IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

TRAVIS ARIO HAMILTON NEREIM,
Appellant.

No. 2 CA-CR 2019-0062
Filed November 5, 2019

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20160984001
The Honorable Gus Aragón, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Joshua C. Smith, Assistant Attorney General, Phoenix
Counsel for Appellee

Robert A. Kerry, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Vásquez authored the decision of the Court, in which Presiding Judge Staring and Judge Brearcliffe concurred.

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Travis Nereim was convicted of aggravated driving under the influence of an intoxicant (DUI) and aggravated driving with a blood-alcohol concentration (BAC) of .08 or more, both while his license was suspended, revoked, restricted, or cancelled; aggravated DUI and aggravated driving under the extreme influence of alcohol, both while a minor was present; and child abuse. The trial court sentenced Nereim to concurrent prison terms, the longest of which are ten years. On appeal, Nereim argues the court erred by denying his motion to suppress his blood-test results because the multiple attempts it took to draw his blood were unreasonable under the Fourth Amendment. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Nereim's convictions. *See State v. Allen*, 235 Ariz. 72, ¶ 2 (App. 2014). Early one morning in February 2016, Tucson Police Department (TPD) Officer Tyler Ashton observed Nereim commit various traffic violations, including making an improper left-hand turn, speeding, and crossing over a lane divider. Nereim's thirteen-year-old daughter was a passenger in the vehicle. Ashton initiated a traffic stop and, upon contact with Nereim, noticed he had "slurred speech," "bloodshot, watery eyes," and "a strong o[dor] of intoxicants coming from [him]." After Nereim exhibited six out of six cues of impairment on the horizontal gaze nystagmus test, he was arrested and transported to a police substation.

¶3 Because Nereim refused to consent to a blood draw, Ashton obtained a search warrant. Officer Eric Altman, a trained phlebotomist, informed Nereim of the warrant and attempted to draw his blood. Nereim, however, stated that they "weren't going to get his blood" and "clenched his fists," bringing "them up to his chest" and "holding them tightly." Because Altman was unsuccessful in drawing Nereim's blood, he requested the assistance of Sergeant Corie Nolan, another phlebotomist. According to Nolan, Nereim "was not cooperative with the blood draw . . . at all," and

they "had to hold him and hold the arm to make the attempt." Nolan also observed that Nereim had sclerosed veins, or "hard veins," which indicated to Nolan that Nereim was an intravenous drug user. After Nolan made two unsuccessful attempts to draw Nereim's blood, he instructed Altman to try once more. Altman was again unsuccessful, and Nolan instructed Ashton to take Nereim to the hospital for assistance.

¶4 At the hospital, Ashton spoke with several nurses, but based on Nereim's refusal to give consent, their supervisor directed them not to assist with the blood draw. Ashton notified Nolan, and they contacted Officer Carter Wingate, who had previously worked as a phlebotomist on the pediatric floor of the hospital, to assist with the blood draw. When Wingate arrived at the hospital, Nereim continued to be "uncooperative" and "verbally antagonistic." Wingate's three attempts to draw Nereim's blood were unsuccessful.

¶5 Ashton then spoke with another hospital administrator who authorized one of the nurses to assist. She was successful in drawing Nereim's blood. A retrograde calculation of the blood sample established that Nereim's BAC was between .203 and .246 within two hours of driving. It was also determined that Nereim had been driving while his license was suspended. A grand jury indicted Nereim for one count each of aggravated DUI while his license was suspended, revoked, restricted, or cancelled; aggravated driving with a BAC of .08 or more while his license was suspended, revoked, restricted, or cancelled; aggravated DUI while a minor was present; aggravated driving under the extreme influence while a minor was present; and child abuse.

¶6 Before trial, Nereim filed a motion to suppress the blood-test results. He pointed out that the drawing of his blood constituted a search under the Fourth Amendment and argued that the search was unreasonable based on "repeated failures to draw blood and pushing past TPD phlebotomy protocol." In response, the state asserted that "the blood draws performed on [Nereim] were reasonable under the circumstances" because the officers had a search warrant, Nereim was "uncooperative" and had "poor-quality veins due to intravenous drug use," and the hospital staff initially refused to help.

¶7 At the suppression hearing, Nolan testified regarding TPD's policy for drawing blood. He explained:

> Typically under reasonable circumstances . . . an initial phlebotomist . . . can try up to two times.

> A secondary phlebotomist . . . can attempt once. After that point under reasonable circumstances, we would then take an individual to a hospital. We wouldn't take any more blood if there was—a reason not to try it, attempt that anymore.

Nolan later explained that was the policy TPD had "c[o]me up with for . . . normal circumstances," when there was no "search warrant or . . . combative individual." The nurse who ultimately drew Nereim's blood also testified regarding the hospital's policy: one nurse can try twice; if both of those attempts are unsuccessful, another nurse can try twice; and if both of those attempts are also unsuccessful, a physician is contacted to "determine whether it [is] medically necessary to continue or if there [is] a more intimate intervention that might be necessary for obtaining blood."

¶8 The trial court denied the motion to suppress. It determined that the TPD policy was not controlling under the circumstances because the policy was "put in place . . . for success in getting the blood draw because some people don't feel it right[or are] having a bad day." The court further explained that the blood draws were "within medical standards" because "everybody who did a blood draw apparently followed the standards of having gloves on, doing everything they could to protect [Nereim] from any kind of infection." Additionally, the court pointed out that "we suppress evidence to try to alter police behavior" but, here, "the blood itself came from the hospital," reasoning that suppression would be "a sanction against . . . the hospital."

¶9 Nereim was convicted as charged, and the trial court sentenced him as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Motion to Suppress

¶10 Nereim argues the trial court erred in denying his motion to suppress because the blood-draw attempts were unreasonable under the Fourth Amendment, which prohibits unreasonable searches and seizures.[1]

[1]Neither below nor on appeal has Nereim argued that the search violated article II, § 8 of the Arizona Constitution. *See State v. Hernandez*, 244 Ariz. 1, ¶ 23 (2018) ("The Arizona Constitution's protections under article 2, section 8 are generally coextensive with Fourth Amendment

See U.S. Const. amends. IV, XIV. "The drawing of blood is a bodily invasion and, thus, constitutes a search under the Fourth Amendment." *State v. Estrada*, 209 Ariz. 287, ¶ 11 (App. 2004); *see also State v. Clary*, 196 Ariz. 610, ¶ 25 (App. 2000) (describing taking of blood as seizure).

¶11 "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 (App. 2008). We review a ruling on a motion to suppress for an abuse of discretion. *State v. Crowley*, 202 Ariz. 80, ¶ 7 (App. 2002). However, we review de novo legal issues, including the ultimate question of whether the blood draw "offended the Fourth Amendment's prohibition against unreasonable searches and seizures." *Estrada*, 209 Ariz. 287, ¶ 2.

¶12 When a search occurs, we must examine the totality of the circumstances to determine whether it "is reasonable within the meaning of the Fourth Amendment." *Samson v. California*, 547 U.S. 843, 848 (2006); *see also State v. Evans*, 235 Ariz. 314, ¶ 11 (App. 2014) (reasonableness under Fourth Amendment is fact-specific inquiry). Specifically in the blood-draw context, the relevant questions are (1) "whether the police were justified in requiring [the defendant] to submit to the blood test" and (2) "whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." *Schmerber v. California*, 384 U.S. 757, 768 (1966); *see also State v. Noceo*, 223 Ariz. 222, ¶ 8 (App. 2009).

¶13 Here, the first *Schmerber* question is not at issue. Nereim does not dispute that the officers were justified in requiring him to submit to the blood draw because they had a search warrant. *See Estrada*, 209 Ariz. 287, ¶ 11 (to comply with Fourth Amendment's requirement that searches be reasonable, police may obtain suspect's blood sample if they obtain search warrant based on probable cause). And Nereim has not challenged the warrant on appeal. *See State v. King*, 226 Ariz. 253, ¶ 11 (App. 2011) (failure to argue claim usually constitutes waiver).

¶14 Nereim's argument is directed at the second *Schmerber* question. He asserts that the officers "ignored" the TPD phlebotomy policy and justified doing so "because they were having trouble doing the draw." He further maintains that "the police knew there were medical problems with getting a blood draw from [him] but continued to subject him to pain

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analysis."). We therefore limit our analysis to Fourth Amendment jurisprudence.

by 'sticking' him six time[s] before turning him over to medical personnel who were successful."

¶15 A review of the relevant case law is instructive. In *Schmerber*, the United States Supreme Court concluded that the petitioner's blood draw, conducted "by a physician in a hospital environment according to accepted medical practices," was performed in a "reasonable manner." 384 U.S. at 771-72. The Court, however, avoided addressing draws "made by [someone] other than medical personnel or in other than a medical environment," noting that to tolerate such searches might "invite an unjustified element of personal risk of infection and pain." *Id.* at 772. Yet, this court has since addressed that situation and concluded 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; *accord State v. May*, 210 Ariz. 452, ¶ 9 (App. 2005).

¶16 Nereim's argument appears to be that the search in this case was unreasonable because the officers violated their own TPD policy that one phlebotomist can attempt a blood draw twice and a second phlebotomist can try once. To the extent Nereim relies on the TPD policy as the standard for reasonableness, his argument misses the mark. Our inquiry is not directed at "the blood draw program as a whole" but, instead, at the specific "'means and procedures employed in taking [Nereim's] blood.'" *Noceo*, 223 Ariz. 222, ¶ 8 (quoting *Schmerber*, 384 U.S. at 768). And Nolan testified at the suppression hearing that the TPD policy on which Nereim relies only applies when there is no search warrant. The officers had a warrant in this case. In addition, Nolan testified that "it was reasonable to continue trying to do the blood draws due to the circumstances" and "to satisfy the search warrant."[2]

¶17 Turning to the evidence presented at the suppression hearing, *see Fornof*, 218 Ariz. 74, ¶ 8, we conclude the search was reasonable under the totality of the circumstances, *see Estrada*, 209 Ariz. 287, ¶ 2. At the police

[2]To the extent Nereim suggests the hospital's blood-draw policy is the standard for reasonableness, we also disagree. The nurse testified the policy was hospital specific and not a "legal requirement set by [s]tate standards." In addition, she explained that the policy was largely for customer service and the comfort of the patient—neither of which applied here because Nereim had been taken to the hospital by officers with a search warrant for his blood—and that if they "really needed the blood [they] would get it."

substation, after Ashton had obtained a search warrant, both Altman and Nolan twice attempted to draw Nereim's blood. When those attempts were unsuccessful, Ashton transported Nereim to the hospital for assistance, but Nereim refused to let anyone draw his blood, prompting the hospital supervisor to direct the nurses not to help. Only at that point did Wingate become involved, and, based on his experience drawing blood from babies, he was "confident" that he would be able to complete the draw. After Wingate unsuccessfully attempted twice, the hospital staff was still refusing to help, and Nolan instructed Wingate to try once more. That attempt was also unsuccessful, but at that point a nurse was able to help, and they were successful in drawing Nereim's blood.

¶18 Altman, Nolan, and Wingate were all trained phlebotomists. *See State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, ¶ 20 (App. 2001) ("[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."). For every attempt, the officers wore gloves, cleaned the site, used a new needle, and changed out the tubes. *See Schmerber*, 384 U.S. at 772 (concern about risk of infection). Nereim did not testify at the suppression hearing that the multiple attempts caused him any pain.[3] *See id.* (concern about pain). Throughout the attempted draws, Nereim was "uncooperative" and, according to Ashton, who was present throughout, "pull[ed] his arms toward his chest," impeding the "officers' ability to gain access to a vein."[4] *See Clary*, 196 Ariz. 610, ¶ 20 (Fourth Amendment does not prohibit use of objectively reasonable force to overcome resistance to blood draw under search warrant).

¶19 Although the officers noticed that Nereim had sclerosed veins, both Nolan and the nurse testified that it depends on the individual

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[3]Although the nurse suggested that each attempt causes some pain because the needle "pinches," she did not—and could not—quantify any pain that Nereim might have experienced. *See Birchfield v. North Dakota*, 136 S. Ct. 2160, 2178 (2016) (recognizing that taking blood sample during physical examination "involves little pain," although not relished).

[4]To the extent that Nereim caused any problems that forced the officers to attempt the blood draw multiple times, applying the exclusionary rule here would not serve its purpose of deterring police misconduct. *See State v. Booker*, 212 Ariz. 502, ¶ 13 (App. 2006) (exclusionary rule is judicially created means of effectuating Fourth Amendment; primary purpose is to deter police conduct in violation of Fourth Amendment).

whether that will make it more difficult to draw blood. Thus, contrary to Nereim's suggestion, his veins did not make it "impossible for police to draw blood." In addition, the offenses for which Nereim was suspected—including DUI and child abuse—were serious. *Id.* ¶¶ 36-37 (court may consider seriousness of defendant's offense in evaluating reasonableness of force used to draw blood). Accordingly, we cannot say the trial court abused its discretion in denying Nereim's motion to suppress.[5] *See Crowley*, 202 Ariz. 80, ¶ 7.

Disposition

¶20 For the foregoing reasons, we affirm Nereim's convictions and sentences.

[5] Because we conclude the search was reasonable, we need not address the trial court's alternate reason for denying the motion to suppress—that suppression of the blood-test results would not serve the purpose of deterring police misconduct because the blood sample was drawn by the nurse, not a police officer. *See State v. Boteo-Flores*, 230 Ariz. 551, ¶ 7 (App. 2012) (we must affirm trial court's ruling if legally correct for any reason).