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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ALBERT EDWARD MORELLI, Appellant.	)	2 CA-CR 2010-0206 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20082223

Honorable Charles S. Sabalos, Judge

AFFIRMED

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B R A M M E R, Presiding Judge.

¶1 Following a jury trial, appellant Albert Morelli was convicted of two counts of child abuse and two counts each of aggravated driving under the influence of an intoxicant (DUI), aggravated driving with a blood alcohol concentration of .08 or more, and aggravated driving while under the extreme influence of intoxicating liquor, all while a minor was present. The trial court imposed concurrent sentences, the longest of which was three years. On appeal, Morelli argues the court erred in denying his motion to suppress evidence from a blood draw he contends was both unconstitutional and performed in violation of A.R.S. § 28-1388(A). He asks that we vacate his convictions and remand for a new trial. Finding no error, we affirm.

¶2 Although the only relevant facts are those related to the blood draw, by way of background, on the night of May 22, 2008, after consuming alcohol at a family gathering, Morelli and his wife left the gathering with their two small children in the car. A police officer arrived as Morelli was backing out of the driveway and noted Morelli exhibited signs of intoxication. The officer ultimately obtained a search warrant to draw blood and transported Morelli to a police substation. Department of Public Safety Officer Joshua Everhart, a phlebotomy-trained officer, drew Morelli's blood at the substation, and subsequent testing revealed a blood alcohol concentration of 0.151. "In reviewing a motion to suppress, we consider only the evidence presented at the suppression hearing and view it in the light most favorable to upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). We will not reverse the trial court's ruling absent an abuse of discretion. *State v. Livingston*, 206 Ariz. 145, ¶ 3, 75 P.3d 1103, 1104 (App. 2003). Although we defer to the trial court's factual findings, we review its legal conclusions de novo. *State v. Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d 610, 612 (App. 2001). Before trial, Morelli moved to suppress the results of the

blood draw on the grounds it was unconstitutional and did not comply with the requirements of A.R.S. § 28-1388(A) ("only a physician, a registered nurse or another qualified person may withdraw blood for the purpose of determining the alcohol concentration . . . in the blood"). Following a two-day evidentiary hearing, the court denied the motion, finding the state had proved Officer Everhart "was minimally qualified to administer [Morelli's] blood draw procedure and the manner in which [Morelli's] blood was drawn did not cause him harm nor did it subject him to an unreasonable risk of harm," and "the extraction of [Morelli's] blood did not constitute an unreasonable search and seizure."

¶3 On appeal, Morelli argues the trial court erred in refusing to suppress evidence of the blood test results because Everhart was not qualified to draw blood under § 28-1388(A), and because the blood draw was unreasonable under the Fourth Amendment. He also asserts the procedure violated his due process rights under the Fourteenth Amendment. Blood tests administered at the behest of law enforcement officers constitute searches that implicate Fourth Amendment protections, which "constrain . . . against intrusions . . . not justified in the circumstances, or . . . made in an improper manner." *Schmerber v. California*, 384 U.S 757, 768 (1966). The Fourth Amendment guarantee against unreasonable searches and seizures is violated when a defendant's blood is drawn in an unreasonable manner. *State v. May*, 210 Ariz. 452, ¶¶ 5-6, 112 P.3d 39, 41 (App. 2005).

¶4 Although Morelli acknowledges § 28-1388(A) does not define those individuals "qualified" to perform a blood draw, he nonetheless asserts that Everhart's having received a "single week" of training, followed by "minimal oversight, supervision, or reevaluation," rendered him unqualified to draw blood under the statute.

As we noted in *May*, however, a police officer who can "'demonstrate competence through training or experience'" in phlebotomy is a "qualified person" pursuant to § 28-1388(A). *May*, 210 Ariz. 452, ¶ 10, 112 P.3d at 42, *quoting State v. Carrasco*, 203 Ariz. 44, ¶ 9, 49 P.3d 1140, 1141 (App. 2002). In addition, "a person is 'qualified' to draw blood for DUI purposes if he or she is competent, by reason of training or experience, in that procedure." *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, ¶ 20, 30 P.3d 649, 655 (App. 2001).

¶5 The evidence at the suppression hearing showed that Everhart had attended a week-long phlebotomy course for law enforcement officers at Pima Community College in 2004. During the course, which included classroom instruction and supervised clinical practice, Morelli completed 100 successful blood draws and a comprehensive final exam. Since his initial training, Everhart attended approximately four "Phlebotomy Refresher Courses for Law Enforcement," and completed approximately 1000 blood draws. Notably, the state's expert, Dr. Tammy Kastre, opined that the training provided to law enforcement officers is essentially the same as that provided to general phlebotomists, that she had no "concerns" about the police training program, and that individuals who successfully complete the police program "are very qualified." In *May*, we concluded a sheriff's deputy who had attended a one-week phlebotomy course and had drawn blood 150 to 200 times, far fewer times than Everhart, was sufficiently qualified to draw blood. 210 Ariz. 452, ¶ 10, 112 P.3d at 42. Morelli also complains the lack of supervision over Everhart rendered the blood draw improper. However, because our jurisprudence already has rejected this very argument, we see no reason to depart from that authority here. *See State ex rel. Pennartz*, 200 Ariz. 582, ¶ 2, 30 P.3d at 651 (Phlebotomists qualified to "perform blood draws for forensic purposes under section 28-

1388(A) without the supervision of a licensed medical professional"); *see also State v. Noceo*, 223 Ariz. 222, ¶ 11, 221 P.3d 1036, 1040 (App. 2009).

¶6 Morelli's expert witness, Dr. Joseph Citron, criticized Everhart's failure to complete the required blood draw report. Although Dr. Kastre acknowledged the documentation on the report could have been more complete, she nonetheless concluded that, based on Everhart's testimony, she was not concerned about the items he had failed to include in the report. "[W]e do not impose our own determination as to the credibility of witnesses," and instead "defer to the trial court's assessment of witness credibility because the trial court is in the best position to make that determination." *State v. Olquin*, 216 Ariz. 250, ¶ 10, 165 P.3d 228, 230 (App. 2007). Moreover, we infer the trial court not only considered the experts' testimony in this matter[1] but also relied on relevant Arizona caselaw, which supports the court's finding that Everhart was qualified to draw blood under the statute. *See May*, 210 Ariz. 452, ¶ 10, 112 P.3d at 42.

¶7 According to Morelli, *Schmerber* stands for the proposition that blood may never be drawn "'in the privacy of the [police] stationhouse.'" *Schmerber*, 384 U.S at 772. He contends that having an officer with "no prior medical training" draw his blood in a non-clinical setting without the use of a phlebotomist chair constituted an unreasonable search and seizure. Morelli also argues the "[F]ourth and [F]ourteenth [A]mendments prohibit police officers from ever performing blood draws." However, we previously have held that, "allowing a properly qualified police officer to draw blood during a DUI arrest does not violate the Fourth Amendment." *Noceo*, 223 Ariz. 222, ¶ 7, 221 P.3d at 1038-39.

[1]We also note the record does not support Morelli's claim that the state had the burden of proving the blood draw was reasonable under Rule 16.2(b), Ariz. R. Crim. P.

¶8 The evidence presented at the suppression hearing showed the blood draw was performed in a competent and reasonable manner and did not violate the Fourth Amendment. *See id.* ¶ 8 (specific procedures used in taking suspect's blood determine whether procedure violates Fourth Amendment). With Morelli's consent, Everhart drew his blood in a small room "next [to] or within [the] booking area" at the police substation. Morelli was seated at the corner of the table, and Everhart instructed him to "make a fist to support [his] elbow," which helped to immobilize his arm and "bring the vein up." Everhart wore latex gloves on his hands, applied a tourniquet "about three inches above the antecubital fossa area," located a suitable vein for the blood draw, cleansed with iodine the area from which he was going to draw blood, removed the tourniquet to allow the iodine to dry, replaced the tourniquet, located the vein, and drew the blood. After he filled two specialized blood vials, Everhart removed the tourniquet, placed gauze on the site, withdrew the needle, and maintained pressure on the site. Everhart testified there was nothing unusual about the blood draw, and described it as "a very quick, easy blood draw."

¶9 Dr. Citron opined that drawing blood at a police substation does not meet the medical community's standard of care, and that when possible it is preferable to conduct the blood draw at a medical clinic. However, Dr. Kastre testified she had no concern about drawing blood at a police substation, which "generally [provides] a great location where a patient may be seated safe and secure with good lighting." As the state correctly asserts in its answering brief, we previously have found more questionable blood draws reasonable. *See, e.g.*, *Noceo*, 223 Ariz. 222, n. 3, 221 P.3d at 1039 n. 3 (blood draw conducted while defendant seated in police car reasonable); *May*, 210 Ariz. 452, ¶ 7, 112 P.3d at 41 (blood draw conducted while defendant standing at rear of police

car reasonable). Nor has Morelli provided any facts that would distinguish the present case from *State v. Clary*, 196 Ariz. 610, ¶¶ 2, 6, 37, 2 P.3d 1255, 1256, 1261 (App. 2000), in which Division One of this court upheld the officers' restraint of the defendant on the floor during a blood draw, given the seriousness of the aggravated DUI offense and the threat to the officers' safety posed by the defendant's active resistance. Based on the evidence presented at the suppression hearing, the risk of injury to Morelli was not increased unconstitutionally by the manner in which Everhart drew his blood, and we thus cannot say the trial court abused its discretion in finding the draw reasonable and denying the motion to suppress.

¶10 Contrary to Morelli's assertion, we do not hold that "all field blood draws that occur without incident are reasonable," only that based on this record there is no evidence this blood draw was unreasonable. Nor is there any evidence to support Morelli's claim the procedures surrounding the blood draw were "shocking." Moreover, Morelli fails to distinguish meaningfully our decisions in *May* and *Noceo* from this case, and in apparent disregard of those decisions, he nonetheless concludes that unless a medical emergency exists, "a blood draw is not reasonable unless it is conducted in a clinical setting." Additionally, Morelli's reliance on *Schmerber* is misplaced, inasmuch as we previously have noted, "*Schmerber* 'did not attempt to set any specific rules for blood tests conducted outside the hospital setting,'" *Noceo*, 223 Ariz. 222, ¶ 11, 221 P.3d at 1040, *quoting May*, 210 Ariz. 452, ¶ 6, 112 P.3d at 41.

¶11 Finally, to the extent Morelli asserts that, based on the "inherent conflict of interest that is created when someone is asked to play the roles of police officer and phlebotomist at the same time," a blood draw conducted by a law enforcement officer is a per se violation of due process, we reject this claim. Because the blood draw in this

matter was both reasonable and constitutional, we find no support for this "inherent conflict" in the record before us.

¶12 For the reasons stated above, we find no error in the trial court's denial of Morelli's motion to suppress and therefore affirm his convictions and sentences.

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

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