IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Petitioner*,

*v.*

HON. CASEY F. MCGINLEY, JUDGE PRO TEMPORE OF
THE SUPERIOR COURT OF THE STATE OF ARIZONA,
IN AND FOR THE COUNTY OF PIMA,
*Respondent*,

*and*

ARASH ESLAMI,
*Real Party in Interest*.

No. 2 CA-SA 2017-0065
Filed October 11, 2017

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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NOT FOR PUBLICATION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. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Spec. Act. 7(g), (i).

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Special Action Proceeding
Pima County Cause No. CR20173077

**JURISDICTION ACCEPTED; RELIEF GRANTED**

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COUNSEL

Michael G. Rankin, Tucson City Attorney
By Alan L. Merritt, Deputy City Attorney, and Jennifer Bonham and Jessie M. Pringle, Associate Prosecuting City Attorneys, Tucson
*Counsel for Petitioner*

Stephen Paul Barnard, Tucson
*Counsel for Real Party in Interest*

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**MEMORANDUM DECISION**

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

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V Á S Q U E Z, Presiding Judge:

**¶1** In this special action, the State of Arizona contends the respondent judge erred in concluding evidence of Intoxilyzer testing results could not be admitted solely because the requirements of A.R.S. § 28-1323 had not been met. We agree, and because our exercise of special action jurisdiction is appropriate when, as in this case, the petitioning party has no remedy by appeal, *see State v. Harris*, 232 Ariz. 34, ¶ 3, 301 P.3d 200, 201 (App. 2013), we accept jurisdiction and grant relief.

**¶2** Real party in interest Arash Eslami was stopped on suspicion of driving under the influence (DUI) in August 2014. Eslami submitted to Intoxilyzer breath tests and the officer began the deprivation period at 2:38 a.m. The first breath test was administered at 3:10 a.m., but during that time the officer administered a preliminary breath test (PBT). Both the state's expert, Terry Gallegos, and the defense expert, Erik Brown, testified that the PBT violated the deprivation period, but both testified that it was unlikely any ethanol was introduced as a result. At trial, Eslami did not object to the admission of the Intoxylizer results or Gallegos's testimony. The jury found Eslami guilty, inter alia, of DUI with a blood alcohol

concentration (BAC) of .08 or more within two hours of driving pursuant to A.R.S. § 28-1381(A)(2).

**¶3** Eslami sought a delayed appeal, which the superior court granted. On appeal, Eslami argued that it was fundamental error to admit the evidence of his BAC because the state had failed to meet the requirements of § 28-1323(4) when the officer administering the Intoxilyzer test did not comply with the operational checklist by failing to properly observe the deprivation period. Eslami did not address the admissibility of the test results under Rule 702, Ariz. R. Evid. But in its reply, the state contended the evidence could be admitted either pursuant to § 28-1323 or Rule 702, citing *State v. Seidel*, 142 Ariz. 587, 691 P.2d 678 (1984).

**¶4** In *Seidel*, our supreme court concluded that the statutory provision was "an alternative method of admitting breath test evidence," and that such evidence could be admitted under either the statute or the rules of evidence. *Id.* at 591, 691 P.2d at 682. Later, in *State v. Superior Court*, this court likewise concluded that when breath tests were deemed inadmissible under the statute, the state should have been allowed to seek admission of the breath evidence "via the scientific method and the Rules of Evidence." 195 Ariz. 555, ¶ 10-11, 991 P.2d 258, 261 (App. 1999).

**¶5** The respondent judge in this matter, however, rejected the state's argument and vacated Eslami's DUI conviction. Respondent stated first that he disagreed with the state's position "that the breath tests at issue here nonetheless comply with Rule 702 of the Arizona Rules of Evidence, and as such, the tests were otherwise admissible." And although that comment could be read, as Eslami suggests, that the state simply had not met the requirements of Rule 702, the respondent went on to state that the statute "provides specific criteria that must be met in order for breath tests to be admissible." And, he elaborated, if he were to conclude that a statutory failure "could be cured simply by complying with Rule 702" the statute would be rendered "superfluous, which the Court cannot do." The respondent therefore clearly rejected the rule set forth in *Seidel*—that a party can seek to introduce breath evidence under either the statute or the rule.

**¶6** For the above reasons, the respondent judge erred by concluding fundamental error had occurred in the justice court proceeding without considering whether the evidence could be admitted under Rule 702. *See Seidel*, 142 Ariz. at 591, 691 P.2d at 682. We therefore grant the state relief, vacate respondent's order, and remand the matter to the superior court for further proceedings consistent with this decision.