IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

THOMAS LEE OLIVER,
Appellant.

No. 2 CA-CR 2014-0359
Filed September 9, 2016

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20134619001
The Honorable Javier Chon-Lopez, Judge

REMANDED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Miller authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Espinosa concurred.

M I L L E R, Presiding Judge:

¶1 On remand from our supreme court, we are directed to reconsider our memorandum decision affirming Thomas Oliver's convictions for driving while under the influence of alcohol (DUI) in light of the court's opinion in *State v. Valenzuela*, 239 Ariz. 299, 371 P.3d 627 (2016).[1] In *Valenzuela*, the court held that the state must show more than acquiescence to an officer's admonition that Arizona law requires submission to chemical tests for DUI in order to prove voluntary consent to the test. *Id.* ¶ 2. The court's reasoning was based on the principle that a chemical test for DUI performed by a law enforcement officer constituted a warrantless search and was prohibited by the Fourth Amendment "unless one of a few well-established exceptions applies." *Id.* ¶ 10. Voluntary consent was the only exception considered by the court. *Id.* ¶ 12. The court observed—based on its interpretation of federal constitutional law—that officers cannot state or imply to arrestees that they "have lawful authority, without a warrant, to compel samples of blood, breath, or other bodily substances." *Id.* ¶ 28.

¶2 In a decision issued after *Valenzuela*, however, the United States Supreme Court addressed a holding of the Minnesota Supreme Court that a warrantless breath test is constitutional under the search-incident-to-arrest exception. *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160 (2016); *see also State v. Bernard*, 859 N.W.2d 762, 772 (Minn. 2015). The Court announced a categorical rule that "the Fourth Amendment permits warrantless breath tests incident to

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[1] Our decision relied, in part, on this court's *Valenzuela* opinion, which was vacated by the Arizona Supreme Court. *See* 239 Ariz. 299, ¶ 36, 371 P.3d at 638.

arrests for drunk driving." *Birchfield*, ___ U.S. at ___, 136 S. Ct. at 2184. As a result, we consider both *Valenzuela* and *Birchfield* before reaching our conclusion that we must remand to the trial court for further consideration in light of *Birchfield*.[2]

Factual and Procedural Background[3]

¶3 In October 2013, a Tucson Police officer investigating a vehicle collision spoke with Oliver, the driver of one of the vehicles. He admitted he had been drinking and the officer observed "signs and symptoms of intoxication." After she had administered field sobriety tests, the officer read Oliver his rights pursuant to *Miranda*.[4] Another officer administered a horizontal gaze nystagmus test, and placed Oliver in handcuffs immediately thereafter.

¶4 Oliver was arrested for criminal damage and endangerment, and was transported to the police station. At the station, the officer read him an "admin per se" form, which stated he was "require[d] to submit to and successfully complete tests of breath, blood or other bodily substance." Oliver then submitted to a

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[2]On appeal, Oliver also challenged an instruction informing the jury that where there is "0.08 percent or more by concentration of alcohol in the defendant's blood, it may be presumed that the defendant was under the influence of intoxicating liquor." *State v. Oliver (Oliver I)*, No. 2 CA-CR 2014-0359, ¶ 31 (Ariz. App. Aug. 18, 2015) (mem. decision), *vacated*, No. CR-15-0317-PR (Ariz. May 19, 2016). The instruction further stated the presumption was rebuttable. *Id.* Oliver argued the trial court should use the term "permissive" to avoid any inference that it was his burden to rebut the presumption. *Id.* ¶ 30. We rejected the argument, and *Valenzuela* does not alter our conclusion. *Id.* ¶ 32. Thus, we do not address it further.

[3]We recount only those facts necessary to address the legal issues on remand. Additional facts are stated in *Oliver I.*

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

breath test, which measured his breath alcohol concentration at .181 and .179.

¶5 Oliver moved to suppress the test results, arguing that his consent to the testing had been coerced by the officer's admonition that he was required to submit to the test in the context of the criminal investigation. The trial court denied the motion, Oliver was convicted at a jury trial,[5] we affirmed, and our supreme court remanded in view of *Valenzuela*. *State v. Oliver (Oliver I)*, No. 2 CA-CR 2014-0359, ¶ 33 (Ariz. App. Aug. 18, 2015) (mem. decision), *vacated*, No. CR-15-0317-PR (Ariz. May 19, 2016). After remand, we issued an order permitting the parties to submit supplemental briefs "addressing the application of *Valenzuela*, including the good faith exception to the exclusionary rule." Our jurisdiction is pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Admissibility of Warrantless Breath Test Results

¶6 We begin by determining how *Birchfield* affected *Valenzuela* before applying the holdings to this case. In *Valenzuela*, our supreme court considered only consent as an exception to the Fourth Amendment's prohibition of warrantless searches. 239 Ariz. 299, ¶¶ 10-11, 371 P.3d at 630-31. Using a totality-of-the-circumstances test, the court held that when the state shows only that the driver was read the admonition, and was not otherwise advised of his right to decline testing, the state has failed to prove by a preponderance of the evidence that consent was voluntary. *Id.* ¶¶ 2, 11, 30. The court noted consent may still be voluntary if the state shows other circumstances, such as if the officer retracts the statement that the driver is required to submit or an attorney advises such. *Id.* ¶ 18. Applied to the facts of Valenzuela's case, the court held that the trial court had erred by finding Valenzuela's consent to blood and breath testing to be voluntary. *Id.* ¶ 30. Ultimately, however, the conviction was upheld based on the good-faith exception to the exclusionary rule as articulated in *Davis v. United States*, 564 U.S. 229 (2011). *Valenzuela*, 239 Ariz. 299, ¶¶ 31-35, 371 P.3d at 636-38.

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[5]The jury acquitted Oliver on a criminal damage charge, but found him guilty of DUI and extreme DUI.

¶7 Two months after *Valenzuela*, and while this case was pending reconsideration, the United States Supreme Court issued its opinion in *Birchfield*, ___ U.S. ___, 136 S. Ct. 2160. There, the Court considered three cases based on North Dakota and Minnesota laws criminalizing refusal to submit to chemical testing after a DUI arrest. ___ U.S. at ___, 136 S. Ct. at 2169-72. In the first case, a defendant had been convicted of refusing a blood test; in the second, the defendant had refused a breath test but his refusal charge had been dismissed; and in the third, the defendant had consented to—and failed—a blood test after having been warned he could be criminally prosecuted for refusal. *Id.* at ___, 136 S. Ct. at 2170-72. Although the three cases presented different factual scenarios, the common threshold issue for each petitioner was whether the warrantless search of their blood or breath comported with the Fourth Amendment; if so, a state could properly criminalize refusal to comply with the demand. *Id.* at ___, 136 S. Ct. at 2172-73. The court observed that if a warrantless test for alcohol was "constitutional, there is no obstacle under federal law to the admission of the results that they yield in either a criminal prosecution or a civil or administrative proceeding." *Id.* at ___, 136 S. Ct. at 2173.

¶8 The Court concluded that a warrantless breath test, but not blood test, is permitted by the Fourth Amendment as a search incident to an arrest for drunk driving. *Id.* at ___, 136 S. Ct. at 2184-85. In doing so, it rejected the argument that the legality of a warrantless breath test should depend on the burden of obtaining a warrant in a particular situation. *Id.* at ___, 136 S. Ct. at 2179. The Court determined a categorical rule was required to provide adequate guidance to police officers. *Id.*

¶9 In the breath test refusal case, defendant Bernard had not been convicted, and the trial court dismissed the charges, concluding that a warrantless breath test would have violated the Fourth Amendment. *Id.* at ___, 136 S. Ct. at 2171. The Minnesota Court of Appeals reversed, and the state supreme court affirmed that judgment. *Id.* The United States Supreme Court held that the test "*was* a permissible search incident to Bernard's arrest for drunk driving," and affirmed the state supreme court's judgment. *Id.* at ___-___, 136 S. Ct. at 2186-87.

¶10 Although consent to a breath test was not at issue in *Birchfield*, its broad holding directly affects one portion of *Valenzuela*. *Valenzuela*'s analysis of voluntary consent to breath and blood testing derived from the proposition that the Fourth Amendment generally required a warrant or consent before DUI testing could be conducted.[6] 239 Ariz. 299, ¶¶ 10-11, 371 P.3d at 630. But the Court in *Birchfield* concluded that "a breath test . . . may be administered as a search incident to a lawful arrest for drunk driving," and therefore "a warrant is not needed" under the Fourth Amendment. ___ U.S. at ___, 136 S. Ct. at 2185. Because state courts are "forbidden to interpret federal constitutional law more strictly than the United States Supreme Court," this conclusion is binding on Arizona courts. *See State v. Knapp*, 114 Ariz. 531, 537, 562 P.2d 704, 710 (1977), *citing Oregon v. Hass*, 420 U.S. 714, 719 (1975).

¶11 Therefore, viewed strictly through the lens of the Fourth Amendment, the results of Oliver's breath test would be admissible despite lack of consent if he was arrested for DUI. But the officer testified she told Oliver he was under arrest for criminal damage and endangerment. She did not say Oliver was arrested for DUI. Parts of the record, however, suggest that he may also have been arrested for DUI. We therefore remand for further fact-finding regarding the circumstances of Oliver's arrest and subsequent breath test.

¶12 Additionally, in his supplemental brief, Oliver raises several issues regarding application of *Birchfield* to Arizona law. Specifically, he contends the requirements for breath tests imposed by our case law as well as article II, § 8 of the Arizona Constitution and A.R.S. § 28-1321 support suppression of the test results. On its face, that statute would appear to prohibit administration of a breath test in the absence of a warrant or valid consent. But the trial court

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[6]The court relied upon its earlier decision in *State v. Butler*, 232 Ariz. 84, ¶ 10, 302 P.3d 609, 612 (2013), which only involved a blood draw. There was no legally significant distinction between a breath and blood sample. *See, e.g.*, *Skinner v. Ry. Labor Execs'. Ass'n*, 489 U.S. 602, 616-17 (1989) (considering blood, breath, and urine samples together as searches to which the Fourth Amendment is applicable).

had no occasion to address these issues before publication of *Valenzuela* and *Birchfield*. Therefore, on remand, Oliver also may assert contentions specific to Arizona law, the state will have the opportunity to respond, and the trial court can consider the arguments in light of the additional fact-finding. If the trial court ultimately concludes it would not change its original ruling denying Oliver's motion to suppress, then it shall so indicate and Oliver may seek appellate review; otherwise, the case shall proceed as appropriate in view of a different ruling on the motion to suppress. This court expresses no opinion on the court's fact-finding or the application of *Valenzuela* and *Birchfield* to any new facts.

Disposition

¶13 For the foregoing reasons, we remand to the trial court for further proceedings consistent with this decision.