IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

KYLE EVAN SMITH,
Appellant.

No. 2 CA-CR 2016-0107
Filed April 17, 2017

Appeal from the Superior Court in Pima County
No. CR20134341001
The Honorable Javier Chon-Lopez, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Terry M. Crist III, Assistant Attorney General, Phoenix
Counsel for Appellee

Robert A. Kerry, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Howard authored the decision of the Court, in which Chief Judge Eckerstrom and Judge Vásquez concurred.

H O W A R D, Presiding Judge:

¶1 Appellant Kyle Smith was convicted after a jury trial of aggravated driving under the influence of an intoxicant (DUI) while his driver's license was suspended and aggravated driving with an alcohol concentration of .08 or more while his license was suspended. Finding Smith previously had been convicted of aggravated DUI, the trial court sentenced him to enhanced, but slightly mitigated, concurrent prison terms of 3.5 years for each offense. Appointed counsel filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing he had found no "arguably meritorious issue," and requesting that this court review the record for fundamental error. Smith has not filed a supplemental brief.

¶2 In reviewing the record pursuant to *Anders*, we discovered an arguable issue regarding the constitutionality of the taking of a sample of Smith's blood in light of *State v. Valenzuela*, 239 Ariz. 299, 371 P.3d 627 (2016), and *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160 (2016). We ordered Smith's counsel to file a supplemental brief addressing the implications of *Valenzuela* and *Birchfield*, including whether any error that does exist here is subject to a fundamental-error analysis, and directed the state to file a response.

¶3 Our supreme court held in *Valenzuela* that "consent given solely in acquiescence to the [incorrect] admonition" that Arizona law requires submission to a test of blood or breath for alcohol or other substances, "is not free and voluntary under the

Fourth Amendment and cannot excuse the failure to secure a warrant." 239 Ariz. 299, ¶¶ 10-12, 33, 371 P.3d at 630-31, 637.[1] But, the court concluded, because the officer in that case had followed "binding precedent that had sanctioned use of the admonition read to Valenzuela," the good-faith exception to the exclusionary rule applied and the constitutional violation did not require suppression of the evidence. *Id.* ¶ 33.

¶4 Two months after our supreme court decided *Valenzuela*, the United States Supreme Court held in *Birchfield* that "the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving." ___U.S. at ___, ___, 136 S. Ct. at 2184. But a blood draw is different, the Court found; it cannot be "justified as a search incident to . . . arrest," ___U.S. ___, ___, 136 S. Ct. at 2186, and the threat of criminal penalties for refusing to submit to such a test without a warrant could undermine the voluntariness of that consent, ___U.S. ___, ___, 136 S. Ct. at 2178-80, 2184-86. The Court also stated that the exigency exception to the warrant requirement "always requires case-by-case determinations." ___U.S. ___, ___, 136 S. Ct. at 2180. The Court remanded one of the three consolidated cases before it back to the trial court to determine whether, under the totality of the circumstances, that defendant's consent had been valid, given that officers had told him he was required by law to submit to a blood test. ___ U.S. ___, ___, 136 S. Ct. at 2186-87.[2]

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[1]The court relied on precedent that included its decision in *State v. Butler*, 232 Ariz. 84, ¶ 10, 302 P.3d 609, 612 (2013), which was based, in part, on *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552, 1556 (2013). The Court held in *McNeely* that the fact that alcohol naturally dissipates from the bloodstream does not constitute a per se exigency justifying the warrantless taking of a sample of the suspect's blood. ___U.S. at ___, 133 S. Ct. at 1560-61.

[2]After the parties filed their supplemental briefs in this case, a divided Arizona Supreme Court held in *State v. Havatone*, 241 Ariz. 506, ¶ 1, 389 P.3d 1251, 1253 (2017), that A.R.S. § 28-1321(C), which permits law enforcement officers to obtain a blood sample from a person who is unconscious, was unconstitutional as applied in that

¶5 Viewed in the light most favorable to sustaining Smith's convictions, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence established that at 4:57 p.m. on October 2, 2013, Sergeant Lopez of the Tucson Police Department stopped Smith, whose driver's license was suspended, after he failed to stop his truck at a red light. Before stopping, Smith drove through a second red light. Lopez noted there was an odor of intoxicants on Smith's person, his eyes were bloodshot and watery, and his face was flushed; Smith failed field sobriety tests another officer administered. Smith was arrested and a sample of his blood was drawn at 6:04 p.m., after Tucson Police Officer Johnson read an implied consent warning to him.[3] Toxicology testing established Smith's blood alcohol concentration was .185.

¶6 Smith did not file a motion to suppress the blood-test results; the only objection he made at trial to the admission of the evidence was insufficient foundation, which the trial court overruled. Johnson testified at trial that she had read Smith "the

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case. Unlike in *Valenzuela*, however, the court concluded that the good-faith exception did not apply. *Id.* ¶¶ 28-34. Smith has not relied on *Havatone,* and *Valenzuela* continues to be good law directly controlling this case.

[3]Arizona's implied consent statute provides, in relevant part, that

> [a] person who operates a motor vehicle in this state gives consent . . . to a test or tests of the person's blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content if the person is arrested for any offense arising out of acts alleged to have been committed . . . while the person was driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor or drugs. A.R.S. § 28-1321(A).

admin per se affidavit," which she described as "a form by Motor Vehicles," which contains "admonitions [that] have to do with obtaining a chemical sample in a D.U.I. investigation." She stated that after she read the form to Smith he consented to have a sample of his blood drawn by an officer who is a phlebotomist, which she witnessed. Johnson was asked no further questions about the issue of consent on direct examination or cross-examination. She did not read the form into the record and it was not admitted as an exhibit.

¶7 Officer Nolan testified that he is a certified phlebotomist and he drew the sample of Smith's blood. He testified Johnson read the "admin per se" form to Smith, "explaining it to him in laymen's terms . . . . She had to continue explaining it to him because he had the same questions over and over again." Like Johnson, Nolan testified Smith had consented to the blood draw. Defense counsel asked Nolan whether there was any "emergency or exigent circumstance in drawing the blood? Meaning were you time crunched to draw this man's blood?" Nolan responded, "Well, typically we try to get it within two hours of the time of driving," explaining that was not an issue in this case because it had been a little over an hour from when he had been driving.

¶8 When a party challenges on appeal the admission of evidence that was the subject of a motion to suppress, we generally review the trial court's ruling on that motion for an abuse of discretion, considering only the evidence that was presented at the suppression hearing. *See State v. Mitchell*, 234 Ariz. 410, ¶ 11, 323 P.3d 69, 72 (App. 2014). But because Smith did not file a motion to suppress, there was neither an evidentiary hearing nor a ruling by the court on these issues. Smith concedes that, consequently, unlike the defendant in *Valenzuela*, who raised the issue in the trial court, 239 Ariz. 299, ¶ 6, 371 P.3d at 630, he forfeited the right to seek relief for all but fundamental, prejudicial error, *see State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). We may review the admission of evidence for fundamental error despite the fact that the arguments were never asserted in a motion to suppress. *See State v. Jones*, 185 Ariz. 471, 482, 917 P.2d 200, 211 (1996). However, "[i]t is highly undesirable to attempt to resolve issues for the first time on appeal, particularly when the record below was made with no

thought in mind of the legal issue to be decided." *State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988). The lack of a record here makes it difficult to review these "fact-intensive" issues, even in the limited context of a fundamental-error review. *See id.* ("It is particularly inappropriate to consider an issue for the first time on appeal where the issue is a fact-intensive one.").

¶9 Error is fundamental when it goes to the foundation of the defendant's case, deprives the defendant of a right that is essential to his defense, and is of such magnitude that the defendant's trial could not possibly have been fair. *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Smith argues that here, as in *Valenzuela*, the state did not sustain its burden of proving by a preponderance of the evidence that his consent to the blood draw "was freely given and not because of the invocation of lawful authority." He asserts the totality of the circumstances show his constitutional rights were violated and seems to suggest the admission of the blood test resulted in fundamental error simply because it was constitutional error.

¶10 The state argues, however, that the record is insufficient to determine precisely what Smith was told, including whether he was informed that he was required by Arizona law to provide a sample of his blood or that he would be subject to criminal penalties if he refused. The state asserts that this court cannot assume the admonition Johnson gave Smith was erroneous. In any event, the state contends, it was deprived of the opportunity to present evidence that (1) the blood draw was nevertheless consensual and (2) even if the "admin per se" warning coerced Smith, based on the existing record and the fact that this incident occurred in October 2013, well before April 2016, which is when the supreme court decided *Valenzuela*, this court can assume the officers relied on existing authorities and had acted in good faith.

¶11 Had Smith raised this issue below, the state would have had the burden of showing the consent was valid; if it could not sustain that burden, it would have had the opportunity to establish the good-faith exception to the exclusionary rule applied. *See State v. Crowley*, 202 Ariz. 80, ¶ 32, 41 P.3d 618, 629 (App. 2002). To the

extent Smith is suggesting the state retains these burdens and is left with the existing record to sustain them, he is mistaken. The burden is on Smith. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607 ("burden of persuasion" shifts to defendant in fundamental error review to discourage him "from 'tak[ing] his chances on a favorable verdict, reserving the 'hole card' of a later appeal on [a] matter that was curable at trial, and then seek[ing] appellate reversal.'"), *quoting State v. Valdez*, 160 Ariz. 9, 13-14, 770 P.2d 313, 317-18 (1989) (alterations in *Henderson*). *Cf. State v. Smith*, 114 Ariz. 415, 419, 561 P.2d 739, 743 (1977) (trial court not required to determine voluntariness of confession sua sponte); *State v. Freeland*, 176 Ariz. 544, 549, 863 P.2d 263, 268 (App. 1993) (no fundamental error where defendant argued for first time on appeal that trial court should have suppressed blood-test results where medical personnel obtained sample during involuntary hospitalization).

¶12 It is because Smith did not raise these issues below that the record is insufficient in terms of (1) whether the admonition, which was accompanied by an explanation in "layman's terms," was erroneous, (2) assuming it was erroneous, whether there existed other indicia that the blood-draw was consensual, and, (3) assuming the blood-draw was not consensual, whether officers had acted in good-faith reliance on existing authority in obtaining Smith's consent to draw a sample of his blood under the analysis of *Valenzuela*.

¶13 Given the paucity of the record, Smith simply cannot sustain his burden. Nor are we able to make these determinations in conducting an independent review of the record pursuant to *Anders*. We will not speculate what evidence might have been presented at a hearing on a motion to suppress. *See Brita*, 158 Ariz. at 124, 761 P.2d at 1028 (refusing to address suppression ruling on alternative basis not litigated in trial court because hearing "might well have taken a decidedly different twist"); *see also State v. Estrella*, 230 Ariz. 401, n.1, 286 P.3d 150, 153 n.1 (App. 2012) (in absence of suppression hearing ability to review issue is limited).[4] Accordingly, we do not find

[4]The instant case is distinguishable from *State v. Newell*, 212 Ariz. 389, 132 P.3d 833 (2006). There, the court acknowledged that a

fundamental error in the trial court's failing to suppress the blood test results.

¶14 The record contains sufficient evidence to support the jury's verdicts on these offenses. *See* A.R.S. §§ 28-1381(A)(1), (2), 28-1383(A)(1), and (2). And the sentences imposed were within the statutory range and were imposed in a lawful manner. *See* § 28-1383(M); *see also* A.R.S. § 13-703(I). We therefore affirm Smith's convictions and the sentences imposed.

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defendant's failure to raise a claim in the trial court generally precludes appellate review of that claim. *Id*. ¶ 34. But because there had been a suppression hearing and the defendant's interrogation had been recorded and admitted into evidence, the court found there was a sufficient record to permit it to review for fundamental error the argument that the defendant had raised for the first time on appeal. *Id*. ¶¶ 33-35.