to accord him trial by an eight-person jury. He also argues that the statute under which he was convicted is unconstitutionally vague. We have jurisdiction to address only the claim that the statute is facially invalid. We find no constitutional infirmity, and accordingly affirm.

¶2 A jury convicted Marchiondo in Seligman Justice Court of the misdemeanor offense of driving while a drug or its metabolite was present in his body, in violation of Arizona Revised Statutes (A.R.S.) 28-1381(A)(3). Marchiondo appealed his conviction to the Yavapai County Superior Court, which affirmed the conviction. Marchiondo filed a timely notice of appeal to this court.

¶3 We have jurisdiction of Marchiondo's appeal pursuant to A.R.S. § 22-375(A) (2002). Our jurisdiction, however, is limited to determining the facial validity of the statute at

issue. *See id.*; *State v. Russo*, 219 Ariz. 223, 225, ¶ 4, 196 P.3d 826, 828 (App. 2009) (citation omitted); *State v. Phillips*, 178 Ariz. 368, 370, 873 P.2d 706, 708 (App. 1994). We accordingly have no jurisdiction in this appeal to address Marchiondo's claims that the trial court erred in denying his motions to suppress evidence that he argued was obtained in violation of the Fourth Amendment and his *Miranda* rights, violated his statutory right to trial by an eight-person jury,[1] or that the statute was vague as applied to him. *See id.*

¶4 We have jurisdiction only to address Marchiondo's argument that A.R.S. § 28-1381(A)(3) is void on its face for vagueness. *See id.* We review *de novo* whether the statute is constitutional. *State v. Mutschler,* 204 Ariz. 520, 522, ¶ 4, 65 P.3d 469, 471 (App. 2003). A party challenging a statute's constitutionality must overcome a "strong presumption" that the statute is constitutional, and we will, if possible, interpret a statute in such a way as to give it a constitutional construction. *State v. Kaiser,* 204 Ariz. 514, 517 ¶ 8, 65 P.3d 463, 466 (App. 2003) (holding that ordinance criminalizing refusal to obey a peace officer was neither overbroad nor vague). The person challenging the statute bears the burden of

[1]Marchiondo has abandoned the constitutional claim he alludes to in the caption to this latter argument by failing to provide any argument in support thereof. *See State v. Carver,* 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989); Ariz. R. Crim. P. 31.13(c)(1)(vi).

establishing its invalidity. *Russo*, 219 Ariz. at 225, ¶ 4, 196 P.3d at 828. A criminal statute is unconstitutionally vague if it fails to give persons of average intelligence reasonable notice of what conduct is prohibited, and fails to provide explicit standards for enforcement. *State v. McLamb*, 188 Ariz. 1, 5, 932 P.2d 266, 270 (App. 1996). A statute "is not void for vagueness simply because it may be difficult to determine how far one can go before the statute is violated." *State v. Lefevre,* 193 Ariz. 385, 390, ¶ 19, 972 P.2d 1021, 1026 (App. 1998) (citations omitted).

¶5 We follow established precedents and hold that A.R.S. § 28-1381(A)(3) is not void for vagueness on its face. A.R.S. § 28-1381(A)(3) expressly provides that "It is unlawful for a person to drive or be in actual physical control of a vehicle in this state . . .[w]hile there is any drug defined in § 13-3401 or its metabolite in the person's body." Marijuana is one of the drugs defined in A.R.S. § 13-3401. *See* A.R.S. § 13-3401(19) and (20)(w). Accordingly, the statute at issue prohibits a person from driving while he has a metabolite of marijuana in his body. *See* A.R.S. § 28-1381(A)(3). This statute provides a person of average intelligence reasonable notice that it is a criminal offense to drive with a metabolite of marijuana in one's body, and thus, a person uses marijuana before driving at his own peril. It also provides a bright line standard for

enforcement: if a person has metabolites of marijuana in his body at the time he drives a vehicle, he has committed the offense.

¶6 We have repeatedly rejected similar vagueness challenges to the facial validity of A.R.S. § 28-1381(A)(3). In *Phillips*, we rejected such a challenge to an earlier statute with identical language, reasoning as follows:

> We fail to see how section 28-692(a)(3) is ambiguous in any way. It precisely defines, in unequivocal terms, the type of behavior prohibited: No one may drive or be in actual physical control of a vehicle if there is *any* amount of illicit drug or its metabolite in that person's system. None of the statute's terms defy common understanding, and its interpretation is not dependent on the judgment of police officers or prosecutors. The statute gives fair and objective guidelines to both potential offenders and law enforcement personnel that any driver who has ingested a proscribed drug will be subject to prosecution.

178 Ariz. at 371, 873 P.2d at 709 (emphasis in original). Quoting this language, we reiterated in *State v. Boyd*, 201 Ariz. 27, 31 P.3d 140 (App. 2001) that A.R.S. § 28-1381(A)(3) is not facially vague. *See id.* at 29, ¶ 12, 30, ¶ 14, 31 P.3d at 142, 143 (holding, however, that the statute was vague *as applied* in prohibiting the metabolite of a legal, over-the-counter product).

¶7 Marchiondo has given us no reason to revisit this issue. Marchiondo's argument that expert testimony in this case

established that "Mr. Marchiondo's bloodstream contained no active metabolite of TCH"[2] is of no consequence to a determination of whether the statute provides adequate notice, because the statute prohibits a person from driving a vehicle when he has any metabolite of marijuana in his body, whether active or inactive. *See* A.R.S. § 28-1381(A)(3); *Phillips*, 178 Ariz. at 371-72, 873 P.2d at 709-10 (rejecting due process challenge, reasoning that "the legislature could have rationally determined that the absence of a reliable indicator of impairment necessitated a flat ban on driving with any proscribed drugs in one's system."). Nor is it of any significance to an analysis of the facial validity of the statute that although Marchiondo "conceded that he had taken a puff of marijuana recently, there was no evidence that Mr. Marchiondo was aware that a THC metabolite was present in his bloodstream." A.R.S. § 28-1381(A)(3) by its terms requires no such awareness; it is a strict liability statute. *See Boyd*, 201

[2]Marchiondo, in any case, is mistaken in his characterization of the testimony. The experts testified that the metabolites found in his *urine* were inactive, and would have had no pharmacological effect. This court noted in *State v. Hammonds*, 192 Ariz. 528, 968 P.2d 601 (App. 1998), that the *metabolic* component of a drug detected in *urine* is inactive, incapable of causing impairment, but a urine test "says nothing conclusively about what is presently in the bloodstream," that is, whether an active component, capable of causing impairment, was simultaneously present in the bloodstream. *Id.* at 530, ¶ 4, 531, ¶¶ 10, 11, 968 P.2d at 603, 604.

Ariz. at 31. ¶ 19, 31 P.3d at 144. The fair notice required by due process is notice that one cannot use an illegal drug and then drive. It is not necessary for due process that the statute define the precise moment for any given person when the metabolites of the illegal drug disappear and it is no longer an offense to drive. *See State v. Thompson*, 138 Ariz. 341, 344, 674 P.2d 895, 898 (App. 1984) (rejecting vagueness challenge to prohibition against driving with .10 BAC that relied on argument that a person would have no way of knowing when his BAC reached .10).

¶8 For the foregoing reasons, we find no constitutional infirmity and affirm Marchiondo's conviction and sentence.

/s/

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JON W. THOMPSON, Judge

CONCURRING:

/s/

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DONN KESSLER, Presiding Judge

/s/

_____
DANIEL A. BARKER, Judge