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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Petitioner, v. JAMES STUART REICHERT, Respondent.	)	2 CA-CR 2012-0341-PR DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20092446001

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF GRANTED

Barbara LaWall, Pima County Attorney
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Tucson
Attorneys for Petitioner

The Law Offices of Stephanie K. Bond, P.C.
By Stephanie K. Bond
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V Á S Q U E Z, Presiding Judge.

¶1 The state seeks review of the trial court's order granting James Reichert post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., and ordering a new trial. We will not disturb that ruling unless the court clearly has abused its discretion. *See State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Reichert was convicted after a jury trial of two counts each of aggravated driving under the influence of an intoxicant (DUI) and driving with an alcohol concentration (AC) of .08 or greater, while his license was suspended, canceled, revoked, refused, or restricted. The trial court sentenced him to enhanced, presumptive, ten-year terms of imprisonment, to be served concurrently. We affirmed his convictions and sentences on appeal. *State v. Reichert*, No. 2 CA-CR 2010-0037 (memorandum decision filed Aug. 31, 2010).

¶3 Reichert filed a petition for post-conviction relief arguing his trial counsel had been ineffective in failing to file a pretrial motion to dismiss or motion to preclude the results of the blood test administered by police officers and in failing to present expert testimony that his AC might have been elevated because of his aborted blood plasma donation earlier on the day of his arrest and to challenge the reliability of the blood analysis on other grounds. The trial court summarily denied relief, but we granted partial relief on review, concluding Reichert had raised a colorable claim that his trial counsel had been ineffective in failing to file a motion to suppress or motion to dismiss on the basis that the state had wrongly interfered with his right to counsel. Accordingly, we

remanded the case for an evidentiary hearing on that issue. *State v. Reichert*, No. 2 CA-CR 2011-0190-PR (memorandum decision filed Sept. 26, 2011).

¶4 At that hearing, Tucson Police Department Officer Amanda De La Ossa testified Reichert had requested counsel only after she had obtained a warrant to draw his blood because Reichert had not consented to a blood draw. According to De La Ossa, Reichert stated: "I want to speak to an attorney before you draw my blood." De La Ossa stated she had not permitted Reichert to contact counsel at that time because the test "couldn't be delayed any further, [and] we needed to fulfill the requirements of the warrant." She also explained that Reichert had requested an independent blood draw and she had taken him to a local hospital pursuant to that request, but he then had decided not to get the independent sample and subsequently was taken to jail. De La Ossa testified Reichert had not repeated his request to speak to an attorney after the blood draw.

¶5 Thomas Wilson, an attorney, testified that competent counsel would have filed a motion arguing that Reichert's right to counsel had been violated, and that a violation of Reichert's right to counsel would result in either the suppression of the blood evidence or dismissal of the charges. He posited that the state might have violated Reichert's right to counsel if it was not justified in taking the blood draw without allowing him to contact an attorney. He also opined that the state might have violated Reichert's right to counsel because it did not permit him to speak with counsel after the

blood draw, and that had Reichert spoken with counsel, he would have been advised to obtain the independent blood draw at the hospital.

¶6 Reichert's trial counsel testified she had considered filing a motion to suppress based upon the state's purported interference with Reichert's right to counsel, but had rejected that option because it would not have led to the suppression of any statements or the blood test results. She acknowledged she had not considered that any violation of Reichert's right to counsel might have interfered with his ability to obtain potentially exculpatory evidence.

¶7 The trial court noted in its ruling that it "questioned" Reichert's assertion in his affidavit[1] that he had requested counsel several times before the blood draw in light of De La Ossa's testimony. And the court found the officer "had every right" to perform the blood draw without permitting Reichert to contact counsel. The court determined, however, that had Reichert been permitted to speak with counsel after the blood draw, he might have obtained the independent blood draw and that counsel's assistance might have led to other "potentially exculpatory evidence." Although it observed that Reichert's claims were "thinly substantiated," the court granted Reichert relief, vacating his convictions and ordering a new trial.

[1]We express no opinion concerning the use of affidavits in lieu of sworn testimony at the hearing.

¶8 The state sought review of that decision in this court. We determined on review that the trial court's ruling contained insufficient findings of fact and conclusions of law as required by Rule 32.8(d) and A.R.S. § 13-4238(D). Thus, we granted relief and remanded the case to the trial court to make those findings and conclusions. *State v. Reichert*, No. 2 CA-CR 2012-0014-PR (memorandum decision filed June 12, 2012). On remand, the court concluded the state had not violated Reichert's right to counsel by proceeding with the blood draw, but had done so by failing to provide him with "an opportunity to call counsel after the blood draw was completed."

¶9 The court further explained, however, that the state had not denied Reichert an opportunity to obtain an independent blood draw and, in any event, "the independent test would not have helped Reichert's defense." But, although the court expressed "serious[] doubts that exculpatory evidence would have been available," it nonetheless determined "there remains an arguable contention that Reichert could have had a videotape created which may have convinced someone that he was not impaired." Thus, the court concluded, Reichert was entitled to a new trial, although it further found that, "[w]ere the Motion to Dismiss/Suppress presented to this Court, it is unlikely that any relief would [have] be[en] granted."

¶10 On review, the state urges that the trial court erred in granting Reichert relief in light of its finding that it would not have granted a motion to suppress or dismiss based on the purported violation of Reichert's right to counsel. To prevail on a claim of

ineffective assistance of counsel, Reichert was required to demonstrate that his counsel's conduct fell below prevailing professional norms and that the conduct prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). To demonstrate prejudice, Reichert must show there is a "'reasonable probability that but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *State v. Gerlaugh*, 144 Ariz. 449, 455, 698 P.2d 694, 700 (1985), *quoting State v. Lee*, 142 Ariz. 210, 214, 689 P.2d 153, 157 (1984). And, if Reichert did not make a sufficient showing on either part of the *Strickland* test, his claim fails. *See State v. Salazar*, 146 Ariz. 540, 541, 707 P.2d 944, 945 (1985).

¶11 We disagree with the state that the trial court's findings are necessarily inconsistent. Instead, those findings reflect only that, although it would not have granted the motion, there was a reasonable probability another court might have concluded differently. *See Gerlaugh*, 144 Ariz. at 455, 698 P.2d at 700. We nonetheless agree with the state that Reichert is not entitled to a new trial.

¶12 First, the trial court correctly determined that the state did not violate Reichert's right to counsel by proceeding with the blood draw despite his request for counsel. We review the court's factual findings for clear error, *State v. Herrera*, 183 Ariz. 642, 648, 905 P.2d 1377, 1383 (App. 1995), but review any legal questions, including constitutional claims involving the right to counsel, de novo, *see State v. Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d 610, 612 (App. 2001). Although law enforcement

officers generally must honor a request for counsel immediately, "the accused does not have the right to interrupt a continuing investigation in order to consult with an attorney." *Kunzler v. Superior Court*, 154 Ariz. 568, 570, 744 P.2d 669, 671 (1987). Thus, only "if there is no disruption of the investigation, . . . may [a defendant] exercise the right to counsel." *Id.*

¶13 Even though the state must demonstrate that honoring a request for counsel would disrupt an investigation, *see State v. Juarez*, 161 Ariz. 76, 81, 775 P.2d 1140, 1145 (1989), it is apparent from the record that honoring Reichert's request would have done so here. The arresting officer testified that, at the time the warrant was served, she had only five minutes to obtain the blood draw within two hours of the stop. A conviction under A.R.S. § 28-1381(A)(2) requires proof of the defendant's alcohol concentration "within two hours of driving or being in actual physical control of the vehicle." If the blood evidence is obtained outside of that two-hour window, the state must present testimony relating the results of that testing to within the two-hour timeframe required to obtain a conviction. *See State ex rel. O'Neill v. Superior Court*, 187 Ariz. 440, 441, 930 P.2d 517, 518 (App. 1996). And our supreme court has recognized that "[t]he highly evanescent nature of alcohol in the defendant's blood stream guaranteed that the alcohol would dissipate over a relatively short period of time." *State v. Cocio*, 147 Ariz. 277, 284, 709 P.2d 1336, 1345 (1985). Thus, further delays in drawing Reichert's blood

would have compounded the complexity of evidence the state would have to present to obtain a conviction and could have significantly weakened its case against Reichert.

¶14 We disagree with the trial court, however, that the state violated Reichert's right to counsel because it did not provide him an opportunity to speak with an attorney after the blood draw. Reichert stated only that he "want[ed] to speak to an attorney before you draw my blood." The United States Supreme Court has made clear that a request for counsel may be limited in scope. *See Connecticut v. Barrett*, 479 U.S 523, 528-29 (1987) (authorities not required "to ignore the tenor or sense of a defendant's response to [*Miranda*[2]] warnings"; defendant's refusal to give written statement without attorney did not warrant suppression of oral statements); *see also State v. Uraine*, 157 Ariz. 21, 21-22, 754 P.2d 350, 350-51 (App. 1988) (defendant's statement "he did not want to take the breath test until he talked to his lawyer" limited invocation of right to counsel); *United States v. Eirin*, 778 F.2d 722, 728 (11th Cir. 1985) ("Merely refusing to sign a waiver of rights form without an attorney's guidance is not synonymous with an affirmative request for assistance of counsel."). Reichert's request for counsel similarly was limited to the blood draw, and the police officers were entitled to rely on the scope of his entirely unambiguous invocation of his right to counsel. *See Barrett*, 479 U.S at 528-29. Further, there is no evidence in the record suggesting that Reichert renewed or expanded the scope

[2]*Miranda v. Arizona*, 384 U.S. 436 (1966).

of that request at any time following the blood draw. Accordingly, there is no basis to conclude that the police violated Reichert's right to counsel.

¶15 Because there was no violation of Reichert's right to counsel, the filing of a motion to dismiss or motion to suppress would not have afforded Reichert any remedy. Accordingly, the trial court erred in granting Reichert relief and in ordering a new trial. We grant the state's petition for review and grant relief; the trial court's order granting Reichert post-conviction relief and a new trial is reversed.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge