

IN THE UTAH COURT OF APPEALS

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Salt Lake City,	)	MEMORANDUM DECISION
	)	(Not For Official Publication)
Plaintiff and Appellee,	)	
	)	Case No. 20021018-CA
v.	)	
	)	F I L E D
Stanley Lucido,	)	(September 1, 2005)
	)	
Defendant and Appellant.	)	<span style="border: 1px solid black; padding: 2px;">2005 UT App 369</span>

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Third District, Salt Lake Department, 005900723  
The Honorable Judith S. Atherton

Attorneys: Patrick V. Lindsay, Provo, and Margaret P. Lindsay,  
Orem, for Appellant  
Simarjit S. Gill and Paige Williamson, Salt Lake  
City, for Appellee

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Before Judges Billings, Davis, and McHugh.

DAVIS, Judge:

Defendant Stanley Lucido argues that he was denied his Sixth Amendment right to competent trial counsel when his trial counsel waived, at both the suppression hearing and at trial, a Fourth Amendment challenge to the admission of blood evidence. We affirm.

To prevail on an ineffective assistance of counsel claim, Defendant "must show, first, that his counsel rendered a deficient performance in some demonstrable manner, which performance fell below an objective standard of reasonable professional judgment and, second, that counsel's performance prejudiced [D]efendant." State v. Wright, 2004 UT App 102, ¶9, 90 P.3d 644 (quotations and citation omitted). "[B]ecause a defendant has the burden of meeting both parts of [this] test, it is unnecessary for this court to apply both parts where our inquiry reveals that one of its parts is not satisfied." Id. (first alteration in original) (citation omitted). Moreover, "failure to raise motions or objections which would be futile does not constitute ineffective assistance of counsel." State v. Wight, 765 P.2d 12, 15 (Utah Ct. App. 1988).

At the suppression hearing, both the trial court and Defendant's counsel agreed that the protections afforded by the Fourth Amendment were not at issue in this case. We agree. The Fourth Amendment was not implicated in the seizure of Defendant's blood sample because Defendant gave his implied consent to the blood draw under Utah's implied consent statute. See Utah Code Ann. § 41-6-44.10 (Supp. 1999). Therefore, a Fourth Amendment objection to the admissibility of the blood draw results would have been futile.

Utah Code section 41-6-44.10 "grants peace officers the authority to obtain blood samples from drivers who operate motor vehicles while under the influence of intoxicants." In re R.L.I., 771 P.2d 1068, 1069 (Utah 1989). Section 41-6-44.10, in relevant part, states:

(1)(a) A person operating a motor vehicle in this state is considered to have given his consent to a chemical test or tests of his breath, blood, or urine for the purpose of determining whether he was operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited . . . if the test is or tests are administered at the direction of a peace officer having grounds to believe that person to have been operating or in actual physical control of a motor vehicle while having a blood or breath alcohol content statutorily prohibited . . . or while under the influence of alcohol, any drug, or combination of alcohol and any drug  
. . . .

. . . .

(3) Any person who is dead, unconscious, or in any other condition rendering him incapable of refusal to submit to any chemical test or tests is considered to have not withdrawn the consent provided for in Subsection (1), and the test or tests may be administered whether the person has been arrested or not.

Utah Code Ann. § 41-6-44.10(1)(a), (3). Chemical tests, however, cannot be taken without a driver's consent prior to arrest, see State v. Cruz, 21 Utah 2d 406, 446 P.2d 307, 309 (1968) ("[A] person prior to arrest has not given his implied consent to a chemical test and, therefore, his actual consent must be

given."), unless the driver is unconscious or otherwise not able to give consent, see Wight, 765 P.2d at 16 ("Section 41-6-44.10 does not require arrest prior to taking a blood sample, and allows drawing blood from an unconscious person with or without arrest.").

In this case, Defendant was placed under arrest and, as the trial court found at the suppression hearing, did not withdraw his consent to any blood or other test. Moreover, the trial court found that Defendant was incapable of withdrawing his consent to any chemical test. On appeal, Defendant does not challenge the trial court's findings, but rather relies on State v. Rodriguez and its Fourth Amendment analysis of warrantless blood draws. See State v. Rodriguez, 2004 UT App 198, 93 P.3d 854, cert. granted, 100 P.3d 220 (Utah 2004). Defendant's reliance on Rodriguez, however, is misplaced. The blood draw in Rodriguez involved neither actual nor implied consent. See id. at ¶5.

Because the trial court in this case determined that Defendant was incapable of withdrawing his consent to any chemical testing, the seizure of Defendant's blood sample clearly fell within the purview of section 41-6-44.10, and any Fourth Amendment challenge to the blood sample's admissibility would have been futile.

Affirmed.

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James Z. Davis, Judge

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WE CONCUR:

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Judith M. Billings,  
Presiding Judge

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Carolyn B. McHugh, Judge